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

VOTE.ORG, *et al.*,

Plaintiffs,

v.

GEORGIA STATE ELECTION BOARD, *et al.*,

Defendants,

GEORGIA REPUBLICAN PARTY, INC., *et al.*,

Intervenor-Defendants.

Civil Action No.: 1:22-cv-01734-JPB

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2021, the Georgia Legislature passed SB 202, which makes several changes to Georgia's absentee voting laws. At issue here is the Legislature's mandate that all applications for absentee ballots must be signed "with a pen and ink," O.C.G.A. § 21-2-381(a)(1)(C)(i) (the "pen and ink rule")—a technical requirement that is entirely irrelevant to voter qualifications. In fact, SB 202 also abolished the signature matching procedure previously mandated for verifying absentee voters and imposed new identification procedures requiring absentee ballot applicants to provide driver's license, state ID, or social security numbers (or other forms of identification) to verify their identity as registered voters.

Undisputed testimony confirms that the pen and ink rule is a meaningless technicality. County Boards of Elections admit they do not use pen and ink signatures for any purpose, and that the instrument used to sign an absentee ballot application is irrelevant to determining whether someone is qualified to vote in Georgia. In fact, the DeKalb County Board *accepts* applications with *no* signature, even as it rejects those signed with any instrument other than pen and ink. SUMF ¶ 20; Ex. 3 ("Smith Dep.") at 85:9–86:24. As for the State Defendants, they, too, concede that a pen and ink signature is not necessary to determine a voter's qualifications, describing the rule as "not so much a qualification as it is sort of a checking in." SUMF ¶ 36; Ex. 4 ("Lindsay Dep.") at 26:5–10.

While the pen and ink rule does nothing to help Georgia officials administer elections, it creates unnecessary and sometimes costly procedural hoops for Plaintiffs' members and constituents, some of whom lack access to printers—which they need to print and hand-sign application forms—or have to contend with transportation and health-related challenges that make voting in person impractical. *See* SUMF ¶¶ 86, 87; Ex. 11 ("Andrews Dep.") at 47:5–10, 10:17–19, 13:8–17; 24:21–22; SUMF ¶¶ 79, 80, 81; Ex. 12 ("Isom Dep.") at 22:18–23, 23:4–9; SUMF ¶ 83; Ex. 13 ("Simmons Dep.") at 19:24–20:1. The pen and ink rule has forced Vote.org to discontinue use of its e-sign tool in Georgia, which had allowed thousands of voters to complete an absentee ballot application with their mobile device, by uploading an image of their handwritten signature. SUMF ¶ 44; Ex. 6 ("Hailey Dep.") at 37:20–38:8, 39:22–40:1; 42:10–19. And Priorities USA ("Priorities") has spent roughly half a million dollars on an extended get-out-the-vote digital advertising program in response to the new rule—money it had to divert from other mission-critical programs. SUMF ¶ 64; Ex. 7 ("Grimsley Dep.") at 60:5–61:8; 94:16–95:20.

The Civil Rights Act of 1964 forbids officials from denying any individual the right to vote "because of an error or omission" that is "not material in determining whether such individual is qualified under [s]tate law to vote . . . . " 52 U.S.C. § 10101(a)(2)(B). Because the undisputed evidence shows that the

instrument used to sign an absentee ballot application is not relevant to any qualifications to vote in Georgia or used to assess these qualifications, Plaintiffs are entitled to summary judgment and an injunction preventing the enforcement of this meaningless technicality in future elections.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the burden to show that no genuine issue of material fact exists, and the burden then shifts to the opposing party to establish otherwise. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). To avoid summary judgment, the opposing party must "go beyond the pleadings" and identify specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). In so doing, it "must come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Irby v. Bittick*, 44 F.3d 949, 953 (11th Cir. 1995) (quoting *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991)).

ARGUMENT

I. Plaintiffs have standing because the rule has caused them to suffer concrete injuries that are traceable to and redressable by Defendants.

An organization may establish Article III standing in one of two ways: it can assert associational standing by bringing claims "on behalf of its members," or it

can demonstrate organizational standing based on "injuries suffered directly by the organization." *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991). All Plaintiffs have standing: The Alliance and CWA have associational standing, and Vote.org and Priorities have organizational standing.

A. The Alliance and CWA have associational standing.

The Alliance and CWA have associational standing based on their members' injuries because (1) their "members would otherwise have standing to sue in their own right," (2) "the interests at stake" in the litigation "are germane to" their "purpose[s]," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *S. River Watershed All., Inc. v. Dekalb County*, 69 F.4th 809, 819 (11th Cir. 2023) (cleaned up).

