UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE GEORGIA SENATE BILL 202	Master Case No.: 1:21-mi-55555-JPB

INTERVENORS' RESPONSE TO THE UNITED STATES' PRELIMINARY INJUNCTION MOTION

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INTRODUCTION

This Court must presume that the Georgia Legislature acted in good faith when enacting SB 202. To prevail on their claims that Georgia enacted these provisions with a discriminatory intent, Plaintiffs must overcome that presumption and show that the Georgia Legislature enacted the challenged provision "because" they would have a discriminatory effect. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Plaintiffs are unlikely to meet this burden.

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Unable to muster evidence to meet their burden, Plaintiffs upend the presumption of good faith by inviting this Court to draw unsupported inferences of racial discrimination. For example, under the guise of applying *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), Plaintiffs weave Georgia's long-past history of discrimination to infer a current discriminatory intent. *See* Doc. 566-1 at 45, 58-61. They argue that this evidence is relevant because it contributed to current socioeconomic disparities. *Id.* at 59. They invite this Court to draw an inference of discrimination from a handful of ambiguous statements from legislators and alleged procedural anomalies. *Id.* at 47-51. And they infer that the Legislature had discriminatory intent because in their view any concerns about, for example, voter-fraud were "baseless." *Id.* at 51.

Plaintiffs' inferences cannot be reconciled with the presumption of good faith required by the Eleventh Circuit. In fact, the Eleventh Circuit recently issued two decisions upholding Florida's and Alabama's election laws against the same arguments Plaintiffs raise here. *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299 (11th Cir. 2021); *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State* (*LWV*), 66 F.4th 905 (11th Cir. 2023). It dismissed "an unlimited look-back to past discrimination." *Greater Birmingham Ministries*, 992 F.3d at 1325. It explained that "[e]vidence of historical discrimination imported through socioeconomic data is no exception" to this rule. *LWV*, 66 F.4th at 923. It found that "[i]t stretches logic to deem a sponsor's 'intent' … as the legally dispositive intent of the entire body of the [state] legislature on that law." *Greater Birmingham*, 992 F.3d at 1324-25. It rejected an inference of discriminatory intent from "procedural maneuverings" like "truncated debate." *Id.* at 1326. And it explained that its precedent "does not require evidence of voter fraud to justify adopting legislation that aims to prevent fraud." *LWV*, 66 F.4th at 925.

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Even if their claims had merit, Plaintiffs' undue delay bars preliminary relief. Plaintiffs must "show reasonable diligence" to obtain a preliminary injunction. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam). This Court denied Plaintiffs' request for a preliminary injunction for the 2022 election cycle nearly a year ago. At that time, they did not seek relief from the

provisions they now challenge. Instead, Plaintiffs waited until now—several months after this Court's previous preliminary injunction decision—to claim irreparable harm from those provisions. That unjustified delay forecloses relief.

Plaintiffs' request also fails under *Purcell*, which instructs "that a court should ordinarily decline to issue an injunction—especially one that changes existing election rules—when an election is imminent." *Coal. for Good Governance v. Kemp*, 2021 WL 2826094, at *3 (N.D. Ga. July 7). This Court previously looked to the four conditions that a plaintiff must "at least" satisfy under Justice Kavanaugh's opinion in *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring). It denied relief to Plaintiffs because they could not satisfy two of these requirements: the merits were not clearcut in their favor, and the changes they requested would add significant cost and confusion. The same is true here, but Plaintiffs also fail a third factor—undue delay. So *Purcell* bars relief.[1]

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ARGUMENT

A preliminary injunction is an "extraordinary and drastic remedy that should not be granted unless the movant clearly carries its burden." *Georgiacarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th

[1] Intervenors join the State's opposition to the United States' preliminary injunction motion.

Cir. 2015). That burden requires Plaintiffs to show a "substantial likelihood" of success on the merits, irreparable injury absent an injunction, that the balance of the equities favors them, and that an injunction favors the public interest. *Id*. But that alone is not enough in cases like this one. Courts must also look to "considerations specific to election cases." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022). Those considerations instruct courts not to issue injunctions that could cause disruption and voter confusion close to an election. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Plaintiffs cannot meet their burden on the merits or on the equities.

