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

IN RE GEORGIA SENATE BILL 202	Master Case No.: 1:21-MI-55555-JPB
THE NEW GEORGIA PROJECT, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No.: 1:21-cv-01229-JPB
GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, *Plaintiffs,* v. BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.*, *Defendants,* REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No.: 1:21-cv-01259-JPB

SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, *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 No.: 1:21-cv-01284-JPB

STATE DEFENDANTS' MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, CERTIFICATION FOR IMMEDIATE APPEAL

Pursuant to this Court's Civil Local Rule 7.2(E), Brian Kemp, Brad Raffensperger, the State Election Board, Rebecca Sullivan, Sara Ghazal, Matthew Mashburn, and Anh Le ("State Defendants") hereby move for reconsideration of this Court's Orders of December 9, 2021, prior to the consolidation of the SB 202 cases, in *New Georgia Project v. Raffensperger,* No. 21-cv-1229 [Doc. 86, Exhibit A]; *Georgia State Conference of NAACP v. Raffensperger,* No. 21-cv-1259 [Doc. 64, Exhibit B]; and *Sixth District of African Methodist Episcopal Church v. Kemp,* No. 21-cv-1284 [Doc. 110, Exhibit C], denying State Defendants' motions to dismiss the complaints. State Defendants move the Court to reconsider whether Plaintiffs have standing

against State Defendants as to Count III of the First Amended Complaint in *New Georgia Project v. Raffensperger,* No. 21-cv-1229 [Doc. 39, ¶¶ 177–184]; Count V of the Amended Complaint in *NAACP v. Raffensperger,* No. 21-cv-1259 [Doc. 35, ¶¶ 223–32]; and Count IV of the First Amended Complaint in *Sixth District of African Methodist Episcopal Church v. Kemp,* No. 21-cv-1284 [Doc. 83, ¶¶ 342–48]. In the alternative, State Defendants respectfully move the Court to certify the Orders for immediate appeal of the issue of whether Plaintiffs have standing to sue State Defendants as to the previously mentioned counts under 28 U.S.C. § 1292(b).

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Dated: January 6, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Motion has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Gene C. Schaerr

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STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, CERTIFICATION FOR IMMEDIATE APPEAL

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INTRODUCTION

In its Orders of December 9, 2021, this Court held that Plaintiffs had standing to sue state officials, even as to procedures over which the named State Defendants have no responsibility or control.

But the Supreme Court's recent holding in *Whole Woman's Health v. Jackson* casts doubt on the correctness of the Orders. In that case, the Court held that petitioners lacked standing to sue the Attorney General of Texas because they did not "direct this Court to any enforcement authority the attorney general possesse[d] in connection with [the challenged law] that a federal court might enjoin him from exercising." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 534 (2021). The principle is clear: Plaintiffs may only sue those who have responsibility to enforce the provisions Plaintiffs challenge. Federal courts have no jurisdiction to enter injunctive relief against defendants to whom the State has not allocated enforcement authority, because an injunction against those defendants would not give Plaintiffs the relief they seek.

The Eleventh Circuit's holdings in *Luckey v. Harris* and *Georgia Latino Alliance for Human Rights v. Governor of Georgia* are not to the contrary. Both recognize that traceability and redressability are at the core of standing analysis. *See Luckey v. Harris*, 860 F.2d 1012, 1015 (11th Cir. 1988); *Georgia*

Latino All. for Hum. Rts. v. Governor of Georgia, 691 F.3d 1250, 1260 n.5 (11th Cir. 2012) ("*GLA*"). Many of the injuries Plaintiffs claim here simply are not traceable to State officials and will not be redressed by an injunction against them. That is because those claims address matters that are within the authority and control of local election officials rather than the named State Defendants. Accordingly, the Court should reconsider its decisions and follow *Jackson*, which would require dismissal of several of Plaintiffs' claims against Governor Kemp and Secretary of State Raffensperger.

Alternatively, this Court should certify the standing issue for immediate appeal under 28 U.S.C. § 1292(b). This issue presents a controlling question of law where an appeal will materially advance the ultimate termination of the litigation. Indeed, if State Defendants are correct, several of Plaintiffs' complaints must be dismissed as to the Governor and Secretary of State. Accordingly, the Court should certify this issue for immediate appeal so that the Eleventh Circuit may address whether, in light of the Supreme Court's holding in *Jackson*, Plaintiffs lack standing to seek an injunction against State officials who have no enforcement authority over the challenged provisions.

ARGUMENT

I. This Court Should Grant Reconsideration Because Controlling Supreme Court Precedent Holds That Plaintiffs Lack Standing To Sue State Officials When Those Officials Lack Responsibility To Enforce the Challenged Provisions.

Several of Plaintiffs' claims can be redressed only through action by County, not State, officials. The day after this Court issued its Orders, the Supreme Court held in *Jackson* that petitioners lacked standing to sue the Attorney General of Texas where they did not show that he had any enforcement authority that the federal courts could enjoin him from exercising. 142 S. Ct. at 534. That holding calls this Court's decisions into question. Accordingly, this Court should reconsider its Orders holding that Plaintiffs have standing to seek injunctive relief against State Defendants as to provisions over which the State has allocated sole responsibility to the Counties.[1]

[1] The Court also held that State Defendants had waived arguments regarding traceability and redressability, *see New Georgia Project* Order at 13 n.11 [Doc. 86], but standing is not subject to waiver, *United States v. Hays*, 515 U.S. 737, 742 (1995).

A. The Supreme Court Held in *Whole Woman's Health v. Jackson* That Plaintiffs Lack Standing If There Is No Specific Action a Court Could Enjoin Defendants From Taking.

The Supreme Court held in *Jackson* that the petitioners in that case could not sue the Texas attorney general to enjoin enforcement of a controversial new state law, S. B. 8, because "the petitioners do not direct this Court to any enforcement authority the attorney general possesses in connection with S. B. 8 that a federal court might enjoin him from exercising." 142 S. Ct. at 534. So too here. As to several of the challenged provisions, Plaintiffs have not directed this Court to any enforcement authority State Defendants possess in connection with SB 202 that a federal court might enjoin them from exercising. Indeed, Plaintiffs cannot do so, because Georgia has allocated authority over those provisions to County, not State, officials.

Luckey v. Harris, which this Court cited in support of its conclusion that Plaintiffs have standing as to State Defendants, does not support the Court's Orders. 860 F.2d 1012. Under *Luckey*, the official must still be "responsible for the challenged action." *Id.* at 1015. Where a state official's authority is "simply too attenuated," he is not "responsible for" a challenged action. *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003). The Eleventh Circuit has held that a state official was not "responsible for" a

challenged action where his only connection with the law was that he had shared authority over the Department which had responsibility for enforcing the challenged law. *Id.* For several of the claims in this case, including the criminal prohibitions on distributing items of value to those waiting in line at polling places and an allegation that the legislature adopted SB 202 with the purpose of restricting Plaintiffs' First Amendment right to vote for their preferred candidates, the enforcement authority of State Defendants is even more attenuated than was the authority of the Governor in *Women's Emergency Network*. Plaintiffs have not shown that Georgia has allocated *any* responsibility to State Defendants regarding these provisions.

Georgia Latino Alliance for Human Rights v. Governor of Georgia likewise does not support the holding that Plaintiffs have standing to sue State Defendants to enjoin them from enforcing provisions over which they have no responsibility. 691 F.3d 1250. The authority of State officers over the challenged provisions is not simply indirect; they lack responsibility over several of the challenged provisions altogether. *See id.* at 1260 n.5. Any alleged injury caused by those procedures would not be redressed by enjoining State Defendants from enforcing them, because there is no action those officials are responsible for under those provisions. And under *GLA* (as under

all standing cases), the injury must be redressable by enjoining the challenged provision. *See id.* at 1260.

As *Jackson* makes clear, "no court may … enjoin challenged laws themselves;" they may only "enjoin named defendants from taking specified unlawful actions." 142 S. Ct. at 535. Because there is no action the Court could enjoin State officials from taking pertaining to several of the provisions Plaintiffs challenge, Plaintiffs lack standing to sue them as to those provisions.

B. For Several of the Challenged Provisions, An Injunction Against State Officials Does Not Redress Plaintiffs' Alleged Injuries Because Only County Officials Are Responsible for Enforcement.

To the extent that County officials rather than State officials are responsible for enforcing a challenged provision, an injunction directed toward State officials does Plaintiffs no good. Plaintiffs must sue the County officials who have the responsibility to enforce the provisions.

As the Eleventh Circuit has held, "it must be *the effect of the court's judgment on the defendant*—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (internal punctuation omitted) (citation omitted). The Plaintiffs would not "obtain relief that directly redresses the injury that [they] claim[] to have suffered" were this Court to enter an

injunction prohibiting State officials from enforcing provisions over which they have no responsibility. *See id.* (internal punctuation omitted) (citation omitted). Where State officials have "no enforcement role whatsoever," *id.* at 1301–02, and where those officials "will not cause any injury the voters and organizations might suffer," a judgment against them would not redress Plaintiffs' alleged injuries, either "directly or indirectly," *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254 (11th Cir. 2020) (citation and internal quotation marks omitted).

State Defendants simply have no enforcement role whatsoever in relation to several of Plaintiffs' grievances, including:

- Counties' decisions to close polling locations and early voting sites [Doc. 35, ¶¶ 89, 108–09; Doc. 83, ¶¶ 172–77];
- Challenges to voters' registration status[2] [Doc. 35, ¶ 179(9)];
- Long lines to vote [Doc. 83, ¶¶ 178–180, 189, 302–09]; and
- The criminal prohibition on providing items of value to people waiting in line to vote [Doc. 35, ¶¶ 223–32; Doc. 83, ¶¶ 342–48].

Georgia has allocated the responsibility to address these issues to the Counties, not the State. *See, e.g., Fair Fight Action, Inc. v. Raffensperger*,

[2] Such challenges are heard at the county, not state, level. *See, e.g.*, O.C.G.A. § 21-2-229, *et seq*.

No. 1:18-cv-05391-SCJ, slip op. at 37–38 (N.D. Ga. Feb. 16, 2021) (Doc. 612) (Exhibit D) ("The Court finds that Plaintiffs lack standing to pursue their claims related to the moving and closing of precincts and polling places because those claims are neither traceable to nor redressable by Defendants," citing O.C.G.A. §§ 21-2-70(4), -261(a), -262(c)–(d), -265(a)–(b), -265(e)). And County officials "are elected at the county level by the people of [Georgia]; they are not appointed by [State Defendants]." *Jacobson*, 974 F.3d at 1253. They are "independent officials who are not subject to [State Defendants'] control." *Id.* Plaintiffs must seek an injunction against County officials, not State Defendants, to obtain relief.

For these reasons, the general authority State Defendants have over election procedures does not establish traceability or redressability. This Court and the Eleventh Circuit have already correctly rejected the contention that alleged injuries from a state's election laws are traceable to state officials based on general authority over elections. *Id.* at 1254 (holding that the Florida Secretary of State's "general supervision and administration of the election laws" did not establish traceability); *Anderson v. Raffensperger*, 497 F. Supp. 3d 1300, 1329 (N.D. Ga. 2020) (holding injuries were not traceable to Secretary Raffensperger "simply because the Georgia Code refers to him as the 'state's chief election official.'"). Likewise, the Court has correctly rejected "the notion

the alleged injuries are traceable to the State Election Board simply because of its duty to ensure uniformity in the administration of election laws." *Anderson*, 497 F. Supp. 3d at 1329. Nor does the Board's rulemaking authority make Plaintiffs' injuries traceable to members of the Board. *See Jacobson*, 974 F.3d at 1257 (stating that rulemaking authority does not establish that a defendant "possess[es] authority to enforce the complained-of provision" (alteration in original)). Simply put, "[n]o Georgia law allows State Defendants to reach down into the county precincts and demand the relief Plaintiffs seek." *Anderson*, 497 F. Supp. 3d at 1329.

That lack of redressability is fatal to three of Plaintiffs' claims against State officials. Specifically, Count IV of the First Amended Complaint in *Sixth District of African Methodist Episcopal Church v. Kemp,* No. 21-cv-1284 [Doc. 83, ¶¶ 342–48], and Count V of the Amended Complaint in *NAACP v. Raffensperger,* No. 21-cv-1259 [Doc. 35, ¶¶ 223–32] allege violations of Plaintiffs' constitutional rights based on SB 202's prohibition on distributing food and drink to individuals waiting in line at polling places. But Plaintiffs have identified no enforcement authority State Defendants possess over that prohibition. Because there is nothing for this Court to enjoin State Defendants from doing, these claims should be dismissed as to State Defendants.

Similarly, Count III of the First Amended Complaint in *New Georgia Project v. Raffensperger,* No. 21-cv-1229 [Doc. 39, ¶¶ 177–84] alleges that the General Assembly enacted SB 202 with the purpose of restricting voters' ability to cast ballots for their preferred candidates, and that the law therefore violates Plaintiffs' First Amendment rights. But once again, Plaintiffs fail to identify any enforcement authority State Defendants possess as to the injuries alleged in this claim. Thus, this claim should also be dismissed as to State Defendants.

C. Because Standing Is a Jurisdictional Issue, Traceability and Redressability Cannot Be Waived.

Insofar as this argument goes to the traceability and redressability elements of standing analysis, this Court erred by saying that State Defendants "waived their arguments on these points." *New Georgia Project*, Order at 13 n.11 [Doc. 86]. The Supreme Court has long held that "[t]he question of standing is not subject to waiver," and courts are required to address it "even if the parties fail to raise the issue." *Hays*, 515 U.S. at 742. Further, "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *Id.* (cleaned up). Arguments challenging Plaintiffs' standing may thus be raised at any time and cannot be waived.

II. An Immediate Appeal of the Standing Issue Should Be Allowed If The Court Does Not Reconsider Its Orders.

If this Court does not reconsider the Orders, it should certify the standing issue for immediate appeal under 28 U.S.C. § 1292(b). That statute provides: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." *Id.*

All of the required elements of 28 U.S.C. § 1292(b) are satisfied here. First, whether Plaintiffs' injuries under the three claims identified above are traceable to the authority of State Defendants and redressable by an injunction against those Defendants is no doubt a "controlling question of law." *Id.* It is what the Eleventh Circuit would describe as "a pure, controlling question of law" that "the court of appeals can rule on" but "without having to delve beyond the surface of the record in order to determine the facts." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).

Second, Defendants have a strong argument that under *Jackson*, Plaintiffs lack standing against State Defendants as to three of their claims.

There is, in other words, a "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Plaintiffs, like the petitioners in *Jackson*, have not directed the Court to any enforcement authority that a federal court might enjoin the Governor or Secretary of State from exercising in connection with several challenged provisions. *See Jackson*, 142 S. Ct. at 534. Their failure to do so creates a strong argument under binding Supreme Court precedent that Plaintiffs lack standing. The second requirement of § 1292(b) is therefore satisfied here.

Third, an immediate appeal would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "This is not a difficult requirement to understand. It means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin*, 381 F.3d at 1259. Here, if Defendants prevail on the standing issue, several of Plaintiffs' claims must be dismissed. That, in turn, will obviate the need for any further motions practice on those claims, as well as costly discovery and the potential for future discovery disputes. Thus, this and all of the requirements of § 1292(b) are satisfied in this instance. *Cf. id.* ("The antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case.").

Accordingly, if this Court does not wish to revisit its holding that Plaintiffs have standing to sue State Defendants as to provisions over which those Defendants lack responsibility, it should certify the issue to the Eleventh Circuit.

CONCLUSION

In *Jackson*, the Supreme Court made clear that Plaintiffs lack standing if Defendants possess no enforcement authority that a federal court might enjoin them from exercising. 142 S. Ct. at 534. Because this Court's Order cannot be squared with *Jackson* as to the three claims discussed above, State Defendants' motion for reconsideration or, in the alternative, certification for immediate appeal of the standing issue should be granted.

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Dated: January 6, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Motion has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Gene C. Schaerr
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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE NEW GEORGIA PROJECT, et al.,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, et al.,

Defendants.

CIVIL ACTION NO.
1:21-cv-01229-JPB

ORDER

Before the Court are the following motions:

1. Defendants Brad Raffensperger, Rebecca Sullivan, David Worley, Sara Tindall Ghazal, Matthew Mashburn and Anh Le's (collectively "State Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 45);

2. Defendant Gregory Edwards' ("Edwards") Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 53);[1]

3. Defendants Margaret Bentley, Glenda Henley, Betty Bryant, Vera McIntosh and Roy McClain's (collectively the "Spalding County Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 55);

[1] Edwards is sued in his official capacity as the District Attorney of Dougherty County.

4. Defendant Keith Gammage's ("Gammage") Motion to Dismiss (ECF No. 57);[2]

5. Defendants Alex Wan, Mark Wingate, Aaron Johnson, Kathleen Ruth and Vernetta Keith Nurridin's (collectively the "Fulton County Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 61);

6. Defendants Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee and Georgia Republican Party, Inc.'s (collectively "Intervenor Defendants") Motion to Dismiss (ECF No. 73); and

7. Defendants Charles Dave, Zurich Deshazior, Don Istefano and Karen Murray's (collectively the "Brooks County Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 74).[3]

Having fully considered the papers filed therewith, the Court finds as follows:

I. BACKGROUND

Plaintiffs The New Georgia Project, Black Voters Matter Fund, Rise, Inc., Elbert Solomon, Fannie Marie Jackson Gibbs and Jauan Durbin (collectively "Plaintiffs") filed this action seeking injunctive and declaratory relief with respect to certain provisions of Georgia Senate Bill 202 ("SB 202").[4] Governor Brian Kemp signed SB 202 into law on March 25, 2021, and the challenged provisions

[2] Gammage is sued in his official capacity as the Solicitor General of Fulton County.

[3] The Spalding County Defendants, Fulton County Defendants and Brooks County Defendants are collectively referred to as "County Defendants." State Defendants, County Defendants and Intervenor Defendants are collectively referred to as "Defendants."

[4] Plaintiffs amended their Complaint on May 17, 2021.

regulate election-related processes and activities ranging from absentee ballot voting to out-of-precinct in-person voting.

Plaintiffs allege that the challenged provisions violate the United States Constitution, the Voting Rights Act and/or the Civil Rights Act. Specifically, Plaintiffs oppose the specified regulations on the following grounds: discrimination, undue burden on the right to vote, immaterial voting requirement and abridgement of free speech, expression and association.

II. DISCUSSION

All County Defendants move to dismiss the Amended Complaint on standing grounds; Spalding County Defendants additionally assert arguments based on the sufficiency of process and failure to join an indispensable party; Intervenor Defendants challenge Plaintiffs' claims on the merits only; State Defendants seek dismissal both on standing grounds and on the merits; Edwards joins the State Defendants' motion; and Gammage separately seeks dismissal on standing grounds.[5]

[5] Count IV of the Amended Complaint alleges claims solely against Gammage and Edwards related to SB 202's line warming prohibition. "Line warming" refers to the provision of refreshments, such as food and drinks, to voters standing in line to vote at a polling place. *See generally* Am. Compl. ¶ 187, ECF No. 39.

The Court will address the jurisdiction and other threshold questions first. *See Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1422 (11th Cir. 1995) (stating that the Court is obligated "'to ensure it is presented with the kind of concrete controversy upon which its constitutional grant of authority is based'" (quoting *Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 759 (11th Cir. 1991))).

A. Standing[6]

To satisfy standing requirements under Article III of the United States Constitution, a plaintiff must show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

[6] Standing is jurisdictional, *see Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n.42 (11th Cir. 1991), and a motion to dismiss for lack of standing can rest on either a facial or factual challenge to the complaint, *see Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). In evaluating a facial challenge, a court considers only the allegations in the complaint and accepts them as true, whereas in a factual challenge, a court considers matters outside the pleadings, such as testimony and affidavits. *See Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003). Here, the parties do not reference matters outside the Complaint with respect to their standing arguments. Therefore, the Court will evaluate State Defendants' standing argument as a facial challenge and will limit its analysis to facts alleged in the Complaint.

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). These requirements ensure federal courts adjudicate only actual "cases" and "controversies."[7] *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1210 (11th Cir. 2019).

1. Injury

"'[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair [the organization's] ability to engage in its projects by forcing [it] to divert resources to counteract those illegal acts.'" *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (quoting *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008)). In *Common Cause/Georgia*, the Eleventh Circuit Court of Appeals found that the plaintiff had established an injury sufficient to challenge a Georgia voting statute because the

[7] "Where only injunctive relief is sought, only one plaintiff with standing is required." *Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1118 (N.D. Ga. 2020) (quoting *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1333 (N.D. Ga. 2018)); *see also, e.g.*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (finding that it was not necessary to consider the standing of other plaintiffs where standing was established as to one plaintiff); *Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003) ("Having concluded that those two plaintiffs have standing, we are not required to decide whether the other plaintiff, the one who has not altered his behavior . . . , has standing."). Therefore, the Court's analysis will focus on one plaintiff for the purpose of deciding the instant motions to dismiss.

plaintiff planned to divert resources from its regular voter registration, mobilization and education activities to a campaign to educate and assist voters in complying with the new voter photo identification requirement under the challenged statute. *See id.* The court reasoned that this diversion constituted an adequate injury because it would cause the organization's noneconomic goals to suffer. *See id*. at 1350-51. Courts have found that a sufficient injury is demonstrated for standing purposes even when the diversion of resources is only "reasonably anticipate[d]." *E.g.*, *Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1260 (11th Cir. 2012) (alteration in original) (internal punctuation and citation omitted).

Here, the Amended Complaint alleges that SB 202 will cause Plaintiff Rise, Inc. ("Rise") to divert resources away from its core activities to initiatives that will inform voters of and help them navigate SB 202's changes to the election process. Rise states that it "runs statewide advocacy and voter mobilization programs in Georgia, as well as on a number of campuses nationwide" and that its "mission is to fight for free higher education, end student hunger and homelessness, and increase voting access for college students." Am. Compl. ¶ 23, ECF No. 39. Rise's "student organizers and volunteers engage in grassroots voter registration, education, and turnout activities, including on-campus get-out-the-vote drives and

canvasses." *Id*. "Rise volunteers also distribute food and water at polling locations to encourage voters to cast their ballots." *Id*.

Rise asserts that SB 202 "frustrates Rise's mission and forces [it] to divert resources, as well as shift the focus of its day-to-day activities" to address SB 202's changes to Georgia's election processes. *Id*. ¶ 24. This includes Rise's "student organizers [who] will be forced to divert resources and day-to-day attention from their college affordability, hunger, and homelessness advocacy programs in Georgia and elsewhere to implement effective voter education and mobilization efforts." *Id*. Rise also asserts that SB 202 prevents one of its normal activities of distributing food and water at the polls for the purpose of encouraging voters to stay in line. *Id*.

Based on these allegations, which are analogous to those asserted by the organization plaintiff in *Common Cause/Georgia*, the Court finds that Rise has alleged a diversion of resources that is sufficient to show an injury for standing purposes.[8] *See Common Cause/Georgia*, 554 F.3d at 1350.

The Court is not persuaded by State and County Defendants' argument that Rise lacks standing because its alleged diversion of resources is not different in

[8] Notwithstanding this decision, Plaintiffs will be expected to prove at trial that they have indeed suffered an injury to be entitled to relief. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.21 (1982).

nature from its current work and instead constitutes baseline work it is already doing. *E.g.*, State Defs.' Br. 4-5, ECF No. 45-1. In *Common Cause/Georgia*, the court noted that one of the plaintiffs was "actively involved in voting activities" and planned to divert resources "to educate and assist voters" in complying with the challenged voting identification requirements. 554 F.3d at 1350. In finding that standing was established there, the court focused on the ***diversion*** of resources—the shifting of resources from one activity to another—as the essence of the inquiry and did not mention, much less impose, the counterintuitive requirement that the new activities must further a different purpose within the organization. *Id*. And, as stated above, a reasonably anticipated diversion of resources suffices.

Even the court in *Common Cause Indiana v. Lawson*, which State and County Defendants cite in support of their position, had a "hard time imagining" why "an organization would undertake any additional work if that work had nothing to do with its mission." 937 F.3d 944, 955 (7th Cir. 2019). In the end, the *Common Cause Indiana* court concluded that the voting advocacy organizations had established an injury for standing purposes by showing that they planned to

expand voter education programs, among other things, to counter the effects of the challenged statute.[9] *Id*.

Additionally, State and County Defendants' reliance on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), is misplaced. The Supreme Court of the United States in *Clapper* found that the plaintiffs lacked standing because the future injury they identified was not certainly impending where they did not have knowledge of the government's enforcement practices relating to the statute, and they could not provide a credible basis for their fear of prosecution under the statute. *Id*. at 411. Unlike in *Clapper*, the key standing question here is whether Rise has demonstrated that SB 202 will cause it to divert resources away from its normal activities, not necessarily whether it faces potential prosecution under SB 202.

The opinion in *Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332 (11th Cir. 2021), which State Defendants cite as an additional reason to find that Plaintiffs lack standing in this case, similarly does not require a different result. *Tsao* involved an "insubstantial," "non-imminent" and general threat of

[9] The only other case State and County Defendants cite in support of their argument—*Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett County Board of Registration and Elections*, 499 F. Supp. 3d 1231, 1240 (N.D. Ga. 2020)—is on appeal to the Eleventh Circuit.

identity theft to an individual as a result of a data breach. *Id.* at 1345. That type of case is thus quite different from the instant pre-enforcement challenge to SB 202.

In any event, it is well settled that "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging [a] law." *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017) (internal punctuation omitted) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). To the contrary, "'the very purpose of the Declaratory Judgment Act'" is to address the "[t]he dilemma posed by . . . putting the challenger to the choice between abandoning his rights or risking prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 152 (1967)). Therefore, courts allow a plaintiff to bring a pre-enforcement suit "when he has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Wollschlaeger*, 848 F.3d at 1304 (internal punctuation omitted) (quoting *Driehaus*, 573 U.S. at 159). This type of injury is not considered too remote or speculative to support standing. *See id*. at 1305.

Gammage's additional argument that Plaintiffs cannot show an injury because he has not announced that he will prosecute parties who engage in line

warming lacks merit. The danger of prosecution is credible and supports standing where the government has not disavowed prosecuting persons who violate the challenged legislation. *See, e.g.*, *Holder v. Humanitarian L. Project*, 561 U.S. 1, 16 (2010) (finding a credible threat of prosecution existed because the government did not indicate it would forego prosecuting the plaintiffs if they violated the statute). In *Wollschlaeger*, the Eleventh Circuit found that the plaintiff doctors had demonstrated an injury sufficient for the purposes of standing where they challenged a new statute that prohibited them from discussing firearm safety with their patients, although they had ceased those discussions as a result of the statute's enactment. 848 F.3d at 1304. There, an actual threat of prosecution was not required for standing, and the court explained that "[w]here the 'alleged danger' of legislation is 'one of self-censorship,' harm 'can be realized even without an actual prosecution.'" *Id*. at 1305 (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)).