1. Members of the Alliance and CWA are injured by the pen and ink rule.

CWA and the Alliance have each identified "at least one" member who faces a "realistic danger of suffering an injury" because complying with the rule requires them to expend additional time and money to obtain a printed absentee ballot application, sign it in pen and ink, and return the form to election officials in order to vote absentee.[1] *See S. River Watershed All.*, 69 F.4th at 819–20.

[1] Because CWA is an affiliate retiree chapter of the Alliance, all CWA members enjoy dual membership in both CWA and the Alliance. SUMF ¶ 75; Ex. 8 ("Clancy Dep.") at 29:7–11; Ex. 9 ("Scott Dep.") at 20:15–18. CWA members "automatically" receive the benefits of Alliance membership, including the ability

CWA and Alliance member Stephan Isom is a DeKalb County resident who intends to vote absentee in future elections; because treatments for recently-diagnosed cancer have left him immunocompromised, he must avoid crowded polling places—which he encountered the last time he voted in person. SUMF ¶ 80; Isom Dep. at 22:18–23; 30:8–17. To receive an absentee ballot, Mr. Isom must hand-sign (with pen and ink) a physical application form. But because he does not own a printer, he must either pay to print his application at a library or retail printing service, or spend additional time calling local election officials to request a copy to be mailed to him—and hope it arrives on time, a concern given experience he has had with unreliable mail service. SUMF ¶ 81; Isom Dep. at 23:1–9, 24:2–7.

Teresa Simmons, also a member of CWA and the Alliance, and a DeKalb County resident, is a long-time absentee voter. SUMF ¶ 82; Simmons Dep. at 7:12–16, 11:5–10, 16:12–16. Like Mr. Isom, Ms. Simmons does not own a functioning printer and must spend either time or money to obtain a physical copy of her absentee ballot application to sign it with pen and ink. SUMF ¶ 83; Simmons Dep. at 18:10–19:11.

Walter Andrews—also a member of CWA and the Alliance and a DeKalb

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to cast votes and hold executive office within the Alliance. This dual membership structure means that the CWA members' injuries also establish the Alliance's associational standing. SUMF ¶¶ 75, 78, 82; Clancy Dep. at 29:7–11, 31:3–6; Clancy Dep. Ex. 5 at 7, 9; Simmons Dep. at 11:8–10; Isom Dep. at 13:16–23.

County resident—lacks access to reliable transportation and suffers from progressively worsening health issues, which has made waiting in line to vote painful, even in the expedited queue for disabled voters. As a result, he intends to vote absentee. SUMF ¶¶ 86, 87; Andrews Dep. at 10:17–19, 24:21–22. Mr. Andrews also does not own a printer and will have the same difficulties as his fellow CWA/Alliance members attempting to comply with the pen and ink rule. SUMF ¶ 86; Andrews Dep. at 47:2–10.

All of these members, among others, are injured because of the additional hurdles they must now navigate to comply with the new rule and vote absentee.

2. Ensuring members can successfully vote is germane to the purposes of both CWA and the Alliance.

CWA and the Alliance also satisfy the second requirement for associational standing—that the interest at stake be germane to the plaintiff organization's purpose—because encouraging and enabling their members and others to vote for retiree-friendly policies and policymakers is critical to their missions. *See Schalamar Creek Mobile Homeowner's Ass'n, Inc. v. Adler*, 855 F. App'x 546, 553 (11th Cir. 2021) ("[T]he germaneness requirement is undemanding and requires 'mere pertinence' between the litigation at issue and the organization's purpose.") (quotations omitted).

As laid out in CWA's bylaws, the organization's purposes include "develop[ing] effective support for programs on federal, state, and community

levels to bring about retirement security for all," and "promot[ing] and support[ing] . . . public policy that assist retired members in securing medical care, prescription drugs and other consumer goods." SUMF ¶ 71; Ex. 20 ("CWA Bylaws") at 3. Because electing policymakers who support CWA's preferred policies is central to its goals, CWA conducts phone banks on behalf of candidates, SUMF ¶ 68; Scott Dep. at 36:17–37:2, uses its social media to encourage members to attend candidate forums, SUMF ¶ 68; Scott Dep. at 35:25–36:9; Ex. 10 at 2, and organizes members to wave signs at busy intersections to encourage other voters to support CWA's endorsed candidates, SUMF ¶ 68; Ex. 10 at 3. CWA members also discuss voting and voting rights at about half of their meetings, SUMF ¶ 73; Isom Dep. at 12:7–14, and CWA even arranged for Fulton County officials to demonstrate voting machines at a CWA meeting to prepare members to use new polling equipment, SUMF ¶ 73; Scott Dep. at 116:25–117:9; Isom Dep. 12:7–14.

