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.

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

STATE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case ***Page(s)***

Rules

Statutes

INTRODUCTION

Unable to establish standing or a violation of the Materiality provision of the Voting Rights Act (VRA), Plaintiffs' motion for summary judgment should be denied. The Georgia Alliance of Retired Americans (GARA) and Communications Workers of America Local 3204 Retired Members Council (RMC) have failed to identify a single member who was unable to vote because of the pen and ink rule adopted as part of Georgia's election integrity law (SB 202) at issue here, or who will be unable to comply going forward. Priorities USA (PUSA) and Vote.org have failed to establish diversion of resources—past or future—due to the rule and cannot assert third-party standing. And their alleged injuries are not traceable to or redressable by the Georgia State Election Board (SEB or State Defendants). Thus, all Plaintiffs have failed to show standing.

Even if Plaintiffs have standing, the VRA's Materiality provision does not apply. As Justice Alito has emphasized (without contradiction from any other Justice), "[w]hen a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.'" *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting from denial of the application for a stay) (quoting *Brnovich v. Democratic Natl. Comm.*, 141 S. Ct. 2321, 2338 (2021)). The Third Circuit recently reached the same conclusion: "[I]t makes no sense to read the Materiality Provision to prohibit enforcement of vote-

casting rules that are divorced from the process of ascertaining whether an individual is qualified to vote." *Pa. State Conf. of NAACP Branches v. Sec'y of State of Pa.*, No. 23-3166, 2024 WL 1298903, at *9 (3d Cir. Mar. 27, 2024). The pen and ink rule having not prevented anyone from voting, and even assuming the Materiality provision applies here, the pen and ink rule *is* material—because it furthers important State interests in confirming voter qualifications.

ARGUMENT

I. All Plaintiffs Failed to Satisfy the Three Standing Requirements.

As the Supreme Court has long held, "Article III of the Constitution restricts [the judicial power] to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). Accordingly, Plaintiffs here "must have '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (en banc) (citation omitted). Plaintiffs fail to satisfy any of these criteria.

A. Plaintiffs failed to show concrete injury.

Organizations, like individuals, must establish a distinct injury that is "concrete, particularized, and actual or imminent, rather than conjectural or

hypothetical." *Muransky*, 979 F.3d at 925 (footnote omitted). GARA and RMC lack standing because they have not "ma[d]e specific allegations that at least one identified member ha[s] suffered or [will] suffer harm." *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018) (cleaned up). And Vote.org and PUSA have failed to establish any diversion of resources or any other basis for standing in their own right.

1. GARA and RMC fail to show particularized injury.

Plaintiffs do not dispute that *none* of RMC's or GARA's members' absentee-ballot applications were rejected because of the pen and ink rule. *See* Doc. 159-1 ("Pls.' MSJ"); DRSUF[1] ¶¶ 73–75, 92–96 (Clancy 30(b)(6)14:20–16:8; Scott 30(b)(6) 57:3–18, 81:12–14, 118:3–11). Nor have they claimed that *any* members cannot comply with the rule going forward. Rather, they claim that members Stephan Isom, Teresa Simmons, and Walter Andrews must "expend additional time and money to obtain a printed absentee ballot application, sign it with pen and ink, and return the form to election officials." Pls.' MSJ at 4–6. But that does not remotely suggest they have or will be denied the right to vote for some immaterial error or omission on the absentee-ballot application.

To the contrary, each identified member affirmed that they could comply with the rule and never had a problem with it previously. *See* Doc. 156-2

[1] "DRSUF" refers to State Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts, which is being filed simultaneously with this brief.

("DSUF") ¶¶ 99–101, 111, 104, 107–09, 114 (Andrews 30:8–31:11,35:24–36:2, 40:20–41:5, 43:21–22; Simmons 19:12–23, 14:17–22, 29:6–9, 33:11–19; Isom 28:14–18); DRSUF ¶ 77, 80–88 (same). Indeed, Simmons not only complied with the law without incident before and after SB 202 but was unaware there had been any change prior to this lawsuit. DSUF ¶ 52 (Simmons 13:18–14:6); DRSUF ¶¶ 77, 84 (Simmons 14:12–22). Just as significant, Plaintiffs have not provided evidence that these members even have the ability to digitally sign or add an imaged signature to an application. DRSUF ¶ 88 (Andrews 35:10–13).

Because Andrews, Simmons, and Isom are of advanced age, they can submit one absentee-ballot application for all elections per election cycle. O.C.G.A. § 21-2-381(a)(1)(G); DRSUF ¶ 77 (Simmons 32:18–20, Andrews 9:19–24, Isom 28:19–21). And because all three already plan to vote by mail, they can apply up to 78 days before the first election in a cycle—alleviating concerns that voters must "hope [their ballots] arrive on time." Pls.' MSJ at 5; *see* O.C.G.A. § 21-2-381(a)(1)(A) (timeline).