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I. Plaintiffs are not likely to succeed on their claims that Georgia's election regulations violate the Constitution and the Voting Rights Act.

To prevail on their Fourteenth Amendment, Fifteenth Amendment, and Section 2 claims, Plaintiffs must show, among other things, that the challenged provisions were enacted with a discriminatory intent. This showing requires "more than intent as volition or intent as awareness of consequences." *v. Feeney*, 442 U.S. at 279. They must show that the Georgia Legislature enacted the challenged provisions "because of" their discriminatory effect. *Id*. To do this, they must overcome the presumption that the Georgia Legislature acted in good faith when it passed SB 202. *See Greater Birmingham Ministries*, 992 F.3d at 1325.

But Plaintiffs would turn that presumption on its head. They claim SB 202's justifications were "steeped in a racialized narrative." Doc. 566-1 at 4. They say lawmakers spoke in "racially-coded language" that this Court must decipher (in their favor, of course). Doc. 566-1 at 15. But every statement, statistic, and piece of evidence that Plaintiffs say shows racial discrimination requires an inferential leap. At the motion to dismiss stage, the Court drew inferences in Plaintiffs' favor. But at this stage, this Court cannot credit their unsupported inferences. It must instead presume that the Georgia Legislature acted in good faith.

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A. The Eleventh Circuit has rejected inferences from outdated history.

Plaintiffs begin with "Georgia's well-documented history of discrimination against Black voters." Doc. 566-1 at 4. That's the same place the district court started in *League of Women Voters*. And "[f]rom the start, the district court erred" in that case. *LWV*, 66 F.4th at 923. That's because "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980), *superseded by statute on other grounds as stated in Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). Instead, the Court must presume the legislature acted in good faith "even in the light of 'a finding of past discrimination.'" *LWV*, 66 F.4th at 923 (citation omitted).

Plaintiffs nevertheless weave "distant instances" of discrimination throughout their argument to bolster their inferences of present discrimination. *Id.* They cite the Fourth Circuit's reliance on a State's "troubled racial history and racially polarized voting." Doc. 566-1 at 45 (quoting *McCrory*, 831 F.3d at 226-27). And they discuss at length "Georgia's history of discrimination against Black Georgians." *Id.* at 58-61. But "old, outdated intentions of previous generations" cannot ban Georgia's "legislature from ever enacting otherwise constitutional laws about voting." *Greater Birmingham Ministries*, 992 F.3d at 1325.

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Plaintiffs' reliance on long-past discrimination cannot be justified by the *Arlington Heights* factors. Those factors do not provide "an unlimited look-back to past discrimination." *Id.* at 1325. *Arlington Heights* analysis must focus on the "specific sequence of events leading up to the challenged decision." *Id.* (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)). Plaintiffs' references to other Georgia cases discussing different laws are thus irrelevant to whether SB 202 is discriminatory. *See* Doc. 566-1 at 59 (citing *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297 (M.D. Ga. 2018) (finding that a county's method of electing its board of education violated the Voting Rights Act); *Whitest v. Crisp Cnty. Ga. Bd. of Educ.*, 2021 WL 4483802, at *5 (M.D. Ga. Aug. 20, 2021) (same); *Rose v. Raffensperger*, 619 F. Supp. 3d 1241, 1268 (N.D. Ga. 2022) (finding that

Georgia's system for electing Public Service Commission members violated the Voting Rights Act)).

Because Plaintiffs cannot rely explicitly on Georgia's history, they try to construe Georgia's *past* discrimination as *present* discrimination. The Eleventh Circuit has rejected those arguments, too. Plaintiffs say that Georgia's "history of official discrimination is relevant under Section 2 of the VRA because of its lasting effects on socioeconomic conditions and political participation." Doc. 566-1 at 59. In circular fashion, they say their socioeconomic data is relevant because it is "linked to the history of official race discrimination in Georgia and [has] well-established impacts on voter participation." *Id.* at 42. But "[e]vidence of historical discrimination imported through socioeconomic data is no exception" to the rule that courts should not rely on a State's outdated history. *LWV*, 66 F.4th at 923. Plaintiffs' conclusion that SB 202 disproportionately impacts black voters thus rests on a premise that "cannot support a finding of discriminatory intent in this case." *Id.*

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B. Plaintiffs provide no evidence that the legislature acted with discriminatory intent.