Here, the Amended Complaint alleges that Rise (and other plaintiffs) engage in line warming activities throughout Georgia, including in Fulton and Dougherty counties, where Gammage and Edwards have authority to enforce SB 202. Am. Compl. ¶ 25, ECF No. 39. Gammage confirms that "[t]hroughout his tenure as Solicitor General, [he] has diligently and effectively prosecuted violations of the

laws of the State of Georgia and Fulton County" but states that he has not "threatened" anyone with prosecution for line warming activities "at this juncture."[10] *Id*. at 6. Notably, Gammage not only concedes that he has the authority to prosecute violations of SB 202's line warming prohibition, but he is also silent on whether he intends to prosecute such violations. Gammage's Br. 5-6, ECF No. 57-1. Gammage's assertion regarding current prosecution efforts is not enough to deny Plaintiffs standing in this case, and an injury is established in light of SB 202's prohibition of line warming activities. *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (finding that the plaintiffs had standing to challenge the statute, "despite the fact that the record [did] not disclose that any one of them ha[d] been prosecuted, or threatened with prosecution, for violation of the [challenged statute]," because the statute operated to bar the actions they wished to take).

Younger v. Harris, 401 U.S. 37, 42 (1971), which Gammage cites, is inapposite because in that case, the plaintiffs did not allege that they would be prosecuted for the proscribed conduct. They claimed only that they felt "inhibited" by the mere presence of the statute. *Id*. The Supreme Court found that such a claim was not concrete enough to support standing. *Id*. The circumstances in

[10] Edwards does not address this point.

Younger were quite different from the allegations here that Plaintiffs have engaged in line warming activities in the past, but those activities now directly violate SB 202 with corresponding penalties.

2. Traceability and Redressability[11]

It is well-settled that "[t]o satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253 (11th Cir. 2020) (quoting *Lujan*, 504 U.S. at 560). Further, "it must be *the effect of the court's judgment on the defendant*—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (internal punctuation omitted) (quoting *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015)). Therefore, the court must be satisfied that a decision in the plaintiff's favor would "significantly increase the likelihood that [the plaintiff] would obtain relief that

[11] State Defendants do not address the traceability and redressability prongs of the standing analysis and have therefore waived their arguments on these points. *See Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) (stating that "the failure to make arguments and cite authorities in support of an issue waives it"). Since Spalding County Defendants simply joined State Defendants' motion to dismiss and did not make independent standing arguments, they have similarly waived any traceability and redressability arguments.

directly redresses the injury that she claims to have suffered." *Id.* (internal punctuation and alteration omitted) (quoting *Harrell v. Fla. Bar*, 608 F.3d 1241, 1260 n.7 (11th Cir. 2010)).

In *Luckey v. Harris*, which involved a complaint against the governor of Georgia and certain state judges regarding the state's provision of legal services to indigent criminal defendants, the Eleventh Circuit explained that "[a]ll that is required [for injunctive relief against a state official] is that the official [sued] be responsible for the challenged action." 860 F.2d 1012, 1015 (11th Cir. 1988). Thus, "the state officer sued must, by virtue of his office, have some connection with the unconstitutional act or conduct complained of. Whether this connection arises out of general law, or is specially created by the act itself, is not material so long as it exists." *Id*. at 1015-16 (internal punctuation, alteration and citation omitted). The court therefore concluded that prospective relief could be ordered against the judges because they were "responsible for administering the system of representation for the indigent criminally accused." *Id*. at 1016.

Relying on this "binding precedent" from *Luckey*, the Eleventh Circuit, in *Georgia Latino Alliance*, rejected the state officials' argument that the plaintiffs did not have standing to sue because the state officials lacked enforcement authority over the challenged statute. 691 F.3d at 1260 n.5. The court emphasized

that it was "easily satisfied" that the plaintiffs met the traceability and redressability requirements to bring a pre-enforcement challenge against the officials, where "[e]ach injury [was] directly traceable to the passage of [the challenged statute] and would be redressed by enjoining each provision" of the statute. *Id*. at 1260.

Following this reasoning, the Court finds that the traceability and redressability requirements are satisfied in this case. The injuries Plaintiffs allege are directly traceable to SB 202, for which State, County and the individual Defendants have enforcement responsibility.

Fulton and Brooks County Defendants' argument that SB 202's provisions are not traceable to them and cannot be redressed by entering an injunction against them is without merit. Indeed, they concede that they must enforce SB 202 and do not dispute Plaintiffs' assertion that county officials are directly responsible for enforcing numerous election administration provisions of SB 202—from the new absentee ballot application and voting requirements to the provision of ballot drop boxes.

Further, Fulton and Brooks County Defendants have not cited any authority that supports their argument that Plaintiffs cannot establish redressability without bringing suit against all Georgia counties. *Bush v. Gore*, 531 U.S. 98 (2000), is

inapposite because that opinion did not analyze standing. Rather, the Supreme Court addressed the manual recount of paper ballots in a Florida election and the related issue of disparate treatment of voters across the state under the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 107. Those circumstances are easily distinguishable from Fulton and Brooks County Defendants' redressability argument.

Regardless, to satisfy redressability requirements for standing purposes, Plaintiffs need to show only that an injunction against Fulton and Brooks County Defendants would address at least some of the alleged injuries in this case. *See Losch v. Nationstar Mortg. LLC*, 995 F.3d 937, 943 (11th Cir. 2021) (finding that the plaintiff had standing to sue the defendant even if only "a small part of the [total] injury [was] attributable to" the defendant). They have fulfilled that requirement.

Based on the foregoing analysis, the Court finds that the Article III standing requirements to bring this suit are satisfied by at least Rise.

B. Sufficiency of Process

Spalding County Defendants argue that Plaintiffs failed to effect service on them according to applicable law. They contend that Marcia L. Ridley ("Ridley"), the county elections supervisor who accepted service on their behalf, is not a

person authorized by law to do so. They also assert that she was not otherwise designated to accept service for the elections board, and she incorrectly told the process server that she was authorized to accept service. As such, Spalding County Defendants maintain that the Court lacks jurisdiction over them.

Plaintiffs respond that Spalding County Defendants have failed to offer any evidence in support of their claims, despite having the burden of proof in a sufficiency of process challenge. Plaintiffs further argue that as the election board's administrative director under law, Ridley is a "clerk" authorized under O.C.G.A. § 9-11-4(e)(5) to accept service on behalf of Spalding County Defendants.

Spalding County Defendants do not dispute that section 9-11-4(e)(5) provides for proper service on them through a "clerk" of the organization. They do not even address Plaintiffs' argument that Ridley is a "clerk" within the meaning of that statute. Instead, they focus on the arguments that the elections supervisor is not specially designated by the statute to accept service of process and that Ridley's voluntary acceptance of service cannot otherwise bind them.

Spalding County Defendants, however, miss the point. Since they do not dispute that, as the election board's administrative director, Ridley's role encompasses clerk functions such as recordkeeping, they cannot dispute that

Ridley can be considered a "clerk" authorized to accept service under section 9-11-4(e)(5). *See Summerlin v. Ga. Pines Cmty. Serv. Bd.*, 630 S.E.2d 115, 118 (Ga. Ct. App. 2006) (finding that a personnel manager whose duties included keeping records and accounts was a "clerk" within the meaning of section 9-11-4(e)(5) and could therefore accept service on behalf of the public entity). This is a separate and proper basis for service, and it makes no difference that the statute lacks a specific provision designating Ridley's role as an agent for service of process or that Ridley accepted service without Spalding County Defendants' designating her as such an agent.

Accordingly, the Court finds that Spalding County Defendants' argument claiming insufficiency of process lacks merit.

C. Indispensable Party

Spalding County Defendants initially argued that the Amended Complaint should be dismissed for failure to join an indispensable party because it names members of the election board who no longer serve in that capacity and does not name their replacements. However, Spalding County Defendants appear to concede in their reply brief that the proper remedy for this issue is substitution.

Under Federal Rule of Civil Procedure 25(d):

> An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while

> the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

Accordingly, the Court **DIRECTS** Plaintiffs to substitute the new election board members' names in place of former members in all subsequent proceedings.

D. Failure to State a Claim

Having resolved the threshold issues, the Court now turns to Defendants' arguments that the Amended Complaint fails to state a claim upon which relief may be granted.

In evaluating a motion to dismiss under Rule 12(b)(6), a court "accept[s] the allegations in the complaint as true and construe[es] them in the light most favorable to the plaintiff."[12] *Traylor v. P'ship Title Co.*, 491 F. App'x 988, 989 (11th Cir. 2012). However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550

[12] A court is limited to reviewing what is alleged "'within the four corners of the complaint.'" *Hayes v. U.S. Bank Nat'l Ass'n*, 648 F. App'x 883, 887 (11th Cir. 2016) (quoting *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1329 n.7 (11th Cir. 2006)). If the court accepts matters outside the complaint, it "must convert the motion to dismiss into one for summary judgment." *Prop. Mgmt. & Invs., Inc. v. Lewis*, 752 F.2d 599, 604 (11th Cir. 1985).

U.S. 544, 555 (2007) (internal punctuation and citation omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that a complaint does not suffice "if it tenders 'naked assertions' devoid of 'further factual enhancement'" (alteration omitted) (quoting *Twombly*, 550 U.S. at 557)).

Moreover, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "This standard does not require a party to plead facts with such particularity to establish a significant probability that the facts are true, rather, it requires a party's pleading of facts to give rise to a 'reasonable expectation that discovery will reveal evidence [supporting the claim].'" *Burch v. Remington Arms Co.*, No. 2:13-cv-00185, 2014 WL 12543887, at *2 (N.D. Ga. May 6, 2014) (alteration in original) (quoting *Twombly*, 550 U.S. at 556); *see also Twombly*, 550 U.S. at 570 (dismissing complaint because the plaintiffs did not state facts sufficient to "nudge[] their claims across the line from conceivable to plausible").

At bottom, the complaint must contain more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," *Iqbal*, 556 U.S. at 678, and must "'plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,'" *Traylor*, 491 F. App'x at 990

(quoting *Speaker v. U.S. Dep't of Health & Hum. Servs.*, 623 F.3d 1371, 1380 (11th Cir. 2010)).

The Court will now address the question of whether Plaintiffs have satisfied their pleading burden with respect to each count of the Amended Complaint.[13]

1. Count I (undue burden on the right to vote under the First and Fourteenth Amendments)

Plaintiffs allege that SB 202 "inflicts severe burdens on Georgia's voters through each individual restriction and the cumulative effect of" the measures. Am. Compl. ¶ 158, ECF No. 39. In particular, they contend that absentee voters will face:

> an identification requirement that denies them the ability to vote absentee unless they possess certain limited forms of identification or identification numbers; a narrowed window in which they can return their absentee ballot; restrictions on drop boxes that limit the availability of safe and secure methods of returning absentee ballots; and restrictions preventing election officials and organizations from even distributing absentee ballot applications or assisting voters in returning them.

Id. ¶ 159.

[13] State Defendants address the challenged provisions individually rather than in connection with the specified counts of the Amended Complaint. This approach, however, analyzes the challenged provisions out of context and does not account for Plaintiffs' contention that the challenged provisions also ***collectively*** violate the law. For the purpose of deciding the instant motions, the Court will evaluate each count as a whole and determine whether Plaintiffs have stated a claim as to the specific count.

Plaintiffs assert that SB 202 also targets Georgians who vote in person because many voters will be required "to travel longer distances and wait in long lines" and because "voters whose inflexible schedules prevent them from voting after 5:00 p.m. [will] face a significantly greater risk of outright disenfranchisement." *Id.* ¶ 160. Plaintiffs further allege that voters will be subjected to "unlimited voter challenges," which "impose[] substantial burdens on voters who are forced to prove their eligibility and subject[] voters to ongoing abuse and intimidation." *Id.* ¶ 162. In Plaintiffs' view, "[n]o state interest justifies any of these restrictions." *Id.* ¶ 164.

Among other points, State Defendants repeatedly argue that Plaintiffs have not established an actionable burden under the *Anderson/Burdick* framework for evaluating voting rights claims because the changes to the election process are "only minimally burdensome," and the state's interests "more than justify the changes." State Defs.' Br. 25, ECF No. 45-1.

Intervenor Defendants additionally argue that because "[m]ost of the challenged provisions of SB 202 regulate only absentee voting," "the right to vote is not at stake here." Intervenor Defs.' Br. 3, ECF No. 73-1 (internal punctuation omitted). They also argue that "[t]he only burdens that Plaintiffs assert are legally

irrelevant because they are special burden[s] on some voters, not categorical burdens on all voters." *Id*. at 6.

In resolving an undue burden on voting claim, a court must: (i) "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"; (ii) "identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule"; (iii) "determine the legitimacy and strength of each of those interests"; and (iv) "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The analysis is not a "litmus-paper test" and instead requires a "'flexible'" approach. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (citation omitted). If a court finds that a plaintiff's voting rights "are subjected to severe restrictions, the [respective] regulation must be narrowly drawn to advance a state interest of compelling importance. But when [the law] imposes only reasonable, nondiscriminatory restrictions . . . , the [s]tate's important regulatory interests are generally sufficient to justify the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal punctuation and citation omitted).

Here, the Amended Complaint contains detailed allegations of burdens that Plaintiffs assert the challenged provisions will impose on Georgia voters. Plaintiffs also maintain that there are no legitimate state interests that would support such burdens. *Anderson* and *Burdick* do not require more from Plaintiffs at the motion to dismiss stage. Because State and Intervenor Defendants' weighing of the alleged burden on voters relies on facts not asserted in the Amended Complaint, such analysis is not appropriate at this time.

The Court also declines, as Intervenor Defendants suggest, to forego the undue burden analysis the Supreme Court developed in *Anderson* and *Burdick* and summarily dispose of Plaintiffs' voting rights claims. The Court does not read *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807-08 (1969), which states that there is no right to an absentee ballot, to require such an outcome. As described above, the *Anderson-Burdick* framework requires the Court to evaluate the type of burden imposed by the challenged provisions and apply the corresponding level of review. "Only after weighing [the designated] factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 789.

For all these reasons, the Court declines to dismiss Count I of the Amended Complaint.

2. Count II (intentional discrimination and discriminatory results under § 2 of the Voting Rights Act ("VRA"))[14]

Plaintiffs allege that SB 202 violates § 2 of the VRA under either the intent or results tests.[15]

a. Intentional Discrimination

According to the Amended Complaint, "[a]ll of the relevant indicia demonstrate that a discriminatory purpose was a motivating factor in the passage" of SB 202. Am. Compl. ¶ 171, ECF No. 39. Specifically, Plaintiffs assert that:

[14] Complaints seeking to invalidate a voting statute on the grounds that it is discriminatory typically allege claims under § 2 of the VRA and/or the Fourteenth and Fifteenth Amendments. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1329 (11th Cir. 2021). VRA § 2 claims generally constitute allegations of vote dilution (*e.g.*, challenges to election districting schemes) or vote denial (*e.g.*, challenges to time, place or manner restrictions on voting, such as absentee and in-person voting rules). Either type of claim may be asserted as a discriminatory purpose/intent claim (*i.e.*, the statute was enacted with discriminatory intent and has a discriminatory effect) or a discriminatory results claim (*i.e.*, the statute results in the abridgement of the right to vote under the circumstances). *See Chisom v. Roemer*, 501 U.S. 380, 394 n.21 (1991). In this case, Plaintiffs make vote denial allegations, which are styled as § 2 discriminatory intent and results claims (Count II).

[15] Courts generally analyze discriminatory intent or purpose claims under the framework the Supreme Court established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977). However, *Arlington Heights* did not involve a voting statute, so it does not track or refer to the language of § 2. Discriminatory results claims, on the other hand, are usually analyzed under the framework the Supreme Court developed in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986). *Gingles* involved a vote dilution claim, and the relevant analysis incorporates the text of § 2.

(i) SB 202 was enacted after "[n]early 30% of Black voters cast their ballot by mail in 2020, compared to only 24% of white voters";

(ii) "[t]he presidential candidate preferred by Black voters won Georgia's electoral votes for the first time since 1992";

(iii) "[f]ollowing [a] historic runoff, the paramount concern among leaders of the Republican Party was to prevent these results from repeating in future elections";

(iv) "over the course of just 36 days, [SB 202] was rushed through committee hearings and into final form, with limited opportunities for public input or testimony from interested parties";

(v) SB 202 "surgically removed accommodations" and options relied on and favored by Black and other minority voters; and

(vi) in the years leading up to the bill's passage, certain Republican lawmakers and other political operatives made racially tinged remarks in connection with political campaigns.

Id. ¶¶ 41, 55, 57, 112, 139-46, 171. The bottom-line allegation of the Amended Complaint is that SB 202 "erect[ed] new impediments that will disproportionately burden Black voters," *id.* ¶ 171, and will also "impose . . . unjustifiable burdens disproportionately on the [s]tate's minority, young, poor, and disabled citizens," *id.* ¶ 4.

Similar to their arguments for dismissal of Plaintiffs' undue burden claim, State Defendants focus on the merits of Plaintiffs' allegations as to their § 2 claims. They generally assert that Plaintiffs have not sufficiently alleged a disparate impact

claim because SB 202's provisions are not burdensome, given Georgia's alternate voting options. *See generally* State Defs.' Br. 17-25, ECF No. 45-1.

Intervenor Defendants make similar arguments but also contend that the Court should focus on the legislative findings underlying SB 202, which they assert are "the only reliable evidence of *the legislature's* purposes." Intervenor Defs.' Br. 14, ECF No. 73-1. In their view, those findings prove that SB 202 was not enacted with discriminatory intent. They argue that, at worst, the legislature was driven by the permissible purpose of securing partisan advantage. *Id*. at 16.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court of the United States identified a non-exhaustive list of factors that courts can use to evaluate whether government action was undertaken with discriminatory intent.[16] 429 U.S. 252, 267-68 (1977). These include the "historical background of the decision"; the "specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence" in taking the action; "[t]he legislative or administrative history," including "contemporary statements by members of the decisionmaking body";

[16] State and Intervenor Defendants do not dispute that *Arlington Heights* governs Plaintiffs' discriminatory purpose claim.

and whether the "impact of the official action . . . bears more heavily on one race than another." *Id*.

Because the aforementioned allegations in the Amended Complaint are consistent with the *Arlington Heights* factors and otherwise bear on the issue of intentional discrimination, the Court finds that Plaintiffs have stated a plausible discriminatory purpose claim. At the motion to dismiss stage, Plaintiffs are not required to establish "a significant probability that the facts are true," *Burch*, 2014 WL 12543887, at *2, and only have to state facts sufficient to "nudge[] their claims across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570. They have done so here.

State and Intervenor Defendants' arguments, which attack the validity of Plaintiffs' allegations, are premature at this stage because they go to the merits of the claim and not to the question of whether Plaintiffs have asserted a plausible claim for relief.

Additionally, contrary to State and Intervenor Defendants' contentions that *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), established certain requirements that Plaintiffs failed to meet here, the Supreme Court in that case specifically "decline[d] . . . to announce a test to govern all VRA § 2 claims" involving time, place or manner voting restrictions, *id*. at 2336. The Supreme

Court explained that *Brnovich* was its "first foray" into deciding this type of claim and therefore found it "sufficient for present purposes to identify certain ***guideposts***" that led to its decision rather than to mandate a test that must be satisfied in all circumstances. *Id*. (emphasis added). Thus, while the language in *Brnovich* could portend future requirements to state or prove a § 2 time, place or manner claim, it should not be interpreted as currently setting forth pleading requirements that Plaintiffs must fulfill in this case.[17]

Likewise, while the Court acknowledges that the *Brnovich* opinion discusses the legislators' intent in passing the challenged statute, that analysis does not support State and Intervenor Defendants' position that *Brnovich* now requires plaintiffs in cases such as this one to allege that the legislature as a whole acted with discriminatory intent. The Supreme Court's discussion of intent in that case occurred in the course of its review of whether the district court's interpretation of the evidence of discrimination was "permissible" under the clearly erroneous standard of review. *Id*. at 2349. The district court found no indication that the

[17] *Compare Guideline*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/guideline (last visited Dec. 6, 2021) ("an indication or outline of policy or conduct") *with Requirement*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/requirement (last visited Dec. 6, 2021) ("something essential to the existence or occurrence of something else"). "Guideline" and "Guidepost" are equivalent in the Merriam-Webster dictionary.

legislature "as a whole" was motivated by race, despite evidence in the record that a video reflecting a racial appeal played a role in the legislature's actions. *Id*. at 2349-50. The Supreme Court concluded that the district court's finding was not clearly erroneous. *Id*. When viewed in context, this finding does not establish a new test to state a VRA § 2 discrimination claim, especially in light of the Supreme Court's express disavowal of doing so.

b. Discriminatory Results

In addition to the allegations identified above, the Amended Complaint asserts that SB 202 "abridges and, in some cases, entirely denies the rights of Black voters" when the totality of the circumstances is considered. Am. Compl. ¶ 176, ECF No. 39. Plaintiffs further allege that SB 202's provisions disproportionately affect Black voters and deny "Black voters an equal opportunity to participate in the political process and/or elect a candidate of their choice." *Id*. ¶ 175. Plaintiffs explain that this result is due in part to the "long history of voting-related discrimination against Black people in Georgia," the "highly polarized" nature of voting in Georgia and the "legacy" of racial discrimination reflected in Georgia's housing, economic and health disparities. *Id*. ¶ 174. Other paragraphs in the Amended Complaint specifically expound on these points. *See, e.g.*, *id*. ¶ 131 (stating that Georgia has historically disenfranchised Black voters, including

through "literacy tests, strict residency requirements, onerous registration procedures, voter challenges and purges [and] the deliberate slowing down of voting by election officials").

State and Intervenor Defendants make similar arguments in seeking dismissal of Plaintiffs' voting claims. Like State Defendants, Intervenor Defendants argue that the challenged provisions of SB 202 "impose nothing beyond the usual burdens of voting"; Plaintiffs improperly "focus on how each provision of SB 202 burdens a particular method of voting, without considering the State's entire [voting] system"; and "Plaintiffs misstate the strength of the state interests behind the challenged laws." Intervenor Defs.' Br. 11-13, ECF No. 73-1. Intervenor Defendants also contend that Plaintiffs have failed to assert certain facts required by *Brnovich*, including "allegations comparing Georgia's laws with those of other States" and "'the size' of any racially disparate impacts." *Id*. at 12.

> A violation of § 2 of the VRA
>
> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class . . . in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). To evaluate a results claim under § 2 of the VRA, courts have relied on the factors that the Supreme Court identified in *Thornburg v.*

Gingles, 478 U.S. 30, 36-37 (1986), such as the extent of any history of discrimination affecting the right to vote, the scope of racially polarized voting and the degree to which discrimination hinders the class' ability to participate in the voting process.[18]

However, the Supreme Court's opinion in *Brnovich* called into question the usefulness of some of the *Gingles* factors in evaluating a vote denial claim under § 2 of the VRA.[19] *Brnovich*, 141 S. Ct. at 2340. The Supreme Court identified other relevant factors, but, as discussed above, it was careful to define those factors as mere guideposts. *See id*. at 2336. These guideposts include the size and degree of the burden on voting, the size of the disparities between the protected class and other groups, the opportunities provided by a state's voting system, etc. *See id*. at 2336, 2338-39. Because this list is neither exhaustive nor prescriptive, *Brnovich* does not require Plaintiffs to plead any specific set of factors.

Here, Plaintiffs' allegations set forth above correspond with *Gingles* factors that may be relevant in this specific circumstance and ultimately weigh upon the

[18] Not all factors will be pertinent or essential to all claims. *See Nipper v. Smith*, 39 F.3d 1494, 1526-27 (11th Cir. 1994).

[19] *Gingles* was a vote ***dilution*** case, wherein the plaintiff claimed that legislative districting plans diluted the ability of particular voters to affect the outcome of elections. 478 U.S. at 47.

issue of whether the political process in Georgia is equally open to all voters. Therefore, Plaintiffs have stated a plausible claim under § 2 of the VRA.

While State and Intervenor Defendants' arguments regarding the burden on voters, Georgia's voting system as a whole and Georgia's underlying interests in enacting SB 202 will likely be relevant to the analysis of Plaintiffs' claims at a later stage of this case, those contentions investigate the merits of the claims, and their resolution requires an inquiry into facts not alleged in the Amended Complaint. Therefore, they are not appropriate at the motion to dismiss stage.

Further, as the Court explained above, the *Brnovich* factors are not prescriptive. Thus, contrary to Intervenor Defendants' position, Plaintiffs are not required to allege those factors or otherwise provide detailed facts regarding them. *See id.* at 2336; Fed. R. Civ. P. 8(a)(2) (requiring a plaintiff to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief").

Based on the foregoing analysis, the Court finds that Plaintiffs have stated a VRA § 2 claim under both the intent and results tests. For this reason, the Court declines to dismiss Count II of the Amended Complaint.

3. Count III (viewpoint discrimination under the First Amendment)

Plaintiffs allege that SB 202 was enacted after approximately 30% of Black voters cast their ballot by mail and "immediately after Black voters, young voters, and Democratic voters saw their preferred candidates win" Georgia's presidential and senatorial elections. Am. Compl. ¶¶ 41, 55, 57, 182, ECF No. 39. Plaintiffs contend that SB 202 "surgically removed" voting mechanisms preferred by Black voters. *Id*. ¶ 171. They conclude that SB 202's purpose is to restrict "voters' ability to cast ballots for their preferred candidates in future elections on the basis of their viewpoint." *Id*. ¶ 183.

State Defendants argue that Plaintiffs "do not say how, why, or which part of SB 202 violates . . . voters' free speech, expression, or association rights." State Defs' Reply Br. 13, ECF No. 66. Intervenor Defendants, on the other hand, acknowledge that retaliating against Georgians who elected Democrats would "normally" constitute viewpoint discrimination in violation of the First Amendment. Intervenor Defs.' Br. 16, ECF No. 73-1. However, they assert that Plaintiffs have not stated a claim here because they cannot challenge a "facially neutral" law on the grounds that it was passed for an impermissible purpose. *Id*. at 16-17.

The First Amendment prohibits the enactment of laws that abridge the freedom of speech. *See* U.S. Const. amend. I. Therefore, governments generally "ha[ve] no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

Regulation of speech based on the topic discussed or the idea or message expressed is presumptively unconstitutional and may be justified only if the government proves that the regulation is narrowly tailored to serve compelling state interests. *See id*. at 165 (stating that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech" (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993))). In *Hand v. Scott*, the Eleventh Circuit recognized that a voting regulation that "was facially or intentionally designed to discriminate based on viewpoint—say, for example, by barring Democrats, Republicans, or socialists from [a voting opportunity] on account of their political affiliation—might violate the First Amendment." 888 F.3d 1206, 1211-12 (11th Cir. 2018).

Here, the Amended Complaint as a whole is centered on the idea that SB 202 was enacted in response to and intentionally to deter certain voters' exercise of

their franchise to elect Democratic candidates. Thus, at a minimum, Plaintiffs have stated facts that could plausibly support a claim of viewpoint discrimination as acknowledged by *Hand*. Whether SB 202 was indeed enacted with such a retaliatory purpose is a question that cannot be resolved at this stage of the litigation. Rather, the Court must accept all factual allegations in the Amended Complaint as true and allow the action to move forward where, as here, those facts nudge the allegations of viewpoint discrimination across the line from conceivable to plausible. *See Twombly*, 550 U.S. at 570.