Finally, none of the individuals faces a "certainly impending" disqualification because they lack a printer. *Ga. Republican Party*, 888 F.3d at 1202; *see* 52 U.S.C. § 10101. Contrary to Plaintiffs' suggestion (at 5–6), the pen and ink requirement does not create barriers for members that do not own printers. Having a printer is irrelevant to obtaining an absentee ballot. Voters often receive applications unsolicited from third-party advocacy groups and

can obtain an application by requesting one be mailed from their local election office. *See* O.C.G.A. § 21-2-381(a)(1)(C)(ii). Thus, Plaintiffs' attempts to rely on a speculative theory of injury fail to establish standing.

2. Vote.org and PUSA fail to show that they have diverted or will divert resources because of the pen and ink rule.

Contrary to their assertion, neither PUSA nor Vote.org has demonstrated past or future diversion of resources to protect a community injured by the pen and ink requirement. *See City of S. Mia. v. Governor of Fla.*, 65 F.4th 631, 639–640 (11th Cir. 2023). At most, as the Eleventh Circuit recently put it, Vote.org and PUSA "diverted resources to address fears of *hypothetical* future harm that is not certainly impending" and—at worst—diverted resources by "inflicting harm on themselves based on highly speculative' fears." *Id.* at 640 (cleaned up, emphasis added). Because they cannot "prove an injury from the law's actual application to the community the organization sought to support, any diversion was a 'self-inflicted' injury that [cannot] support standing." *Id.* at 639 (cleaned up).

To be sure, Vote.org recites various alleged harms relating to costs and staff time allegedly spent on its print-and-mail program. Pls.' MSJ at 9–10. But Vote.org utilizes this program in other states. *See* DSUF ¶¶ 165, 167 (Hailey 30(b)(6) 110:16–19, 138:23–139:2, 163:24, 164:2). So in response to SB 202, Vote.org's Georgia website was simply changed to the same layout

already designed for other states. DSUF ¶¶ 164–67 (Hailey 30(b)(6) 109:21–110:19, 138:23–139:2). It cannot be that every time a state passes new voting laws, organizations are injured by considering how to respond. Indeed, Vote.org does not deny that it updates its processes "continuously" for every state every election cycle. DRSUF ¶ 151 (Hailey 30(b)(6) 103:15). At most, Vote.org's staff were paid the same to focus on a slightly different task.

Similarly, Vote.org's claim that the program cost $60,000 is not only unsupported by any documentation but also Vote.org did not create the program *for Georgia*. Pls.' MSJ at 9; DSUF ¶¶ 165, 168–69 (Hailey 30(b)(6) 80:1–23, 110:16–19). Further, Vote.org is unable to identify any project it diverted resources *from* to cover this cost. DSUF ¶¶ 180–82 (Hailey 30(b)(6) 139:23–140:10, 142:25–147:1, 148:13–19, 151:12–152:10, 208:3–14). Such a showing is crucial to a party's standing on a diversion-of-resources theory. *See Jacobson v Fla. Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020).

PUSA's claims of harm suffer even more glaring flaws. Pls.' MSJ at 10–11. PUSA cites the additional time it ran an advertising campaign in Georgia's 2022 runoff election as harm. *Id.* But its spending on that campaign was within its normal range for statewide elections. DSUF ¶ 141 (Grimsley 30(b)(6) 105:3–5). PUSA likewise fails to corroborate (at 11) that it diverted the funds from other projects, such as its Spring 2023 local election programming in Wisconsin. *See Jacobson*, 974 F.3d at 1250; DSUF ¶ 134 (Grimsley 30(b)(6)

93:19–94:2 ("I don't have any documents that show that reasoning[.]"),135:2–4 (no documents to "demonstrate the diversion of resources")).

Moreover, *none of these ads mentioned the pen and ink requirement.* DSUF ¶ 132 (Grimsley 30(b)(6) 36:10–24, 44:2–6, 64:11–19, 97:18–24). There is thus no basis to assert the ad buy was extended to permit voters to "make alternative plans to vote in light of the pen and ink rule." Pls.' MSJ at 11. Though aware of the pen and ink rule, PUSA could not even confirm that the rule was specifically discussed—let alone considered—when it made the Georgia ad buy in 2022. DSUF ¶¶ 138–39 (Grimsley 30(b)(6) 74:3–75:2). That failure destroys its argument.

