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' CONSOLIDATED RESPONSE TO STATE AND DEKALB DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants' concession that voter "qualifications are determined at registration" resolves this case. *See* ECF No. 156-1 at 32.[1] They do not use the pen and ink signature on an absentee ballot application to assess the applicant's qualifications—they already determined qualifications when registering the applicant to vote. In fact, the record confirms that Defendants do not use pen and ink signatures for *any* reason, as SB 202 abolished the signature matching procedure that Georgia election officials previously used to verify each absentee voter's identity.

Unable to contest these commonsense conclusions, Defendants advance radical theories of standing and make assumptions contradicted by record evidence. They argue, for instance, that Plaintiffs lack standing because they cannot identify anyone who was disenfranchised by the pen and ink rule. But it's well settled that a plaintiff does not need to be disenfranchised to challenge a voting law. *See, e.g.*, *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009). And even so, their assertion is incorrect: Plaintiffs identified at least two witnesses—Sarah Stambler and Dr. Joonna Trapp—who were prevented from voting because of the

[1] DeKalb County Defendants joined State Defendants' motion for summary judgment in addition to filing their own. ECF No. 178 at 1–2. Intervenor-Defendants also joined State Defendants' motion. ECF No. 158. This brief responds to all arguments in State Defendants' motion and DeKalb Defendants' motion and refers to all Defendants collectively, except where otherwise noted.

pen and ink rule, and data from Fulton, DeKalb, Cobb, and Gwinnett Counties suggests there are many more.

Next, Defendants pivot from ignoring Eleventh Circuit precedent to suggesting this Court reject it entirely. Relying solely on a case applying § 2 of the Voting Rights Act, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021), Defendants encourage the Court to take "a fresh look" at questions that the Eleventh Circuit has conclusively resolved—whether private plaintiffs may enforce the materiality provision via § 1983. ECF No. 156-1 at 24. But the Court must decline that invitation because "district courts in this Circuit must apply [Eleventh Circuit] caselaw when addressing issues of federal law," *Drazen v. Pinto*, 74 F.4th 1336, 1340 n.2 (11th Cir. 2023), and the Eleventh Circuit has held that private plaintiffs may enforce the materiality provision, *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003).

Defendants' disregard for precedent continues as they advance an exceedingly narrow construction of the materiality provision that this Court—among others—has repeatedly rejected. Under Defendants' reading, the materiality provision cannot invalidate the pen and ink rule because Georgia is not obligated to provide absentee voting in the first place. But they make no attempt to reconcile their theory with the provision's plain text, which allows no distinction between absentee ballots and other methods of voting. When states give voters the opportunity to vote by mail or

otherwise, they can no more condition that right on immaterial paperwork errors than poll taxes or literacy tests.

Finally, the Court should reject Defendants' invitation to draw an adverse inference from Plaintiffs' decision to challenge the pen and ink rule specifically, rather than attack the entire signature requirement. The Eleventh Circuit has made clear that "injunctive relief should be limited in scope to the extent necessary to protect the interests of the parties," *Garrido v. Dudek*, 731 F.3d 1152, 1159 (11th Cir. 2013) (cleaned up), and consistent with that instruction, Plaintiffs tailored their claim to target the source of their most immediate injuries: an antiquated rule that prevents voters from completing their absentee ballot applications digitally and renders Vote.org's e-sign tool functionless. That Plaintiffs do not seek the broadest possible injunction makes their claim more compelling, not less, and is all the more reason why injunctive relief is appropriate. The Court should therefore grant summary judgment in Plaintiffs' favor and deny State Defendants' and DeKalb County Defendants' motions.

ARGUMENT

I. Plaintiffs have standing to challenge the pen and ink rule.

Although a single plaintiff with standing is sufficient for injunctive relief, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1333 (N.D. Ga. 2018), all plaintiffs here have presented unrefuted evidence sufficient to establish standing as a matter of law.

Vote.org and Priorities have organizational standing because the pen and ink rule impairs their missions and requires them to divert resources from other critical programs in response. CWA and the Alliance have associational standing to bring claims on behalf of their members who will be forced to either incur additional time and expense in order to vote, or risk disenfranchisement, all because of the pen and ink rule. And these injuries will be remedied by an injunction preventing Defendants from exercising their undisputed power to enforce the pen and ink rule.