In re Hubbard, 803 F.3d 1298 (11th Cir. 2015), does not require dismissal of this count. Although, as Intervenor Defendants state, that case confirms the well-settled principle that "courts cannot 'strike down an ***otherwise constitutional*** statute on the basis of an alleged illicit legislative motive,'" *id*. at 1312 (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (emphasis added)), Intervenor Defendants' reliance on that principle at this stage of the litigation is misplaced. The Court would have to first deem the challenged provisions constitutional before the *O'Brien* principle can govern. But the constitutionality of the challenged provisions is still an open question.

Further, Intervenor Defendants appear to use "constitutional" and "facially neutral" interchangeably, which conflates an important distinction. A facially

neutral regulation is not presumptively constitutional and does not automatically escape scrutiny. *See Reed*, 576 U.S. at 163-64. As such, the *O'Brien* rule does not insulate SB 202 from scrutiny simply because Intervenor Defendants contend it is facially neutral. The Court would still have to find that the challenged provisions are constitutional. Since it has not, *O'Brien* is not an appropriate basis upon which to reject Plaintiffs' viewpoint discrimination claim at this time.

For these reasons, the Court declines to dismiss Count III of the Amended Complaint.

4. Count IV (freedom of speech and expression under the First Amendment as to Gammage and Edwards)

Plaintiffs allege that distributing food and drink to voters waiting in line and encouraging them to stay in line constitute core political speech and expression protected by the First Amendment. Am. Compl. ¶ 187, ECF No. 39. Accordingly, they claim that "SB 202 unconstitutionally criminalizes protected speech and expression" by making it a misdemeanor to offer such accommodations to voters. *Id*. ¶ 188.

Gammage does not address the substance of this claim, and Edwards joins State Defendants' brief, which argues only that speech can be restricted near polling places and that the state's "important regulatory interests" justify the restrictions. State Defs.' Br. 23, ECF No. 45-1.

Intervenor Defendants make a similar argument and additionally contend that the First Amendment is not implicated because line warming "is conduct, not speech." Intervenor Defs.' Br. 17, ECF No. 73-1. They therefore assert that while the challenged provision will impose an "incidental" burden on speech, the statute should not be analyzed as one regulating speech. *Id*.

Taking as true Plaintiffs' allegations that SB 202 establishes what type of conduct and communication is permissible while engaging with voters who are waiting in line and construing those allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have plausibly alleged that SB 202's restrictions on line warming impinge on speech and/or expressive conduct in some way.

State Defendants do not provide support for their contention that such activities can be restricted simply because they occur near a polling place. Nor do Intervenor Defendants cite any authority for the proposition that line warming *per se* cannot be considered expressive conduct under the First Amendment. Indeed, they concede that line warming could impose some burden on speech.

The Eleventh Circuit's second opinion in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, which Intervenor Defendants cite, did not disturb that court's prior conclusion in the case that the food sharing demonstrations at issue

constituted expressive conduct protected by the First Amendment. 11 F.4th 1266, 1291 (11th Cir. 2021). Although the court's latest opinion noted that most food-sharing events will not be considered expressive conduct, it acknowledged that its prior holding was reached "after a close examination of the specific context surrounding the events." *Id*. at 1292.

At the motion to dismiss stage, the Court does not have the benefit of sufficient facts to properly assess the specific context of Plaintiffs' allegations. To wit, answering the questions of whether line warming occurs in a nonpublic forum subject to greater restrictions; whether the associated speech or conduct is of the type protected by the First Amendment; what type of analysis should apply; and whether the state has identified interests sufficient to meet the applicable standard requires the type of substantive merits inquiry that is not appropriate on a motion to dismiss.

For all these reasons, the Court declines to dismiss Count IV of the Amended Complaint.

5. Count V (immaterial voting requirement under 52 U.S.C. § 10101(a)(2)(B))

Plaintiffs allege that the provisions of SB 202 requiring voters to provide their date of birth with their absentee ballot applications and their voted absentee ballots violate 52 U.S.C. § 10101(a)(2)(B) because they "require[] election

officials to reject absentee applications and ballots solely on the basis of a missing or incorrect year of birth." Am. Compl. ¶ 197, ECF No. 39.

State Defendants respond that the date of birth requirement does not violate § 10101(a)(2)(B) because the provision requires notice to the voter of an error and an opportunity to cure the defect before the absentee ballot can be rejected. *See* State Defs.' Br. 25, ECF No. 45-1. Intervenor Defendants do not address this count of the Amended Complaint.

Under § 10101(a)(2)(B),

> [n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under [s]tate law to vote in such election.

Plaintiffs have alleged that date of birth information is not necessary to determine whether a person is qualified to vote, yet SB 202 requires county officials to reject absentee ballot applications and voted ballots of voters who make errors in providing such information. As such, the Court finds that Plaintiffs have stated a plausible claim for relief under § 10101(a)(2)(B).

State Defendants have not provided any support for their argument that the opportunity to cure an error rehabilitates any potential violation of § 10101(a)(2)(B), and the statute is silent on this point. This argument would also

require the Court to incorrectly address the merits of Plaintiffs' allegations at the motion to dismiss stage.

For these reasons, the Court declines to dismiss Count V of the Amended Complaint.

III. CONCLUSION

Based on the foregoing analysis, the Court **DENIES** Defendants' motions to dismiss (ECF Nos. 45, 53, 55, 57, 61, 73, 74).

SO ORDERED this 9th day of December, 2021.

J. P. BOULEE
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA STATE CONFERENCE OF THE NAACP, et al.,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, et al.,

Defendants.

CIVIL ACTION NO.
1:21-cv-01259-JPB

ORDER

Before the Court are the following motions:

1. Defendants Brad Raffensperger, Rebecca Sullivan, Sara Tindall Ghazal, Matthew Mashburn and Anh Le's (collectively "State Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 42);

2. Defendants the county boards of election and registration for Fulton, Gwinnett and Cobb Counties' (collectively "County Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 52); and

3. Defendants Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee and Georgia Republican Party, Inc.'s (collectively "Intervenor Defendants") Motion to Dismiss (ECF No. 53).[1]

[1] State Defendants, County Defendants and Intervenor Defendants are collectively referred to as "Defendants."

Having fully considered the papers filed therewith, the Court finds as follows:

I. BACKGROUND

Plaintiffs Georgia State Conference of the NAACP, Georgia Coalition for the People's Agenda, Inc., League of Women Voters of Georgia, Inc., GALEO Latino Community Development Fund, Inc., Common Cause, Lower Muskogee Creek Tribe and Urban League of Greater Atlanta, Inc. (collectively "Plaintiffs") filed this action seeking a declaration that certain provisions of Georgia Senate Bill 202 ("SB 202") violate the United States Constitution, the Voting Rights Act and/or the Civil Rights Act.[2]

Governor Brian Kemp signed SB 202 into law on March 25, 2021, and the challenged provisions regulate election-related processes and activities ranging from absentee ballot voting to out-of-precinct in-person voting. Plaintiffs oppose the specified regulations on the following grounds: discrimination, undue burden on the right to vote, immaterial voting requirement and abridgement of free speech, expression and association.

II. DISCUSSION

County Defendants move to dismiss the Amended Complaint solely on standing grounds; Intervenor Defendants challenge Plaintiffs' claims on the merits

[2] Plaintiffs amended their Complaint on May 28, 2021.

only; and State Defendants seek dismissal both on standing grounds and on the merits. The Court will address the standing question first. *See Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1422 (11th Cir. 1995) (stating that the Court is obligated "'to ensure it is presented with the kind of concrete controversy upon which its constitutional grant of authority is based'" (quoting *Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 759 (11th Cir. 1991))).

A. Standing[3]

To satisfy standing requirements under Article III of the United States Constitution, a plaintiff must show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action

[3] Standing is jurisdictional, *see Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n.42 (11th Cir. 1991), and a motion to dismiss for lack of standing can rest on either a facial or factual challenge to the complaint, *see Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). In evaluating a facial challenge, a court considers only the allegations in the complaint and accepts them as true, whereas in a factual challenge, a court considers matters outside the pleadings, such as testimony and affidavits. *See Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003). Here, the parties do not reference matters outside the Complaint with respect to their standing arguments. Therefore, the Court will evaluate State Defendants' standing argument as a facial challenge and will limit its analysis to facts alleged in the Complaint.

> of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). These requirements ensure federal courts adjudicate only actual "cases" and "controversies."[4] *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1210 (11th Cir. 2019).

1. Injury

"'[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair [the organization's] ability to engage in its projects by forcing [it] to divert resources to counteract those illegal acts.'" *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (quoting *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008)). In *Common*

[4] "Where only injunctive relief is sought, only one plaintiff with standing is required." *Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1118 (N.D. Ga. 2020) (quoting *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1333 (N.D. Ga. 2018)); *see also, e.g.*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (finding that it was not necessary to consider the standing of other plaintiffs where standing was established as to one plaintiff); *Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003) ("Having concluded that those two plaintiffs have standing, we are not required to decide whether the other plaintiff, the one who has not altered his behavior . . . , has standing."). Therefore, the Court's analysis will focus on one plaintiff for the purpose of deciding the instant motions to dismiss.

Cause/Georgia, the Eleventh Circuit Court of Appeals found that the plaintiff had established an injury sufficient to challenge a Georgia voting statute because the plaintiff planned to divert resources from its regular voter registration, mobilization and education activities to a campaign to educate and assist voters in complying with the new voter photo identification requirement under the challenged statute. *See id.* The court reasoned that this diversion constituted an adequate injury because it would cause the organization's noneconomic goals to suffer. *See id*. at 1350-51. Courts have found that a sufficient injury is demonstrated for standing purposes even when the diversion of resources is only "reasonably anticipate[d]." *E.g.*, *Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1260 (11th Cir. 2012) (alteration in original) (internal punctuation and citation omitted).

Here, the Amended Complaint alleges that SB 202 will cause each plaintiff to divert resources away from its core activities to initiatives that will inform voters of and help them navigate SB 202's changes to the election process. For example, Plaintiff League of Women Voters of Georgia, Inc. ("League") asserts that it typically "work[s] for good government by studying issues, advocating for reforms, and, through the League's Observer Corps, observing and reporting on the work of all levels of government." Am. Compl. ¶ 42, ECF No. 35. "Many League members also assist with [get-out-the-vote] efforts, poll watching, and serving as

vote review panelists." *Id*. The League contends that SB 202 will cause it to divert "resources toward educating voters about [SB 202's] requirements" and "away from its regular advocacy, voter registration, fundraising, and other activities, [thereby] affecting its ability to operate and function with respect to its normal activities." *Id*. ¶ 46.

Based on these allegations, which mirror those asserted by the organization plaintiff in *Common Cause/Georgia*, the Court finds that the League has alleged a diversion of resources that is sufficient to show an injury for standing purposes.[5] *See Common Cause/Georgia*, 554 F.3d at 1350.

The Court is not persuaded by State and County Defendants' argument that Plaintiffs lack standing because their alleged diversion of resources is not "different in nature" from their current work and instead constitutes baseline work they are already doing. State Defs.' Br. 5, ECF No. 41-1. In *Common Cause/Georgia*, the court noted that one of the plaintiffs was "actively involved in voting activities" and planned to divert resources "to educate and assist voters" in complying with the challenged voting identification requirements. 554 F.3d at 1350. In finding that standing was established there, the court focused on the

[5] Notwithstanding this decision, Plaintiffs will be expected to prove at trial that they have indeed suffered an injury to be entitled to relief. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.21 (1982).

diversion of resources—the shifting of resources from one activity to another—as the essence of the inquiry and did not mention, much less impose, the counterintuitive requirement that the new activities must further a different purpose within the organization. *Id*. And, as stated above, a reasonably anticipated diversion of resources suffices.

Even the court in *Common Cause Indiana v. Lawson*, which State and County Defendants cite in support of their position, had a "hard time imagining" why "an organization would undertake any additional work if that work had nothing to do with its mission." 937 F.3d 944, 955 (7th Cir. 2019). In the end, the *Common Cause Indiana* court concluded that the voting advocacy organizations had established an injury for standing purposes by showing that they planned to expand voter education programs, among other things, to counter the effects of the challenged statute.[6] *Id*.

Additionally, State and County Defendants' reliance on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), is misplaced. The Supreme Court of the United States in *Clapper* found that the plaintiffs lacked standing because the

[6] The only other case State and County Defendants cite in support of their argument—*Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett County Board of Registration and Elections*, 499 F. Supp. 3d 1231, 1240 (N.D. Ga. 2020)—is on appeal to the Eleventh Circuit.

future injury they identified was not certainly impending where they did not have knowledge of the government's enforcement practices relating to the statute, and they could not provide a credible basis for their fear of prosecution under the statute. *Id*. at 411. Unlike in *Clapper*, the key standing question in this case is whether the organization plaintiffs have demonstrated that SB 202 will cause them to divert resources away from their normal activities, not whether they face potential prosecution under SB 202.

The opinion in *Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332 (11th Cir. 2021), which State Defendants cite as an additional reason to find that Plaintiffs lack standing in this case, similarly does not require a different result. *Tsao* involved an "insubstantial," "non-imminent" and general threat of identity theft to an individual as a result of a data breach. *Id.* at 1345. That type of case is thus quite different from the instant pre-enforcement challenge to SB 202.

In any event, it is well settled that "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging [a] law." *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017) (internal punctuation omitted) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). To the contrary, "'the very purpose of the Declaratory Judgment Act'" is to address the "[t]he dilemma posed by . . . putting the challenger to the choice

between abandoning his rights or risking prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 152 (1967)). Therefore, courts allow a plaintiff to bring a pre-enforcement suit "when he has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Wollschlaeger*, 848 F.3d at 1304 (internal punctuation omitted) (quoting *Driehaus*, 573 U.S. at 159). This type of injury is not considered too remote or speculative to support standing. *See id*. at 1305.

2. Traceability and Redressability

It is well-settled that "[t]o satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253 (11th Cir. 2020) (quoting *Lujan*, 504 U.S. at 560). Further, "it must be *the effect of the court's judgment on the defendant*—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (internal punctuation omitted) (quoting *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015)).

Therefore, the court must be satisfied that a decision in the plaintiff's favor would "significantly increase the likelihood that [the plaintiff] would obtain relief that directly redresses the injury that she claims to have suffered." *Id.* (internal punctuation and alteration omitted) (quoting *Harrell v. Fla. Bar*, 608 F.3d 1241, 1260 n.7 (11th Cir. 2010)).

In *Luckey v. Harris*, which involved a complaint against the governor of Georgia and certain state judges regarding the state's provision of legal services to indigent criminal defendants, the Eleventh Circuit explained that "[a]ll that is required [for injunctive relief against a state official] is that the official [sued] be responsible for the challenged action." 860 F.2d 1012, 1015 (11th Cir. 1988). Thus, "the state officer sued must, by virtue of his office, have some connection with the unconstitutional act or conduct complained of. Whether this connection arises out of general law, or is specially created by the act itself, is not material so long as it exists." *Id*. at 1015-16 (internal punctuation, alteration and citation omitted). The court therefore concluded that prospective relief could be ordered against the judges because they were "responsible for administering the system of representation for the indigent criminally accused." *Id*. at 1016.

Relying on this "binding precedent" from *Luckey*, the Eleventh Circuit, in *Georgia Latino Alliance*, rejected the state officials' argument that the plaintiffs

did not have standing to sue because the state officials lacked enforcement authority over the challenged statute. 691 F.3d at 1260 n.5. The court emphasized that it was "easily satisfied" that the plaintiffs met the traceability and redressability requirements to bring a pre-enforcement challenge against the officials, where "[e]ach injury [was] directly traceable to the passage of [the challenged statute] and would be redressed by enjoining each provision" of the statute. *Id*. at 1260.

Following this reasoning, the Court finds that the traceability and redressability requirements are satisfied in this case. The injuries Plaintiffs allege are directly traceable to SB 202, for which both State and County Defendants have enforcement responsibility. Although State Defendants argue that certain provisions of SB 202 are handled at the county level, that does not necessarily mean that they lack enforcement authority with respect to those provisions.

County Defendants' argument that SB 202's provisions are not traceable to them and cannot be redressed by entering an injunction against them is similarly without merit. Notably, they do not dispute Plaintiffs' assertion that county officials are directly responsible for enforcing numerous election administration provisions of SB 202—from the new absentee ballot application and voting requirements to voter registration challenges.

Further, County Defendants have not cited any authority that supports their argument that Plaintiffs cannot establish redressability without bringing suit against all Georgia counties. *Bush v. Gore*, 531 U.S. 98 (2000), which County Defendants cite, is inapposite because that opinion did not analyze standing. Rather, the Supreme Court addressed the manual recount of paper ballots in a Florida election and the related issue of disparate treatment of voters across the state under the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 107. Those circumstances are easily distinguishable from County Defendants' redressability argument.

Regardless, to satisfy redressability requirements for standing purposes, Plaintiffs need to show only that an injunction against County Defendants would address at least some of the alleged injuries in this case. *See Losch v. Nationstar Mortg. LLC*, 995 F.3d 937, 943 (11th Cir. 2021) (finding that the plaintiff had standing to sue the defendant even if only "a small part of the [total] injury [was] attributable to" the defendant). They have fulfilled that requirement.

Based on the foregoing analysis, the Court finds that the Article III standing requirements to bring this suit are satisfied by at least the League.

B. Failure to State a Claim

Having resolved the threshold standing issue, the Court now turns to Defendants' arguments that the Amended Complaint fails to state a claim upon which relief may be granted.

In evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court "accept[s] the allegations in the complaint as true and construe[es] them in the light most favorable to the plaintiff."[7] *Traylor v. P'ship Title Co.*, 491 F. App'x 988, 989 (11th Cir. 2012). However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal punctuation and citation omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that a complaint does not suffice "if it tenders 'naked assertions' devoid of 'further factual enhancement'" (alteration omitted) (quoting *Twombly*, 550 U.S. at 557)).

[7] A court is limited to reviewing what is alleged "'within the four corners of the complaint.'" *Hayes v. U.S. Bank Nat'l Ass'n*, 648 F. App'x 883, 887 (11th Cir. 2016) (quoting *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1329 n.7 (11th Cir. 2006)). If the court accepts matters outside the complaint, it "must convert the motion to dismiss into one for summary judgment." *Prop. Mgmt. & Invs., Inc. v. Lewis*, 752 F.2d 599, 604 (11th Cir. 1985).

Moreover, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "This standard does not require a party to plead facts with such particularity to establish a significant probability that the facts are true, rather, it requires a party's pleading of facts to give rise to a 'reasonable expectation that discovery will reveal evidence [supporting the claim].'" *Burch v. Remington Arms Co.*, No. 2:13-cv-00185, 2014 WL 12543887, at *2 (N.D. Ga. May 6, 2014) (alteration in original) (quoting *Twombly*, 550 U.S. at 556); *see also Twombly*, 550 U.S. at 570 (dismissing complaint because the plaintiffs did not state facts sufficient to "nudge[] their claims across the line from conceivable to plausible").

At bottom, the complaint must contain more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," *Iqbal*, 556 U.S. at 678, and must "'plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,'" *Traylor*, 491 F. App'x at 990 (quoting *Speaker v. U.S. Dep't of Health & Hum. Servs.*, 623 F.3d 1371, 1380 (11th Cir. 2010)).

The Court will now address the question of whether Plaintiffs have satisfied their pleading burden with respect to each count of the Amended Complaint.[8]

1. Count I (intentional discrimination under the Fourteenth and Fifteenth Amendments and § 2 of the Voting Rights Act ("VRA"))[9]

Plaintiffs allege that SB 202 was enacted with "a racially discriminatory purpose in violation of [§] 2 of the [VRA] and the Fourteenth and Fifteenth

[8] State Defendants address the challenged provisions individually rather than in connection with the specified counts of the Amended Complaint. This approach, however, analyzes the challenged provisions out of context and does not account for Plaintiffs' contention that the challenged provisions also collectively violate the law. For the purpose of deciding the instant motions, the Court will evaluate each count as a whole and determine whether Plaintiffs have stated a claim as to the specific count.

[9] Complaints seeking to invalidate a voting statute on the grounds that it is discriminatory typically allege claims under § 2 of the VRA and/or the Fourteenth and Fifteenth Amendments. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1329 (11th Cir. 2021). VRA § 2 claims generally constitute allegations of vote dilution (*e.g.*, challenges to election districting schemes) or vote denial (*e.g.*, challenges to time, place or manner restrictions on voting, such as absentee and in-person voting rules). Either type of claim may be asserted as a discriminatory purpose/intent claim (*i.e.*, the statute was enacted with discriminatory intent and has a discriminatory effect) or a discriminatory results claim (*i.e.*, the statute results in the abridgement of the right to vote under the circumstances). *See Chisom v. Roemer*, 501 U.S. 380, 394 n.21 (1991). Claims brought under the Fourteenth and Fifteenth Amendment require proof of discriminatory intent and effect (whether in the vote dilution or vote denial context). *See Greater Birmingham*, 992 F.3d at 1328-29. Therefore, the analysis of Fourteenth and Fifteenth Amendment discriminatory intent claims mirrors that of § 2 intent claims. In this case, Plaintiffs make vote denial allegations, which are styled as § 2 and Fourteenth and Fifteenth Amendment discriminatory intent claims (Count I) and a § 2 results claim (Count II).

Amendments."[10] Am. Compl. ¶ 177, ECF No. 35. Specifically, Plaintiffs assert that:

> (i) "SB 202 was enacted at a time when Black voters and other voters of color were making increasing use of [the] means of voting that are being limited and restricted in SB [202]";
>
> (ii) "SB 202 was enacted immediately following elections in which the size of the population of Black voters and other voters of color, particularly when compared to the diminishing share of the white vote, had become larger in statewide elections";
>
> (iii) "[i]n passing SB 202, the Georgia legislature deviated from procedural norms [and] rush[ed] the bill to passage"; and
>
> (iv) "[t]he Chair of the House Committee on Public Integrity made culturally insensitive statements in connection with the passage of SB 202."

Id. ¶¶ 181-83, 185.

Other paragraphs in the Amended Complaint expound on these points. For example, Plaintiffs also allege that:

> (i) "there was a 25% increase in Black voter registration [for the 2020 and 2021 elections] compared to 2016";

[10] Courts generally analyze discriminatory intent or purpose claims under the framework the Supreme Court established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977). However, *Arlington Heights* did not involve a voting statute, so it does not track or refer to the language of § 2. Discriminatory results claims, on the other hand, are usually analyzed under the framework the Supreme Court developed in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986). *Gingles* involved a vote dilution claim, and the relevant analysis incorporates the text of § 2.

(ii) "nearly 30% of Black voters cast their ballot by mail, with Black voters accounting for almost 32% of absentee ballot requests" compared to "only roughly 24% of white voters vot[ing] through the mail";

(iii) Chairman Fleming of the House of Representatives Special Committee on Election Integrity "publicly likened absentee ballots to the 'shady part of town down near the docks' where the 'chance of being shanghaied' is significant";

(iv) Chairman Fleming prohibited certain organizations from commenting on the bill while it was being considered in the House; and

(v) draft versions of SB 202 were sometimes taken up in the House without first providing a copy of the bill to the public or giving proper notice of the agenda.

Id. ¶¶ 111-31. The Amended Complaint ultimately concludes that SB 202 was "intended to, and will" "disproportionately and adversely affect[] the right to vote of Black voters and other voters of color." *Id.* ¶ 179.

State Defendants argue that Plaintiffs' intentional discrimination claim should be dismissed because the alleged impact of the challenged provisions "is minimal at best, the history relied on is far distant, the legislation went through normal channels, the legislature explained exactly what it was doing in the first pages of the bill[] and none of the statements by the legislature were racially discriminatory." State Defs.' Br. 12-13, ECF No. 42-1 (citations omitted).

Intervenor Defendants make similar arguments but also contend that the Court should focus on the legislative findings underlying SB 202, which they assert are "the only reliable evidence of *the legislature's* purposes." Intervenor

Defs.' Br. 15, ECF No. 53-1. In their view, those findings prove that SB 202 was not enacted with discriminatory intent. They argue that, at worst, the legislature was driven by the permissible purpose of securing partisan advantage. *Id*. at 17.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court of the United States identified a non-exhaustive list of factors that courts can use to evaluate whether government action was undertaken with discriminatory intent.[11] 429 U.S. 252, 267-68 (1977). These include the "historical background of the decision"; the "specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence" in taking the action; "[t]he legislative or administrative history," including "contemporary statements by members of the decisionmaking body"; and whether the "impact of the official action . . . bears more heavily on one race than another." *Id*.

Because the aforementioned allegations in the Amended Complaint are consistent with the *Arlington Heights* factors and otherwise bear on the issue of intentional discrimination, the Court finds that Plaintiffs have stated a plausible

[11] State and Intervenor Defendants do not dispute that *Arlington Heights* governs Plaintiffs' discriminatory purpose claim.

discriminatory purpose claim.[12] At the motion to dismiss stage, Plaintiffs are not required to establish "a significant probability that the facts are true," *Burch*, 2014 WL 12543887, at *2, and only have to state facts sufficient to "nudge[] their claims across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570. They have done so here.

State and Intervenor Defendants' arguments, which attack the validity of Plaintiffs' allegations, are premature at this stage because they go to the merits of the claim and not to the question of whether Plaintiffs have asserted a plausible claim for relief.

Additionally, contrary to State and Intervenor Defendants' contentions that *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), established certain requirements that Plaintiffs failed to meet here, the Supreme Court in that case specifically "decline[d] . . . to announce a test to govern all VRA § 2 claims" involving time, place or manner voting restrictions, *id*. at 2336. The Supreme Court explained that *Brnovich* was its "first foray" into deciding this type of claim and therefore found it "sufficient for present purposes to identify certain

[12] As noted above, Plaintiffs bring intent claims under § 2 as well as under the Fourteenth and Fifteenth Amendments. Since all of these claims are analyzed in the same way, the Court's conclusion herein—that Plaintiffs have stated a claim for discriminatory intent—applies to the Fourteenth and Fifteenth Amendment intent claims as well as the § 2 intent claim.

guideposts" that led to its decision rather than to mandate a test that must be satisfied in all circumstances. *Id*. (emphasis added). Thus, while the language in *Brnovich* could portend future requirements to state or prove a § 2 time, place or manner claim, it should not be interpreted as currently setting forth pleading requirements that Plaintiffs must fulfill in this case.[13]

Likewise, while the Court acknowledges that the *Brnovich* opinion discusses the legislators' intent in passing the challenged statute, that analysis does not support State and Intervenor Defendants' position that *Brnovich* now requires plaintiffs in cases such as this one to allege that the legislature as a whole acted with discriminatory intent. The Supreme Court's discussion of intent in that case occurred in the course of its review of whether the district court's interpretation of the evidence of discrimination was "permissible" under the clearly erroneous standard of review. *Id*. at 2349. The district court found no indication that the legislature "as a whole" was motivated by race, despite evidence in the record that a video reflecting a racial appeal played a role in the legislature's actions. *Id*. at

[13] *Compare Guideline*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/guideline (last visited Dec. 6, 2021) ("an indication or outline of policy or conduct") *with Requirement*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/requirement (last visited Dec. 6, 2021) ("something essential to the existence or occurrence of something else"). "Guideline" and "Guidepost" are equivalent in the Merriam-Webster dictionary.