B. Vote.org and PUSA lack third-party standing and a statutory cause of action.

For two reasons, Vote.org and PUSA also lack third-party standing to assert the rights of Georgia voters. First, their alleged injury lacks a causal connection to any injury to voters. *Mata Chorwadi, Inc. v. City of Boynton Beach*, 66 F.4th 1259, 1266 (11th Cir. 2023). In this Circuit a litigant asserting third-party standing must show that "the statutory provision at issue imposed a duty on the litigant and the litigant's compliance with that duty indirectly violated third parties' rights." *Id.* Thus, Vote.org and PUSA's compliance must cause both their own injury and result in an injury to Georgia voters. *Id.*

But here, Plaintiffs have established no "causal connection between"

their compliance and Georgia voters' alleged injuries. *Id.* ("[T]here is no legal duty imposed on [Plaintiffs] that indirectly violates third parties' rights when [Plaintiffs] comply."). PUSA neither complied with nor violated nor referenced the pen and ink requirement with its ad buys, and Vote.org's compliance with the statute has not, on this record, led to the disqualification of a single Georgia voter. *See* DSUF ¶¶ 187–91(Hailey 30(b)(6) 26:12–27:6, 170:18–172:7, 185:15–186:5, 186:13–21, 186:22–187:12).

Second, Vote.org and PUSA also failed to identify voters with whom they have a "close relationship"—or any relationship. Third-party litigants must establish (1) "a 'close' relationship" between a plaintiff and supposedly represented third parties, and (2) a "'hindrance' to [the third parties'] ability to protect [their] own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *accord Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1042 (11th Cir. 2008). Yet neither PUSA nor Vote.org have shown a "close relationship" with *any* impacted Georgia voter. *Mata Chorwadi, Inc.*, 66 F.4th at 1266; DSUF ¶¶ 145, 187–90 (Grimsley 30(b)(6) 80:2–15 (PUSA unaware of anyone burdened by rule); Hailey 30(b)(6) 26:12–27:6, 170:18–172:7, 185:15–186:5, 186:13–21, 187:9–12 (same for Vote.org).[2]

[2] Plaintiffs' reliance on *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), is misguided. Pls.' MSJ at 12. First, the Eleventh Circuit never affirmed the district court's holding on third-party standing. *See*

Even assuming Vote.org and PUSA had third-party standing, they lack a valid cause of action under the Materiality provision because the plain language protects "the right of any *individual* to vote"—not organizations. 52 U.S.C. § 10101(a)(2)(B) (emphasis added); *see Aaron Priv. Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1339–40 (11th Cir. 2019) (plaintiff must show statutory standing after third-party standing). Thus, their claims should be dismissed.

C. Any alleged injuries are neither traceable to nor redressable by State Defendants, and the SEB is not a proper defendant.

Plaintiffs have also failed to establish traceability or redressability as to State Defendants. Traceability and redressability do not arise from State Defendants' authority to promulgate *regulations* governing absentee-ballot applications. Pls.' MSJ at 14. *First*, State Defendants have no enforcement authority to issue regulations inconsistent with Georgia law, and they can only impose penalties on county officials who actually violate Georgia law. *See* O.C.G.A. § 21-2-381(e) (permitting the SEB to issue regulations only "for the implementation" of the statute), § 21-2-33.1(a) (limiting enforcement power to

Browning, 522 F.3d at 1159 n.9. Second, the district court's decision there would permit any organization to assert generic interests with any identifiable group to have third-party standing. But in this Circuit "[a] litigant ordinarily may not assert the right of a third party," *Lodge v. U.S. Att'y Gen.*, 92 F.4th 1298, 1303 (11th Cir. 2024), absent unusual closeness such as, for instance, landlord-tenant, restaurant-patron, or doctor-patient relationships, *see Young Apartments*, 529 F.3d at 1042; *Mata Chorwadi, Inc.*, 66 F.4th at 1266.

"directing compliance with this chapter"); *see also Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1202–03 (11th Cir. 2021) (defendants lack authority to punish *compliance* with state law). Plaintiffs' citation to the promulgation of rules permitting the use of web-based tools is both unrelated to the pen and ink requirement and does not show that State Defendants could issue regulations in *violation* of state law. Pls.' MSJ at 14.

Second, Plaintiffs concede that "*County* Defendants enforce the pen and ink rule" by processing absentee-ballot applications. *Id.* at 13–14; *see* O.C.G.A. § 21-2-384(a)(2); *Ga. Republican Party v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 WL 7488181, at *2–3 (11th Cir. Dec. 21, 2020) (unpublished) (denying emergency motion for stay because unable to "order a nonparty county official to do something contrary to state law"). But as Plaintiffs well know, County Defendants are not under the control of State Defendants.