Because Georgia's history cannot justify their motion, Plaintiffs turn to allegations of present-day discrimination by the Georgia Legislature. Plaintiffs invoke strong language: their inferences of racial discrimination are "obvious," their evidence of discriminatory intent is "highly probative," and the

legislature's racialized motives "led directly" to the enactment of SB 202. Doc. 566-1 at 45-46, 51 n.21. But they fail to support these claims.

After months of discovery, weeks of depositions, and millions of documents exchanged, Plaintiffs have found zero direct evidence of discriminatory intent. To establish discriminatory intent, Plaintiffs must show "more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279. Although Plaintiffs can cite "circumstantial and direct evidence of intent as may be available," it still must be "evidence of intent." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Plaintiffs cling to that line because the only evidence they have is, at best, circumstantial evidence. So they turn to a "chain of inferences," reading between the lines of the evidence they proffer. *LWV*, 66 F.4th at 939.

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Plaintiffs first complain that SB 202 "passed alongside" successful black electoral efforts. Doc. 566-1 at 45. Even if that's true, "it is impossible to say whether any relationship is causal based on a mere correlation." *LWV*, 66 F.4th at 932. Plaintiffs have trouble showing correlation—much less causation—since they have no statistically significant evidence that black electoral efforts were any less successful in elections under SB 202. *Compare* Doc. 566-1 at 20 n.10 ("Black voters were 30.0% of all registrants in Georgia in 2020 and 29.5% in 2022."), with *LWV*, 66 F.4th at 932-33 (A "1.3 percentage point difference" is not statistically significant.).

Plaintiffs also claim that the bill "grew out of a tenuous and racialized voter fraud context." Doc. 566-1 at 46. Their support for that inference is a statement by Rudy Giuliani during a Governmental Affairs Committee hearing that election officials were handing out ballots like they were "passing out dope." *Id.* at 13-14, 46-47. Of course, Giuliani is not a Georgia legislator, the hearing was not about SB 202, and the statement had nothing to do with race. Plaintiffs' editorialized commentary about "racialized" statements does not live up to their promise of "highly probative" evidence.

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Like Giuliani's comment, much of Plaintiffs' evidence about the "legislative process" is not about the legislative process of SB 202 at all. Plaintiffs spend many pages talking about 2020 election fraud claims, which they say gave "momentum" to SB 202. Doc. 566-1 at 47. But legislative comments must be "about *that* legislation" to support an inference of discrimination—not older comments about a generalized subject matter. *Greater Birmingham Ministries*, 992 F.3d at 1325 (emphasis added).

When it comes to the legislative history of SB 202, Plaintiffs' record is bare. They implicitly admit that the Legislature followed all procedural rules in enacting SB 202. *See* Doc. 566-1 at 47. Indeed, their chief complaint is not about any substantive violation of the legislative process, but rather the "lack of transparency" and "short debate" of the bill. Doc. 566-1 at 47-50. But "procedural maneuverings" such as "truncated debate" are part and parcel of

the legislative process, and thus poor evidence of *racial* motive. *Greater Birmingham Ministries*, 992 F.3d at 1326.

Plaintiffs also complain that some meetings excluded black members "of the minority party." Doc. 566-1 at 48. But Plaintiffs provide no evidence that those members were excluded *because of their race*, rather than because they and others who were not invited to attend those sessions opposed the entire SB 202 project. *See Greater Birmingham Ministries*, 992 F.3d at 1326. Regardless, besides their claim that that the legislature considered "an atypical amount of bills for one session," Plaintiffs provide no evidence that the procedures were anomalous. Doc. 566-1 at 48. The Georgia Legislature's reaction to one of the most unusual and hotly contested elections in modern American history mirrored the reactions of legislatures across the country, including Florida. *See LWV*, 66 F.4th at 941 ("[E]xamining the record reveals that the finding of intentional discrimination rests on hardly any evidence.").