Helping elect retiree-friendly state and federal lawmakers is fundamental to the Alliance's mission as well. SUMF ¶ 68; Ex. 21 ("GARA Bylaws") at 3. The Alliance advocates for a progressive political and social agenda that focuses on securing access to retirement benefits, pensions, Social Security, Medicare and Medicaid, which makes the election of lawmakers who share the Alliance's goals a necessity. SUMF ¶¶ 68, 69; Clancy Dep. at 33:3–22. To that end, the Alliance has shared information about candidates and issues at meetings of its affiliates

including the Union of Auto Workers ("UAW") and the Georgia Association of Federated Labor and Congress of Industrial Organizations ("AFL-CIO"). SUMF ¶ 69; Clancy Dep. at 33:2–22, 47:12–48:4.

3. Participation of individual members of the Alliance and CWA is not required.

Because CWA and the Alliance seek only injunctive relief, and not to recover monetary or other damages on behalf of members, the participation of individual members is not required. *See United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996) (explaining that "'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members"). When, as here, Plaintiffs seek only prospective relief such as an injunction, courts routinely assume that any remedy "will inure to the benefit" of Plaintiffs' injured members, and thus, individual members need not participate as parties to the case. *E.g.*, *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1244 (11th Cir. 2003); *see also Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *30 (N.D. Ga. Aug. 20, 2023).

B. Vote.org and Priorities have organizational standing.

Because the Alliance and CWA have standing, the Court has jurisdiction and need not even consider whether other plaintiffs also have standing. *See Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1124–25 (11th Cir. 2019). Nonetheless, Vote.org and Priorities also have standing because Defendants' enforcement of the

pen and ink rule "impair[s]" their "ability to engage in [their] own projects by forcing" them "to divert resources" to counteract the rule's harmful effects. *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014).

Vote.org has been forced to expend significant staff time and financial resources to respond to the pen and ink rule. Before the rule's enactment, Vote.org developed and operated a web application that allowed voters to complete an absentee ballot application online by uploading an image of their handwritten signature. SUMF ¶ 42; Hailey Dep. at 39:22–40:1. The web application would then allow voters to submit the signed form electronically. SUMF ¶ 42; Hailey Dep. at 39:2–13. With this tool, Vote.org helped roughly 8,000 Georgia voters request an absentee ballot in 2018. SUMF ¶ 44; Hailey Dep. at 37:20–38:8.

Because of the pen and ink rule, Vote.org has been forced to launch a print-and-mail program, through which Vote.org contracts with vendors to print, mail, and track physical absentee ballot applications. SUMF ¶ 46; Hailey Dep. at 42:10–19. The program cost the organization approximately $60,000 and a substantial number of staff hours to operate in Georgia in 2022. SUMF ¶¶ 49, 50; Hailey Dep. at 80:1–8, 135:5–136:25. It will cost considerably more to operate for a longer timeframe during future election cycles, as Vote.org intends to do. SUMF ¶ 56; Hailey Dep. at 163:8–23. Managing the print-and-mail program also requires the additional time and attention of several senior staff members at Vote.org, including

its COO and its partnerships staff, leaving them less time to work on other mission-critical projects like Vote.org's youth programs on college campuses; influencer and micro-influencer programs; and radio, text, and email campaigns. SUMF ¶ 51 (describing these programs); Hailey Dep. at 135:5–136:25. Diversion of resources away from these programs impairs Vote.org's ability to fulfill its mission of mobilizing voters and leaves fewer resources for the organization's get-out-the-vote efforts. *See* SUMF ¶ 54; Hailey Dep. at 165:7–25, 153:4–10.