Third, Plaintiffs' standing argument fails because "it must be the effect of the court's judgment on the *defendant*—not an absent third party—that redresses the plaintiff's injury" at least in part. *Jacobson*, 974 F.3d at 1254 (quoting *Lewis v. Governor of Ala.,* 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc) (general authority is insufficient to find redressability)). And on that point, Plaintiffs' reliance on *Moody v. Holman*, 887 F.3d 1281 (11th Cir. 2018) is misplaced. Pls.' MSJ at 14. There, the Eleventh Circuit held that an inmate's injury was redressable when a favorable decision would delay but not

cancel his execution. *Id.* at 1287. While redress need not be complete, *id.*, it must still exist. Here, an order aimed at State Defendants will not provide any relief because it would not alter any county's obligation to apply the statutory pen and ink requirement. Indeed, Plaintiffs do not even identify what order would redress their alleged harm—would it mean no signature is required (although they do not challenge the requirement to sign the oath), would a false name count, perhaps a typed signature, or some other potential way they may want the Court to legislatively rewrite the signature requirement found in Georgia law? Even so, State Defendants can give Plaintiffs no relief, and Plaintiffs have not identified how their alleged harms are traceable to or redressable by State Defendants.

Finally, the SEB should be dismissed based on sovereign immunity. Neither the Supreme Court nor the Eleventh Circuit has ever held that Congress abrogated sovereign immunity for suits invoking the Materiality provision. And other courts have held that, although individual state actors may be sued in their official capacities, sovereign immunity has not been abrogated to allow suit against state entities. *Tex. Democratic Party v. Hughs*, 860 F. App'x 874, 877 n.3 (5th Cir. 2021) (unpublished) ("Congress has not abrogated sovereign immunity for [52 U.S.C. § 10101(a)(2)(B)] claims[.]"); *Liebert v. Wisc. Elections Comm'n*, No. 23-CV-672-JDP, 2024 WL 181494, at *3 (W.D. Wis. Jan. 17, 2024) (dismissing state election board due to sovereign

immunity).

Thus, at a minimum, the SEB must be dismissed. But, for reasons explained earlier, *all* of the other State Defendants must be dismissed as well.[3]

II. Defendants Are Entitled to Summary Judgment on the Merits.

Standing aside, State Defendants are entitled to summary judgment on the merits. Plaintiffs' argument simply assumes that the state can place no requirement on any document related to voting that requires any information beyond age, residency, and citizenship. Pls.' MSJ at 15. But the VRA's Materiality provision applies only to determining voter qualifications, not to voting mechanics. *See* 52 U.S.C. § 10101(a)(2)(B).

This is confirmed by a recent opinion issued by Justice Alito—without contradiction from any other Justices—which set out the elements of a Materiality provision claim as follows: (1) the proscribed conduct must be performed by a person who is "acting under color of law"; (2) it must have the effect of "deny[ing]" an individual "the right to vote"; (3) this denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "related to [an] application, registration, or other act requisite

[3] Plaintiffs also lack a private right of action. To be sure, they state that the Eleventh Circuit has held the Materiality provision provides a private right of action. Pls.' MSJ at 25. But respectfully, State Defendants believe the Eleventh Circuit erred. *See* Doc. 156-1 at 23–25. And State Defendants will urge a reconsideration of *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), in an appropriate appellate proceeding.

to voting"; and (5) errors or omissions must not be "material in determining whether such individual is qualified under State law to vote in such election." *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from denial of application for a stay) (quoting 52 U.S.C. § 10101(a)(2)(B)); *see NAACP Branches*, 2024 WL 1298903 at *5 (adopting Justice Alito's test). Only "error[s] or omission[s] … not material in determining whether such individual is qualified under State law to vote in such election" count. *Vote.org v. Byrd*, No. 4:23-cv-111-AW-MAF, 2023 WL 7169095, at *5 (N.D. Fla. Oct. 30, 2023) (citing 52 U.S.C. § 10101(a)(2)(B)) (pending appeal). The Eleventh Circuit has likewise held that such a claim turns on whether, "accepting the error as true and correct, the information contained in the error is material to determining the eligibility of the applicant" under state law. *Browning*, 522 F.3d at 1175 (cleaned up).

Here, even assuming the Materiality provision applies to absentee voting per se, *In re Ga. Senate Bill 202*, No. 1:21-mi-55555-JPB, 2023 WL 5334582 (N.D. Ga. Aug. 18, 2023) (pending appeal),[4] State Defendants are entitled to

[4] State Defendants maintain that the Materiality provision does not apply to applications to absentee voting per se. As Justice Alito recently explained (without contradiction from any other Justice), the meaning of "record or paper" "related to [an] application, registration, or other act requisite to voting" attaches to the right to vote per se—not the ability to vote in any particular way—disregarding procedural requirements. *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting from denial of the application for a stay); *accord State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, No. 23-3166, 2024 WL 1298903 at *6 (3d Cir. Mar. 27, 2024) ("[T]he text tells us the Materiality Provision targets laws that restrict who may vote. It does not

preempt state requirements on how qualified voters may cast a valid ballot."). And here, Plaintiffs admit (at 22-23), that requesting an absentee ballot does not "determin[e] whether such individual is qualified under State law to *vote*." *See NAACP Branches*, 2024 WL 1298903, at *7 ("Because the 'in determining' phrase, as explained, makes clear the Materiality Provision applies to determinations that affect a voter's eligibility to cast a ballot, its application necessarily is limited to "record[s] or paper[s]" used in that process." (citing 52 U.S.C. § 10101(a)(2)(B))). That should be the end of the argument.