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Georgia legislators' statements also do not support Plaintiffs' claims of "obvious" discrimination. Plaintiffs first rely on statements by election officials and legislators who opposed SB 202. *See* Doc. 566-1 at 48-54. But "the concerns expressed by political opponents during the legislative process are not reliable evidence of legislative intent." *LWV*, 66 F.4th at 940. At most, those statements imply only partisan motive, which undercuts Plaintiffs' claims of racial motive. For the same reason, Plaintiffs' admission that "Legislators voted along party

lines in both the House and Senate" undercuts the weight of their complaint that "no Black legislators voted for SB 202." Doc. 566-1 at 50; *see Greater Birmingham Ministries*, 992 F.3d at 1326 (dismissing plaintiffs' argument that "no black legislators voted for HB19, and the vote was a strictly party-line vote" implied racial discrimination).

The three supporter statements that Plaintiffs rely on are even less probative. First, Plaintiffs cite David Ralston's concern about universal absentee ballots, but even their spin on his comment admits it was about "electoral outcomes he did not favor," not about race. Doc. 566-1 at 8-9, 50-51. Second, Barry Fleming talking about the "shady part of town down near the docks" where you risked getting "shanghaied" does not have the racial undertones Plaintiffs would have the Court believe. *Id.* at 51. Presumably—one can only guess—Plaintiffs object to Fleming's use of the word "shanghaied." But that commonplace word is not the invidious racial term Plaintiffs imply. *E.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448, 2466 (2018) (describing "a person shanghaied for an unwanted voyage"); Charles Lane, *Shanghaied*, 7 Green Bag 2d 247 (2004).[2] Third, Chuck Martin's suggestion

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[2] In fact, the term "shanghaied" was coined not because the kidnapping of sailors was associated with a particular ethnic group, but because Shanghai stood in for the far-off *destination* of the subsequent voyage. *See Shanghai*, *Merriam-Webster.com Dictionary*, https://perma.cc/Q2DS-VWEZ; *see also* Jessica Saia, The Bold Italic (Nov. 7, 2014), https://perma.cc/PQW9-

that the absentee process was "susceptible to 'foolishness'" says nothing about race. Doc. 566-1 at 51. Even the *district court* in *LWV* declined to credit such thin inferences of ordinary language. *LWV*, 66 F.4th at 931. Those three statements are Plaintiffs' best evidence of racial motive, and they have nothing to do with race.

At bottom, Plaintiffs' assertion of racial intent rests on unsupported inferences. But "the presumption of legislative good faith" prohibits such inferences, even in light of "a finding of past discrimination." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). And even if those inferences could be drawn in Plaintiffs' favor, "[i]t stretches logic to deem a sponsor's 'intent' … as the legally dispositive intent of the entire body of the [state] legislature on that law." *Greater Birmingham*, 992 F.3d at 1324-25.

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In sum, most of Plaintiffs' evidence of racially discriminatory motive is outdated, irrelevant, or improper. And all of it relies on threadbare inferences and circumstantial evidence construed in their favor. Thus, "it is clear that Plaintiffs have failed to prove that the law was enacted with discriminatory intent." *Id.* at 1327.

9PDX (noting that "[t]he phrase … doesn't actually derive from historical malice towards Chinese people").

C. Plaintiffs ignore the Legislature's many legitimate justifications for the law.

Plaintiffs cannot rebut the many legitimate justifications for the SB 202. *See Arlington Heights*, 429 U.S. at 271. Section 1 of SB 202 lays out extensive legislative findings and purposes that courts have repeatedly found are legitimate. Among them, a State's "interests in modernizing election procedures, combating voter fraud, and protecting public confidence in the integrity of the electoral process are legitimate." *Greater Birmingham Ministries*, 992 F.3d at 1320. "[P]rotecting voter privacy is also a valid state interest," as is "preserving order at polling places." *LWV*, 66 F.4th 905, 929-30. And the law "does not require evidence of voter fraud to justify adopting legislation that aims to prevent fraud." *Id.* at 925.