Priorities, likewise, has diverted resources away from programs that further its core mission to respond to the pen and ink rule, and will be forced to continue to do so in the future if the rule is not enjoined. During the 2022 runoff election, for example, Priorities dedicated a million dollars to two digital advertising programs: the first was a voter protection program directing Georgians to a hotline that helps people understand their rights in case they encounter any difficulty voting. SUMF ¶ 61; Grimsley Dep. at 35:8–36:13. The second was a 20-day "get out the vote" advertising program that started running 12 days before early voting began, specifically to encourage people to apply early for their absentee ballot or develop an alternative plan to vote. SUMF ¶ 62; Grimsley Dep. at 35:8–36:13, 44:19–25. Over half of the million dollars allocated to these ad buys "was spent to extend the length of the" get-out-the-vote program—which started 12 days before early voting—to provide "extra runway" for voters to apply for their absentee

ballots and ensure they had adequate time to address any difficulties and make alternative plans to vote in light of the pen and ink rule. SUMF ¶¶ 62–64; Grimsley Dep. at 43:21–24, 45:19–46:3 (explaining, for example, that voters would need to account for the time it takes to print and scan or mail their application, particularly if they do not have access to a scanner or printer), 46:4–10, 61:3–8.

This additional expense required Priorities to divert funding from its voter protection ad program during the same election cycle; its Spring 2023 programming to encourage participation in local elections, which is "really important" to Priorities' mission of "establish[ing] habitual voting"; and from retaining staff in its paid media, creative, and analytics departments, SUMF ¶ 64; Grimsley Dep. at 60:5–61:8, 94:16–96:5, all of which impaired Priorities' ability to carry out its mission of educating and turning out voters. In future elections, Priorities will be forced to divert more staff time and financial resources to ensure Georgia voters are equipped to navigate the administrative hurdles imposed by the pen and ink rule. SUMF ¶ 66; Grimsley Dep. at 60:5–61:8, 94:16–95:20.

Vote.org and Priorities have thus suffered textbook organizational injuries sufficient to confer standing. *See Arcia*, 772 F.3d at 1340, 1341–42.

C. Vote.org and Priorities may enforce the rights of individual voters.

In addition to organizational standing, Vote.org and Priorities also have third-party standing to enforce the rights of their constituents in Georgia. A

plaintiff can establish third-party standing if it demonstrates: (1) an injury in fact to itself, (2) a close relationship to the third-party, and (3) a hindrance to the third-party's ability to assert its own interests. *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1042 (11th Cir. 2008). The Fifth Circuit recently found that Vote.org had third-party standing to vindicate the rights of individuals who used its web application. *Vote.org v. Callanen*, 89 F.4th 459, 472 (5th Cir. 2023). This Court should reach the same conclusion for both organizations.

As discussed above, Vote.org and Priorities have demonstrated injuries in fact to themselves. The organizations also satisfy the second part of the test because they have a close relationship with their constituents, who benefit from their work. Indeed, the organizations share with their constituents a core interest in ensuring that minority and overlooked voters in Georgia can build political power and become civically active. *See* SUMF ¶¶ 41, 58; Hailey Dep. at 35:14–18; Grimsley Dep. at 35:1–14. This "commonality of interests . . . demonstrates that [each organization is] 'fully, or very nearly, as effective a proponent of the rights'" of the voters they serve. *Fla. State Conf. of NAACP v. Browning*, No. 4:07-cv-402-SPM/WCS, 2007 WL 9697660, at *3 (N.D. Fla. Dec. 18, 2007), *aff'd* 522 F.3d 1153 (11th Cir. 2008) (quoting *Harris v. Evans*, 20 F.3d 1118, 1123 (11th Cir. 1994)). Vote.org and Priorities thus have a sufficiently close relationship with their constituent voters and are well-suited to represent their interests in challenging the

pen and ink rule. *See Vote.org*, 89 F.4th at 472 (finding "Vote.org's position as a vendor [of its web application] and voting rights organization is sufficient to confer third-party standing"); *Fla. State Conf. of NAACP*, 2007 WL 9697660, at *3 (finding third-party standing for organizations conducting voter registration activities).

Vote.org and Priorities also satisfy the third element of this test, as their constituents are hindered from protecting their own interests. The pen and ink rule imposes burdens that many voters will not become aware of until it is too late to obtain relief. *See*, *e.g.*, SUMF ¶¶ 92, 96; Stambler Dep. at 8:12–14, 24:14–17; 25:13–16; 25:23–27:2, 27:10–14, 33:7–8. When such burdens arise, "the election clock may not permit" injured voters "to assert their rights in time to protect their right to vote." *Fla. State Conf. of NAACP*, 2007 WL 9697660, at *3. "These are legitimate reasons for recognizing [the organizations'] standing to sue on behalf of non-member [voters]." *Id.*