2349-50. The Supreme Court concluded that the district court's finding was not clearly erroneous. *Id*. When viewed in context, this finding does not establish a new test to state a discrimination claim, especially in light of the Supreme Court's express disavowal of doing so.

For all these reasons, the Court declines to dismiss Count I of the Amended Complaint.[14]

2. Count II (results claim under § 2 of the VRA)

Plaintiffs allege that the challenged provisions of SB 202 "individually and collectively" result in the "political process in Georgia . . . not [being] equally open to participation [by] Black voters and other voters of color." Am. Compl. ¶ 199, ECF No. 35. They explain that this disparity is a result of the totality of the circumstances, including "Georgia's history of racial discrimination in voting," *id*. ¶¶ 80-83, 196, racially polarized voting in Georgia, *id*. ¶¶ 92-110, and "the effects

[14] Citing *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), Intervenor Defendants argue that a presumption of good faith applies to the legislature's actions, and a history of voting discrimination cannot condemn all later actions by the state. Intervenor Defs.' Reply Br. 12, ECF No. 62. However, *Abbott* does not address whether the presumption of good faith applies in vote denial cases. And even if the presumption applies, it is not a shield that requires automatic dismissal of discrimination claims at the pleading stage. *See Abbott*, 138 S. Ct. at 2324-25. The Court must analyze the Government's allegations under applicable law and consider the historical context as "'one evidentiary source.'" *Id*. at 2325 (citation omitted).

of discrimination in education, employment, and health[, which] hinder [voters of color's] ability to participate effectively in the political process," *id*. ¶ 197.

In particular, Plaintiffs assert that "Georgia was the only state [subject to preclearance under the VRA] that . . . implemented voting restrictions in every category the [United States] Commission [on Civil Rights] examined"; "Black voters and other voters of color usually provide strong support to Democratic candidates"; and Black voters and other voters of color are more likely to live below the poverty line, lack a vehicle or computer access in their homes and have jobs that do not allow the flexibility to use certain voting options. *Id*. ¶¶ 82, 98, 103-07.

Intervenor Defendants, like State Defendants, rely in large part on *Brnovich* to challenge Plaintiffs' claims. They argue that the challenged provisions of SB 202 "impose nothing beyond the usual burdens of voting"; "Plaintiffs [improperly] focus on how each provision of SB 202 burdens a particular method of voting, without considering the [s]tate's entire [voting] system"; and "Plaintiffs misstate the strength of the state interests behind the challenged laws." Intervenor Defs.' Br. 12-14, ECF No. 53-1. Intervenor Defendants also contend that Plaintiffs have failed to assert certain facts required by *Brnovich*, including "how widespread SB 202's requirements (or similar ones) are in other [s]tates" and "the size (or any

meaningful comparison) of any racially disparate impacts." Intervenor Defs.' Reply Br. 3, ECF No. 62.

> A violation of § 2 of the VRA
>
> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the [s]tate or political subdivision are not equally open to participation by members of a [protected] class . . . in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). To evaluate a results claim under § 2 of the VRA, courts have relied on the factors that the Supreme Court identified in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986), such as the extent of any history of discrimination affecting the right to vote, the scope of racially polarized voting and the degree to which discrimination hinders the class's ability to participate in the voting process.[15]

However, the Supreme Court's opinion in *Brnovich* called into question the usefulness of some of the *Gingles* factors in evaluating a vote denial claim under § 2 of the VRA.[16] *Brnovich*, 141 S. Ct. at 2340. The Supreme Court identified other

[15] Not all factors will be pertinent or essential to all claims. *See Nipper v. Smith*, 39 F.3d 1494, 1526-27 (11th Cir. 1994).

[16] *Gingles* was a vote ***dilution*** case, wherein the plaintiff claimed that legislative districting plans diluted the ability of particular voters to affect the outcome of elections. 478 U.S. at 47.

relevant factors, but, as set forth above, it was careful to define those factors as mere guideposts. *See id*. at 2336. These guideposts include the size and degree of the burden on voting, the size of the disparities between the protected class and other groups, the opportunities provided by a state's voting system, etc. *See id*. at 2336, 2338-39. Because this list is neither exhaustive nor prescriptive, *Brnovich* does not require Plaintiffs to plead any specific set of factors.

Here, Plaintiffs' allegations identified above correspond with *Gingles* factors that may be relevant in this specific circumstance and ultimately weigh upon the issue of whether the political process in Georgia is equally open to all voters. Therefore, Plaintiffs have stated a plausible claim under § 2 of the VRA.

While State and Intervenor Defendants' arguments regarding the burden on voters, Georgia's voting system as a whole and Georgia's underlying interests in enacting SB 202 will likely be relevant to the analysis of Plaintiffs' claims at a later stage of this case, those contentions investigate the merits of the claims, and their resolution requires an inquiry into facts not alleged in the Amended Complaint. Therefore, they are not appropriate at the motion to dismiss stage.

Further, as the Court explained above, the *Brnovich* factors are not prescriptive. Therefore, contrary to Intervenor Defendants' position, Plaintiffs are not required to allege those factors or otherwise provide detailed facts regarding

them. *See id.* at 2336; Fed. R. Civ. P. 8(a)(2) (requiring a plaintiff to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief").

For all these reasons, the Court declines to dismiss Count II of the Amended Complaint.

3. Count III (undue burden on the right to vote under the First and Fourteenth Amendments)

Plaintiffs allege that the individual provisions of SB 202, as well as their collective effect, impose "substantial burdens on Georgia's voters" and, "in some cases[,] cause voters to risk being completely disenfranchised." Am. Compl. ¶¶ 209-10, ECF No. 35. They explain that SB 202 makes it more difficult for certain groups of voters to vote, including by changing the process for requesting and voting absentee ballots and increasing the probability that such ballots will be rejected, *see, e.g.*, *id.* ¶¶ 134, 140; limiting the availability of alternative voting options, such as early in-person voting, *see, e.g.*, *id.* ¶¶ 147-52; and changing the rules for accepting out-of-precinct votes, *see, e.g.*, *id.* ¶¶ 159-61. Plaintiffs further allege that "[n]o legitimate state interest justifies [SB 202's] significant restrictions and burdens" and that the state's "purported goals of increasing confidence in elections or encouraging uniformity are pretextual at best." *Id.* ¶¶ 211-13.

State Defendants argue, among other things, that "Plaintiffs have not pleaded any burden under [the] *Anderson/Burdick* [framework for evaluating voting rights claims] because Georgia has numerous options for voters to cast their ballots and request absentee ballots," and the state's interest underlying the challenged provisions "more than outweighs any burden" the provisions impose on voters. State Defs.' Br. 14, ECF No. 42-1.

Intervenor Defendants additionally argue that because "[m]ost of the challenged provisions of SB 202 regulate only absentee voting," "the right to vote is not at stake here." Intervenor Defs.' Br. 3, ECF No. 53-1 (internal punctuation omitted). They also argue that "[t]he only burdens that Plaintiffs assert are legally irrelevant because they are special burden[s] on some voters, not categorical burdens on all voters." *Id.* at 6.

In resolving an undue burden on voting claim, a court must: (i) "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"; (ii) "identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule"; (iii) "determine the legitimacy and strength of each of those interests"; and (iv) "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v.*

Celebrezze, 460 U.S. 780, 789 (1983). The analysis is not a "litmus-paper test" and instead requires a "'flexible'" approach. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (citation omitted). If a court finds that a plaintiff's voting rights "are subjected to severe restrictions, the [respective] regulation must be narrowly drawn to advance a state interest of compelling importance. But when [the law] imposes only reasonable, nondiscriminatory restrictions . . . , the [s]tate's important regulatory interests are generally sufficient to justify the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal punctuation and citation omitted).

Here, the Amended Complaint contains detailed allegations of burdens that Plaintiffs assert the challenged provisions will impose on Georgia voters. Plaintiffs also maintain that there are no legitimate state interests that would support such burdens. *Anderson* and *Burdick* do not require more from Plaintiffs at the motion to dismiss stage. Because State and Intervenor Defendants' weighing of the alleged burden on voters relies on facts not asserted in the Amended Complaint, such analysis is not appropriate at this time.

The Court also declines, as Intervenor Defendants suggest, to forego the undue burden analysis the Supreme Court developed in *Anderson* and *Burdick* and summarily dispose of Plaintiffs' voting rights claims. The Court does not read

McDonald v. Board of Election Commissioners, 394 U.S. 802, 807-08 (1969), which states that there is no right to an absentee ballot, to require such an outcome. As discussed above, the *Anderson-Burdick* framework requires the Court to evaluate the type of burden imposed by the challenged provisions and apply the corresponding level of review. "Only after weighing [the designated] factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 789.

For all these reasons, the Court declines to dismiss Count III of the Amended Complaint.

4. Count IV (freedom of speech and association under the First and Fourteenth Amendments)

Plaintiffs allege that SB 202 restricts and chills their core political speech by preventing them from "encouraging" citizens to vote "through the distribution of absentee ballot applications." Am. Compl. ¶¶ 219-20, ECF No. 35. Specifically, the Amended Complaint alleges that SB 202 prohibits organizations from sending out unsolicited absentee ballot applications to voters and places organizations at risk of incurring "hefty criminal sanctions" or fines if they "attempt to help voters request absentee ballots" or send an absentee ballot application to a voter who has already requested or voted an absentee ballot. *Id.* ¶¶ 142-43. Plaintiffs also assert that SB 202 "compel[s] them to include a confusing disclosure" on the absentee

ballot application forms that they provide to voters that "stat[es] that the form was not sent by a government entity." *Id*. ¶ 144.

State Defendants argue that Plaintiffs' First Amendment claims should be dismissed because distributing ballot applications to voters is not expressive conduct that implicates speech. Intervenor Defendants do not address this count of the Amended Complaint.

The First Amendment prohibits the enactment of laws that abridge the freedom of speech. *See* U.S. Const. amend. I. Therefore, governments generally "ha[ve] no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

Regulation of speech based on the topic discussed or the idea or message expressed is presumptively unconstitutional and may be justified only if the government proves that the regulation is narrowly tailored to serve compelling state interests. *See id*. at 165 (stating that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech" (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993))). In the context of a political campaign, the Supreme Court in *McIntyre v.*

Ohio Elections Commission found that an Ohio statute improperly regulated speech where it required that publications intended to influence voters bear certain source identification information. 514 U.S. 334, 345-46 (1995).

In light of Plaintiffs' allegations that the challenged provisions limit organizations' ability to convey their message through absentee ballots and force them to include certain language on the absentee ballot applications that they do distribute, the Court finds that Plaintiffs have stated a plausible claim that the challenged provisions regulate or chill core political speech or expression.

The Court is not aware of any authority in this Circuit holding, as State Defendants contend, that distributing absentee ballots *per se* cannot be considered expressive conduct under the First Amendment. *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742 (M.D. Tenn. 2020)—the only case in State Defendants' brief that touches on this question—is out-of-Circuit, inapposite and does not go as far as State Defendants argue.

As an initial matter, that case was decided on a motion for preliminary injunction, which requires a court to look beyond the allegations in the complaint and evaluate whether the plaintiff has shown a likelihood of success on the merits of the claim. That type of inquiry into the merits of Plaintiffs' allegations is neither required nor proper at this stage of the litigation.

Moreover, the *Lichtenstein* court did not declare a *per se* rule that would be applicable in all circumstances. The court acknowledged that "whether [the] distribution [of absentee ballots] actually is speech in a particular situation depends on what is being distributed, why it is being distributed, and how such distribution would reasonably be perceived." *Id*. at 766-67. Then the court "place[d] itself in the position of a hypothetical intended recipient" and tried "to objectively gauge whether there is a great likelihood that such a person would understand the message" the absentee ballot distributors intended to convey. *Id*. at 767. Noting that the issue was "fairly close," the court concluded that "an intended recipient would understand the distribution to him or her as merely a means to carry out [the] otherwise-conveyed message" of encouragement to vote. *Id*. As such, even if the Court were to consider the *Lichtenstein* opinion as persuasive authority, it is not a basis upon which to dismiss Plaintiffs' claims in this case.

For these reasons, the Court declines to dismiss Count IV of the Amended Complaint.

5. Count V (freedom of expressive conduct under the First and Fourteenth Amendments)

Plaintiffs allege that SB 202 prohibits them from providing water or snacks "within 25 feet of any voter standing in line to vote at any polling place, thereby restricting line warming expression for hundreds of feet outside of the entrances to

polling places."[17] Am. Compl. ¶ 166, ECF No. 35. They claim that this provision "chill[s] protected expressive conduct and speech that supports . . . the act of voting." *Id*. ¶ 225. Plaintiffs further assert that the restriction is content-based and that it applies in a public forum without the requisite compelling government interest. *See id*. ¶ 228.

State Defendants counter that because a polling area is restricted, government-controlled property set aside for the purpose of voting, the much lower reasonableness standard applies to any regulation of speech or expression therein. State Defs.' Br. 24, ECF No. 42-1. They conclude that under that lower standard, SB 202's restrictions pass muster because they are reasonable in light of the state's "regulatory interests." *Id*.

Intervenor Defendants make a similar argument and additionally contend that the First Amendment is not implicated because line warming "is conduct, not speech." Intervenor Defs.' Br. 18, ECF No. 53-1. They therefore assert that while the challenged provision will impose an "incidental" burden on speech, the statute should not be analyzed as one regulating speech. *Id*.

[17] "Line warming" refers to the provision of refreshments, such as food and drinks, to voters standing in line to vote at a polling place. *See* Am. Compl. ¶ 166, ECF No. 35.

Taking as true Plaintiffs' allegations that SB 202 establishes what type of conduct and communication is permissible while engaging with voters who are waiting in line and construing those allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have plausibly alleged that SB 202's restrictions on line warming impinge on speech and/or expressive conduct in some way.

State Defendants do not provide support for their contention that any voting line would presumptively occur in a non-public forum, where a lower standard of review would apply. Nor do Intervenor Defendants cite any authority for the proposition that line warming *per se* cannot be considered expressive conduct under the First Amendment. Indeed, Intervenor Defendants concede that line warming could impose some burden on speech.

In any event, answering the questions of whether line warming occurs in a public versus a nonpublic forum; whether the associated speech or conduct is of the type protected by the First Amendment; what standard of review should apply; and whether the state has identified interests sufficient to meet the requisite standard requires the type of substantive merits inquiry that is not appropriate on a motion to dismiss.

For all these reasons, the Court declines to dismiss Count V of the Amended Complaint.

6. Count VI (immaterial voting requirement under 52 U.S.C. § 10101(a)(2)(B))

Plaintiffs allege that the provisions of SB 202 requiring voters to provide their date of birth with their absentee ballot applications and their voted absentee ballots violate 52 U.S.C. § 10101(a)(2)(B) because they "require[] county election officials to reject absentee ballot applications and [voted] absentee ballots based on a failure to provide exactly matching information . . . that is not material to determining whether individuals are qualified to vote." Am. Compl. ¶ 237, ECF No. 35.

State Defendants respond that a voter's date of birth could be material in the context of absentee ballot voting and that regardless, the provisions do not violate § 10101(a)(2)(B) because they require notice to the voter and an opportunity to cure the defect before an absentee ballot can be rejected. *See* State Defs.' Br. 13, ECF No. 42-1. Intervenor Defendants do not address this count of the Amended Complaint.

Under § 10101(a)(2)(B),

> [n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other

> act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under [s]tate law to vote in such election.

Plaintiffs have alleged that date of birth information is not necessary to determine whether a person is qualified to vote, yet SB 202 requires county officials to reject absentee ballot applications and voted ballots of voters who make errors in providing such information. As such, the Court finds that Plaintiffs have stated a plausible claim for relief under § 10101(a)(2)(B).

State Defendants have not provided any support for their argument that the opportunity to cure an error rehabilitates any potential violation of § 10101(a)(2)(B), and the statute is silent on this point. This argument would also require the Court to incorrectly address the merits of Plaintiffs' allegations at the motion to dismiss stage.

For these reasons, the Court declines to dismiss Count VI of the Amended Complaint.

III. CONCLUSION

Based on the foregoing analysis, the Court **DENIES** Defendants' motions to dismiss (ECF Nos. 42, 52, 53).

SO ORDERED this 9th day of December, 2021.

J. P. BOULEE
United States District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, et al.,

Plaintiffs,

v.

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

Defendants.

CIVIL ACTION NO.
1:21-cv-01284-JPB

ORDER

Before the Court are the following motions:

1. Defendants Brian Kemp, Brad Raffensperger, Rebecca Sullivan, Sara Tindall Ghazal, Matthew Mashburn and Anh Le's (collectively "State Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 87);

2. Defendants the county boards of election and registration for Fulton, DeKalb, Gwinnett, Cobb, Hall, Clayton, Richmond, Bibb, Chatham, Clarke and Columbia Counties' (collectively the "County Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 90); and

3. Defendants Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee

and Georgia Republican Party, Inc.'s (collectively "Intervenor Defendants") Motion to Dismiss (ECF No. 100).[1]

Having fully considered the papers filed therewith, the Court finds as follows:

I. BACKGROUND

Plaintiffs Sixth District of the African Methodist Episcopal Church ("AME Church"), Georgia Muslim Voter Project, Women Watch Afrika, Latino Community Fund Georgia, Delta Sigma Theta Sorority, Inc., The Arc of the United States, Georgia Adapt, Georgia Advocacy Office and Southern Christian Leadership Conference (collectively "Plaintiffs") filed this action seeking injunctive and declaratory relief with respect to certain provisions of Georgia Senate Bill 202 ("SB 202").[2] Governor Brian Kemp signed SB 202 into law on March 25, 2021, and the challenged provisions regulate election-related processes and activities ranging from absentee ballot voting to out-of-precinct in-person voting.

Plaintiffs allege that the challenged provisions violate the United States Constitution, the Voting Rights Act, the Americans with Disabilities Act, the Rehabilitation Act and/or the Civil Rights Act. Specifically, Plaintiffs oppose the

[1] State Defendants, County Defendants and Intervenor Defendants are collectively referred to as "Defendants."
[2] Plaintiffs amended their Complaint on May 24, 2021.

specified regulations on the following grounds: discrimination, undue burden on the right to vote, immaterial voting requirement and abridgement of free speech and expression.

II. DISCUSSION

County Defendants move to dismiss the Amended Complaint on standing grounds; Intervenor Defendants challenge Plaintiffs' claims on the merits only; and State Defendants seek dismissal both on standing grounds and on the merits.

The Court will address the standing question first. *See Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1422 (11th Cir. 1995) (stating that the Court is obligated "'to ensure it is presented with the kind of concrete controversy upon which its constitutional grant of authority is based'" (quoting *Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 759 (11th Cir. 1991))).

A. Standing[3]

To satisfy standing requirements under Article III of the United States Constitution, a plaintiff must show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). These requirements ensure federal courts adjudicate only actual "cases" and "controversies."[4] *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925

[3] Standing is jurisdictional, *see Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n.42 (11th Cir. 1991), and a motion to dismiss for lack of standing can rest on either a facial or factual challenge to the complaint, *see Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). In evaluating a facial challenge, a court considers only the allegations in the complaint and accepts them as true, whereas in a factual challenge, a court considers matters outside the pleadings, such as testimony and affidavits. *See Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003). Here, the parties do not reference matters outside the Complaint with respect to their standing arguments. Therefore, the Court will evaluate State Defendants' standing argument as a facial challenge and will limit its analysis to facts alleged in the Complaint.

[4] "Where only injunctive relief is sought, only one plaintiff with standing is required." *Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1118 (N.D. Ga. 2020) (quoting *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1333 (N.D. Ga. 2018)); *see also, e.g.*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (finding that it was not necessary to

F.3d 1205, 1210 (11th Cir. 2019).

1. Injury

"'[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair [the organization's] ability to engage in its projects by forcing [it] to divert resources to counteract those illegal acts.'" *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (quoting *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008)). In *Common Cause/Georgia*, the Eleventh Circuit Court of Appeals found that the plaintiff had established an injury sufficient to challenge a Georgia voting statute because the plaintiff planned to divert resources from its regular voter registration, mobilization and education activities to a campaign to educate and assist voters in complying with the new voter photo identification requirement under the challenged statute. *See id.* The court reasoned that this diversion constituted an adequate injury because it would cause the organization's noneconomic goals to suffer. *See id*. at 1350-51. Courts have found that a sufficient injury is demonstrated for standing

consider the standing of other plaintiffs where standing was established as to one plaintiff); *Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003) ("Having concluded that those two plaintiffs have standing, we are not required to decide whether the other plaintiff, the one who has not altered his behavior . . . , has standing."). Therefore, the Court's analysis will focus on one plaintiff for the purpose of deciding the instant motions to dismiss.

purposes even when the diversion of resources is only "reasonably anticipate[d]." *E.g.*, *Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1260 (11th Cir. 2012) (alteration in original) (internal punctuation and citation omitted).

Here, the Amended Complaint alleges that SB 202 will cause AME Church to divert resources away from its core activities to initiatives that will inform voters of and help them navigate SB 202's changes to the election process. AME Church states that it "is a nonprofit religious organization" that "has always placed a strong emphasis on social justice initiatives." Am. Compl. ¶¶ 32-33, ECF No. 83. AME Church encourages civic participation by "holding 'Souls to the Polls' events to transport churchgoers to polling locations during advance voting periods, registering voters for elections, hosting 'Get Out the Vote' ("GOTV") efforts to increase voter turnout, and providing food, water, encouragement, and assistance to voters waiting in lines at polling locations." *Id.* ¶ 33.

AME Church alleges that it will be forced to divert "much-needed and limited resources" from its existing activities to initiatives, such as assisting constituents to understand and comply with SB 202's requirements; developing "new training materials and public education documents"; and helping members obtain SB 202-approved identification. *Id.* ¶¶ 34-39. AME Church also asserts

that SB 202's prohibition of food and water distribution at the polls will "result in the arrests of Black clergymen, lay leaders, and other volunteers." *Id*. ¶ 319.

Based on these allegations, which are analogous to those asserted by the organization plaintiff in *Common Cause/Georgia*, the Court finds that AME Church has alleged a diversion of resources that is sufficient to show an injury for standing purposes.[5] *See Common Cause/Georgia*, 554 F.3d at 1350.

The Court is not persuaded by State and County Defendants' argument that AME Church lacks standing because its alleged diversion of resources is too speculative and not different in nature from its current work. *E.g.*, State Defs.' Br. 6-7, ECF No. 87-1. In *Common Cause/Georgia*, the court noted that one of the plaintiffs was "actively involved in voting activities" and planned to divert resources "to educate and assist voters" in complying with the challenged voting identification requirements. 554 F.3d at 1350. In finding that standing was established there, the court focused on the ***diversion*** of resources—the shifting of resources from one activity to another—as the essence of the inquiry and did not mention, much less impose, the counterintuitive requirement that the new activities

[5] Notwithstanding this decision, Plaintiffs will be expected to prove at trial that they have indeed suffered an injury to be entitled to relief. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.21 (1982).

must further a different purpose within the organization. *Id*. And, as stated above, a reasonably anticipated diversion of resources suffices.

Even the court in *Common Cause Indiana v. Lawson*, which County Defendants cite in support of their position, had a "hard time imagining" why "an organization would undertake any additional work if that work had nothing to do with its mission." 937 F.3d 944, 955 (7th Cir. 2019). In the end, the *Common Cause Indiana* court concluded that the voting advocacy organizations had established an injury for standing purposes by showing that they planned to expand voter education programs, among other things, to counter the effects of the challenged statute.[6] *Id*.

Additionally, State and County Defendants' reliance on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), is misplaced. The Supreme Court of the United States in *Clapper* found that the plaintiffs lacked standing because the future injury they identified was not certainly impending where they did not have knowledge of the government's enforcement practices relating to the statute, and they could not provide a credible basis for their fear of prosecution under the

[6] The only other case County Defendants cite in support of their argument—*Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett County Board of Registration and Elections*, 499 F. Supp. 3d 1231, 1240 (N.D. Ga. 2020)—is on appeal to the Eleventh Circuit.

statute. *Id*. at 411. Unlike in *Clapper*, the key standing question here is whether AME Church has demonstrated that SB 202 will cause it to divert resources away from its normal activities, not necessarily whether it faces potential prosecution under SB 202.

The opinion in *Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332 (11th Cir. 2021), which State Defendants cite as an additional reason to find that Plaintiffs lack standing in this case, similarly does not require a different result. *Tsao* involved an "insubstantial," "non-imminent" and general threat of identity theft to an individual as a result of a data breach. *Id.* at 1345. That type of case is thus quite different from the instant pre-enforcement challenge to SB 202.

In any event, it is well settled that "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging [a] law." *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017) (internal punctuation omitted) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). To the contrary, "'the very purpose of the Declaratory Judgment Act'" is to address the "[t]he dilemma posed by . . . putting the challenger to the choice between abandoning his rights or risking prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 152 (1967)). Therefore, courts allow a plaintiff to bring a pre-

enforcement suit "when he has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Wollschlaeger*, 848 F.3d at 1304 (internal punctuation omitted) (quoting *Driehaus*, 573 U.S. at 159). This type of injury is not considered too remote or speculative to support standing. *See id*. at 1305.

2. Traceability and Redressability

It is well-settled that "[t]o satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253 (11th Cir. 2020) (quoting *Lujan*, 504 U.S. at 560). Further, "it must be *the effect of the court's judgment on the defendant*—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (internal punctuation omitted) (quoting *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015)). Therefore, the court must be satisfied that a decision in the plaintiff's favor would "significantly increase the likelihood that [the plaintiff] would obtain relief that directly redresses the injury that she claims to have suffered." *Id.* (internal

punctuation and alteration omitted) (quoting *Harrell v. Fla. Bar*, 608 F.3d 1241, 1260 n.7 (11th Cir. 2010)).

In *Luckey v. Harris*, which involved a complaint against the governor of Georgia and certain state judges regarding the state's provision of legal services to indigent criminal defendants, the Eleventh Circuit explained that "[a]ll that is required [for injunctive relief against a state official] is that the official [sued] be responsible for the challenged action." 860 F.2d 1012, 1015 (11th Cir. 1988). Thus, "the state officer sued must, by virtue of his office, have some connection with the unconstitutional act or conduct complained of. Whether this connection arises out of general law, or is specially created by the act itself, is not material so long as it exists." *Id*. at 1015-16 (internal punctuation, alteration and citation omitted). The court therefore concluded that prospective relief could be ordered against the state officers, including the governor of Georgia, who is generally responsible for enforcing the state's laws. *Id*. at 1016. The court explained:

> According to the Georgia constitution, the governor is responsible for law enforcement in [the] state and is charged with executing the laws faithfully. The governor further has the residual power to commence criminal prosecutions and has the final authority to direct the Attorney General to "institute and prosecute" on behalf of the state. Defendants[, including the Governor,] are therefore appropriate parties against whom prospective relief could be ordered.