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Plaintiffs argue that these interests are pretext for discrimination, but they continue to rely on weak inferences and improper assumptions. For example, Plaintiffs read a "racial overlay" from phrases like restoring the "'sanctity' of the precinct" and guarding against the "'perception' of intimidation." Doc. 566-1 at 56. But it is beyond dispute that those are "strong and entirely legitimate state interest[s]." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021). Plaintiffs counter that these state interests "centered" on black populations. But they provide no evidence that the legislature, in passing neutral, generally applicable laws, meant to target

specific areas "on account of race or color." 52 U.S.C. §10301(b). Plaintiffs cannot backfill their racialized assumptions through claims of statistical disparities. *Greater Birmingham Ministries*, 992 F.3d at 1330-31. "Lacking a showing of evidence necessary to demonstrate the 'sort of causal connection between racial bias and disparate effect necessary to make a vote-denial claim' dooms Plaintiff's claims." *Id.*

At most, Plaintiffs' evidence of statistical disparities shows partisan motive, not racial motive. But "[a] connection between race and partisan voting patterns is not enough to transform evidence of partisan purpose into evidence of racially discriminatory intent." *LWV*, 66 F.4th at 931. And "while it might be suspicious if partisan reasons were the only consideration or justification for the law," those partisan considerations do not weigh against the State when it "has provided valid neutral justifications (combatting voter fraud, increasing confidence in elections, and modernizing [the State's] elections procedures) for the law's passage." *Greater Birmingham Ministries*, 992 F.3d at 1326-27 (footnote omitted). Plaintiffs make no attempt to untangle partisan impact from racial impact.

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Plaintiffs also rely on bad evidence. For example, Plaintiffs fault SB 202 for including "incorrect data" in the preamble, which states that the "number of duplicated ballots has continued to rise dramatically from 2016 through 2020." Doc. 566-1 at 57 (quoting SB 202). Plaintiffs attempt to rebut that claim

by arguing that out-of-precinct provisional ballots decreased from 2018 to 2020. *Id.* at 57-58. But Plaintiffs are comparing apples to oranges—duplicate ballots *include* duplicate out-of-precinct ballots, but they also include duplicate ballots for "other purposes." SB 202 §1(14). Even if the legislature was the one making the mistake, "such a mistake hardly proves that their concerns were a pretext for discriminatory intent." *LWV*, 66 F.4th at 930 (dismissing the legislature's mistaken assumption that Florida's registration-delivery provision was required by court order). Finally, Plaintiffs' frequent refrain that voter-fraud claims were "unsupported by the facts on the ground" is irrelevant. Doc. 566-1 at 55. As explained, the law "does not require evidence of voter fraud to justify adopting legislation that aims to prevent fraud." *LWV*, 66 F.4th at 925.

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D. Plaintiffs' evidence of discriminatory impact does not meet Section 2's high standard.

Even if Plaintiffs had shown discriminatory intent, "a finding of discriminatory impact is necessary to establish a violation of section 2." *LWV*, 66 F.4th at 943. And the standard is "high." *Id.* To conclude that SB 202 likely violates Section 2, this Court would have to find "that the political processes leading to" elections in Georgia "are not equally open" to black voters "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."

Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248 (2022). Some evidence of disparate impact is not enough, which is why the Eleventh Circuit concluded that the record in *League of Women Voters* did "not come close to meeting that standard." *LWV*, 66 F.4th at 944. The panel reversed the district court, holding that "[n]one of the challenged provisions violates section 2 of the Voting Rights Act." *Id.* at 943. This case is no different.

If there were any doubt about Plaintiffs' ability "to meet section 2's high standard," *id.*, the Court need only observe what evidence they *don't* have. Given Plaintiffs' certainty that SB 202 will suppress black voters, one would expect the 2022 election conducted under SB 202 to have dramatically harmed black electoral efforts and black voter turnout. But Plaintiffs present almost no evidence of the 2022 election, even though that election is the test case for their racialized claims about SB 202. Plaintiffs try to obscure the fact that SB 202 did not "result in significant loss of turnout," by shifting the Court's attention to "burdens in voting" in isolation. *Id.* at 34 n.15, 45. But the Court must look at "the totality of the circumstances," to determine whether "the challenged law violates Section 2(a) because it deprives minority voters of an *equal opportunity* to participate in the electoral process and to elect representatives of their choice." *Greater Birmingham Ministries*, 992 F.3d at 1329. The Secretary recently reported on the success of the 2022 elections, observing that "Georgia's voters are expressing confidence and satisfaction

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with the voting process."[3] Plaintiffs have no substantial evidence that the 2022 election, conducted under the laws they challenge, resulted in a discriminatory impact on black voters. That is enough to deny the motion. *LWV*, 66 F.4th at 943.