Defendants' principal arguments against standing misunderstand the doctrine. They insist that the pen and ink rule cannot injure anyone because there is no right to vote by mail and the rule has not disenfranchised any voters. ECF No. 156-1 at 11–16, 19–20. Both arguments not only ignore the materiality provision's text—and its expansive definition of the term "vote"—but also contradict the Eleventh Circuit's well-established rule that "[a] plaintiff need not have the franchise wholly denied to suffer injury." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005). Defendants' unsubstantiated standing theories pose no barrier to this Court's subject matter jurisdiction.

A. Vote.org and Priorities have organizational standing.

Vote.org and Priorities have organizational standing because Defendants' enforcement of the pen and ink rule impairs their "ability to engage in [their] own projects by forcing" them to divert resources to counteract the rule's harmful effects.

See Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1341 (11th Cir. 2014). And the harm to the communities of Georgia voters that Vote.org and Priorities seek to protect are both legally cognizable and closely connected to each organization's diversions of resources. *Curling v. Raffensperger*, No. 1:17-CV-2989-AT, 2023 WL 7463462, at *35 (N.D. Ga. Nov. 10, 2023).

1. Vote.org will be forced to divert resources in future election cycles in response to the pen and ink rule.

Vote.org, an organization that uses technology to mobilize voters, particularly from minority and overlooked communities, developed a web application that allows voters to complete the application process digitally by uploading an image of their signature onto a digital application form. SAMF ¶¶ 42–46; Hailey Dep. at 33:13–34:23, 35:14–18, 39:2–40:1, 65:2–22, 239:5–12. But the pen and ink rule rendered this tool virtually functionless in Georgia and forced the organization to divert resources to launch a print-and-mail program, through which it contracts with vendors to print and mail physical absentee ballot applications to voters. SAMF ¶ 49; Hailey Dep. at 42:10–19. Managing the print-and-mail program requires the 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 mission-critical projects like Vote.org's youth programs on college campuses; influencer and micro-influencer programs; and radio, text, and email campaigns. SAMF ¶¶ 61–63 (describing these

programs); Hailey Dep. at 35:5–18, 77:1–7, 135:5–136:25, 148:7–12, 152:21–153:3. 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* SAMF ¶ 64; Hailey Dep. at 153:4–10, 165:7–25. These injuries to Vote.org will continue operating as long as the pen and ink rule is in effect. SAMF ¶ 66; Hailey Dep. at 163:8–165:6.[2]

The record plainly refutes Defendants' argument that Vote.org has "pleaded only backward-looking costs." *See* ECF No. 156-1 at 16–17. Vote.org alleged that it "has been, *and will continue to be*, forced to divert resources from its general, nationwide operations—as well as its specific programs in other states—to redesign its absentee ballot web application and employ more expensive (and less effective) means of achieving its voter participation goals in Georgia." ECF No. 96 ¶ 15 (emphasis added). Vote.org's CEO further explained that if the pen and ink rule remains in force, the organization will have to "scale the [print-and-mail] program to serve voters for as long as [it] can handle the [additional] cost." SAMF ¶ 65; Hailey Dep. at 163:8–23. These are legally cognizable injuries, which are ongoing and will continue unless the pen and ink rule is enjoined.

[2] As this testimony demonstrates, Defendants' claim that "Vote.org is unable to identity [sic] what program or project it had to divert resources from," is plainly incorrect. ECF No. 156-1 at 17.

The record similarly contradicts Defendants' argument that "Georgia was simply incorporated with other states" because "Vote.org utilizes the print-and-mail program in other states." ECF No. 156-1 at 17. While Vote.org may use the same vendors in multiple states, its CEO explained that its engineering and information technology departments spent "a fair amount of time" re-designing its web application, which previously allowed voters to complete and submit their absentee ballot applications electronically, to "create a secure way" to transmit voter data to "the vendor shop." SAMF ¶ 59; Hailey Dep. at 139:6–18.

Defendants also identify no authority substantiating their arguments that Vote.org's injuries are insufficient because they were established using deposition testimony and were not quantified. *See* ECF No. 156-1 at 17. In fact, the Eleventh Circuit has held just the opposite. *See Arcia*, 772 F.3d at 1341–42 (finding deposition testimony sufficient to establish organizational standing based on diverted resources); *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) ("[T]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." (quoting *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007))).

And the Fifth Circuit agrees: it determined that Vote.org established standing for the exact same reasons presented in this case. *Vote.org v. Callanen*, 89 F.4th 459, 468, 470–71 (5th Cir. 2023). There, the court held that Vote.org suffered injury

because it diverted "staff time and resources" from its "engineering, partnership, and operations teams" to stand up a print-and-mail program after the enforcement of Texas's wet signature law forced Vote.org "to shut down its app." *Id.* at 470. This diversion of resources impaired Vote.org's ability to fulfill its mission in other ways, including by planning "programs at historically black colleges and universities, other college programs, youth influencer programs, corporate organizing activities, and advocating for election day as a holiday." *Id*.