Id. (citations omitted).

Relying on this "binding precedent" from *Luckey*, the Eleventh Circuit rejected the state officers' argument in *Georgia Latino Alliance* that the plaintiffs did not have standing to sue because the state officials, including the governor of Georgia, lacked enforcement authority over the challenged statute. 691 F.3d at 1260 n.5. The court emphasized that it was "easily satisfied" that the plaintiffs met the traceability and redressability requirements to bring a pre-enforcement, constitutional challenge against the officers, where "[e]ach injury [was] directly traceable to the passage of [the challenged statute] and would be redressed by enjoining each provision." *Id*. at 1260.

Following this reasoning, the Court finds that the traceability and redressability requirements are satisfied in this case. The injuries Plaintiffs allege are directly traceable to SB 202, for which County and State Defendants, including the Governor, have enforcement responsibility.

County Defendants' argument that SB 202's provisions are not traceable to them and cannot be redressed by entering an injunction against them is without merit. Indeed, they concede that they must enforce SB 202 and do not dispute Plaintiffs' assertion that county officials are "responsible for the day-to-day operations of running elections" in their respective counties. *E.g.*, Am. Compl. ¶ 99, ECF No. 83.

Further, County Defendants have not cited any authority that supports their argument that Plaintiffs cannot establish redressability without bringing suit against all Georgia counties. *Bush v. Gore*, 531 U.S. 98 (2000), is inapposite because that opinion did not analyze standing. Rather, the Supreme Court addressed the manual recount of paper ballots in a Florida election and the related issue of disparate treatment of voters across the state under the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 107. Those circumstances are easily distinguishable from County Defendants' redressability argument.

Regardless, to satisfy redressability requirements for standing purposes, Plaintiffs need to show only that an injunction against County Defendants would address at least some of the alleged injuries in this case. *See Losch v. Nationstar Mortg. LLC*, 995 F.3d 937, 943 (11th Cir. 2021) (finding that the plaintiff had standing to sue the defendant even if only "a small part of the [total] injury [was] attributable to" the defendant). They have fulfilled that requirement.

Based on the foregoing analysis, the Court finds that the Article III standing requirements to bring this suit are satisfied by at least AME Church.

B. Failure to State a Claim

Having resolved the threshold standing issue, the Court now turns to State and Intervenor Defendants' arguments that the Amended Complaint fails to state a claim upon which relief may be granted.

In evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court "accept[s] the allegations in the complaint as true and construe[es] them in the light most favorable to the plaintiff."[7] *Traylor v. P'ship Title Co.*, 491 F. App'x 988, 989 (11th Cir. 2012). However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal punctuation and citation omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that a complaint does not suffice "if it tenders 'naked assertions' devoid of 'further factual enhancement'" (alteration omitted) (quoting *Twombly*, 550 U.S. at 557)).

[7] A court is limited to reviewing what is alleged "'within the four corners of the complaint.'" *Hayes v. U.S. Bank Nat'l Ass'n*, 648 F. App'x 883, 887 (11th Cir. 2016) (quoting *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1329 n.7 (11th Cir. 2006)). If the court accepts matters outside the complaint, it "must convert the motion to dismiss into one for summary judgment." *Prop. Mgmt. & Invs., Inc. v. Lewis*, 752 F.2d 599, 604 (11th Cir. 1985).

Moreover, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "This standard does not require a party to plead facts with such particularity to establish a significant probability that the facts are true, rather, it requires a party's pleading of facts to give rise to a 'reasonable expectation that discovery will reveal evidence [supporting the claim].'" *Burch v. Remington Arms Co.*, No. 2:13-cv-00185, 2014 WL 12543887, at *2 (N.D. Ga. May 6, 2014) (alteration in original) (quoting *Twombly*, 550 U.S. at 556); *see also Twombly*, 550 U.S. at 570 (dismissing complaint because the plaintiffs did not state facts sufficient to "nudge[] their claims across the line from conceivable to plausible").

At bottom, the complaint must contain more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," *Iqbal*, 556 U.S. at 678, and must "'plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,'" *Traylor*, 491 F. App'x at 990 (quoting *Speaker v. U.S. Dep't of Health & Hum. Servs.*, 623 F.3d 1371, 1380 (11th Cir. 2010)).

The Court will now address the question of whether Plaintiffs have satisfied their pleading burden with respect to each count of the Amended Complaint.[8]

1. Count I (intentional discrimination and discriminatory results under § 2 of the Voting Rights Act ("VRA")); Count II (intentional discrimination under the Fourteenth and Fifteenth Amendments)[9]

Plaintiffs allege that SB 202 violates § 2 of the VRA under either the intent

[8] State Defendants address the challenged provisions individually rather than in connection with the specified counts of the Amended Complaint. This approach, however, analyzes the challenged provisions out of context and does not account for Plaintiffs' contention that the challenged provisions also ***collectively*** violate the law. For the purpose of deciding the instant motions, the Court will evaluate each count as a whole and determine whether Plaintiffs have stated a claim as to the specific count.

[9] Complaints seeking to invalidate a voting statute on the grounds that it is discriminatory typically allege claims under § 2 of the VRA and/or the Fourteenth and Fifteenth Amendments. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1329 (11th Cir. 2021). VRA § 2 claims generally constitute allegations of vote dilution (*e.g.*, challenges to election districting schemes) or vote denial (*e.g.*, challenges to time, place or manner restrictions on voting, such as absentee and in-person voting rules). Either type of claim may be asserted as a discriminatory purpose/intent claim (*i.e.*, the statute was enacted with discriminatory intent and has a discriminatory effect) or a discriminatory results claim (*i.e.*, the statute results in the abridgement of the right to vote under the circumstances). *See Chisom v. Roemer*, 501 U.S. 380, 394 n.21 (1991). Claims brought under the Fourteenth and Fifteenth Amendment require proof of discriminatory intent and effect (whether in the vote dilution or vote denial context). *See Greater Birmingham*, 992 F.3d at 1328-29. Therefore, the analysis of Fourteenth and Fifteenth Amendment discriminatory intent claims mirrors that of § 2 intent claims. In this case, Plaintiffs make vote denial allegations, which are styled as § 2 discriminatory intent and results claims (Count I) and Fourteenth and Fifteenth Amendment discriminatory intent claims (Count II).

or results tests.[10]

a. Intentional Discrimination

According to the Amended Complaint, the challenged provisions of SB 202 "were adopted for the purpose of denying voters of color full and equal access to the political process." Am. Compl. ¶ 332, ECF No. 83. Specifically, Plaintiffs assert that:

> (i) Georgia has a long history of "racially discriminatory voting schemes," which "necessitated federal intervention 187 times, including over 91 objections since the 1982 reauthorization of [§] 5 of the VRA";
>
> (ii) "[b]etween October 2016 and October 2020, Georgia added nearly a quarter-million Black and Latinx voters to its voter registration rolls," while "the white share of the state's electorate declined";
>
> (iii) voting in Georgia is "highly racially polarized" with 93% of Black voters supporting the Democratic candidate for governor in 2018 compared to 25% of white voters;
>
> (iv) "[n]early 30% of Black voters cast their ballot by mail in 2020, compared to only 24% of white voters," and "[c]andidates preferred by Black voters received a higher percentage of absentee votes relative to their overall percentage of the final vote count";

[10] Courts generally analyze discriminatory intent or purpose claims under the framework the Supreme Court established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977). However, *Arlington Heights* did not involve a voting statute, so it does not track or refer to the language of § 2. Discriminatory results claims, on the other hand, are usually analyzed under the framework the Supreme Court developed in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986). *Gingles* involved a vote dilution claim, and the relevant analysis incorporates the text of § 2.

(v) "[i]n response to increasing Black voter participation and record election participation in recent elections, the Georgia General Assembly passed [SB] 202, only 79 days after" the 2021 runoff elections;

(vi) "[SB] 202 was rushed into . . . law with little time for the public to weigh in";

(vii) "[SB] 202 placed restrictions on many of the safe and secure options by which Black voters, voters of color, immigrant voters, poor voters, student voters, older voters, and voters with disabilities exercised their right to vote"; and

(viii) Black and Latinx Georgia residents experience poverty at nearly twice the rate of white residents, and white per capita income and median income is "significantly greater" than that of Black and Latinx households.[11]

Id. ¶¶ 152, 196, 202, 206, 212, 219, 244. The bottom-line allegation of the Amended Complaint is that SB 202 will "disparately impact and discriminate against Black voters, other voters of color, voters with disabilities, and other historically disenfranchised communities" and that "voters with multiple of those identities—many of whom are Plaintiffs' members—will face compounded burdens, in scale and degree." *Id.* ¶ 324.

State Defendants' arguments for dismissal of Plaintiffs' intentional discrimination claims largely focus on the merits of Plaintiffs' allegations. In a nutshell, they assert that Plaintiffs have not sufficiently alleged a disparate impact

[11] The Court highlights only a few pertinent factual allegations from the Amended Complaint's extensive recitation.

claim because SB 202's provisions are not burdensome, given Georgia's alternate voting options. *See generally* State Defs.' Br. 13-25, ECF No. 87-1.

Intervenor Defendants make similar arguments but also contend that the Court should focus on the legislative findings underlying SB 202, which they assert are "the only reliable evidence of *the legislature's* purposes." Intervenor Defs.' Br. 15, ECF No. 100-1. In their view, those findings prove that SB 202 was not enacted with discriminatory intent. They argue that, at worst, the legislature was driven by the permissible purpose of securing partisan advantage. *Id*.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court of the United States identified a non-exhaustive list of factors that courts can use to evaluate whether government action was undertaken with discriminatory intent.[12] 429 U.S. 252, 267-68 (1977). These include the "historical background of the decision"; the "specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence" in taking the action; "[t]he legislative or administrative history," including "contemporary statements by members of the decisionmaking body";

[12] State and Intervenor Defendants do not dispute that *Arlington Heights* governs Plaintiffs' discriminatory purpose claim.

and whether the "impact of the official action . . . bears more heavily on one race than another." *Id*.

Because the aforementioned allegations in the Amended Complaint are consistent with the *Arlington Heights* factors and otherwise bear on the issue of intentional discrimination, the Court finds that Plaintiffs have stated a plausible discriminatory purpose claim.[13] At the motion to dismiss stage, Plaintiffs are not required to establish "a significant probability that the facts are true," *Burch*, 2014 WL 12543887, at *2, and only have to state facts sufficient to "nudge[] their claims across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570. They have done so here.

State and Intervenor Defendants' arguments, which attack the validity of Plaintiffs' allegations, are premature at this stage because they go to the merits of the claim and not to the question of whether Plaintiffs have asserted a plausible claim for relief.

Additionally, contrary to State and Intervenor Defendants' contentions that *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), established

[13] Plaintiffs bring intent claims under § 2 as well as under the Fourteenth and Fifteenth Amendments. Since all of these claims are analyzed in the same way, the Court's conclusion that Plaintiffs have stated a plausible discriminatory intent claim applies to Plaintiffs' § 2 intent claim (Count I) as well as to their Fourteenth and Fifteenth Amendment intent claims (Count II).

certain requirements that Plaintiffs failed to meet here, the Supreme Court in that case expressly "decline[d] . . . to announce a test to govern all VRA § 2 claims" involving time, place or manner voting restrictions, *id*. at 2336. The Supreme Court explained that *Brnovich* was its "first foray" into deciding this type of claim and therefore found it "sufficient for present purposes to identify certain ***guideposts***" that led to its decision rather than to mandate a test that must be satisfied in all circumstances. *Id*. (emphasis added). Thus, while the language in *Brnovich* could portend future requirements to state or prove a § 2 time, place or manner claim, it should not be interpreted as currently setting forth pleading requirements that Plaintiffs must fulfill in this case.[14]

Likewise, while the Court acknowledges that the *Brnovich* opinion discusses the legislators' intent in passing the challenged statute, that analysis does not support State and Intervenor Defendants' position that *Brnovich* now requires plaintiffs in cases such as this one to allege that the legislature as a whole acted with discriminatory intent. The Supreme Court's discussion of intent in that case

[14] *Compare Guideline*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/guideline (last visited Dec. 6, 2021) ("an indication or outline of policy or conduct") *with Requirement*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/requirement (last visited Dec. 6, 2021) ("something essential to the existence or occurrence of something else"). "Guideline" and "Guidepost" are equivalent in the Merriam-Webster dictionary.

occurred in the course of its review of whether the district court's interpretation of the evidence of discrimination was "permissible" under the clearly erroneous standard of review. *Id*. at 2349. The district court found no indication that the legislature "as a whole" was motivated by race, despite evidence in the record that a video reflecting a racial appeal played a role in the legislature's actions. *Id*. at 2349-50. The Supreme Court concluded that the district court's finding was not clearly erroneous. *Id*. When viewed in context, this finding does not establish a new test to state a VRA § 2 discrimination claim, especially in light of the Supreme Court's express disavowal of doing so.

b. Discriminatory Results

In addition to the allegations set forth above, the Amended Complaint asserts that "[SB] 202 further violates [§] 2 of the VRA because, given the totality of the circumstances . . . , the [challenged] provisions, individually and cumulatively, will disproportionately deny voters of color an equal opportunity to participate in the political process and to elect representatives of their choice." Am. Compl. ¶ 333, ECF No. 83.

State and Intervenor Defendants make similar arguments in seeking dismissal of Plaintiffs' voting claims under the results test. Like State Defendants, Intervenor Defendants argue that the challenged provisions of SB 202 "impose

nothing beyond the usual burdens of voting"; "Plaintiffs [improperly] focus on how each provision of SB 202 burdens a particular method of voting, without considering the [s]tate's entire [voting] system"; and "Plaintiffs misstate the strength of the state interests behind the challenged laws." Intervenor Defs.' Br. 12-14, ECF No. 100-1. Intervenor Defendants also contend that Plaintiffs have failed to assert certain facts required by *Brnovich*, including "allegations comparing Georgia's laws with those of other [s]tates" and "'the size' of any racially disparate impacts." *Id*. at 12-13.

> A violation of § 2 of the VRA
>
> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the [s]tate or political subdivision are not equally open to participation by members of a [protected] class . . . in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). To evaluate a results claim under § 2 of the VRA, courts have relied on the factors that the Supreme Court identified in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986), such as the extent of any history of discrimination affecting the right to vote, the scope of racially polarized voting and

the degree to which discrimination hinders the class's ability to participate in the voting process.[15]

However, the Supreme Court's opinion in *Brnovich* called into question the usefulness of some of the *Gingles* factors in evaluating a vote denial claim under § 2 of the VRA.[16] *Brnovich*, 141 S. Ct. at 2340. The Supreme Court identified other relevant factors, but, as discussed above, it was careful to define those factors as mere guideposts. *See id*. at 2336. These guideposts include the size and degree of the burden on voting, the size of the disparities between the protected class and other groups, the opportunities provided by a state's voting system, etc. *See id*. at 2336, 2338-39. Because this list is neither exhaustive nor prescriptive, *Brnovich* does not require Plaintiffs to plead any specific set of factors.

Here, Plaintiffs' allegations identified above correspond with *Gingles* factors that may be relevant in this specific circumstance and ultimately weigh upon the issue of whether the political process in Georgia is equally open to all voters. Therefore, Plaintiffs have stated a plausible claim under § 2 of the VRA.

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[15] Not all factors will be pertinent or essential to all claims. *See Nipper v. Smith*, 39 F.3d 1494, 1526-27 (11th Cir. 1994).

[16] *Gingles* was a vote ***dilution*** case, wherein the plaintiff claimed that legislative districting plans diluted the ability of particular voters to affect the outcome of elections. 478 U.S. at 47. A vote ***denial*** claim, on the other hand, concerns time, place or manner restrictions on voting, such as absentee and in-person voting rules. *See Brnovich*, 141 S. Ct. at 2334.

While State and Intervenor Defendants' arguments regarding the burden on voters, Georgia's voting system as a whole and Georgia's underlying interests in enacting SB 202 will likely be relevant to the analysis of Plaintiffs' claims at a later stage of this case, those contentions investigate the merits of the claims, and their resolution requires an inquiry into facts not alleged in the Amended Complaint. Therefore, they are not appropriate at the motion to dismiss stage.

Further, as the Court explained above, the *Brnovich* factors are not prescriptive. Thus, contrary to Intervenor Defendants' position, Plaintiffs are not required to allege those factors or otherwise provide detailed facts regarding them. *See id.* at 2336; Fed. R. Civ. P. 8(a)(2) (requiring a plaintiff to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief").

Based on the foregoing analysis, the Court finds that Plaintiffs have stated a VRA § 2 claim under both the intent and results tests. For this reason, the Court declines to dismiss Counts I and II of the Amended Complaint.

2. Count III (undue burden on the right to vote under the First and Fourteenth Amendments)

Plaintiffs allege that the "challenged provisions of S.B. 202 collectively and individually impose severe and, at a minimum, significant burdens on eligible Georgia voters' right to vote, including on Plaintiffs and members of Plaintiffs'

organizations." Am. Compl. ¶ 340, ECF No. 83. The Amended Complaint contains a detailed description of how SB 202's provisions, including regulations regarding mobile voting units, the prohibition of line relief,[17] additional requirements for absentee voting and restrictions on drop boxes and the distribution of absentee ballots will burden the right to vote of disabled voters, voters of color and others. *See* Am. Compl. ¶¶ 275-328. According to Plaintiffs, "[n]one of the burdens imposed by the challenged provisions . . . are necessary to achieve . . . any sufficiently weighty legitimate state interest." *Id*. ¶ 341.

State Defendants respond that Plaintiffs have not established an actionable burden under the *Anderson/Burdick* framework for evaluating voting rights claims because the changes to the election process are "only minimally burdensome," and the state's interests "more than justify the changes." State Defs.' Br. 20, ECF No. 87-1.

Intervenor Defendants additionally argue that because "[m]ost of the challenged provisions of SB 202 regulate only absentee voting," "the right to vote is not at stake here." Intervenor Defs.' Br. 3, ECF No. 100-1 (internal punctuation omitted). They also argue that "[t]he only burdens that Plaintiffs assert are legally

[17] "Line relief" refers to the provision of refreshments, such as food and drinks, to voters standing in line to vote at a polling place. *See* Am. Compl. ¶ 22, ECF No. 83.

irrelevant because they are special burden[s] on some voters, not categorical burdens on all voters." *Id*. at 6.

In resolving an undue burden on voting claim, a court must: (i) "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"; (ii) "identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule"; (iii) "determine the legitimacy and strength of each of those interests"; and (iv) "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The analysis is not a "litmus-paper test" and instead requires a "'flexible'" approach. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (citation omitted). If a court finds that a plaintiff's voting rights "are subjected to severe restrictions, the [respective] regulation must be narrowly drawn to advance a state interest of compelling importance. But when [the law] imposes only reasonable, nondiscriminatory restrictions . . . , the [s]tate's important regulatory interests are generally sufficient to justify the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal punctuation and citation omitted).

Here, the Amended Complaint contains detailed allegations of burdens that Plaintiffs assert the challenged provisions will impose on Georgia voters. Plaintiffs also maintain that there are no legitimate state interests that would support such burdens. *Anderson* and *Burdick* do not require more from Plaintiffs at the motion to dismiss stage. And State and Intervenor Defendants' weighing of the alleged burden on voters, which relies on facts not asserted in the Amended Complaint, is not appropriate at this time.

The Court also declines, as Intervenor Defendants suggest, to forego the undue burden analysis the Supreme Court developed in *Anderson* and *Burdick* and summarily dispose of Plaintiffs' voting rights claims. The Court does not read *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807-08 (1969), which states that there is no right to an absentee ballot, to require such an outcome. As described above, the *Anderson-Burdick* framework requires the Court to evaluate the type of burden imposed by the challenged provisions and apply the corresponding level of review. "Only after weighing [the designated] factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 789.

For all these reasons, the Court declines to dismiss Count III of the Amended Complaint.

3. Count IV (freedom of speech under the First Amendment)

Plaintiffs allege that distributing food and drink to voters waiting in line and encouraging them to stay in line constitute core political speech and expression protected by the First Amendment. Am. Compl. ¶¶ 344-45, ECF No. 83. The Amended Complaint further explains that line relief is neither "electioneering" nor "partisan," and Plaintiffs offer relief to voters "regardless of how they plan to cast their ballot" and without asking or knowing for whom they plan to vote. *Id*. ¶ 317. Accordingly, Plaintiffs contend that the SB 202 provisions prohibiting such conduct "unconstitutionally burden [their] First Amendment rights of speech and expression[] and are not supported by any sufficient, let alone compelling, government purpose." *Id*. ¶ 348.

State Defendants counter that because a polling area is a nonpublic forum, the much lower reasonableness standard applies to any regulation of speech or expression therein. State Defs.' Br. 21-22, ECF No. 87-1. They conclude that under that lower standard, SB 202's restrictions pass muster because they are reasonable in light of the state's "regulatory interests." *Id*. at 22.

Intervenor Defendants make a similar argument and additionally argue that the First Amendment is not implicated because line relief "is conduct, not speech." Intervenor Defs.' Br. 18, ECF No. 100-1. They therefore assert that while the

challenged provision will impose an "incidental" burden on speech, the statute should not be analyzed as one regulating speech. *Id*. at 19.

The First Amendment prohibits the enactment of laws that abridge the freedom of speech. *See* U.S. Const. amend. I. Therefore, governments generally "ha[ve] no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

Regulation of speech based on the topic discussed or the idea or message expressed is presumptively unconstitutional and may be justified only if the government proves that the regulation is narrowly tailored to serve compelling state interests. *See id*. at 165 (stating that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech" (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993))).

Taking as true Plaintiffs' allegations that SB 202 establishes what type of conduct and communication is permissible while engaging with voters who are waiting in line and construing those allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have plausibly alleged that SB 202's

restrictions on line relief impinge on speech and/or expressive conduct in some way.

State Defendants do not provide support for their contention that such activities can be restricted simply because they occur near a polling place or that any voting line would presumptively occur in a nonpublic forum, where a lower standard of review would apply. Nor do Intervenor Defendants cite any authority for the proposition that line relief *per se* cannot be considered expressive conduct under the First Amendment. Indeed, they concede that line warming could impose some burden on speech.

In any event, answering the questions of whether line relief occurs in a nonpublic forum subject to greater restrictions; whether the associated speech or conduct is of the type protected by the First Amendment; what type of analysis should apply; and whether the state has identified interests sufficient to meet the applicable standard requires the type of substantive merits inquiry that is not appropriate on a motion to dismiss.

For all these reasons, the Court declines to dismiss Count IV of the Amended Complaint.

4. Count V (discrimination under Title II of the Americans with Disabilities Act ("ADA")) and Count VI (discrimination under Section 504 of the Rehabilitation Act)[18]

Plaintiffs allege that their members and constituents are qualified individuals with disabilities under the ADA.[19] Am. Compl. ¶ 351, ECF No. 83. They further allege that SB 202 imposes burdens on disabled voters' opportunity to vote absentee by mail, including by "adding burdensome identification requirements"; imposing criminal penalties on certain groups of people "who provide even the most basic of assistance to individuals with disabilities in returning an absentee ballot"; and "disenfranchis[ing] disabled voters who go to the wrong precinct within the right county[] and who do not have the resources (physical or financial) to travel to the correct precinct." *Id.* ¶ 358. Plaintiffs also contend that "[b]y limiting the locations, number, and accessibility of the drop box program, [SB] 202 essentially makes the program unavailable to many disabled voters." *Id.*

The Amended Complaint provides specific examples of ways in which Plaintiffs assert the challenged provisions of SB 202 "will screen out or tend to screen out people with disabilities from voting and/or will defeat or substantially

[18] Since the ADA and Rehabilitation Act claims are governed by the same legal standard, the Court's analysis of the ADA claim applies to the Rehabilitation Act claim. *See Goldberg v. Fla. Int'l Univ.*, 838 F. App'x 487, 492 (11th Cir. 2020).
[19] Defendants do not dispute this point.

impair" the ability of eligible disabled voters to cast their ballots. *Id*. ¶ 323; *see also, e.g.*, *id*. ¶¶ 320-28. Plaintiffs conclude that because SB 202 includes "no systemic provisions to provide reasonable modifications to individuals with disabilities," it "discriminates against qualified Georgia voters with disabilities who wish to participate in the electoral process" and denies "them a full and equal opportunity to participate in the [s]tate's voting programs." *Id*. ¶ 360.

State Defendants' key argument in support of dismissal of this claim is that "disabled voters have multiple options to vote." State Defs.' Br. 16-17, ECF No. 87-1; *see also, e.g.*, *id*. at 17 ("Plaintiffs have not sufficiently alleged a claim for discrimination under the ADA or Rehabilitation Act because disabled voters still have multiple accessible options to participate."). Intervenor Defendants similarly argue that "Georgia gives voters many ways to cast a ballot" and add that Plaintiffs cannot plead a plausible facial challenge to the ADA under these circumstances because they cannot show that the challenged provisions are invalid in every instance. Intervenor Defs.' Br. 17-18, ECF No. 100-1.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The

implementing regulations for this section of the ADA further specify that "[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150. Thus, to state a claim under the ADA, a plaintiff must establish

> "(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability."

Silberman v. Mia. Dade Transit, 927 F.3d 1123, 1134 (11th Cir. 2019) (quoting *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1083 (11th Cir. 2007)).

"A violation of Title II, however, does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity." *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001). Rather, a plaintiff states a claim under the ADA when the complaint alleges facts indicating that certain "services, programs, and activities" are not "readily accessible" by reason of a disability. *Id.*; *see also People First v. Merrill*, 467 F. Supp. 3d 1179, 1216 (N.D. Ala. 2020), *appeal dismissed*, No. 20-12184-GG, 2020 WL 5543717 (11th Cir. July 17, 2020) (stating that "exclusions under Title II need not be absolute").

In *Shotz*, the Eleventh Circuit found that the plaintiffs sufficiently stated a claim under the ADA where they alleged that trials in the courthouse were not "readily accessible" to them, given the courthouse's steep wheelchair ramps and unfit bathrooms. 256 F.3d at 1080. It did not matter to the court that the plaintiffs were able to attend trial, despite these obstacles. *Id.* The important point was that the courthouse was not ***readily*** accessible to the plaintiffs. *Id*.

Here, the Amended Complaint contains allegations that the challenged provisions of SB 202 make it harder for disabled voters to cast their vote. Central to the claim is the contention that the new absentee voting procedures impose burdens that disproportionately harm disabled voters and prevent them from participating fully and equally in the voting process. Even if, as Intervenor Defendants suggest, the Court were to consider SB 202's absentee voting provisions in the context of Georgia's voting system as a whole, the facts necessary to evaluate what accommodations the state provides for disabled voters and the scope and reasonableness of such accommodations are not alleged in the Amended Complaint. Therefore, those facts cannot be considered on a motion to dismiss. Ultimately, the Court is left with only allegations of restricted access, which it must take as true at this stage, and which are sufficient to state a claim under the ADA.