E. Plaintiffs' invitation to follow out-of-circuit precedent that conflicts with Eleventh Circuit precedent confirms they are unlikely to succeed on the merits.

Plaintiffs cite *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), more than any other authority, save *Arlington Heights*. They invite this Court to draw inferences in the same way that the Fourth Circuit did in *McCrory*. *See, e.g.*, Doc. 166-1 at 44, 45, 47, 50, 55, 56, 60. But *McCrory* is nonbinding, wrongly decided, and inconsistent with Eleventh Circuit precedent. Plaintiffs' dependence on it confirms that they do not have a substantial likelihood of success on the merits in this circuit.

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The Court should not follow *McCrory* for at least three reasons. First, *McCrory* failed to apply the presumption of legislative good faith. For example, the Fourth Circuit thought that the legislature's rushed process to enact voting reforms soon after *Shelby County*, along a party-line vote, cast a "suspicious narrative." *McCrory*, 831 F.3d at 228. To that end, the panel held that the

[3] Georgia Sec'y of State, *University of Georgia Poll Finds 99% of Georgia Voters Reported No Issue Casting Ballot* (Jan. 24, 2023), https://perma.cc/6FSA-X87U.

"district court erred in refusing to draw the obvious inference that this sequence of events signals discriminatory intent." *Id.* at 227. But that inference is far from "obvious," and drawing that inference violates the presumption of legislative good faith, which *McCrory* did not even mention. In fact, the Eleventh Circuit has rejected the idea that procedural anomalies such as "the use of cloture and truncated debate" can support an inference of discrimination. *Greater Birmingham Ministries*, 992 F.3d at 1326. Plaintiffs rely on the same inappropriate inferences, inviting this Court to make the same errors the Eleventh Circuit recently reversed. *LWV*, 66 F.4th at 923, 938-40.

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Second, *McCrory*'s reliance on North Carolina's "long history of race discrimination" is inconsistent with Supreme Court and Eleventh Circuit precedent. *Id.* at 223. Even while recognizing that North Carolina's pre-1965 history would normally be given "limited weight," the Fourth Circuit weighed it "more heavily" because of North Carolina's recent release from the Section 5 preclearance process. *Id.* That makes no sense. The Supreme Court held that the coverage formula that subjected States to the preclearance process was unconstitutional *because* it relied on "40–year–old facts having no logical relation to the present day." *Shelby Cnty.*, 570 U.S. at 554. The Fourth Circuit turned that holding on its head by ruling that those 40–year–old facts were *more* relevant because *Shelby County* had released North Carolina from the

unconstitutional preclearance regime. *McCrory* then found that a history of different cases about different laws from the 1980s "constitutes a critical—perhaps the most critical—piece of historical evidence here." *McCrory*, 831 F.3d at 225. But the Eleventh Circuit bars this kind of "unlimited look-back to past discrimination." *Greater Birmingham Ministries*, 992 F.3d at 1325.

Third, *McCrory* relied on socioeconomic disparities that the Eleventh Circuit has said courts may not use as a proxy for historical discrimination. *McCrory* leaned on evidence that "African Americans were more likely to experience socioeconomic factors that may hinder their political participation," because they were "disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health." *McCrory*, 831 F.3d at 232-33 (citation omitted). From this data, it concluded that early voting, same-day registration, out-of-precinct voting, and preregistration "are a necessity" for African Americans in North Carolina. *Id*. at 233. But the Court did not explain why that supported "the 'unjustified leap from *the disparate inconveniences* that voters face when voting to *the denial or abridgement of the right to vote*.'" *Greater Birmingham Ministries*, 992 F.3d at 1330 (quoting *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600-01 (4th Cir. 2016)). In the Eleventh Circuit, courts must be careful to avoid looking too far back at "[e]vidence of historical discrimination imported through socioeconomic data." *LWV*, 66 F.4th at 923.