D. Plaintiffs satisfy the traceability and redressability requirements of standing.

Because Defendants have "the authority to enforce" the pen and ink rule, and an "injunction prohibiting enforcement" would remedy their harms, Plaintiffs' injuries are traceable to Defendants and would be redressed by a favorable decision. *See Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021). For one, County Defendants are charged by O.C.G.A. § 21-

2-381(b) with assessing the sufficiency of each application, and it is undisputed that in practice County Defendants enforce the pen and ink rule. SUMF ¶¶ 19, 21; Brittain Dep. at 42:1–20; Williams Dep. at 82:20–25, 97:24–98:13. State Defendants, too, are specifically authorized to promulgate rules governing the absentee ballot application process and the pen and ink rule in particular. O.C.G.A. § 21-2-381(e). And they did so by adopting regulations requiring applicants to sign absentee ballot applications and permitting the use of "web-based" tools only to allow applicants to "*partially* complete" an application by "entering personal information," but making no allowance for digital signatures. Ga. Comp. R. & Regs. r. 183-1-14-.12(2).[2] Thus, an injunction against County and State Defendants would redress at least some of the harm caused by the pen and ink rule. *Moody v. Holman*, 887 F.3d 1281, 1287 (11th Cir. 2018) ("Article III . . . does not demand that the redress sought by a plaintiff be complete.").

II. The pen and ink rule violates the materiality provision.

In 1964, Congress amended Section 101 of the Civil Rights Act to prohibit the denial of the right to vote based on immaterial paperwork errors. In what is now codified as 52 U.S.C. § 10101(a)(2)(B), Congress provided:

[2] State Defendants also have a statutory duty to promulgate rules and regulations in order to "obtain uniformity in the practices and proceedings" of county officials, O.C.G.A. § 21-2-31, and the power to levy civil penalties and suspend county officials who fail to comply with the law, O.C.G.A. § 21-2-33.1, each of which further demonstrates their connection to the enforcement of the challenged law.

> No person acting under color of law shall –
>
> (B) 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 State law to vote in such election.

The elements of a materiality provision claim are accordingly: (1) the denial of any individual's right to vote, (2) because of an error or omission on any paper relating to an application or other act requisite to voting, (3) where such error or omission is not material in determining whether an individual is qualified to vote under state law. A straightforward application of the statute to the undisputed evidence compels the conclusion that the pen and ink rule violates the materiality provision.

A. The pen and ink rule denies Georgians the right to vote.

The Civil Rights Act's plain language confirms that the pen and ink rule denies individuals the right to vote. The statute defines "the word 'vote'" to include "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast." 52 U.S.C. § 10101(a)(3)(A), (e). This Court, too, has recognized that the term "vote" in this context includes not only the ultimate act of casting a ballot, but also all actions required to have the ballot counted. ECF No. 59 at 16. For absentee voters, that means successfully submitting an application. And contrary to

State Defendants' arguments, "the text of the Materiality Provision does not distinguish between . . . an act requisite to voting *absentee* and an act requisite to voting *in person*." *In re Ga. Senate Bill 202*, No. 1:21-mi-55555-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023) (emphasis in original) (cleaned up).

But even accepting State Defendants' theory that a law must *prevent* individuals from voting through any means before it implicates the materiality provision, ECF No. 36-1 at 16–17, the pen and ink rule would still be unlawful because it disenfranchises Georgians who are physically unable to vote in person. Plaintiffs identified two such individuals: Sarah Stambler, a DeKalb County resident currently attending college in Maryland, had her absentee ballot application rejected in the November 2022 general election because she signed it using an electronic signature. SUMF ¶ 91; Ex. 18, ("Stambler Dep.") at 21:1–22:24. Ms. Stambler did not have enough time to correct the error before the election, could not return to Georgia in the middle of the fall semester, and was unable to vote as a result. *See* SUMF ¶¶ 92, 96; Stambler Dep. at 8:10–14, 10:6–12, 14:25–15:3, 25:23–27:2, 33:7–8. Similarly, Dr. Joona Trapp, another DeKalb County voter, was visiting Texas to care for her elderly parents during the May 2022 primary when her application was rejected for failure to comply with the pen and ink rule. As a result, she was denied the opportunity to vote. SUMF ¶ 101; Ex. 19, ("Trapp Dep.") at 28:20–29:12, 31:14–18, 33:18–34:9. And members of the

Alliance and CWA, as discussed above, suffer from health-related challenges that make voting in person impractical. SUMF ¶¶ 80, 87; Andrews Dep. at 10:17–19; Isom Dep. at 22:18–23, 30:8–17.