The Third Circuit, moreover, recently found there was no violation of the Materiality provision when a ballot is rejected because of a voter's failing to follow procedures for casting an absentee-by-mail ballot (there, dating the envelope). That is because "[a] voter whose ballot is set aside because of [a failure to comply with a procedural requirement] has previously been determined to be eligible and qualified to vote the election." *Id.* at *9 (cleaned up). Thus, the rejection was not a determination of "eligibility" within the purview of the Materiality provision. And the same is true here.

In their discussion of caselaw, Plaintiffs rely on distinguishable cases. Initially, Plaintiffs fail to mention that *La Union del Pueblo Entero v. Abbott*, No. 5:21-cv-0844-XR, 2023 WL 8263348, at *21 (W.D. Tex. Nov. 29, 2023), has been stayed by the Fifth Circuit because "Appellants are likely to succeed on the merits," because states may apply at least as much scrutiny to absentee voting as they do to in person voting. *See United States v. Paxton*, Case No. 23-50885 at *7 (5th Cir Dec. 15, 2023) [Docs. 22 (Mot. for Stay), 31 (Order Granting Temporary Stay), 80 (Order Granting Stay Pending App.)]. This is no surprise, as the district court bizarrely found that errors in a driver's license number on the absentee-ballot application or return envelope was somehow "immaterial." *La Union del Pueblo Entero*, 2023 WL 8263348, at *14 ("It is self-evident that a voter's ID number is not material to her eligibility to vote under Texas law. Indeed, by itself, a voter's DPS number or SSN4 cannot offer any information about a voter's substantive eligibility to vote…"). Yet, under Eleventh Circuit precedent, accepting an erroneous identification number as true would mean the person was not who they claimed to be, a very material "error." *NAACP v. Browning,* 522 F.3d 1153, 1175 (11th Cir. 2008).

Likewise distinguishable are pre-SB 202 decisions where state law did not impose the requirements at issue. *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324 (N.D. Ga. 2018) (following *Martin*); *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wisc. 2021) (explaining that *Martin* "held that the county's decision [pre-SB 202] was inconsistent with state law"

summary judgment on the merits for two independent reasons: (a) Plaintiffs have not established that anyone has been or is likely to be denied the right to vote as a result of the pen and ink requirement, and (b) in any event, the pen and ink requirement is material as a matter of law.

A. The pen and ink rule has not denied and does not deny anyone the ability to vote.

Plaintiffs assert that the pen and ink rule violates the Materiality provision because it denies individuals the right to vote. Pls.' MSJ at 15–19. But it does no such thing. No Plaintiff could identify a single voter denied the right to vote in *any* election since the pen and ink requirement was enacted. DSUF ¶¶ 73–78 (Clancy 30(b)(6) 14:20–16:8, 36:18–37:4), 92–97 (Scott 30(b)(6) 25:23–24, 78:8–24, 81:12–24, 118:3–11), 144–45 (Grimsley 30(b)(6) 63:14–25, 80:2–15), 187–89 (Hailey 30(b)(6) 26:12–27:6, 170:18–172:7, 187:9–12), 191 (Hailey 30(b)(6) 197:13–20, 199:3–200:5, 200:6–17). Unable to identify any members, Plaintiffs point to Ms. Stambler and Ms. Trapp as people "denied" the right to vote because of a pen and ink signature violation. But these allegations misstate the undisputed evidence.

Plaintiffs err at the outset about why these individuals did not vote. It is simply not true that Stambler, a senior at the University of Maryland, "was

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and voting "information [must be] uniformly required across the State."). "*Martin* isn't instructive" here, where a pen and ink signature is *uniformly required* by state law. *Thomsen,* 574 F. Supp. 3d at 636.

unable to vote" because of her electronic signature rejection. Pls.' MSJ at 16. She submitted an absentee-ballot application for the November 2022 election on September 19, 2022, with a digital signature, despite *knowing* a pen and ink signature was required. DRSUF ¶ 91, 94 (Stambler 20:21–22:14, Stambler Ex. 3). Two days later, on September 21, 2022, DeKalb County mailed her a notice of deficiency, cure affidavit, and provisional ballot. Stambler returned her absentee ballot (issued on October 11, 2022), but not her cure affidavit. She failed to return the cure affidavit because she did not want to enter the campus library she walked past almost every day to photocopy her driver's license. *Id.* ¶¶ 91, 94–95 (Stambler 22:15–19, 27:10–28, 37:3–8, 37:24–38:23, Stambler Ex. 3, 4). Of course, she could have taken a photo of her driver's license and emailed it with the completed cure affidavit. *Id.* (Brittian 30(b)(6) 81:23–82:1). But she didn't do that, either.