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Finally, even under the Fourth Circuit's approach, *McCrory* is of no help in determining whether SB 202 is constitutional. The Fourth Circuit has limited *McCrory* to the unique circumstances of the North Carolina Legislature's immediate reaction to *Shelby County*'s end of Section 5's preclearance obligations. *Lee*, 843 F.3d at 603-04 (holding that the "facts in *McCrory* are in no way like those found in Virginia's legislative process for the enactment of [Virginia's voter photo ID law]"). The end of the preclearance coverage formula is itself over a decade old, and Georgia has enacted many lawful election laws outside of that unconstitutional regime. This Court would err by following *McCrory*.

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II. Plaintiffs' undue delay defeats their request for a preliminary injunction.

"[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam). The "balance of the equities … tilt[s] against" a party who cannot show reasonable diligence. *Id.*; *see also Adventist Health Sys./Sunbelt, Inc. v. HHS*, 17 F.4th 793, 806 (8th Cir. 2021) (Delay "means that the balance of the equities favors the denial of a preliminary injunction."). This principle "is as true in election law cases as elsewhere." *Benisek*, 138 S. Ct. at 1944. Delay also "militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com,*

Inc., 840 F.3d 1244, 1248 (11th Cir. 2021); *see also Adventist Health Sys.*, 17 F.4th at 806 (Delay "refuted … allegations of irreparable harm.").

So far, Plaintiffs have misread *Wreal*. Plaintiffs argued that "a delay in seeking a preliminary injunction matters only where it 'militates against a finding of irreparable harm.'" Doc. 590 at 16 (quoting *Wreal*, 840 F.3d at 1248). That has it backwards: "[A] party's failure to act with speed or urgency in moving for a preliminary injunction *necessarily undermines* a finding of irreparable harm." *Wreal*, 840 F.3d at 1248 (emphasis added).

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Plaintiffs failed to act with reasonable diligence in moving for a preliminary injunction. The NAACP and AME Plaintiffs moved to enjoin the line-warming provisions for the 2022 election, claiming those provisions would cause irreparable harm. *See* AME and Georgia NAACP PI Motion (Doc. 171) (May 25, 2022). But the DOJ—and the other Plaintiffs joining this motion—did not ask the Court to enjoin any provisions based on VRA violations. Plaintiffs' failure to request for the *last* election the relief they want for *this* election shows "that the harm would not be serious enough to justify a preliminary injunction." *Adventist Health Sys.*, 17 F.4th at 805 (quoting Wright & Miller, 11A Fed. Prac. & Proc., §2948.1 & n.13 (3d ed. 2013)). Plaintiffs have been free to move for a preliminary injunction for the 2024 election cycle since filing their lawsuit. At the very least, they should have sought relief after the November 2022 elections. Instead, they waited over six months to file their

motion as discovery closed and the parties prepared for summary judgment briefing.

Far more modest delays have defeated requests for a preliminary injunction. *Wreal* found that a "five-month delay" supported denial of a preliminary injunction. *Wreal, LLC*, 840 F.3d at 1248. A delay "even of only a few months," the Eleventh Circuit explained, "militates against" a preliminary injunction. *Id*. This Court should reach the same conclusion based on Plaintiffs' unexplained six-month delay.

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Ongoing discovery does not excuse a party for delay in seeking for a preliminary injunction. *Benisek* confirmed that privilege disputes that "delayed the completion or discovery … d[id] not change the fact that plaintiffs could have sought a preliminary injunction much earlier." 138 S. Ct. at 1944. And delay is especially unjustified when "the preliminary-injunction motion relied exclusively on evidence that was available" earlier. *Wreal*, 840 F.3d at 1248-49 (rejecting preliminary-injunction motion based on evidence "available" to the moving party "at the time it filed its complaint").