Defendants' attempt to distinguish this obviously identical posture again mischaracterizes the record. They argue that "Vote.org has *not* shut down its electronic signature application across the board," ECF No. 156-1 at 18 (emphasis in original), but fail to explain the relevance of that observation. Just as in Texas, Vote.org can no longer use its e-sign tool in Georgia to assist voters in completing their applications digitally, and instead must divert resources into creating a workaround: printing and mailing partially completed applications for voters to sign with pen and ink. SAMF ¶ 49; Hailey Dep. at 42:10–19. And when asked whether Vote.org "still use[s] the e-sign tool in Georgia," Vote.org's CEO explained, "[w]e can't use the e-sign tool in Georgia." SAMF ¶ 50; Hailey Dep. at 207:14–17.

Both this case and *Callanen* involve the same plaintiff (Vote.org) challenging parallel restrictions on voter registration and absentee ballot applications that injure Vote.org in similar ways. *Callanen*, 89 F.4th at 468, 470–71. *Callanen* supports the

inescapable conclusion that Vote.org has standing here.

2. Priorities will be forced to divert resources in future election cycles in response to the pen and ink rule.

Priorities, a voter-centric, progressive advocacy organization dedicated to educating and turning out voters, SAMF ¶¶ 68–71; Grimsley Dep. at 18:11–14; 35:1-14; 39:1–5; 50:12–51:4, 101:21–24, 101:19–102:8, had to alter and lengthen a digital advertising program because of the pen and ink rule, to provide "extra runway" for voters to apply for their absentee ballots and ensure they had adequate time to make alternative plans to vote in the December 2022 runoff. SAMF ¶¶ 76–78; Grimsley Dep. at 43:21–24, 45:19–46:10, 61:3–8. This additional expense forced 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, and retaining staff in its paid media, creative, and analytics departments, all of which impaired Priorities' ability to carry out its mission. SAMF ¶¶ 78–80; Grimsley Dep. at 60:5–61:8, 94:16–95:20. Priorities will be forced to divert more staff time and financial resources towards customizing future digital advertising programs designed to ensure Georgia voters are equipped to navigate the administrative hurdles imposed by the pen and ink rule. SAMF ¶ 80; Grimsley Dep. at 68:17–70:11.

While Defendants argue that Priorities cannot establish "how much less it would have spent on advertising in Georgia if not for the pen and ink requirement,"

ECF No. 156-1 at 19, the record, once again, discredits this claim: when asked how much Priorities spent on its digital advertising campaign "because voters were required to sign their absentee ballot application[s] with a pen and ink," Priorities' Chief Operating Officer responded: "[o]ver half of that million dollars." SAMF ¶ 78; Grimsley Dep. at 43:17–24. Regardless, Defendants' objections are legally irrelevant: "the fact that the added cost has not been estimated and may be slight does not affect standing." *Browning*, 522 F.3d at 1165 (cleaned up).

3. The injuries to the communities that Vote.org and Priorities serve are closely connected to the organizations' diversions of resources.

The injuries Vote.org and Priorities seek to counteract—the burdens the pen and ink rule impose on voters—are both legally cognizable and closely connected to the organizations' diversions of resources. *Curling*, 2023 WL 7463462, at *30. The pen and ink rule burdens voters by forcing them to spend additional time and money applying for absentee ballots and subjecting them to potential disenfranchisement. *See infra* I.B. These harms are closely connected to Vote.org's and Priorities' diversions of resources: Priorities has incurred additional expense to educate voters about this application process, SAMF ¶¶ 76–78; Grimsley Dep. at 43:21–24, 45:19–46:10, 61:3–8. Vote.org has printed absentee ballot applications and mailed them to voters with postage, SAMF ¶¶ 49, 51; Hailey Dep. at 42:10–19, 43:5–22.