Contrary to Intervenor Defendants' position, Plaintiffs need not show that the voting access allegedly denied here is absolute. Both the text of the ADA and cases interpreting it are clear that a partial denial of access could be actionable.

The Court is also not currently convinced by Intervenor Defendants' argument that Plaintiffs' ADA claim should be construed as a constitutional preemption claim. Intervenor Defs.' Reply Br. 9, ECF No. 103. Plaintiffs point out (and the Amended Complaint reflects) that their claim for disability discrimination is expressly alleged under the ADA and not under the Constitution. The Court will thus evaluate the allegations against the ADA standard for now, and, as set forth above, Plaintiffs have met those requirements.

For all these reasons, the Court declines to dismiss Counts V and VI of the Amended Complaint.

5. Count VII (immaterial voting requirement under 52 U.S.C. § 10101(a)(2)(B))

Plaintiffs allege that the provisions of SB 202 requiring voters to provide their date of birth with their absentee ballot applications and their voted absentee ballots violate 52 U.S.C. § 10101(a)(2)(B) because they require election officials to "reject [an] absentee ballot solely because the date of birth on the absentee ballot does not match the date of birth in the voter's voter registration records." Am. Compl. ¶ 375, ECF No. 83.

State Defendants respond that the date of birth requirement does not violate § 10101(a)(2)(B) because the provision requires notice to the voter of an error and an opportunity to cure the defect before the absentee ballot can be rejected. *See* State Defs.' Br. 13, ECF No. 87-1. Intervenor Defendants do not address this count of the Amended Complaint.

Under § 10101(a)(2)(B),

> [n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under [s]tate law to vote in such election.

Plaintiffs have alleged that date of birth information is not necessary to determine whether a person is qualified to vote, yet SB 202 requires county officials to reject absentee ballot applications and voted ballots of voters who make errors in providing such information. As such, the Court finds that Plaintiffs have stated a plausible claim for relief under § 10101(a)(2)(B).

State Defendants have not provided any support for their argument that the opportunity to cure an error rehabilitates any potential violation of § 10101(a)(2)(B), and the statute is silent on this point. This argument would also require the Court to incorrectly address the merits of Plaintiffs' allegations at the motion to dismiss stage.

For these reasons, the Court declines to dismiss Count VII of the Amended Complaint.

III. CONCLUSION

Based on the foregoing analysis, the Court **DENIES** Defendants' motions to dismiss (ECF Nos. 87, 90, 100).[20]

SO ORDERED this 9th day of December, 2021.

J. P. BOULEE
United States District Judge

[20] The Court declines to dismiss the Amended Complaint on shotgun pleading grounds. While it is true that the Amended Complaint contains some of the hallmarks of a shotgun pleading, including verbosity and adopting the allegations of preceding counts, dismissal is appropriate "where 'it is *virtually impossible* to know which allegations of fact are intended to support which claim(s) for relief.'" *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1325 (11th Cir. 2015) (citation omitted). Defendants' robust response to the Amended Complaint indicates that is not the case here.

Exhibit D

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

FAIR FIGHT ACTION, INC., et al.,

Plaintiffs,

v.

BRAD RAFFENSPERGER, et al.,

Defendants.

CIVIL ACTION FILE NO.

1:18-CV-5391-SCJ

ORDER

This matter appears before the Court on Defendants' Motion for Summary on Jurisdiction. Doc. No. [441].

I. BACKGROUND[1]

Plaintiffs Fair Fight Action, Inc. ("Fair Fight"), Care in Action, Inc. ("Care in Action"), Ebenezer Baptist Church of Atlanta, Georgia, Inc. ("Ebenezer"), Baconton Missionary Baptist Church, Inc. ("BMBC"), Virginia-Highland Church, Inc. ("Virginia-Highland"), and The Sixth Episcopal District, Inc. (the "Sixth District") (collectively, "Plaintiffs") first filed this lawsuit on November 27, 2018.

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[1] All citations are to the electronic docket unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

Doc. No. [1]. Since then, Plaintiffs have twice amended their Complaint (Doc. Nos. [41]; [582]), and the Court dismissed several of Plaintiffs' original claims. Doc. No. [68]. Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief brings certain claims against Defendants Brad Raffensperger (in his official capacity as Secretary of State of the State of Georgia and as Chair of the State Election Board of Georgia), Members of the State Election Board in their official capacities (Rebecca N. Sullivan, David J. Worley, Matthew Mashburn, and Anh Le), and the State Election Board (collectively, the "Defendants"). Doc. No. [582].

In their Second Amended Complaint, Plaintiffs allege that in the 2018 General Election, Defendants "enforced unconstitutional and otherwise unlawful legislation, created and enforced unconstitutional and otherwise unlawful policies, and engaged in gross mismanagement that resulted in an election that deprived Georgia citizens, and particularly citizens of color, of their fundamental right to vote." Id. ¶ 2. Plaintiffs assert that Defendants' actions violated the First,

Fourteenth, and Fifteenth Amendments to the United States Constitution, as well as Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. Id. ¶ 3.[2]

On June 10, 2020, upon Defendants' request, the Court informed the Parties that they would be allowed to file two separate summary judgment motions for purposes of addressing jurisdictional and substantive issues. Doc. No. [379]. On June 29, 2020, Defendants filed their Motion for Summary Judgment on Jurisdiction (Doc. No. [441]), arguing that Plaintiffs lack organizational and associational standing, are unable to show that their alleged harms are traceable to or redressable by Defendants, and assert other claims that are moot, barred, or otherwise foreclosed by law (see Doc. No. [441-1], pp. 1–2). Plaintiffs have

[2] Specifically, Plaintiffs' five causes of action are as follows: (1) violation of the fundamental right to vote (First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983) (Count I); (2) violation of the ban on racial discrimination in voting (Fifteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983) (Count II); (3) violation of Equal Protection (Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983) (Count III); (4) violation of Procedural Due Process (Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983) (Count IV); (5) violation of Section 2 of the Voting Rights Act of 1965 (Count V). Doc. No. [582], ¶¶ 150–222. Despite the recent amendment of the Complaint, the Court is of the opinion that its prior Eleventh Amendment immunity ruling as to the State Election Board (as a state agency) controls. Doc. No. [68], pp. 43–52, 85. Accordingly, only Count V (which pertains to Section 2 of the Voting Rights Act of 1965) remains pending against the State Election Board. The immunity ruling does not apply to the official capacity causes of actions asserted against the individual members of the State Election Board.

responded in opposition (Doc. No. [489]), and Defendants replied (Doc. No. [533]).[3] The Court held a hearing on the pending motion on January 12, 2021. Doc. No. [602]. After consideration of the arguments and the Parties' presentations of material facts,[4] this matter is now ripe for review.

II. LEGAL STANDARD[5]

Federal Rule of Civil Procedure 56(a) provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

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[3] Additional supplemental filings are at Doc. Nos. [546], [553], [564], [566], [594].

[4] Plaintiffs and Defendants have both filed various iterations and updates of statements of material facts, as well as responses and objections thereto. See, e.g., Doc. Nos. [451]; [458]; [491]; [492], [506]; [532]; [534]; [550]; [604]; [610]. In this Order, the Court draws primarily from the uncontested material facts in Defendants' (Doc. No. [451]) and Plaintiffs' (Doc. No. [604]) latest statements of material facts. The Court recognizes that Defendants have filed a global objection to Plaintiffs' Corrected Statement of Additional Material Facts (Doc. Nos. [534], [610]). The Court has deemed it proper to resolve the jurisdictional aspects of the case first. The Court will resolve the global objection prior to a ruling on the merits aspect of the case. To the extent that any party has filed specific objections to the facts cited in this Order, the Court has overruled said objection by the inclusion of said fact in this Order (or otherwise specified the purpose for which the Court considered the fact).

[5] The standard below pertains only to summary judgment. Additional legal standards pertaining to specific standing doctrines will be discussed further below in the analysis section.

A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). A factual dispute is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of showing the court, by reference to materials in the record, that there is no genuine dispute as to any material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party's burden is discharged merely by "showing—that is, pointing out to the district court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex Corp., 477 U.S. at 325 (internal quotations omitted).

In determining whether the movant has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the nonmoving party. Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996). "In doing so, the district court may not weigh the evidence or find facts. Nor may the court make credibility determinations of its own." Ga. State Conf. of NAACP v.

Fayette Cty. Bd. of Comm'rs, 775 F.3d 1336, 1343 (11th Cir. 2015) (internal quotations and citations omitted). Further, "mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005) (per curiam) (citation omitted); Jefferson v. Sewon Am., Inc., 891 F.3d 911, 924–25 (11th Cir. 2018) (holding that "conclusory allegations without specific supporting facts have no probative value").

Once the movant has adequately supported its motion, the nonmoving party then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Celotex Corp., 477 U.S. at 324 (requiring the nonmoving party to "go beyond the pleadings" to establish that there is a "genuine issue for trial"). All reasonable doubts should be resolved in the favor of the nonmovant. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). When the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine [dispute] for trial." Id. (citations omitted).

III. ANALYSIS

The Court's analysis is divided into three parts: standing, mootness, and political question doctrine.

A. Standing

"Standing 'is the threshold question in every federal case, determining the power of the court to entertain the suit.'" CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1269 (11th Cir. 2006) (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)). Article III of the United States Constitution limits the courts to hearing actual "Cases" and "Controversies." U.S. Const. Art. III § 2; see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992). Overall, the standing requirement arising out of Article III seeks to uphold separation-of-powers principles and "to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013). Standing is typically determined by analyzing the plaintiff's situation as of the time the complaint is filed, and subsequent events do not alter standing. Focus on the Fam. v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1275 (11th Cir. 2003) (collecting authorities); Johnson v. Bd. of Regents of Univ. of Ga., 263

11 F.3d 1234, 1267 (11th Cir. 2001); Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1352 n.3 (11th Cir. 2005).

To establish standing, a plaintiff must show three things:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560–61 (internal quotations, citations, and alterations omitted). "The party invoking federal jurisdiction bears the burden of establishing standing—and, at the summary judgment stage, such a party can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts." Clapper, 568 U.S. at 411–12 (internal quotations and citations omitted); see also Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 777 F.2d 598, 607 n.24 (11th Cir. 1985) (noting that standing "is a legal determination based on the facts established by the record").

The Court will now consider the three requisites that the organizational plaintiffs must establish: injury in fact, causal connection, and redressability.

1. Injury in Fact

An organization may have standing under a "diversion-of-resources" theory when it must divert financial resources or its personnel's time to counteract a defendant's unlawful acts, thereby impairing the organization's ability to engage in its typical projects. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); Common Cause/Ga. v. Billups, 554 F.3d 1340, 1350 (11th Cir. 2009) (finding that an organization had standing because it "would divert resources from its regular activities to educate and assist voters in complying with" a challenged statute); Common Cause Ind. v. Lawson, 937 F.3d 944, 952–53 (7th Cir. 2019) (listing cases finding organizational standing for voter-advocacy groups that diverted resources to counteract unlawful election activity).[6] The

[6] An organization that diverts its resources voluntarily can still have standing if the "drain on [the] organization's resources arises from the organization's need to counteract the defendants' assertedly illegal practices [because] that drain is simply another manifestation of the injury to the organization's noneconomic goals." Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1166 (11th Cir. 2008) (internal quotations and citation omitted).

diversion of resources constitutes an Article III injury in fact. See Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1165 n.14 (11th Cir. 2008).

In the Eleventh Circuit, a litigant can establish organizational standing to challenge election laws by showing it has or anticipates having to divert time, personnel, or other resources from its usual projects to assist voters whose ability to vote is affected by state action. See Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1341 (11th Cir. 2014); Browning, 522 F.3d at 1165–66 (finding organizational standing when a plaintiff diverted resources from election-day education and monitoring to educating volunteers and voters on compliance with a new election law). Even when an organization diverts its resources to achieve its typical goal in a different or amplified manner, the organization may still gain standing. See Browning, 522 F.3d at 1166 (finding organizational standing when a plaintiff anticipated that it would "expend many more hours than it otherwise would have" on specific election-related activity). To create a concrete injury, the diversion must cause a perceptible impairment of organizational activities. Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1249 (11th Cir. 2020). And to show the concrete injury, the organization must identify the specific activities from which it diverted or is diverting resources. Id. at 1250.

Plaintiffs assert that they have established organizational standing under a diversion-of-resources theory. Doc. No. [489], pp. 6–19.[7] Each Plaintiff is an organization involved in civic engagement and that undertakes work in voting rights. See Doc. No. [582], ¶¶ 10–35. In their Motion for Summary Judgment on Jurisdiction, Defendants argue that Plaintiffs have failed to establish organizational standing because "they (1) are not diverting resources, (2) are serving their organizational mission, [and] (3) cannot identify what activities they diverted resources from." Doc. No. [441-1], p. 1. They argue that several Plaintiffs are unable to identify from what activity or fund they divert resources because they were unable to "quantify" the diversion. E.g., id. at 9, 15 (stating that certain Plaintiffs were unable to quantify exactly how much personnel time was diverted or how diverting personnel time impacted their other activities). In sum, Defendants argue that Plaintiffs failed to summon "trial-worthy evidence

[7] Although Plaintiffs argued during the hearing that "associational standing has been part of this case all along" (Doc. No. [607], p. 50), Plaintiffs assert it for the first time in their response to Defendants' Motion for Summary Judgment on Jurisdiction. Doc. No. [489], pp. 19–20. Defendants argue that Plaintiffs' delay in bringing this argument results in a waiver of their right to assert it. Doc. No. [533], pp. 9–10. Because the Court finds that Plaintiffs have established organizational standing, the Court will forgo analysis as to associational standing.

showing" that they diverted resources in a manner that would confer standing. Id. at 6.

Plaintiffs counter that they do not need to quantify their diversions of resources to show that they have in fact diverted resources and thereby suffered a concrete injury. Doc. No. [489], p. 8.[8] Plaintiffs also argue that they do not have to undertake new activities that conflict with their organizational missions. Id. Instead, Plaintiffs contend that they need only show—and have shown—that they had or will have to divert resources because Defendants' unlawful conduct would hinder Plaintiffs' abilities to carry out their missions. Id.

As an initial matter, the Court agrees with Plaintiffs that they do not need to quantify their diversions of resources to show that such diversions occurred. Plaintiffs must make only a minimal showing of a concrete injury to meet the modest diversion-of-resources requirement. While quantifying the diversion of resources certainly would help the Court identify a concrete injury, it is but one

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[8] For support, Plaintiffs cite People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 189 F. Supp. 3d 1327, 1340 (S.D. Fla. 2016), aff'd 879 F.3d 1142 (11th Cir. 2018), which states that "[t]he showing of an actual, concrete injury is a modest requirement for Article III standing, which does not require quantification."

way to show the injury. Testimony identifying the diversion—even if that testimony does not *quantify* the diversion—suffices.

Furthermore, the Court agrees that Plaintiffs do not have to undertake new missions that conflict with their existing missions to show a diversion of resources. As the law currently stands, Plaintiffs simply need to show that Defendants' actions caused Plaintiffs to divert resources, even if that manifests as a diversion from one activity geared towards achieving the organization's mission to a different activity geared towards that mission.[9] Similarly, while Defendants are correct that mere interest in an issue is not sufficiently concrete to support standing (see Doc. No. [533], p. 2), the law currently confers standing to an organization that diverts its resources to counteract a defendant's unlawful

[9] To be clear, the question is not necessarily whether the litigant is unable to continue pursuing its core mission but instead whether it suffered a perceptible impairment in its pursuit of that mission by having to divert resources to counteract the defendant's acts. The litigant may both continue to pursue its core mission and gain organizational standing if it has been forced to divert resources from one means of achieving the mission to another means of doing so. In other words, for organizations with broad missions such as "voting rights," the analysis may often turn on whether the organization had to divert resources in a way that forced it to alter *how* it achieved its mission, not *whether* it was pursuing its usual or a new mission. Otherwise, organizations with broad missions would never have standing to challenge laws that affect their area of work. Of course, a diversion of resources from an unrelated activity or mission may also suffice.

acts. The fact that the organization has a preexisting interest in the subject at issue does not change the diversion-of-resources analysis, and under current jurisprudence an organization can show more than mere interest if it shows that it suffered an injury by diverting resources.[10]

The Court now analyzes organizational standing as to each Plaintiff.

i. Fair Fight Action, Inc.

Fair Fight is a 501(c)(4) nonprofit organization whose "core mission is to secure the voting rights of Georgians." Doc. No. [582], ¶ 10. Fair Fight alleges that its past voter-related efforts have included conducting a vote-by-mail program, educating voters about upcoming elections, and engaging in a "get-out-the-vote" program. Id. ¶ 11. Plaintiffs assert that these efforts were focused solely on educating and encouraging voters about elections and voter registration, but they were not focused on "educating voters about how to overcome the voter

[10] During summary judgment oral argument, Defendants also noted perceived tension in the organizational standing jurisprudence, questioning why an organization could have standing to sue a state in an election case when individuals have had their election lawsuits dismissed due to lack of a particularized injury. See Doc. No. [607], pp. 14–18. The cases cited by Defendants are factually distinguishable. Regardless, the law currently gives standing to organizations that divert resources to counteract a defendant's unlawful acts. Without further guidance from the Eleventh Circuit, standing jurisprudence for individuals does not change the Court's analysis here.

suppression" about which Plaintiffs complain. Id. ¶ 12. Fair Fight intends to continue its past work but must implement new programs and engage in new efforts to counteract Defendants' acts. See id. Fair Fight alleges that these new activities will require it "to expend additional resources diverted from its other programs," and that this "diversion of resources is necessitated by and directly traceable to Defendants' misconduct." Id. ¶ 13.

Defendants contend that Fair Fight did not divert resources but instead merely "continued its organizational mission of making voting more accessible" and fighting voter suppression, even if Fair Fight claimed during this litigation that its mission is only "to do voter engagement work." See Doc. No. [441-1], pp. 16–18. Thus, Defendants argue, Fair Fight "can show only a frustration of its objectives" that is insufficient to confer organizational standing. Id. at 18. Also, Defendants argue that Fair Fight was unable to quantify its diversions of funds. Id. And to the extent staff would not be working to counteract Defendants' acts, they would be working on matters for a separate organization, so there is no diversion of personnel time that impairs Fair Fight's activities. Id. at 20. In sum, Defendants argue that Fair Fight was formed specifically to litigate this matter, and as a result it cannot show a diversion of resources. See id. at 19–20.

Plaintiffs respond that Fair Fight has shown that it diverted resources from its typical voter engagement activities to voter protection activities. Doc. No. [489], p. 16. They argue that Fair Fight has provided evidence that its work to counteract Defendants' acts has "come[] at a cost" to its core work and limited Fair Fight's typical efforts in voter education and engagement. Id. at 16–18. And while Fair Fight was formed to undertake election work, it has still shown a "diversion of resources because it has responded to Defendants' acts by undertaking voter suppression work, which has impaired its voter education and engagement work." Id.

The Court finds that Fair Fight has provided sufficient evidence to show a diversion of resources. Fair Fight has shown through deposition testimony that Defendants' actions perceptibly impaired its ability to carry out its usual voter education efforts. See Doc. No. [604-2], ¶¶ 113, 137. Fair Fight has also sufficiently shown that it has diverted and anticipates needing to divert resources from its general voter education efforts to address alleged voter suppression. See id. ¶¶ 99, 101–102, 106–112. Further, Fair Fight has provided specific examples of activities from which it was diverting personnel time and other resources. See,

e.g., id. ¶¶ 132–134, 136–137, 139–141.[11] Even though Fair Fight was able to maintain its core mission (see Doc. No. [604-2], ¶ 96), it still has shown that it diverted personnel time and other resources from its typical activities to counteract Defendants' acts. Because Fair Fight could have allocated those resources to their typical activities, the diversion necessarily results in a perceptible impairment of their ability to pursue their typical activities.[12] Therefore, Fair Fight has shown a diversion of resources sufficient to show an injury in fact.

ii. Care in Action, Inc.

Care in Action is a 501(c)(4) organization that undertakes work to support domestic workers, which includes engaging in voter encouragement and

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[11] Fair Fight also shows that it diverted personnel time by having phone-banking volunteers ask Georgia residents about voter registration status, in addition to engaging in their typical voter education talking points. Doc. No. [604-2], ¶¶ 113, 120. Even in situations like these where an organization adds to its usual activities instead of fully replacing them, a diversion of resources can still result. For example, Fair Fight may not have *replaced* its usual phone-banking talking points by including questions concerning voter registration, but the additional time spent covering the latter logically reduces the breadth of Fair Fight's potential outreach, thereby creating a perceptible impairment of Fair Fight's ability to carry out its usual tasks.

[12] After all, the diversion-of-resources standard does not require the diversion to preclude the organization from undertaking its typical activities—the diversion need only perceptibly impair the organization's ability to do so.

education. Doc. No. [582], ¶¶ 14–15. Care in Action alleges that Defendants' actions have thwarted its "mission by burdening domestic workers' right to vote." Id. ¶ 16. It also alleges that it "dedicated significant resources to counteracting" Defendants' acts. Id. ¶ 17. For example, Care in Action states that it undertook efforts to contact voters who cast provisional ballots and reallocated personnel to help with voting rights issues in Georgia. Id. Moreover, Care in Action alleges that Defendants' actions have caused it to "shift[] its budget priorities and add[] more staff to address voting rights," and that Care in Action will continue to divert resources from its traditional programs to counteract Defendants' alleged acts. See id. ¶¶ 18–20.

While Care in Action claims that it diverted both financial resources and personnel time, Defendants argue that counting provisional ballots falls squarely within Care in Action's stated mission of encouraging domestic workers to vote, is not "contrary to its mission," and is not in response to Defendants' alleged acts. Doc. No. [441-1], pp. 12–13. To the extent Care in Action identified expenditures, Defendants argue it was unable to specify how those expenses "were unique to its post-election counting of provisional ballots" or otherwise was different from its usual election-related activities. See id. at 13–14. Defendants also contend that

Care in Action failed to identify from what activities it allegedly diverted funds and in fact expended resources only in furtherance of its stated mission. See id. at 14–15. Similarly, Defendants argue that Care in Action has failed to show that it diverted personnel time in response to Defendants' acts because the organization had already trained domestic workers in election-related matters, did not undertake activities that substantially differed from its typical voting-related work, and did not identify whether its usual activities were impaired. Id. at 15. And Defendants contend that even when Care in Action was able to identify a staffer who was diverted from other work to counteract Defendants' acts, it was unable to quantify how the diversion of the staff member impaired its usual activities. Id. In sum, Defendants argue that Care in Action did not divert resources but instead "merely continued its pre-election campaign activities." Id. at 16.

Plaintiffs respond that Care in Action has shown that it extended its anticipated election work in Georgia in response to Defendants' acts, which is sufficient for diversion-of-resources standing. Doc. No. [489], p. 14. Specifically, Plaintiffs argue that Care in Action has provided evidence that it diverted resources from its usual projects to undertake unexpected post-election work in

response to Defendants' acts to ensure provisional ballots were counted. Id. at 14–15. For example, Care in Action has shown that a staff member who stayed in Georgia to assist with post-election efforts was unable to perform tasks in the staffer's regular, full-time job in immigration work. Id. at 14. Plaintiffs also argue that, even though Care in Action need not quantify its diversions, it did so by describing the usual activity a staffer was not undertaking and providing documentation of its relevant expenses. Id. at 15. Finally, Plaintiffs reject Defendants' argument that Care in Action need have undertaken activities contrary to its mission to gain organizational standing. Id. at 15–16.

The Court finds that Care in Action has shown a diversion of resources. Care in Action has provided deposition testimony that Defendants' acts caused it to divert financial resources and personnel time from its usual work—including planned immigration and lobbying projects—to assist with post-election work in Georgia that it had not anticipated undertaking. See Doc. No. [604-2], ¶¶ 56, 58, 61–74, 81–87.[13] Care in Action further showed that it has

[13] For example, Care in Action stated that one staff member forwent a planned work trip to Mexico to help open an immigration refugee camp so the staff member could remain in Georgia to undertake election work. See Doc. No. [604-2], ¶ 83.

continued to divert resources to counteract Defendants' acts and expects to continue doing so. See id. ¶¶ 77–78. The organization has shown an injury in fact.

iii. Ebenezer Baptist Church of Atlanta, Georgia, Inc.

Ebenezer is a 501(c)(3) organization and church with a 6,000-member congregation and that "has long-served Atlanta's African American community and has been at the forefront of the civil rights movement." Doc. No. [582], ¶ 21. Among other work in "global ministry dedicated to individual growth and social transformation," Ebenezer has long engaged in voting rights efforts. Id. ¶¶ 21–22. For example, "Ebenezer regularly sponsors voter registration drives and activities, partners with community organizations to raise awareness regarding voting, provides information and education to the community about voting, and provides community members with rides to voting locations." Id. ¶ 22. Ebenezer alleges that Defendants have thwarted its voting-related mission and have forced it to divert resources from its typical activity to conducting "an extensive vote-by-mail campaign." See id. ¶¶ 22–23. Ebenezer had to reallocate church volunteers, staff, and space to undertake the campaign, and it had to divert its resources, "including personnel and time," from its other ministries and activities.

Id. ¶ 22. The church anticipates having to continue diverting resources from its other church activities to counteract Defendants' actions. Id. ¶¶ 22–24.

Defendants argue that Ebenezer has long undertaken voting rights work, funding that work through a social-justice budget "that does not specify the type of voting-related activity within that line item." Doc. No. [441-1], pp. 10–11. Defendants contend that Ebenezer cannot support its claim that it diverted monetary resources because the church had no documentation that it spent money differently to counteract Defendants' acts. Id. at 10–11. And in any event, Defendants argue, Ebenezer's efforts in 2018 were mere continuations of their already existing efforts to register, encourage, and educate voters. See id. at 10. Defendants acknowledge that Ebenezer identified diversions in the form of reallocating volunteer time and establishing a voter hotline, but Defendants argue that these activities were in pursuit of Ebenezer's existing mission to assist voters and did not impair its regular activities. See id. at 11–12.

In response, Plaintiffs argue that in 2018 Ebenezer had intended to commit resources to voting encouragement efforts but was forced to counter Defendants' alleged suppression tactics instead. Doc. No. [489], p. 9. Plaintiffs provide evidence that Ebenezer established a phone bank, created materials to counteract

Defendants' acts, and refocused its educational efforts and materials. See id. at 9 n.2. Plaintiffs also show that Ebenezer diverted these resources from church programming, allocation of church space, and election-related activities that Ebenezer typically undertook. Id. at 9–10. Thus, Plaintiffs argue Ebenezer has provided evidence that it diverted resources to counteract Defendants' acts. See id. at 10.