Plaintiffs' delay cannot be excused because the 2024 election was not impending six months ago. At most, the time until the 2024 election might support an argument that Plaintiffs are only now facing irreparable injury. But courts have "reject[ed] [the] implausible assertion of law" that "delay bears on irreparable harm only where the plaintiff delays despite suffering the

harm." *Adventist Health Sys.*, 17 F.4th at 806 (cleaned up). More importantly, "the balance of the equities" would still "tilt[]" against Plaintiffs because of their delay. *Benisek*, 138 S. Ct. at 1944. In fact, the Supreme Court rejected a delayed request for preliminary relief looking only to the balance of the equities and public interest, not irreparable harm, in *Benisek*. *See id*. The same is true here; Plaintiffs' "unreasonable delay … means that the balance of the equities favors the denial of a preliminary injunction." *Adventist Health Sys.*, 17 F.4th at 806.

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III. *Purcell* forecloses relief.

The *Purcell* principle is a "bedrock tenet of election law." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of stay applications). This principle instructs that the "traditional test" for injunctive relief "does not apply" when a plaintiff asks for "an injunction of a state's election in the period close to an election." *Id*. Instead, "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Id*. at 880-81.

Purcell is an equitable principle that protects against disruption of elections. Preliminary injunctions barring the enforcement of election laws cause "voter confusion" that encourages voters to stay "away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). They also cause confusion for election administrators who may have to "grapple with a different set of rules." *Coal. for Good Governance v. Kemp*, 2020 WL 2829064, at *3 (N.D. Ga. July 7).

Plaintiffs make no effort to justify a preliminary injunction under *Purcell*. *See* Doc. 566-1 at 64-65. Nor could they. To "overcome" *Purcell*, they must show "at least … (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Milligan*, 142 S. Ct. 881 (Kavanaugh, J., concurring). This Court found that some Plaintiffs "failed to show at least two" of these factors in their previous line-warming motion: the merits are not clearcut in their favor, and a change would not be feasible without significant cost, confusion, or hardship. Doc. 241 at 741-42. The same analysis applies to Plaintiffs' motion this time. And now, Plaintiffs cannot satisfy the third factor either. By waiting over six months to move for a preliminary injunction, Plaintiffs unduly delayed. Thus, *Purcell* provides sufficient basis to deny Plaintiffs renewed motion. *League of Women Voters*, 32 F.4th at 1371.

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Since they cannot justify an injunction under *Purcell*, Plaintiffs announce that it "does not preclude granting the relief sought." Doc. 566-1 at 64. But *Purcell* applies to Plaintiffs' request. Even an election several months away is close enough for *Purcell*. The Supreme Court applied *Purcell* to an election that was "about four months" away in *Milligan*. 142 S. Ct. at 88

(Kagan, J., dissenting). And the Eleventh Circuit found that four months "easily falls within" *Purcell*'s reach. *League of Women Voters of Fla.*, 32 F.4th at 1371. Other courts have applied *Purcell* six months before an election. *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020). In each of these cases, the Courts measured from the time when the State would have to implement a disruptive change. *See Milligan*, 142 S. Ct. at 88 (Kagan, J., dissenting) (Election is "four months from now."); *League of Women Voters*, 32 F.4th at 1371 ("[D]istrict court … issued its injunction" when the next election was "set to begin in *less* than four months); *Thompson*, 959 F.3d at 813 ("[M]oving or changing a deadline or procedure now will have inevitable, further consequences."). While Georgia's presidential primary in March 2024 may be only a few weeks further, these decisions confirm that *Purcell* is not categorically inapplicable because a plaintiff sought relief several months before an election.

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The costs of an injunction reinforce *Purcell's* applicability. In *Milligan*, Justice Kavanaugh noted that "'[h]ow close to an election is too close may depending in part on … how easily the State could make the change without undue collateral effects." The collateral effects of a change here would be great. This Court has a noted that "S.B. 202 is already the law, and an injunction … would not merely preserve the status quo." Doc. 241 at 69. Since voters have already voted with the challenged requirements in place, a change would cause

voter confusion. *See id.* at 69-70. It would also require retraining election officials who have been trained to follow the challenged requirements. *See id.* These unavoidable costs confirm that *Purcell* applies to Plaintiff's request.

CONCLUSION

This Court should deny Plaintiffs' motion for preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with Local Rule 5.1(B) because it uses 13-point Century Schoolbook.

/s/ *William Bradley Carver*

CERTIFICATE OF SERVICE

On July 27, 2023, I e-filed this document on ECF, which will email everyone requiring service.

/s/ *William Bradley Carver*

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