Undisputed expert analysis further confirms that many Georgians whose absentee ballot applications are rejected because of the pen and ink rule ultimately do not vote. Plaintiffs' expert, Dr. Kenneth Mayer, reported that 35.2% of Georgia voters who experienced pen-and-ink rejections in a given election did not vote in that election. SUMF ¶ 90; Ex. 16 ("Mayer Rep.") at 6. Most of these rejected applicants were "habitual voters who [had] cast ballots in every general, statewide primary, or statewide runoff election" before their rejection, Mayer Rep. at 6.[3] State Defendants' expert, Dr. Justin Grimmer, did not dispute that "[t]here are people who experienced a pen and ink rejection and did not vote." SUMF ¶ 89; Ex. 15 ("Grimmer Dep.") at 33:7–8. In fact, Dr. Grimmer identified even *more* such voters than Dr. Mayer did. SUMF ¶ 90; Ex. 15 ("Grimmer Rep.") at 15–16 and tbls. 5&6. And it is undisputed that "[i]nterruptions to voting habits . . . can reduce the likelihood that someone votes," SUMF ¶ 77; Ex. 14 ("Mayer Dep.") at 56:23–25; *accord* Grimmer Dep. at 87:9–12 ("It is possible for a policy change to disrupt

[3] Dr. Mayer found that "[o]f the 19 individuals with a pen and ink rejection who did not ultimately vote in the election in which their applications were rejected, [13] voted in at least five other elections, one voted in 12 other elections, and one voted in 14 other elections." Mayer Rep. at 6.

habits that -- that cause someone not to vote, yes.").

It makes no difference that some counties may permit voters who experience pen-and-ink rejections to submit a cure affidavit and cast a provisional ballot. As this Court recognized, State Defendants "have not provided any support for their argument that the opportunity to cure an error rehabilitates any potential violation of the Materiality Provision," ECF 59 at 16, and for good reason: with that provision, Congress sought to eradicate immaterial requirements that only serve to increase the number of errors, and not simply to give voters multiple chances to comply. *See La Union del Pueblo Entero v. Abbott*, No. 5:21-cv-0844-XR, 2023 WL 8263348, at *21 (W.D. Tex. Nov. 29, 2023). Consistent with the statute's plain language, a denial occurs once election officials apply the pen and ink rule and refuse to provide an applicant with an absentee ballot that will be "counted and included in the appropriate totals of votes cast," 52 U.S.C. § 10101(e), regardless of any ameliorative actions a voter may take after the fact. *See In re Ga. Senate Bill 202*, 2023 WL 5334582, at *2, 9, 11 (finding date of birth requirement violates materiality provision notwithstanding "the opportunity to cure the defect").

In any event, the purported cure opportunity is illusory. Voters like Ms. Stambler and Dr. Trapp received cure affidavits far too late to complete and return them before the deadline. SUMF ¶¶ 96, 101; Stambler Dep. at 24:14–17, 25:13–16, 27:10–14; Trapp Dep. 34:16–37:5; *cf. Vote.org*, 89 F.4th at 487 (expressing "doubt

about the efficacy of an *ability* to cure") (emphasis in original). It is also outside the scope of SB 202's express authorization for curing applications with missing ID. *See* O.C.G.A. § 21-2-381(a)(1)(C)(i). In fact, the county boards testified that the Secretary of State instructed them (verbally) to issue cure affidavits and provisional ballots for applications that lacked a pen and ink signature only after this lawsuit was filed. SUMF ¶¶ 17, 22–23; Brittian Dep. at 63:20–66:22, 68:7–19; Williams Dep. at 112:13–113:8; *cf. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (explaining that voluntary cessation of unlawful conduct is generally insufficient to moot a case).

B. The materiality provision applies to absentee ballot applications.

The materiality provision extends to absentee ballot applications because it explicitly covers any "error or omission on any record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). An "absentee ballot application squarely constitutes a 'record or paper' relating to an 'application' for voting." ECF No. 59 at 17 (quoting 52 U.S.C. § 10101(a)(2)(B)). Submitting a successful absentee ballot application is an act "requisite to voting" for all Georgians who vote absentee, and particularly for those who must rely on absentee ballots to vote at all. *See supra*. And, again, this Court has explained that "the Materiality Provision does not distinguish between . . . an act requisite to voting *absentee* and an act requisite to voting *in person*." *In*

re Ga. Senate Bill 202, 2023 WL 5334582, at *10 (emphasis in original). *See also Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018), *reconsideration denied*, 1:18-CV-4776-LMM, 2018 WL 9943564 (N.D. Ga. Nov. 15, 2018); *La Union del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2023 WL 8263348, at *16-18 (W.D. Tex. Nov. 29, 2023).