Defendants contend that the harms suffered by Georgia voters are not legally

cognizable because Plaintiffs "identified no one who did not complete an absentee-ballot application . . . because of the pen and ink rule," and that all voters identified by Plaintiffs' expert as having experienced a pen-and-ink rejection ultimately received an absentee ballot and "were able to vote." ECF No. 156-1 at 19. These claims are misdirected because a voter "need not have the franchise wholly denied" to suffer a legally cognizable injury. *Cox*, 408 F.3d at 1352. Forcing voters to either incur the additional time and expense of obtaining paper applications and signing them with pen and ink, or risk disenfranchisement, *see infra* I.B, imposes precisely the type of harm courts recognize as sufficient for standing. *See Common Cause/Ga.*, 554 F.3d at 1351–52 (voters "required to present photo identification to vote in person" established legally cognizable injury); *Cox*, 408 F.3d at 1352 (voter who alleged she would be "unable to vote in her . . . home precinct" established same).

Putting aside their erroneous standard, Defendants' arguments continue to dodge key evidence. While they argue that all voters identified by Plaintiffs' expert as having experienced a pen-and-ink rejection ultimately received an absentee ballot and "were able to vote," ECF No. 156-1 at 19, they fail to mention that *their own expert* identified rejected applicants that *did not* receive absentee ballots, SAMF ¶ 104; Grimmer Dep. at 32:9–33:14, and that both experts identified rejected applicants who ultimately did not vote after experiencing pen-and-ink rejections, SAMF ¶ 103; Pls.' Mot. Summ. J. Ex. 16 ("Mayer Rep.") at 6 & tbl. 2, ECF No.

159-19; Pls.' Mot. Summ. J. Ex. 17 ("Grimmer Rep.") at 15–16 & tbls. 5&6, ECF No. 159-20.

The record similarly belies Defendants' argument that "[a]ll apparent voters identified in this case for which Plaintiffs have any knowledge either voted or identified a reason other than the pen and ink rule for why they did not vote," ECF No. 156-1 at 19–20. 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. SAMF ¶ 109; Ex. 18, ("Stambler Dep.") at 25:23–27:2. 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* SAMF ¶¶ 105–110; Stambler Dep. at 8:10–14, 10:6–12, 14:25–15:3, 25:23–27:2, 33:7–8. Similarly, Dr. Joonna 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. SAMF ¶¶ 112–116; Ex. 19, ("Trapp Dep.") at 28:20–29:12, 31:14–18, 33:18–34:9. State Defendants' brief makes no mention of Ms. Stambler or Dr. Trapp. But even under Defendants' manufactured standard, Vote.org and Priorities have standing.

4. Plaintiffs' injuries are traceable to and redressable by Defendants.

Defendants' briefs collectively suggest that *no* election official can be held responsible for enforcing the pen and ink rule. State Defendants disclaim any role in enforcing the law despite promulgating rules governing the completion and submission of absentee ballot applications, or their authority to enforce those rules through a series of adverse actions against non-compliant county officials. DeKalb Defendants believe that the General Assembly, and not county officials, is to blame for creating the law. Both arguments misapply the governing standard: when bringing a "lawsuit seeking to enjoin a government official from enforcing the law," a plaintiff may "establish traceability" by "show[ing] that the official has the authority to enforce the particular provision being challenged, such that the injunction prohibiting enforcement would be effectual." *Dream Defs. v. Governor of the State of Fla.*, 57 F.4th 879, 888–89 (11th Cir. 2023) (cleaned up). Both sets of Defendants easily meet that threshold.

a. Plaintiffs have standing to seek relief against State Defendants.

Georgia law vests State Defendants with specific authority "to promulgate reasonable rules and regulations" to implement absentee ballot application requirements, including the pen and ink rule. O.C.G.A. § 21-2-381(e). Pursuant to this authority, State Defendants previously adopted regulations requiring applicants

to sign absentee ballot applications and permitting the use of "web-based" tools to "*partially* complete" applications by "entering personal information"; this suggests voters cannot *fully* complete the application forms by signing with digital signatures. Ga. Comp. R. & Regs. 183-1-14-.12(2) (emphasis added).[3]

Coupled with this specific rulemaking authority is State Defendants' power to investigate, fine, suspend, and replace county officials who fail to apply the pen and ink rule or State Defendants' implementing regulations. And State Defendants have used this authority to investigate Fulton County officials for "alleged mismanagement of elections."[4] Their combined authority to promulgate specific regulations enforcing the pen and ink rule and to direct county officials' compliance, is sufficient to establish traceability. *See Dream Defs. v. DeSantis*, 553 F. Supp. 3d 1052, 1080 & n.10 (N.D. Fla. 2021) (finding plaintiffs' injuries traceable to governor based on governor's authority to order sheriffs to enforce challenged law coupled