The Court finds that Ebenezer has sufficiently shown a diversion of resources. Ebenezer provided deposition testimony that the church had undertaken or planned to undertake certain voting rights activities—such as voter registration, education, and mobilization—but had to divert resources, volunteers, and staff from those and other church activities to refocus efforts on voter verification, educating voters about alleged voter suppression in Georgia, and teaching voters how properly to vote by mail. See Doc. No. [604-2], ¶¶ 6, 8–10, 12, 18–23, 25–27, 34–36, 38–47. These new activities included establishing a voter verification hotline in which volunteers who normally undertook other church or voting-related activities assisted callers ensure they were properly registered to vote. See id. ¶¶ 9–10, 22–23, 25–27. While these new activities arguably fall within Ebenezer's broad, preexisting mission to support voting

rights, they are materially different means of achieving that goal. And even though Ebenezer did not provide financial documentation, the church has provided sufficient evidence to show that it diverted resources from its typical activities in order to pursue these new means. Thus, the Court finds that Ebenezer has shown that it diverted resources to counteract Defendants' acts and has thereby suffered an injury in fact.

iv. Baconton Missionary Baptist Church, Inc.

BMBC is a "nonprofit religious organization" that "considers voting an integral part of its community building mission." Doc. No. [582], ¶ 25. During past election cycles, BMBC has undertaken voting activities such as voter engagement, education, and registration drives, as well as weekly prayer meetings for candidates. Id. BMBC alleges that Defendants' actions have frustrated and will continue to frustrate its mission. Id. ¶ 26. Specifically, BMBC claims that Defendants' voter "purges" have caused BMBC to divert the "time of its church volunteers and church resources to assist church and community members" to determine whether they could vote. Id. BMBC alleges that it will continue to divert resources from its usual church activities to counteract Defendants' actions. Id. ¶¶ 26–27.

Defendants argue that BMBC failed to show a diversion of resources. Doc. No. [441-1], pp. 9–10. They contend that while BMBC alleged that voting issues are part of the church's mission and that time spent on voting issues could not be spent on other parts of the church's mission, BMBC failed to *quantify* how much time spent allegedly counteracting Defendants' actions was diverted from other activities or impaired the church's normal activities. See id. For example, BMBC's diversion allegedly includes a pastor's time discussing Defendants' actions in sermons and Bible-study classes and volunteers spending time helping voters check their voter status instead of engaging in other church activity. Id. at 9. But, according to Defendants, BMBC could not sufficiently quantify the time or resources diverted. Id. at 10. And to the extent the pastor estimated his time spent discussing Defendants' actions, it was minimal and not different enough from prior election-related speech to constitute a perceptible impairment of the church's activities. Id.

Plaintiffs respond that although BMBC has long undertaken election-related activities, it has shown that it had to divert resources to counter Defendants' acts. Doc. No. [489], pp. 11–12. For example, BMBC has shown that

its pastor and volunteers spent time discussing or facilitating voter verification when they could have discussed or assisted with other church matters. Id. at 12.

Through deposition testimony, BMBC showed that while it previously had engaged in voting-rights activities, its pastor and the church shifted their focus to ensuring that congregants and their communities were checking their voter registration status by, among other things, devoting time during worship and church meetings to discuss the matter, and also printing related materials that the church otherwise would not have printed. Doc. No. [604-2], ¶¶ 146–156. BMBC has asserted that this focus diverted from time and other resources typically spent addressing issues such as feeding the hungry and engaging in other community outreach. See id. ¶¶ 164–166. BMBC also diverted volunteer time from these typical activities to assist with voter verification. See id. ¶¶ 157–159. While these diversions of resources arguably are minimal, they are enough to satisfy the modest requirements for organizational standing.

v. Virginia-Highland Church, Inc.

Virginia-Highland is a 501(c)(3) organization and Atlanta church that "has focused on inclusivity and has championed social justice for marginalized members of society." Doc. No. [582], ¶ 28. Championing voting rights is central

to Virginia-Highland's cause, and the church has encouraged voters by undertaking voter registration and engagement efforts and assisting with Election Day transportation. See id. In response to Defendants' actions, however, Virginia-Highland will divert its resources from these and other church activities to voter education efforts that it has not undertaken in the past. Id. ¶¶ 28–30.

Defendants argue Virginia-Highland has failed to establish organizational standing because it "claims no financial diversion" and has not actually diverted volunteer time from its usual activities. See Doc. No. [441-1], pp. 7–8. Because the church's mission already "includes voter education and registration," Defendants argue, Virginia-Highland cannot have diverted resources from its usual activities if the church's alleged response to Defendants' actions was to undertake its usual activities. See id. Moreover, Defendants argue that Virginia-Highland was unable to describe a perceptible impairment to its usual activities or quantify how much time its volunteers diverted to counteract Defendants' actions. Id. at 8. As a result, Defendants argue that Virginia-Highland has failed to establish organizational standing. Id.

Plaintiffs counter that while Virginia-Highland previously engaged in election-related activities, Defendants' acts required the church to reallocate

more volunteer time to addressing voter suppression. Doc. No. [489], pp. 10–11. They further argue that even if Virginia-Highland did not "quantify" its diversion, the church has provided sufficient testimonial evidence to show that it has diverted personnel time from church and election-related activities to counteract Defendants' acts. Id. at 11.

The Court finds that Virginia-Highland has provided enough evidence to show a diversion of resources. Virginia-Highland has provided deposition testimony that while it has worked on voter education and registration since 2014, the church diverted volunteer and personnel time from those activities to addressing voter roll irregularities, absentee ballot issues, polling place closures, and other voting issues that the church believe Defendants caused. See Doc. No. [604-2], ¶¶ 169, 171–174, 183–188. For example, Virginia-Highland volunteers have spent more time with voters explaining new issues that voters have had to navigate, allegedly because of Defendants' actions. Id. ¶¶ 172–173. These new points of focus have diverted volunteer time from other church activities and even from the church's typical voting rights efforts because they require volunteers to spend less time addressing their typical voting-rights discussion points, which effectively reduces the number of voters that volunteers can help.

Id. ¶¶ 173–174, 183–188. This deposition testimony suffices to show a diversion of resources from typical activities that Virginia-Highland identified to activities meant to counteract Defendants' acts. Thus, Virginia-Highland has shown an injury in fact.

vi. The Sixth Episcopal District, Inc.

The Sixth District is a 501(c)(3) entity and group of twelve church districts representing hundreds of Georgia African Methodist Episcopal churches. Doc. No. [582], ¶ 31. The Sixth District has long made voting rights part of its social justice mission by encouraging voter registration at its congregations and facilitating election day transportation to the polls. Id. ¶ 32. The Sixth District claims that Defendants' actions have frustrated its mission. Id. During the 2018 election season, Sixth District leadership traveled to congregations and urged church elders to encourage congregants to vote and educate themselves on the 2018 election. Id. ¶ 33. The Sixth District also encouraged voters, assisted with voter registration and verification, and coordinated efforts to transport voters to the polls. Id. According to the Sixth District, Defendants' actions forced it to divert resources from its typical voting-related efforts to educating voters about overcoming voter suppression and otherwise counteracting the same. See id. ¶ 34.

The Sixth District states that it will continue this diversion of resources that otherwise would have gone to its typical "ministries and programs" by communicating with congregants to ensure that they have voted and that their ballots have been counted. Id. ¶¶ 34–35.

Defendants argue that the Sixth District does not have organizational standing because its 30(b)(6) designee testified that (1) the Sixth District did not divert financial resources to counteract Defendants' actions and (2) the Sixth District diverted personnel time but in a manner that did not differ from its usual practices. Doc. No. [441-1], p. 6.

Plaintiffs counter that the Sixth District has shown that it has already diverted resources and will later have to divert resources to counteract Defendants' acts. Doc. No. [489], p. 13. Although the Sixth District's social justice mission includes voting-related work, Plaintiffs argue, the Sixth District will have to divert resources to new election-related activities to remotivate voters and ensure votes are counted. Id. at 13–14.[14]

[14] Counsel for Plaintiffs also asserted during the summary judgment hearing that the Sixth District's 30(b)(6) designee misspoke when he said that the Sixth District had done nothing different from its usual practices, asserting that the designee fully discussed the diversion of resources on redirect in the deposition. See Doc. No. [607], pp. 48–50.

The Court finds that the Sixth District has shown a diversion of resources. The Sixth District provided deposition testimony that it will have to divert resources from its typical voting-related activities to projects to ensure that its congregants are continuing to vote in the face of voter registration concerns caused by Defendants' actions. See Doc. No. [604-2], ¶¶ 195, 197–203, 205. While the Sixth District's mission has encompassed voting rights, its new focus on efforts to ensure that votes are counted has diverted time typically spent on the Sixth District's voter registration activities. See id. ¶ 203. That diversion constitutes a perceptible impairment to the Sixth District's mission. The Sixth District has thus shown a diversion of resources sufficient to show an injury in fact.

2. Causal Connection and Redressability

Next, the Court addresses the second and third requirements for Article III standing: causal connection and redressability. As stated above, for Plaintiffs to establish standing "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. [Also], it must be likely, as opposed to merely

speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560–61 (internal quotations, citations, and alterations omitted).

In this section of the Order, the Court draws guidance from the Eleventh Circuit's recent decision in Jacobson v. Florida Secretary of State, 974 F.3d 1236 (2020). In Jacobson, the Eleventh Circuit considered a constitutional challenge to the order in which the names of candidates appeared on the Florida election ballot. Id. at 1263. The Eleventh Circuit also concluded that the asserted injury was not redressable by judgment against the Florida Secretary of State "because she [did] not enforce the challenged law. Instead, the [county] [s]upervisors. . . officials independent of the Secretary—[were] responsible for placing candidates on the ballot in the order the law prescribe[d]." Id. The Court's conclusion rested on the reality that the county election supervisors were independent officials under Florida law who were not subject to the secretary's control. Id. at 1253.

In the briefing and oral argument for the case *sub judice*, Plaintiffs made several attempts to distinguish Jacobson or otherwise assert its inapplicability. After review, the Court deems it proper to apply Jacobson to this case and align with other recent cases that have applied Jacobson to election-related litigation. See, e.g., Georgia Republican Party, Inc. v. Sec'y of State for Ga., No. 20-14741-

RR, 2020 WL 7488181, at *1 (11th Cir. Dec. 21, 2020) (applying Jacobson to conclude that the plaintiffs failed to demonstrate that any alleged injury was traceable to and redressable by the Georgia Secretary of State where Georgia law gave authority to conduct the absentee ballot signature-verification process to local county supervisors); Anderson v. Raffensperger, No. 1:20-CV-03263, 2020 WL 6048048, at *23 (N.D. Ga. Oct. 13, 2020) ("[G]eneral powers [of the Georgia Secretary of State] are insufficient to establish traceability. . . . The [c]ourt rejects [p]laintiffs' contention that the alleged injuries of which they complain are traceable to the Secretary of State simply because the Georgia Code refers to him as the 'state's chief election official.' Likewise, the [c]ourt rejects the notion the alleged injuries are traceable to the State Election Board simply because of its duty to ensure uniformity in the administration of election laws."). (citations omitted).[15]

The Court is unable to uphold Plaintiffs' arguments to the contrary.[16]

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[15] The Court recognizes that its prior pre-Jacobson joinder ruling on Defendants' motion to dismiss for failure to join the counties as necessary parties is inconsistent with the above-stated ruling concerning standing. See Doc. No. [68], pp. 53–68). However, for purposes of the standing analysis, the Court will adhere to the guidance provided in Jacobson.

[16] In addition, Plaintiffs' "counterexamples"/demonstrative exhibits concerning the

With the Jacobson principles in mind, the Court now addresses each of Plaintiffs' main claims in turn.

i. Plaintiffs Have Standing to Pursue Claims Related to Georgia's "Use It or Lose It" Process and Georgia's Exact Match Policy

Plaintiffs have standing to pursue their claims related to Georgia's list maintenance process (also referred to in this litigation as "Use It Or Lose It," or the "no contact provision") and Exact Match (also referred to as "HAVA Match," relating to the federal Help America Vote Act of 2002) because those claims are directly traceable to and redressable by Defendants. Defendants do not argue that there is a jurisdictional issue with the claims related to list maintenance and

scope of Defendants' authority, i.e., a Consent Order entered between the State Election Board and the Fulton County Board of Registration and Elections and statements made in briefing before the United States Supreme Court, do not change the Court's opinion because under Georgia's statutory scheme, the State Election Board must eventually resort to judicial process if the counties fail to perform their election duties. See O.C.G.A. § 21-2-33.1(c) ("The Attorney General of this state shall, upon complaint by the State Election Board, bring an action in the superior court in the name of the State Election Board for a temporary restraining order or other injunctive relief or for civil penalties assessed against any violator of any provision of this chapter or any rule or regulation duly issued by the State Election Board."). In Jacobson, the Eleventh Circuit concluded that having to resort to judicial process underscores the secretary's "lack of authority over" the county election supervisors and "their actions to implement the ballot statute may not be imputed to the [s]ecretary for purposes of establishing traceability." Jacobson, 974 F.3d at 1253–54.

matching. See Doc. Nos. [441-1], p. 24; [607], Tr. 25:3–8, 28:10–19. Indeed, this Court has already addressed claims related to list maintenance in this and other lawsuits against the Secretary. See Doc. No. [164] (denying Plaintiffs' TRO related to list maintenance); Black Voters Matter Fund v. Raffensperger, No. 1:20-CV-04869-SCJ, 2020 WL 7394457 (N.D. Ga. Dec. 16, 2020) (same). It was never argued that claims related to list maintenance and matching were not traceable to or redressable by the Secretary.

State law explicitly assigns responsibility for the voter verification and matching processes to the Secretary. See O.C.G.A. § 21-2-50(a)(14) (requiring the Secretary to "maintain the official list of registered voters for this state and the list of inactive voters required by this chapter"); O.C.G.A. § 21-2-50.2(a) ("The Secretary of State, as the chief election official designated under the federal Help America Vote Act of 2002, shall be responsible for coordinating the obligations of the state under the federal Help America Vote Act of 2002."); O.C.G.A. § 21-2-216(g)(7) (stating the Secretary "shall establish procedures to match an applicant's voter registration information to the information contained in the data base maintained by the Department of Driver Services for the verification of the accuracy of the information provided on the application for voter registration,

including whether the applicant has provided satisfactory evidence of United States citizenship"). These statutes provide a far more direct link than the general election oversight authority which was insufficient to confer standing in Jacobson. See 974 F.3d at 1254 (holding the Florida the Secretary of State's position as "the chief election officer of the state" with "general supervision and administration of the election laws" did not make the order in which candidates appear on the ballot traceable to her). Thus, these claims do not present jurisdictional issues.

ii. Plaintiffs Lack Standing to Pursue Claims Related to the Moving and Closing of Precincts and Polling Places

In their Second Amended Complaint, Plaintiffs allege that Defendants "deployed a known strategy of voter suppression" in promoting the closure and relocation of polling places. Doc. No. [582], pp. 25–26, ¶ 47. Under Georgia law, the county election superintendent has authority for determining the location of polling places and the "division, redivision, alteration, formation, or consolidation of precincts." See O.C.G.A. §§ 21-2-70(4), -261(a), -262(c), -263, -265(a). Counties sometimes request the Secretary of State to assist in consolidating precincts. Doc. No. [604-2], pp. 322–24, ¶¶ 1001–1002. However, Plaintiffs allege that the Secretary of State did not merely provide help when

asked but in 2015, he actively encouraged counties to consolidate and relocate polling places through direct training on the subject. See Doc. Nos. [582], pp. 47–48 ¶ 101; [604-2], pp. 321–322, ¶¶ 998–999.[17]

Defendants contend that their ability to stop counties from closing and relocating polling places is limited to offering guidance. Doc. No. [604-2], p. 326 ¶ 1006. Plaintiffs, however, assert that, through their enforcement powers and duty to maintain uniformity, Defendants have the ultimate responsibility for the precinct and polling place changes. See Doc. No. [607], Tr. 40:4–8, 57:4–8, 61:19–21, 62:1–23; see id. at 57:11–24. Defendants' alleged failure to fulfill this responsibility is that on which Plaintiffs base, in part, their causes of actions in Counts I, II, III, and V of their Second Amended Complaint. See Doc. No. [582], pp. 69–86, ¶¶ 156, 168, 182, 206.

The Court finds that Plaintiffs lack standing to pursue their claims related to the moving and closing of precincts and polling places because those claims

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[17] In 2015, after the Supreme Court's decision in Shelby Cnty. v. Holder, 570 U.S. 529 (2013) removed the preclearance requirement for polling place changes, the Secretary of State issued a training document that advised counties to start "consolidating and changing polling places '[n]ow.'" Doc. Nos. [582], pp. 47–48 ¶ 101; [604-2], p. 322, ¶ 1000. Between the 2014 and 2018 General Elections, "counties changed the polling places of around 18 percent of voters who remained at the same registered address for all four years—over 650,000 people." Doc. No. [604-2], p. 321, ¶¶ 996–997.

are neither traceable to nor redressable by Defendants. State law explicitly assigns responsibility for determining and changing precincts and polling places to the county superintendents. See O.C.G.A. §§ 21-2-70(4), -261(a), -262(c)–(d), -265(a)–(b), -265(e). It requires that any changes to precincts or polling places satisfy certain requirements. See id. §§ 21-2-261.1, -263, -265(c)–(d). It also identifies who is tasked with providing county superintendents the information they need to make such decisions. See id. §§ 21-2-262(a)–(a.1), -263. Defendants' authority to prescribe rules and provide guidance to the county superintendents does not make this issue traceable to Defendants because their power to prescribe rules and issue directives does not give Defendants the authority to make the complained-of changes. See Jacobson, 974 F.3d at 1257. "If rulemaking authority were sufficient to establish traceability, plaintiffs could presumably also challenge a law by suing the legislators who enacted it instead of the officials who execute it." Id.

For example, Plaintiffs complain that consolidation of precincts—which the Secretary of State actively promoted—resulted in precincts too small to accommodate its voters. Doc. No. [582], pp. 25–26, ¶ 47. They allege that counties based their decisions on whether to change precincts and polling places based off

of the Secretary of State's guidance. Id. at 31, 47–48, ¶¶ 60, 101; Doc. No. [604-2], pp. 321–24, ¶¶ 998, 1000, 1002. But county superintendents are the ones who have the statutory duty to ensure precincts are large enough to accommodate their voters. See O.C.G.A. § 21-2-263 ("If at the previous general election a precinct contained more than 2,000 electors and if all those electors desiring to vote had not completed voting one hour following the closing of the polls, ***the superintendent*** shall either reduce the size of said precinct so that it shall contain not more than 2,000 electors . . . or provide additional voting equipment or poll workers or both before the next general election." (emphasis added)); O.C.G.A. § 21-2-265(c) ("In primaries, ***the superintendent*** . . . shall select a polling place which will provide adequate space for all parties conducting their primaries therein." (emphasis added)).

Plaintiffs argue that where these changes burden individuals' right to vote or otherwise violate election law, Defendants are responsible for making counties comply. Doc. No. [607], Tr. 62:10–23. However, in the absence of any evidence that Defendants control the moving and closing of precincts and polling places, Plaintiffs "cannot rely on the Secretary's general election authority to establish traceability." Jacobson, 974 F.3d at 1254.

Any relief requiring Defendants to mandate where county superintendents place polling places and how they change precincts may force superintendents to violate their statutory duties. See O.C.G.A. § 21-2-265(b) ("[I]f a petition is presented to the superintendent . . . on or before the day set for [a] hearing . . . for change of a polling place, signed by 20 percent of the electors of the precinct objecting to the proposed change, such change shall not be ordered."). Relief against Defendants would not eliminate county superintendents' ultimate statutory authority and responsibility regarding precincts and polling places under Georgia law, for "federal courts have no authority to erase a duly enacted law from the statute books." Jacobson, 974 F.3d at 1255 (quoting Jonathan F. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 936 (2018)) (internal quotation marks omitted); see also Steffel v. Thompson, 415 U.S. 452, 469 (1974) ("Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear." (internal quotation marks omitted)). And an injunction ordering Defendants to promulgate rules and regulations that override or take that statutory authority and responsibility away from the county superintendents would raise "serious federalism concerns." Jacobson, 974 F.3d at 1257.

To the extent that such relief would be limited to requiring Defendants to provide or refrain from giving counties specific guidance regarding precinct and polling place changes, the Eleventh Circuit has rejected such "notice" theory of redressability. Id. at 1254. "Any persuasive effect a judicial order might have upon the [county superintendents], as absent nonparties who are not under the Secretary's control, cannot suffice to establish redressability." Id.; see also id. at 1254–55 ("Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.").

"Even if we consider the persuasive effect of the judgment on the nonparty [superintendents], the [plaintiffs] have not established that redress is likely 'as a practical matter.'" Id. at 1255 (quoting Utah v. Evans, 536 U.S. 452, 461 (2002)). While Defendants may offer guidance and training to counties on how and when to change precincts and polling places, county superintendents are free to ignore their advice. Certainly, some may be likely to follow Defendants' advice when given, but Plaintiffs have not shown that relief against Defendants will "significantly increase the likelihood" that the superintendents will "follow a

federal decree that does not bind them." Id. (quoting Lewis v. Governor of Ala., 944 F.3d 1287, 1301 (11th Cir. 2019)).

For the reasons above, the Court finds that county superintendents—not Defendants—are statutorily responsible and thus accountable for the closing and relocation of polling places and precincts. Thus, the effects stemming from those actions are traceable not to Defendants but to the county superintendents. And for the same reasons, these claims are not redressable by Defendants. As a result, the Court finds that Plaintiffs lack standing to pursue their claims related to the moving and closing of precincts and polling places.

iii. Plaintiffs Have Standing on Their Claim that the Secretary of State Maintains Inaccurate Voter Registration Rolls

Plaintiffs have standing to pursue their claims related to the maintenance of inaccurate voter registration rolls because those claims are directly traceable to and redressable by Defendants.

State law explicitly assigns responsibility for maintenance of the official list of registered voters to the Secretary. See O.C.G.A. § 21-2-50(a)(14) (requiring the Secretary to "maintain the official list of registered voters for this state and the list of inactive voters required by this chapter"); O.C.G.A. § 21-2-50.2(a)

(indicating that the Secretary of State shall be responsible for coordinating the obligations of the state under HAVA); see also 52 U.S.C. § 21083(a)(1), (4) (setting forth each state's duties under HAVA; stating that each state "shall implement . . . a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State"; and stating that "[t]he State election system shall include provisions to ensure that voter registration records in the State are accurate and updated regularly . . . ."). Like the Exact Match and "Use it or Lose It" statutory schemes, the above-stated statutes provide a direct link to the Secretary and establish that the Secretary plays a role in maintenance of accurate voter registration rolls.

The Court recognizes Defendants' argument that, in practice, updates to the voter registration rolls are made at the county (not state) level—and that there is a Jacobson problem. Doc. No. [607], Tr. 31:14–17; 78:9–12. However, after review, the Court does not agree that there is a Jacobson problem because, as indicated above, "the law itself contemplate[s] [a] role for" the Secretary—i.e., maintaining accurate registration rolls under HAVA. Jacobson, 974 F.3d at 1254.

The Secretary maintains and controls the registration rolls and in accordance with the principles of Jacobson, Plaintiffs can rely on the above-stated express statutory authority to establish traceability and redressability of their asserted injuries for the Secretary's challenged conduct.

Accordingly, Plaintiffs meet Article III's traceability and redressability requirements as to their voter list inaccuracy claim.

iv. Plaintiffs Lack Standing to Pursue Their Claims Related to Resources at Polling Places

The Court finds that Plaintiffs lack standing to pursue their claims related to resources at polling places because those claims are not traceable to Defendants. State law explicitly assigns responsibility for ensuring there is an adequate number of supplies to the election superintendents. See O.C.G.A. §§ 21-2-70(4)–(5), -290, -384(a)(1), -400(a); see also Ga. Comp. R. & Regs. 183-1-12-.01, -.11(c), -.18(3). The law sets the minimum number of resources per elector that the superintendent must acquire. See O.C.G.A. §§ 21-2-290, -323(b), -367(b). Local election officials are also tasked with keeping an inventory of election equipment, number of ballots used, and who and how many voted. See O.C.G.A. §§ 21-2-294, -390, -411, -419(e), -432, -433(b), -440(a), -453, -456; Ga. Comp. R. & Regs. 183-1-12-.06(4)–(7). Thus, election superintendents are not without information that

will help them determine what supplies and how many they need to acquire for upcoming elections.

As indicated above, "[t]o satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" Jacobson, 974 F.3d at 1253 (11th Cir. 2020) (quoting Lujan, 504 U.S. at 560). It is true that the Secretary of State provides certain equipment and supplies. See O.C.G.A. §§ 21-2-50(a)(5), -300(a)(1), -300(a), -384(b); Ga. Comp. R. & Regs. 183-1-12-.01. But the county is ultimately responsible for purchasing them and in what amounts. See O.C.G.A. § 21-2-70(5) (requiring the superintendent to purchase all supplies and election equipment "except voting machines"); see also O.C.G.A. §§ 21-2-320, -333, -366, -374(c), -378, -389; Ga. Comp. R. & Regs. 183-1-12-.01; cf. O.C.G.A. § 21-2-327(f) ("In every primary or election, the superintendent shall furnish, *at the expense of the municipality*, all . . . supplies which are required under this chapter and which are not furnished by the Secretary of State. . . . In a municipal primary, ballot labels and other materials necessary for the preparation of the voting machines shall be furnished free of charge to the municipal superintendent by the political party conducting such

primary.") (emphasis added). Further, the superintendent must furnish any other necessary supplies that the state does not provide. See O.C.G.A. §§ 21-2-327(f), -328(c), -330(c), -375(c), -389. A county may also acquire additional equipment and supplies if it so desires. See O.C.G.A. § 21-2-300(a)(3).

Plaintiffs complain that "[d]uring the November and December 2018 elections, polling places faced shortages of paper ballots, causing delays or preventing voting entirely during periods of machine malfunction." Doc. No. [604-2], p. 362 ¶ 1121. However, under Georgia law, "[w]hen the use of voting machines has been authorized . . ., the use of paper ballots therein shall be discontinued." O.C.G.A. § 21-2-323(a). "If . . . the use of voting machines is not possible or practicable, the superintendent *may* arrange to have the voting . . . conducted by paper ballots." O.C.G.A. § 21-2-334 (emphasis added); accord O.C.G.A. §§ 21-2-281, -418(h); see also O.C.G.A. § 21-2-379. Thus, the number of paper ballots, if any, at polling places that used voting machines was within the discretion of the election superintendent.

Plaintiffs argue that where these inadequacies burden individuals' right to vote or otherwise violate election law, Defendants are responsible for making counties comply. Doc. No. [607], Tr. 62:10–23. They assert that because

Defendants recently promulgated rules that require superintendents to have "an adequate supply of provisional ballots," shortage of provisional ballots at polling places is traceable to them. See Doc. No. [604-2], pp. 307–08 ¶¶ 953–956. But again, "[i]f rulemaking authority were sufficient to establish traceability, plaintiffs could presumably also challenge a law by suing the legislators who enacted it instead of the officials who execute it." Jacobson, 974 F.3d at 1257. Yet Plaintiffs contend that subsequent shortages of provisional ballots during elections following this rule change are due to Defendants' failure to put procedures in place to ensure counties comply with the directive. See Doc. No. [604-2], pp. 307–08, ¶¶ 953–956. However, in accordance with Jacobson, Plaintiffs "cannot rely on the Secretary's general election authority to establish traceability." Jacobson, 974 F.3d at 1254.