For the December 2022 runoff election, Stambler submitted an absentee-ballot application *that she signed in pen and ink.* Stambler was issued an absentee ballot on November 19, 2022, but claims it only arrived right before the December 6, 2022 election, without enough time to return it. *Id.* (Stambler 18:4–13, 30:23–31:2), Stambler Ex. 2, 3). Stambler claims that the postal service was notoriously slow delivering mail to her on-campus apartment. *Id.* (Stambler 24:24–25:2). But that is an issue unrelated to the pen and ink rule.

Plaintiffs likewise incorrectly recount Trapp's story. For the May 2022

primary election, Trapp's application was denied because she used an electronic signature, but she was then given a cure affidavit and provisional ballot. *Id.* at 100–01 (Trapp at Ex. 3 (mailing dates of April 26 and 28, respectively)). Trapp timely returned the cure affidavit, but she did not return her ballot until *after* the election. *Id.* (Trapp 35:17–37:10; Mayer Ex. 3). That failure cannot be attributed the pen and ink requirement.[5]

Plaintiffs also misrepresent the expert report of Dr. Grimmer to claim voters were denied the right to vote *because of* the pen and ink rule. Pls.' MSJ at 17. But, as Dr. Grimmer concluded, it is a logical fallacy to find causation where, as here, none has been shown.[6] DSUF ¶¶ 211–14, 216 (Grimmer Dep. 33:15–18, 72:12–73:7, 77:4–7, 97:9–98:16; Mayer Resp. at 5.). Nor do Plaintiffs have any evidence showing that the challenged provision caused anyone not to

[5] And in any event, Trapp is no longer a Georgia resident and has no intent to return. DRUSF ¶ 99 (Trapp 11:2–18, 12:14–13:3).

[6] Dr. Grimmer identified 11 people statewide for the November and December 2022 elections (none were found in the primaries) who did not receive a ballot after a pen and ink denial and did not vote, constituting only 0.00014% of registered Georgia voters. DSUF ¶¶ 211–212, 216 (Grimmer Rep. ¶ 10). Of those, one was a UOCAVA voter, so the failure could not be attributed to SB 202. *Id.* at 195, 212 (Grimmer 97:9–23). Yet another applied for an absentee ballot after the deadline (as did two who still voted). DRSUF ¶ 89 (Grimmer 98:17–99:2. Of the remaining 9, there is no way to determine why they ultimately did not vote given the other myriad options for voting. DSUF ¶¶ 213–216 (Grimmer 33:15–18, 72:12–73:7, 77:4–7; Grimmer Rep. ¶¶ 29–30; Mayer 43:13–19, 57:1–7 (cannot state the pen and ink rule "contributed even one percent" to not voting)).

vote, let alone disqualified anyone from voting. *Id.* ¶ 214 (Mayer 38:17–39:5; Grimmer 21:14–21).

Contrary to Plaintiffs' claims, moreover, the ability to cure an error on the application directly relates to whether voters were denied the right to vote. Pls.' MSJ at 18–19. It is undisputed that the counties timely notify voters of deficiencies and the opportunity to cure. DSUF ¶ 51 (Brittian 30(b)(6) 37:14–19 ("If an application is rejected, the voter is notified. You know, we give them a call."), 45:13–17 (notification must be given within three days), 80:5–81:11; Williams 30(b)(6) 60:13–18, 84:10–14; Smith 30(b)(6) 59:20–60:4). Further, the Eleventh Circuit has recognized that a cure process can mitigate claimed adverse effects of procedural requirements. *Greater Birmingham Ministries v. Sec'y of State for Ala.,* 992 F.3d 1299, 1336 (11th Cir. 2021). Indeed, it is telling that the only examples Plaintiffs can provide to attack the cure process include Stambler, who, as noted above, chose not to return the cure affidavit even though she had multiple ways of doing so, and Trapp, who timely completed and returned her cure affidavit but simply returned her completed ballot too late.[7] DRSUF ¶ 91 (Stambler 28:4–14, 37:3–8, 37:24–38:4, 37:3–8, 37:24–

[7] As both Dr. Mayer and Dr. Grimmer explained, several voters who had an absentee-ballot application rejected due to a pen and ink violation chose to vote in person, whether they received an absentee ballot or not. DRSUF ¶ 20 (Grimmer Rep. ¶ 15 & n.4, ¶ 27 & tbl. 6); *id.* ¶ 89 (Grimmer Rep. ¶ 29); DSUF ¶¶ 192–194 (Mayer Rep. at 5–6, tbl. 2; Mayer 49:24–50:4, 58:19–25, 67:21–68:6, 116:2–17).