[3] Although the regulation does not specifically reference the pen and ink rule, it provides guidance that effectively implements the rule's restrictions on signing applications digitally, which prevents organizations like Vote.org from using web-based tools to help Georgia voters complete absentee ballot applications. *See id.*

[4] *See State Election Board Names Bipartisan Panel to Review Fulton Voting*, Ga. Sec'y of State (Aug. 18, 2021), https://sos.ga.gov/news/state-election-board-names-bipartisan-panel-review-fulton-voting; *see also State Election Board Clears Fulton County "Ballot Suitcase" Investigation*, Ga. Sec'y of State (June 20, 2023), https://sos.ga.gov/news/state-election-board-clears-fulton-county-ballot-suitcase-investigation-report-finds-no.

with power to investigate and suspend sheriffs for noncompliance); *see also League of Women Voters of Fla., Inc. v. Lee*, 566 F. Supp. 3d 1238, 1253 (N.D. Fla. 2021) (finding drop box restriction traceable to Florida Secretary of State based on specific authority to impose civil penalties against non-compliant county officials).

Measured against this significant authority, State Defendants' argument to the contrary falls flat. They contend that Plaintiffs' harms are exclusively traceable to the counties simply because county officials "process absentee-ballot applications," *see* ECF No. 156-1 at 8–9; but it is well-settled that "the presence of multiple actors in a chain of events that lead[s] to the plaintiff's injury does not mean that traceability is lacking with respect to the conduct of a particular defendant." *Garcia-Bengochea v. Carnival Corp.*, 57 F.4th 916, 927 (11th Cir. 2023). And although County Defendants indeed process absentee ballot applications, State Defendants play an indispensable role in enforcing the statute by virtue of their authority to adopt regulations enforcing the pen and ink rule and their power to compel county compliance.

State Defendants' reliance on *Georgia Republican Party, Inc. v. Secretary of State for Georgia*, No. 20-14741-RR, 2020 WL 7488181 (11th Cir. Dec. 21, 2020), is also misplaced. *See* ECF No. 156-1 at 8. There, plaintiffs relied solely on statewide defendants' *general* authority to "manage Georgia's electoral system" and "obtain uniformity in the practices of election officials and to ensure a fair, legal, and orderly

conduction of elections," which the court found insufficient to establish traceability. *Ga. Republican Party*, 2020 WL 7488181, at *2. But as the court noted, plaintiffs in that case did not allege "that the Secretary controls the local supervisors or has control over the signature verification process." *Id.* By contrast, State Defendants here have the power to control local officials and their application of the pen and ink rule. Thus, an injunction preventing State Defendants from implementing the rule through any of the coercive means at their disposal would provide redress for Plaintiffs' injuries. *See Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1127 (11th Cir. 2019) (holding that even an injunction that provides only "partial" relief "would sufficiently redress . . . alleged economic harm for purposes of standing").

b. Plaintiffs have standing to seek relief against DeKalb County Defendants.

DeKalb Defendants do not dispute that they enforce the pen and ink rule by rejecting non-compliant absentee ballot applications. ECF No. 178 at 2; SAMF ¶¶ 15–28; Smith Dep. at 16:12–18:10, 43:15–45:25, 64:10–65:10, 79:12–21, 86:20–24. Nor do they contest that a court order enjoining these actions would redress Plaintiffs' injuries. Still, they misunderstand the traceability inquiry by insisting that they did not "create[] the law in question." ECF No. 178 at 2. While no one suggests that DeKalb Defendants enact laws, the traceability and redressability analyses focus not on who passed the law, but rather on who implements and enforces it. *See, e.g.*,

Finn v. Cobb Cnty. Bd. of Elections & Registration, No. 1:22-CV-02300-ELR, 2023 WL 6370625, at *6 (N.D. Ga. July 18, 2023), *appeal dismissed*, No. 23-13439, 2024 WL 470345 (11th Cir. Jan. 19, 2024). Accepting DeKalb's argument would mean that *only* the General Assembly must be named as a defendant in every case challenging a state law. DeKalb was unable to cite a single case to support this theory, and for good reason: courts have repeatedly rejected it. *E.g.*, *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1204 (11th Cir. 2021) (explaining that Eleventh Circuit has "rejected the idea that an official's role in crafting duly enacted legislation can satisfy the traceability requirement" (citing *Jacobson*, 974 F.3d at 1257)); *Finn*, 2023 WL 6370625, at *6 (finding Plaintiffs correctly "sued the entities responsible for 'enforcing' the Map at issue" and General Assembly was not appropriate defendant (quotation omitted)).