Plaintiffs also argue that voting machines that malfunction or lack the necessary equipment to operate are traceable to the Secretary because he provides the voting machines to the counties. See Doc. No. [604-2], pp. 346–47, ¶ 1082. But, under Georgia law, once voting equipment is delivered to the superintendents, local election officials are responsible for their custody, maintenance, and testing. See O.C.G.A. §§ 21-2-70(5), -327(a)–(c), -331(a), -374(b), -377(a), -450, -457; Ga. Comp. R. & Regs. 183-1-12-.04(8), -.08, -.14. They are also

responsible for ensuring, shortly before polls open, that each piece of equipment is properly programmed and ready for use in its designated precinct. See O.C.G.A. §§ 21-2-327(a), -328(a), -374(a), -375(a), -401(a), -480(e), -482; Ga. Comp. R. & Regs. 183-1-12-.07. While the Secretary must evaluate and approve the *type* of equipment that may be used while local election officials must evaluate *each item* of equipment to ensure it functions properly. Compare O.C.G.A. § 21-2-300(a)(4) ("[T]he Secretary of State is authorized to conduct *pilot programs* to test and evaluate. . . .") (emphasis added) with O.C.G.A. § 21-2-327(a) ("The superintendent of each municipality shall . . . examine *each* machine before it is sent out to a polling place . . . .") (emphasis added).

Further, *prior* to receiving the equipment from the state, counties must "provide polling places that are adequate for the *operation* of such equipment including, if necessary, the placement within the polling places of a sufficient number of electrical outlets and telephone lines." O.C.G.A. § 21-2-300(b) (emphasis added). They must also "provide or contract for adequate *technical support* for the installation, set up, and operation of such voting equipment." O.C.G.A. § 21-2-300(c) (emphasis added).

In sum, the Court finds that there is no genuine dispute of material fact that county superintendents—not Defendants—are statutorily responsible and thus accountable for the inadequate resources at polling places. Because under the applicable statutory scheme, the superintendents' duties regarding resources at polling places are subject to the Secretary's control only to the extent that the *type* of resources must comply with that which the Secretary has approved and Plaintiffs have not identified a problem with the type, the effects stemming from the inadequacy of resources are not traceable to Defendants. Thus, their claim is not redressable by Defendants either. As a result, the Court finds that Plaintiffs lack standing to pursue their claims related to inadequate resources at polling places.

v. Plaintiffs Have Standing to Pursue Their Claims Related to Training on Provisional Ballots and Absentee Ballots

State law requires that the Secretary "conduct training sessions at such places as the Secretary of State deems appropriate in each year, for the training of registrars and superintendents of elections." O.C.G.A. § 21-2-50(a)(11). County election superintendents and registrars are required to be certified by the Secretary. Doc. No. [507-1], p. 954, Tr. 175:8–176:5. The Secretary's office provides

training materials and requires that each superintendent and registrar take a quiz based on those materials to become certified. Id. Tr. 31:24–32:3. To facilitate the "prompt and efficient" distribution of these materials, the Secretary utilizes "Firefly," a digital repository for training materials and election information. Doc. No. [451-30], Tr. 103:9–104:2. Superintendents and registrars must also maintain their certification by completing a minimum of 12 hours' training annually. Doc. No. [451], p. 22, ¶ 77.[18]

Plaintiffs' Second Amended Complaint alleges that Defendants "did not and do not satisfy" their training obligations, "as demonstrated in the 2018 Election; throughout the State, elections officials misunderstand their duties and ignore the law." Doc. No. [582], p. 57, ¶ 126. They argue the Secretary uses training materials that "do not cover everything [county election superintendents and registrars] need to know." Doc. No. [604-2], pp. 110, 313.[19] Most specifically,

[18] The Court will address facts relevant to the substance of the training and its alleged inadequacy in its summary judgment order on the merits.

[19] This was included in the Plaintiffs' Corrected Statement of Additional Material Facts, but the Court agrees with Defendants' objection, see Doc. No. 532, p. 180, ¶ 313, and considers this only as an argument, not a fact.

the Second Amended Complaint alleges that training on provisional and absentee ballots is insufficient. Doc. No. [582], pp. 57–68.

Plaintiffs state that, due to inadequate or inaccurate training, county elections officials gave incorrect information on how provisional ballots would be handled; gave incorrect instructions to voters who showed up at the wrong polling place and failed to offer them a provisional ballot; and applied inconsistent and incorrect rules when handling provisional ballots. Id. at 58–61, ¶¶ 127–131. Plaintiffs also argue that "Defendants fail to oversee, train, and advise counties about the proper handling of absentee ballots," which resulted in failure to timely mail absentee ballots to voters; improper rejection of some absentee ballots; failure to timely notify some voters that their absentee ballots had been rejected, preventing a timely remedy; and refusal to allow some voters to cancel absentee ballots in-person, which the law explicitly permits. Id. at 61–65, ¶¶ 133–142; O.C.G.A. § 21-2-388.

The Supreme Court first recognized 42 U.S.C. § 1983 liability for failure to train in City of Canton v. Harris, 489 U.S. 378 (1989). The Court held that, while the municipality could not be liable just because "one of its employees happened to apply [a city] policy in an unconstitutional manner," an entity can be liable,

under limited circumstances, if the employee's misconduct is traceable to inadequate training by the entity. Id. at 387.[20] Respondeat superior does not apply. Id. To prevail on a failure-to-train theory, a plaintiff must show the employee was inadequately trained and that the failure to train caused a constitutional wrong. Id. To be "inadequate" for purposes of § 1983 liability, the training must "amount[] to deliberate indifference to the rights of persons with whom the [employees] come into contact." Id. at 389. This Order addresses only whether Plaintiffs' failure-to-train claims are traceable to and redressable by Defendants.

The central matter of disagreement between the Parties is the degree to which the Secretary is responsible for training local elections officials other than superintendents and registrars. Defendants concede that they are statutorily responsible for training of superintendents and registrars. Indeed, at the summary judgment hearing, Defendants' counsel agreed that a failure-to-train claim regarding the training of superintendents and registrars would not present a jurisdictional issue. Doc. No. [607], Tr. 30:20–31:1. Plaintiffs argue, however,

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[20] Though the City of Canton analysis applied specifically to municipal liability, the Court finds the same analysis applies where the defendant is a state entity.

that if the Secretary does not adequately train the superintendents, the superintendents do not have the knowledge base to be able to train their personnel, including poll workers. Doc. No. [604-2], p. 110, ¶ 312.[21] Thus, they maintain, issues with training, including lower-level county officials and poll workers, are still traceable to and redressable by the Secretary.

The Court agrees that Plaintiffs have standing to pursue their claims regarding the training of superintendents and registrars given the Secretary's direct statutory responsibilities. O.C.G.A. § 21-2-50(a)(11).[22] Whether failures by lower-level county officials and poll workers are attributable to inadequate training of their supervisors is a question of fact. The Court concludes that Plaintiffs have shown a genuine issue of material fact on the traceability issue such that they survive jurisdictional summary judgment.

In the Rule 30(b)(6) deposition conducted on August 16, 2019, Secretary of State representative and Elections Director Chris Harvey stated:

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[21] This was included in the Plaintiffs' Corrected Statement of Additional Material Facts, but the Court agrees with Defendants' objection, see Doc. No. 532, p. 180, ¶ 312, and considers this only as an argument, not a fact.

[22] The Court will address the substantive sufficiency of those claims in its summary judgment order on the merits.

> We make all of the training materials available on Firefly. We encourage people to sign up for the training webinars. It really is sort of a Train The Trainer scenario where we're giving them the information to them, for them to take back and customize for their offices.

Doc. No. [507-1], p. 958, Tr. 179:8–13. Thus, if the superintendents' training is insufficient or inaccurate, they lack the knowledge base to be able to train their personnel, including poll workers. Id. at 760, Tr. 178:4–10 ("Q: If the superintendents and the registrars aren't well-trained in election laws and practices, they don't really have the knowledge base to be able to train their people; correct? A: Right . . . . If they're going to provide the training, they have to understand it."). Thus, the Court finds that claims related to superintendent and registrar training are directly traceable to and redressable by Defendants. Plaintiffs have shown a genuine issue of material fact as to whether their training claims related to lower level county officials and poll workers are traceable to and redressable by Defendants.[23] Should they survive, to prevail on these claims, Plaintiffs' evidence at trial will need to show that *Defendants'* inadequate training

[23] The Court will address the substance of the failure-to-train claims, including whether they meet the deliberate indifference standard in its second summary judgment order.

of superintendents and registrars caused the constitutional deprivations complained of.[24]

B. Mootness

Satisfied that Plaintiffs have standing to bring this action (as to most of their claims), the Court now turns to the question of mootness.

1. Legal Standard

As indicated above, "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990).[25] "[T]he doctrine of mootness derives directly from the case-or-controversy limitation because 'an action that is moot cannot be characterized as an active case or controversy." De La Teja v. United States, 321 F.3d 1357, 1361–62 (11th Cir. 2003) (citations omitted). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496–97

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[24] Plaintiffs' remaining claims regarding election technology will be discussed *infra* in the mootness section of this Order.

[25] "The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both [the] standing and . . . mootness jurisprudence, but the two inquiries differ in respects critical to the proper resolution of this case, so [the Court] address[es] them separately." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

(1969) (citation omitted). More specifically, "[i]f events that occur subsequent to the filing of a lawsuit . . . deprive the court of the ability to afford the plaintiff . . . meaningful relief, then the case becomes moot and must be dismissed." De La Teja, 321 F.3d at 1362.

One "event" that may moot a claim is when the governmental defendant ceases the behavior on which a claim is based, through the repeal or amendment of a challenged statute, rule, or policy. Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1328–29 (11th Cir. 2004). The Supreme Court and the Eleventh Circuit "have repeatedly indicated that 'the repeal of a challenged statute is one of those events that makes it absolutely clear that the allegedly wrongful behavior . . . could not reasonably be expected to recur.'" Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1256 (11th Cir. 2017) (citations omitted). It also appears that the Eleventh Circuit has established an exception to the general rule that the burden of proving mootness falls on the party asserting it. Id. "As a result, 'once the repeal of an ordinance has caused [the Court's] jurisdiction to be questioned, [the plaintiff] bears the burden of presenting affirmative evidence that its challenge is no longer moot.'" Id. "'The key inquiry' is whether the plaintiff has shown a 'reasonable expectation'—or . . .

a 'substantial likelihood'—that the government defendant 'will reverse course and reenact' the repealed rule." Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1268 (11th Cir. 2020) (citations omitted).

Three broad factors provide guidance to courts in conducting this inquiry: (1) whether the government's change in conduct resulted from substantial deliberation or is merely an attempt to manipulate jurisdiction; (2) whether the government's decision to terminate the challenged conduct was unambiguous; and (3) whether the government has consistently maintained its commitment to the new policy or legislative scheme. Flanigan's Enters., Inc. of Ga., 868 F.3d at 1257. The Eleventh Circuit has also stated:

> When considering a full legislative repeal of a challenged law—or an amendment to remove portions thereof—these factors should not be viewed as exclusive nor should any single factor be viewed as dispositive. Rather, the entirety of the relevant circumstances should be considered and a mootness finding should follow when the totality of those circumstances persuades the court that there is no reasonable expectation that the government entity will reenact the challenged legislation.

Id.

2. *Analysis*

With above-stated legal framework in mind, the Court will now address the mootness categories presented in Defendants' summary judgment motion: technology, voter list security/accuracy, and absentee ballots.

i. Technology

A review of the record shows that Plaintiffs' initial complaints included technology claims concerning the direct-recording electronic ("DRE") voting machines in use by the State of Georgia in 2018. See Doc. Nos. [1], p. 1; [41], p. 12. However, as indicated above, with the Court's leave, post-filing of summary judgment, Plaintiffs filed a Second Amended Complaint in which they removed their claims concerning Georgia's voting technology/machines (Doc. No. [582]), and at oral argument Plaintiffs' Counsel confirmed that Plaintiffs "are no longer pressing a claim around the voting machines." Doc. No. [607], Tr. 68:13–14.[26] As Plaintiffs' Second Amended Complaint supersedes the allegations in the prior complaints, the Court concludes that any issues regarding voting

[26] The Court recognizes that Plaintiffs' Counsel expressed an intent to use the voter machine evidence at trial to support other non-abandoned claims. Doc. No. [607], Tr. 68:13–18. At this time, the Court makes no ruling as to the trial admissibility of such evidence.

technology/machines no longer remain for adjudication in the context of the pending litigation. See Pintando v. Miami-Dade Hous. Agency, 501 F.3d 1241, 1243 (11th Cir. 2007) ("As a general matter, '[a]n amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary.'") (citations omitted).

ii. Voter List Security and Accuracy

In their Second Amended Complaint, Plaintiffs allege that Georgia's voter registration database lacks data security and is vulnerable to cyber-breaches or hacking that could undermine electors' confidence in the outcome. Doc. No. [582], ¶¶ 94, 100. Plaintiffs further allege that "[b]y leaving Georgia's registration database vulnerable to tampering, Defendants place voters at risk of having their voter registrations removed or changed." Id. ¶ 98. In subsequent paragraphs of their Complaint, Plaintiffs allege that the Secretary of State maintains inaccurate voter registration rolls. Id. ¶¶ 104–113.

In their Motion for Summary Judgment, Defendants assert that Plaintiffs' claims about the voter registration system were mooted upon the General

Assembly's adoption of HB 392 and promulgation of the requisite regulation. Doc. Nos. [441-1], pp. 26–27; see also [607], Tr. 31:24–25.

HB 392, is codified at O.C.G.A. § 45-13-20(14.1) and provides in relevant part that the Secretary shall have the duty "[t]o promulgate a regulation that establishes security protocols for voter registration information maintained and developed by the Secretary of State . . . ." Doc. No. [492], pp. 25–26. The requisite regulation was promulgated on August 13, 2019 and is published at Ga. Comp. R. & Regs. 590-8-3-.01. Doc. No. [492], ¶ 35.

Defendants further assert that Plaintiffs' remaining claims concerning "inaccurate" voter rolls are moot based on the State having joined the Electronic Registration Information Center ("ERIC"), a non-profit organization with the sole mission of assisting states to improve the accuracy of America's voter roll, as authorized by HB 316. Doc. Nos. [441-1], pp. 27–28; [491], ¶ 113.

In opposition, Plaintiffs argue that "Defendants have, at most, suggested they have taken additional measures to protect their voter rolls from external hacking or intervention and can now share voter registration information with out-of-state government entities through" ERIC. Doc. No. [489], p. 24. Plaintiffs assert that "[t]hese measures do nothing to address voter roll inaccuracies caused

by problems internal to Defendants' voter registration database, which persistently cancels voters erroneously, marks eligible voters as ineligible, and lists voters as registered in incorrect precincts or even incorrect counties." Id. In support of their argument, Plaintiffs rely upon paragraphs 723–751 of their Statement of Additional Facts. Id. (citing Pl. SAMF, Doc. No. [532], ¶¶ 723-751).

In their reply, Defendants raise a number of objections to Plaintiffs' additional facts. See generally Doc. No. [532]. However, Defendants do admit that two key facts may be considered for purposes of summary judgment: (1) the Secretary received complaints in the 2018 election about people trying to vote and being told that they were not registered and (2) the Secretary received complaints about people trying to vote and being told that the voter rolls did not reflect their address changes. Doc. No. [532], ¶¶ 748–749. The Court concludes that these two facts alone establish a genuine dispute of material fact as to the accuracy of the voter rolls.

As to the remainder of the mootness arguments, the Court finds that Plaintiffs have not presented any affirmative evidence that their claims concerning voter list security are not moot due to the enactment of HB 316 and HB 392. In addition, the totality of the circumstances persuades this Court that

there is no reasonable expectation that the State of Georgia will reenact the challenged legislation or otherwise return to pre-HB 316 and pre-HB 392 law.

In summary, the Court concludes that Plaintiffs' voter list security claims are moot and Plaintiffs' voter list inaccuracy claims are not moot. See Powell, 395 U.S. at 497 ("Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy.").

iii. Absentee Ballots

Defendants assert that two of Plaintiffs' claims about absentee ballots are mooted by recent amendments to O.C.G.A. § 21-2-384 and State Election Board Rules. Doc. No. [441-1], p. 28.[27] More specifically, Defendants assert that "Plaintiffs [sic] claims about voter birthdates resulting in rejection of absentee ballots are moot because the [voter's] date of birth is no longer required and thus ballots cannot be rejected for that reason." Id. Defendants also assert "that Plaintiffs' claims about prompt notification to voters when their absentee ballots

[27] At the January 12, 2021 hearing, Defendants presented Demonstrative Exhibit 4 which included a chart that detailed the pre- and post-HB 316 changes to O.C.G.A. § 21-2-384. The current version of the statute now "omits residential address and birth year from the absentee voter's oath." Defs. Dem. Ex. 4.

are rejected has been resolved by" a State Election Board Rule, Ga. Comp. R. & Regs. R. 183-1-14-.13.[28] Id.

In opposition, Plaintiffs argue that "[a] streamlined oath envelope and faster absentee ballot rejection notifications do not address in any way Defendants' failures to distribute absentee ballots in a timely fashion, to provide accurate information about the status of voters' ballots, or to resolve problems voters experience when attempting to cancel their absentee ballots at the polls." Doc. No. [489], p. 25.[29]

To the extent that Plaintiffs' opposition arguments concern the failure to train aspect of their case, the Court agrees that these training claims are not moot, as there has been no change in the law concerning said claims. However, Plaintiffs have not presented any affirmative evidence[30] that their claims

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[28] Said Rule provides in relevant part that registrars must notify voters of a rejected absentee ballot no later than three business days after rejecting the ballot. Ga. Comp. R. & Regs. R. 183-1-14-.13; see also Doc. No. [491], ¶ 114.

[29] At oral argument, Defendants noted that Plaintiffs' remaining arguments seem to be claiming that Defendants are not following state law, which is barred by the Eleventh Amendment. Doc. No. [607], Tr. 32:2–8. The Court defers ruling on Defendants' Eleventh Amendment arguments. Said arguments will be addressed in the context of the Court's future ruling on the merits motion for summary judgment.

[30] Without more, Plaintiffs' evidence (at Ex. 67, Doc. No. [507-5], p. 42) that the City of Parrott, Georgia received two boxes of election supplies in 2019 with absentee ballots

concerning voters' dates of birth on absentee ballots and notification of absentee ballot rejections are not moot due to the change in Georgia law.[31] In addition, the totality of the circumstances persuades this Court that there is no reasonable expectation that the State of Georgia will reenact the challenged legislation or otherwise return to its old law. Accordingly, the Court concludes that Plaintiffs' claims concerning absentee ballots (dates of birth and rejection notification) are moot.[32]

C. Political Question Doctrine

Defendants argue that this Court lacks jurisdiction under the political question doctrine. Doc. No. [441-1], p. 30. They argue that Plaintiffs' claims are nonjusticiable "because they require this Court to replace Georgia's Election Code with this Court's judgment about the administration of elections . . . ." Id.

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still bearing the date of birth line does not create a genuine dispute of material fact as to mootness based on change in the law. As correctly noted by Defendants, it is only one instance involving a city (Doc. No. [532], p. 594) and the above-stated Flanigan factors look to consistency of the State's conduct/commitment to the new law.

[31] Said claims are found in the Second Amended Complaint (Doc. No. [582]) at ¶¶ 137, 140, 141.

[32] Plaintiffs have amended their Complaint to remove their HAVA cause of action. Doc. No. [582]. Accordingly, it is unnecessary for the Court to address the HAVA grounds asserted in Defendants' motion.

They argue this matter would require the Court to address issues "reserved expressly to the state legislatures—not the Courts." Id. at 33. The Court disagrees and finds the case law cited by Defendants is distinguishable because none of it implicates *individuals'* right to vote or alleges that a state's election law or policy has racially discriminatory effects.

1. Legal Standard

Federal courts will generally refuse to hear a case if they find it presents a "political question." In this context, a political question is generally one that either is best left to the political branches of government or that lacks judicially manageable standards. As the Supreme Court explained in Rucho v. Common Cause, ___ U.S. ___, 139 S. Ct. 2484 (2019):

> Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. Among the political question cases the Court has identified are those that lack judicially discoverable and manageable standards for resolving [them].

Id. at 2494 (internal quotations and citations omitted). The political question doctrine acts as a jurisdictional bar. See McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1365 (11th Cir. 2007).

In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court outlined a list of factors to be used in determining whether a dispute raises a non-justiciable political question. Under Baker, any one of the following removes an issue beyond the scope of justiciability:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Aktepe v. United States, 105 F.3d 1400, 1402–03 (11th Cir. 1997) (quoting Baker, 369 U.S. at 217).

2. Analysis

Defendants are correct that generally, matters related to the administration of elections are reserved to state legislatures. However, state legislatures do not have unreviewable discretion to pass election laws which violate federal statutes or constitutional rights. The Court agrees that it is not the place of federal courts to decide complex and subtle questions of election administration. See Doc. No. [441-1], p. 34. However, federal courts are equipped and empowered to address claims that individuals' voting rights are being burdened.

Defendants rely heavily on the recent decision in Jacobson to support their argument that the political question doctrine bars this Court's consideration of this matter. As noted above, that case involved a challenge to Florida's ballot order law, which provides that candidates of the party that won the last gubernatorial election shall appear first for each office on the ballot. Id. at 1241. The Eleventh Circuit found the plaintiffs' complaint presented a non-justiciable political question because it boiled down to a complaint about unfair partisan advantage. Id. at 1242. "No judicially discernable and manageable standards exist to determine what constitutes a 'fair' allocation of the top ballot position,

and picking among the competing visions of fairness 'poses basic questions that are political, not legal.'" Id. (quoting Rucho, 139 S. Ct. at 2500).

Central to Jacobson's political question doctrine holding, however, was the fact that the plaintiffs' complaint did "not allege *any* burden on individual voting rights." Id. at 1261 (emphasis in original). The case at bar is immediately distinguishable. At bottom, Plaintiffs' Complaint is about individual voting rights and whether Georgia's election laws and policies unduly burden individuals' right to vote. Clearly, and as the Jacobson court noted, there are judicially manageable standards for evaluating such complaints—the Anderson-Burdick framework exists for precisely this purpose. See id. at 1262 ("If the statute burdened voting or associational rights even slightly, we could apply legal standards to determine whether the burden was unconstitutional. Under Anderson and Burdick, we would weigh the burden imposed by the law against the state interests justifying that burden."). Indeed, this case is far more comparable to the cases cited by the Jacobson court as ones that did *not* present nonjusticiable political questions: claims that a statute does not make it more difficult for individuals to vote, or to choose the candidate of their choice; claims that a law limits a political party's or candidate's access to the ballot, which

would interfere with voters' ability to vote for and support that party or candidate; claims that a law burdens the associational rights of political parties by interfering with their ability to freely associate with voters and candidates of their choosing; and claims that a law creates the risk that some votes will go uncounted or be improperly counted. Id. at 1261–62 (collecting cases).

Defendants also cite partisan gerrymandering cases to support their argument. See Doc. No. [441-1], p. 33. Partisan gerrymandering cases are nonjusticiable because they implicate "group political interests, not individual legal rights." Gill v. Whitford, __ U.S. ___, 138 S. Ct. 1916, 1933 (2018). However, this case is more akin to racial gerrymandering cases that claim a burden on individual voting rights and are clearly justiciable. Fundamentally, the one-person, one-vote doctrine implicated in racial gerrymandering cases "requires that each representative must be accountable to (approximately) the same number of constituents." Rucho, 139 S. Ct. at 2501. Thus, racial gerrymandering cases implicate individual rights and are susceptible to judicially manageable standards. Id. In contrast, partisan gerrymandering cases are "about group political interests, not individual legal rights," and thus implicate questions of fairness which courts are not equipped or empowered to answer. Gill, 138 S. Ct.

at 1933. Plaintiffs' claims here implicate individual rights and are thus susceptible to judicially manageable standards.

The Court also rejects Defendants' argument that this case is nonjusticiable because the voting rights groups in this case may represent voters who are more likely to support Democratic candidates. See Doc. No. [441-1], p. 31. All voting rights cases implicate politics—but that does not automatically make them nonjusticiable political questions. See Baker, 369 U.S. at 209 ("[T]he mere fact that [a] suit seeks protection of a political right does not mean it presents a political question."). Otherwise, every time a case is brought to vindicate individual voting rights, any showing that the plaintiffs were more likely to support candidates of a certain party would render their claims nonjusticiable.[33]

3. Elections Clause

Finally, the Court finds the Elections Clause does not bar its consideration of Plaintiffs' claims. The Elections Clause "assigns to state legislatures the power to prescribe the 'Times, Places and Manner of holding Elections" for Members of

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[33] This argument is especially troubling given that voting rights cases are frequently brought by groups that seek to enfranchise minority voters. If this Court were to accept Defendants' argument here, such groups would be barred from bringing suit if they or their members tend to prefer candidates of a certain party. Political question doctrine does not go so far.

Congress, while giving Congress the power to "make or alter' any such regulations." Rucho, 139 S. Ct. at 2495. In Rucho, the Supreme Court rejected an argument that the Elections Clause barred it from considering gerrymandering cases. Id. ("Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree.") (internal citation omitted)). Defendants have cited no cases that hold the Elections Clause prohibits federal courts from considering cases where individual voting rights and federal constitutional rights are implicated.

IV. CONCLUSION

Defendants' Motion for Summary Judgment on Jurisdiction (Doc. No. [441]) is **GRANTED IN PART AND DENIED IN PART.** The motion is granted in part for lack of standing as to Plaintiffs' polling place claims and for mootness as to Plaintiffs' voter list security claim and absentee ballot claims (based on dating and notification issues).[34] The motion is denied as to the remaining

[34] Ordinarily, the Court prefers to link its conclusions to causes of action, as delineated in the Complaint; however, due to the nature of this case, it is impractical to follow this preferred practice. To this regard, the Court's analysis and conclusion address claims, more so than causes of action.

asserted grounds concerning standing, mootness, and the political-question doctrine. The Court also recognizes that certain claims have been abandoned through Plaintiffs' filing of a Second Amended Complaint. Thus, for purposes of perfecting the record, the Court provides the following full list of allegations/claims that are no longer in this case: Help America Vote Act; Voting Machines; Voter List Security; Use of Election Technology that is Vulnerable to Hacking and Manipulation; Absentee Ballots (dating and notification issues); Promotion of Moving and Closing Precincts and Polling Places; and Failure to Provide Adequate Resources to Polling Places.[35]

IT IS SO ORDERED this 16th day of February, 2021.

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

[35] A ruling on the outstanding merits motion for summary judgment (Doc. No. [450]), motions to exclude expert testimony (Doc. Nos. [406], [448]), and renewed objection to Plaintiffs' Corrected Statement of Additional Material Facts (Doc. No. [610]) will follow by separate orders.