38:23); *see also id.* (Brittian 30(b)(6) 81:23–82:1); *id.* at 101 (Trapp 36:18–37:9).

Finally, Plaintiffs falsely claim that the Georgia's Secretary of State's instruction to counties to provide for a provisional ballot and cure affidavit in response to pen and ink rejections is merely a "litigating position" that Georgia may rescind once the case is concluded. Pls.' MSJ at 19 (citing *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167 (2000)). But the curing process, including cure affidavits, had been used to correct "failure[s] to sign the oath" and "invalid signature[s]" well before this lawsuit, and before SB 202 was even drafted. O.C.G.A. § 21-2-386 (2020). Indeed, Gwinnett County confirms it arrived at the cure process through "review of the code and review of the requirements of the application." DRSUF ¶ 22 (Williams 30(b)(6) 112:6–12).

B. Plaintiffs improperly discount Georgia's legitimate interests in ensuring voters are who they claim to be.

Assuming the Materiality provision applies to the pen and ink requirement, the bar for materiality is low, requiring only "some measure of fit." *Vote.org v. Callanen*, 89 F.4th 459, 485 (5th Cir. 2023). And States have "considerable discretion in deciding what is an adequate level of effectiveness" to justify a measure. *Id.* Indeed, the U.S. Supreme Court has long recognized that election codes may properly contain provisions that "govern[] … the voting process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[C]onstitutional law, compels the

conclusion that government must play an active role in structuring elections."); *see also Curling v. Raffensperger*, 50 F.4th 1114, 1122 (11th Cir. 2022) ("the Constitution charges States, not federal courts, with designing election rules"). This certainly applies to absentee-by-mail ballot applications.

1. Upholding a wet signature requirement in Texas, the Fifth Circuit held that the requirement is material if it "meaningfully, even if quite imperfectly, corresponds to the substantial State interest of assuring that those applying to vote are who they say they are[.]" *Vote.org*, 89 F.4th at 489. This is even more significant in the context of absentee-ballot applications where a live ballot is sent to the requester at an address of their choice. Of course, the court "must give weight to a state legislature's judgment when it has created 'evenhanded restrictions that protect the integrity and reliability of the electoral process.'" *Id.* (quoting *Crawford*, 533 U.S. at 189–90). And that is amply true of the pen and ink requirement at issue here.

On that point, State Defendants have presented ample evidence that the pen and ink signature rule protects Georgia voters and elections, including that requiring such a signature ensures that voters take the application more seriously than if they could sign digitally, and ensures that others are less likely to apply unlawfully on behalf of someone else. DSUF ¶¶ 21–24, 32–36, 38 (Lindsey 30(b)(6) 35:22–36:22, 44:3–9, 45:3–22, 49:11–15; Germany Decl. ¶¶ 33–37; Srivastava 31:7–16, 53:16–25, 188:1–17, 208:23–209:12; Srivastava

Rep. ¶¶ 6, 62-73, 77). Plaintiffs barely address the weighty state interests supporting the rule, and when they do they dismiss them as irrelevant rather than unjustified. Pls.' MSJ at 20–25.

And those interests cannot be so lightly dismissed: Although a voter's qualification to vote is determined at registration, a registered voter's identity (and therefore the individual's qualifications) must be verified when seeking to vote because it is possible the voter's qualifications have changed. Even though the signature is not matched against the voter's signature on file, the signature itself is a material part of the process of identifying the voter. DSUF ¶¶ 19–20, 22 (State Defs.' First Interr. Resp. Nos. 1 & 2; Brittian 30(b)(6) 82:25–83:4; Smith 30(b)(6) 101:11–102:1). This is because the voter, by signing the document, affirms the person is who he or she claims to be. *Id.* ¶ 31 (Brittian 30(b)(6) 82:25–83:4; Smith 30(b)(6) 35:11–19, 70:16–23, 101:11–22); *Vote.org*, 89 F.4th at 489–90.

As Dr. Srivastava showed, signing a physical document creates a psychological effect that increases voter honesty, in the same way that requiring witnesses to swear an oath verifies testimony. DSUF ¶¶ 32, 35 (Srivastava Rep. ¶¶ 64, 66); *see* 27 Fed. Prac. & Proc. Evid. § 6042 (2d ed.) (oath "provides a powerful psychological stimulant for the witness"). It also protects voters against others who would request absentee ballots on their behalf without their permission. For example, a computer bot could download and

digitally sign absentee-ballots requests for unaware and vulnerable voters. DRSUF ¶ 21 (Srivastava Rep. ¶ 72–73 (noting dangers of artificial intelligence and data breaches for fraud using electronic signatures)).