C. The instrument used to sign an absentee ballot application is immaterial to determining an individual's eligibility to vote.

The pen and ink rule violates the materiality provision because the instrument a voter uses to sign their absentee ballot application—whether pen and ink, pencil, or a digital device—is immaterial to determining if they are qualified to vote. "[T]he Eleventh Circuit has held that in deciding whether an error or omission is 'material' in this context, a reviewing court must ask whether, 'accepting the error as true and correct, the information contained in the error is material to determining the eligibility of the applicant.'" *In re Ga. Senate Bill 202*, 2023 WL 5334582, at *8 (quoting *Browning*, 522 F.3d at 1175). Accordingly, if the error—here, that the application was signed by a digitized or imaged signature rather than by "pen and ink"—"is not material to determining whether the voter is eligible to vote, the law or procedure violates the Materiality Provision." *Id.*

There is no question that the specific instrument used to sign an absentee ballot application bears *no relation* to any of the qualifications to vote under Georgia law, which consist only of U.S. citizenship, Georgia residency, being at

least eighteen years of age, not having been adjudged incompetent, and not having been convicted of a felony. *Id.* (citing O.C.G.A. § 21-2-216). Notably, the determination of whether an individual is *qualified* to vote occurs through the voter registration process and is therefore complete before a voter ever receives an absentee ballot application. O.C.G.A. § 21-2-226(a) ("It shall be the duty of the county board of registrars to determine the eligibility of each person applying to register to vote in such county."); *see also* SUMF ¶ 8; Brittain Dep. at 20:12–18 (testifying that voter eligibility is determined when a person first registers to vote); Williams Dep. Tr. at 24:3–14, 25:16–21, 26:24–27:25, 33:15–34:5 (same); Lindsey Dep. at 23:2–26:4 (same). Defendants concede as much. They acknowledge that the pen and ink rule—or the method of signing an absentee ballot application—is *not* used to determine voter qualifications. *See* SUMF ¶¶ 35, 36; Lindsey Dep. at 26:5–10, 39:9–41:2; Brittian Dep. at 40:25–41:5; Smith Dep. at 40:19–41:1, 41:14–42:5, 70:16–71:9. And the County Boards admit that they cannot even determine with certainty whether some signatures are applied by pencil, stylus, or image capture. Brittain Dep. at 42:21–43:14.

But perhaps the most glaring indication that the signing instrument is immaterial is that the signature itself serves no election administration purpose. DeKalb County concedes that it *counts* applications with obviously incorrect—i.e., missing—signatures, even as it *rejects* applications with digital signatures. SUMF

¶ 20; Smith Dep. at 85:9–86:24; *cf. Migliori v. Cohen*, 36 F.4th 153, 163 (3d Cir.) (explaining that the fact that counties counted ballots with obviously incorrect dates disproved any argument that dates were material), *cert. granted, judgment vacated sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022). And even when county officials do require a signature, they do not use it to verify the applicant's identity. SUMF ¶ 35; Brittain Dep. at 40:25–41:5; Williams Dep. at 73:20–75:19; Smith Dep. 40:19–41:1, 41:14–42:5, 70:16–71:9. In fact, the Georgia Legislature created new identification requirements to do just that. *See* O.C.G.A. § 21-2-381(a)(1)(C)(i). These undisputed facts show that a voter's ability to sign their absentee ballot application in pen and ink is not material in determining their qualifications under Georgia law. *See Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006) (identifying using wrong "color of ink . . . in filling out the form" as example of immaterial omission).