Plaintiffs grossly misrepresent Dr. Srivastava's opinions by claiming he merely analyzed the acceptability of an electronic signature under the Uniform Electronic Transactions Act (UETA). Pls.' MSJ at 23–24. But Dr. Srivastava's report states its purpose is "to analyze the potential impact of the signature oath requirement of SB 202, specifically requiring a voter to sign an absentee ballot application with pen and ink." DSUF ¶ 38 (Srivastava Rep. ¶ 1). His analysis reviewed UETA cases to trace "the rejection of electronic signatures when it comes to documents related to state election laws," but it does not stop there. *Id.* (Srivastava Rep ¶ 6). And he concluded that UETA does not require electronic signatures, that there are multiple reasons states reject electronic signatures, particularly in the voting context, and that the handwritten signatures are superior to electronic signatures for promoting the integrity and perception of legitimacy of the absentee-by-mail process. *Id.* (Srivastava Rep ¶¶ 18, 25–56, 60–71, 82).

Although Plaintiffs pointed to Dr. Srivastava's statement that both electronic and handwritten signatures serve the "same function," he never said they do so equally. Dr. Srivastava concluded instead that "Georgia has a strong interest in requiring a handwritten signature as part of its absentee

ballot application." *Id.* ¶ 39 (Srivastava Rep. ¶ 6). And the Fifth Circuit has agreed: "applying an original signature to a voter registration form carries 'solemn weight' that an imaged signature does not. [A state] is allowed to have doubts about technological substitutes." *Vote.org*, 89 F.4th at 488–89. As noted above, this is even more important in the absentee-ballot application process. And Plaintiffs do not dispute this uncontroverted evidence.

For all these reasons, it is "implausible that federal law bars a State from enforcing vote-casting rules"—like the pen and ink rule here—that it has deemed necessary to administer its elections." *NAACP Branches*, 2024 WL 1298903, at *9.

2. Plaintiffs' claim that a state's legitimate interests are irrelevant to materiality is also without merit. Pls.' MSJ at 24–25. *Schwier v. Cox*, while holding that required disclosure of SSNs was specifically prohibited by the *Privacy Act* at the time, acknowledged the state's interest in fraud deterrence. 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285, 1286 (11th Cir. 2006). And, although the out-of-circuit district court in *Wash. Ass'n of Churches v. Reed* acknowledged that courts ought to consider state interests, its holding lacks limiting principles and reads the Materiality provision too broadly. 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006). Indeed, it is hard to see how even Georgia's judicially approved photo ID requirements would be material under that court's standard, which has been rejected by the Eleventh

Circuit. *See Greater Birmingham Ministries,* 992 F.3d 1299, 1337 (11th Cir. 2021) (upholding in-person and absentee voter ID requirements). Contrary to Plaintiffs' theories, moreover, the Eleventh Circuit has held that the Materiality provision "does not establish a least-restrictive-alternative test[.]" *Browning*, 522 F.3d at 1175.

Plaintiffs attempt to escape this conclusion by asserting that the "specific instrument used to sign an absentee ballot application bears *no relation* to the qualifications to vote under Georgia law." Pls.' MSJ at 20. But this argument was squarely rejected in *Vote.org v. Byrd* because a wet signature "carries a solemn weight" justified for registering as a voter. 2023 WL 7169095, at *6; *see also Vote.org*, 89 F.4th at 488–89. Moreover, the need to verify identity applies not just to registration and casting a ballot, but also to absentee-ballot requests. Here, Dr. Srivastava's unrebutted evidence demonstrates that the pen and ink requirement increases the effectiveness of an oath and confirms the voter's identity and prior qualifications. Pls.' MSJ at 23; DRSUF ¶ 38 (Srivastava Rep. ¶¶ 60–82). This is a not a "wrong color ink" situation, Pls.' MSJ at 22, but a substantive and material requirement to hand sign the application oath with pen and ink, not unlike the check box requirements upheld in *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1212–14 (S.D. Fla. 2006). And it has a powerful effect in protecting the integrity of Georgia elections.

CONCLUSION

Plaintiffs claim injury from a provision they cannot show denied a single voter's right to vote. They also seek relief from the SEB that it cannot provide, bring suit under a provision that does not apply, and advance a theory of the Materiality provision far beyond the limits and purpose of the VRA. For reasons discussed in prior briefing, the Materiality provision does not apply to the pen and ink requirement, but even if it did, the requirement is material to determining a voter's qualification and justified by Georgia's interests in ensuring voters are who they claim to be. The court should deny Plaintiffs' motion for summary judgment, and grant State Defendants' motion.

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CERTIFICATE OF COMPLIANCE

Under L.R. 7.1(D), the undersigned hereby certifies that the foregoing 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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