The Fifth Circuit's determination that Texas's wet signature requirement for voter registration applications was material does not require the same result here. In *Vote.org v. Callanen*, 89 F.4th 459 (5th Cir. 2023), the Fifth Circuit held that a Texas law mandating that individuals sign their voter registration applications using their "original signature[s]" was material because the wet signature confirmed that the person registering to vote was "who they claim[ed] to be." 89 F.4th at 468, 489. There, the court cited evidence that the signature on a *voter*

registration form was "vital to 23etermine[ing] a voter's qualification to vote." *Id.* at 489. By contrast here, the voters involved have already registered and proven their qualifications. *In re Ga. Senate Bill 202*, 2023 WL 5334582, at *8. The instrument used to sign an absentee ballot application adds nothing to that determination. SUMF ¶ 8; Brittain Dep. at 20:12–18 (testifying voter eligibility is determined during registration); Williams Dep. at 24:3–14, 25:16–21, 26:24–27:25, 33:15–34:5 (same); Lindsey Dep. at 23:2–26:4 (same). Thus, whatever purpose is served by a pen and ink signature on a *registration* form cannot justify the same requirement on an absentee ballot application.[4]

Finally, the opinions offered by State Defendants' proposed expert, Dr. Aashish Srivastava, cannot rehabilitate the pen and ink rule. Not only is Dr. Srivastava, a professor from Australia, unfamiliar with the qualifications to vote and the absentee ballot application process in Georgia, *see* SUMF ¶ 37; Ex. 5 ("Srivastava Dep.") at 33:8–35:1, but he fundamentally misunderstood this case and that misunderstanding led him to answer an irrelevant question. Rather than analyze whether a pen and ink signature is material to determining voter

[4] After the Fifth Circuit's ruling in *Vote.org v. Callanen*, a Florida district court determined that a wet signature requirement for voter registration applications was material to voter qualifications. *See Vote.org v. Byrd*, --- F. Supp. 3d. ---, 2023 WL 7169095 (N.D. Fla. 2023). For the reasons explained, that ruling, which addresses a different phase of the voting process and is currently being appealed to the Eleventh Circuit, should similarly not guide the Court's analysis here.

qualifications (which he is not qualified to do), he erroneously believed this case was about the Uniform Electronic Transactions Act (UETA); as a result, he set out to determine whether UETA required the Georgia to allow electronic signatures on absentee ballot applications, which has nothing to do with the claim before the court. *See* SUMF ¶ 38; Srivastava Dep. at 88:3–7. Indeed, Dr. Srivastava conceded that, if allowed, "the function of [an] e-signature should be the same as [that of the] handwritten signature" on Georgia's absentee ballot application form. SUMF ¶ 39; Srivastava Dep. at 88:3–7, 174:22–175:3.

III. State Defendants' remaining defenses lack merit.

Unable to dodge the plain meaning of the materiality provision, State Defendants advanced various arguments in their motion dismiss that sought to nullify the law entirely. ECF 36-1 at 13–15, 24–25. The Court correctly rejected these arguments in denying their motion to dismiss and should do so again.

First, State Defendants' assertion that the pen and ink rule advances fraud prevention interests and ensures that voters "carefully digest" their absentee ballot applications is entirely irrelevant. *See* ECF 36-1 at 23. The Eleventh Circuit has made clear that the materiality provision forbids states from denying the right to vote based on paperwork errors immaterial to one's qualifications, even when the denial purportedly furthers other interests like fraud prevention. *See Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006); *see also Migliori*, 36 F.4th at 163

(finding state interest in fraud prevention "in no way helps the Commonwealth determine" qualifications); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006) (similar).

Second, State Defendants argued that the materiality provision cannot be enforced by a private right of action; but the Eleventh Circuit has already settled this debate. *Schwier*, 340 F.3d 1284, 1297 (11th Cir. 2003). This Court should once again decline State Defendants' invitation to ignore binding precedent. *See* ECF No. 59 at 14.

Third, State Defendants' argument that Congress has no power under Section 5 of the Fourteenth Amendment to enact legislation regulating absentee ballots also contradicts settled law. ECF No. 36-1 at 24–25. In *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970), the Supreme Court confirmed that Congress had the power to enact Section 202 of the Voting Rights Act, a provision that expressly regulates absentee ballots, 52 U.S.C. § 10502. And Congress's authority under the Fourteenth and Fifteenth Amendments to enact the materiality provision is similarly well-established. *See*, *e.g.*, *Vote.org*, 89 F.4th at 487 (holding Congress had the power to enact the materiality provision).

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to judgment as a matter of law on Count I of the Amended Complaint.

Dated: March 7, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment** has been prepared in accordance with the font type and margin requirements of LR 5.1, N.D. Ga., using font type of Times New Roman and a point size of 14.

Dated: March 7, 2024

/s/ *Uzoma N. Nkwonta*
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CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused to be electronically filed a copy of the foregoing **Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to counsel of record.

Dated: March 7, 2024

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