Finally, that election officials were merely "execut[ing] their duties," ECF No. 178 at 2, is no defense; rather, it conclusively establishes that Plaintiffs' injuries are traceable to and redressable by DeKalb Defendants. Vote.org and Priorities have established Article III standing to bring their claims against all Defendants.

B. CWA and Alliance have established associational standing.

In addition to Vote.org's and Priorities' organizational standing, CWA and the Alliance have associational standing "to enforce the rights of [their] members" because (1) their "members would otherwise have standing to sue in their own right,"

(2) "the interests at stake are germane to" their missions, and (3) "neither the claim asserted nor the relief requested requires the participation of [their] individual members in the lawsuit." *S. River Watershed All., Inc. v. DeKalb Cnty.*, 69 F.4th 809, 819 (11th Cir. 2023) (quotations omitted).

Defendants challenge only the first requirement; their arguments fail, however, because Plaintiffs identified at least three Alliance and CWA members who would otherwise have standing to sue in their own right because they "face[] a realistic danger of suffering an injury" due to Defendants' enforcement of the pen and ink rule. *See id.* at 819–20 (quotations omitted). Specifically, these members do not own printers and must expend additional time and money to obtain a printed copy of an absentee ballot application, which they must then sign in pen and ink and return to their local election officials. SAMF ¶¶ 91–102; Andrews Dep. at 10:17–19, 24:21–22, 47:2–10; Isom Dep. at 22:18–23; 23:1–9, 24:2–7; 30:8–17; Simmons Dep. at 7:12–16, 11:5–10, 16:12–16, 18:10–19:11. And these injuries are traceable to—and redressable by—County and State Defendants who have authority to enforce the pen and ink rule. *See supra* I.A.4.

Defendants attempt to dismiss these members' injuries by insisting that none have been prevented from voting, but again, their arguments are legally irrelevant. The Eleventh Circuit has not only rejected this theory, *Cox*, 408 F.3d at 1352, but it also recognized, in a voter ID case, that a plaintiff who "possessed an acceptable

form of photo identification . . . would still have standing to challenge the statute that required them to produce photo identification to cast an in-person ballot." *Common Cause/Ga.*, 554 F.3d at 1351. A plaintiff can establish standing based on "[a]ny concrete, particularized, non-hypothetical injury to a legally protected interest," *Cox*, 408 F.3d at 1352, and the loss of money and time are both cognizable injuries, *see Pinson v. JPMorgan Chase Bank, Nat'l Ass'n*, 942 F.3d 1200, 1207 (11th Cir. 2019) (holding that a plaintiff established injury in fact based on lost time and money). The CWA and Alliance members' injuries easily surpass this threshold.

C. There are no prudential limitations on this Court's review.

Defendants misinterpret settled precedent and misread the materiality provision's plain text in their attempt to create prudential limitations to its enforcement by Vote.org and Priorities.[5] None of their arguments have merit.

Beginning with third-party standing, plaintiffs may assert the rights of others when they have: (1) suffered an injury in fact, (2) have a close relationship to the third-party, and (3) show 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). Vote.org and Priorities easily meet these requirements. As to the first element, both organizations have suffered an injury in fact based on their diversion of

[5] Defendants do not raise any prudential limitations to CWA and GARA's claims, both of which assert associational standing. *See supra* I.B.

resources from other critical projects to assist their constituents in response to the pen and ink rule. *See supra* I.A.1, I.A.2.

Organizations like Vote.org and Priorities also satisfy the second element by virtue of their close relationship with, and vested interest in, ensuring their users or constituents can exercise their right to vote. *See* SAMF ¶¶ 44, 70; Hailey Dep. at 35:14–18; Grimsley Dep. at 35:1–14. The Fifth Circuit recognized as much when it held that "Vote.org's position as a vendor and voting rights organization is sufficient to confer third-party standing." *Callanen*, 89 F.4th at 472. Likewise, the Supreme Court has explained that "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U.S 190, 195 (1976); *see also Young Apartments*, 529 F.3d at 1041–42.

Vote.org and Priorities act on behalf of their users and constituents in exactly this manner. The pen and ink rule severely restricts Vote.org's ability to serve Georgia voters with its web application, requiring the organization to stand-up a less efficient and more costly print-and-mail program in its place. SAMF ¶ 49; Hailey Dep. at 42:10–19. Priorities, though not a vendor, is in a similar position to Vote.org and squarely within *Craig*'s ambit. *See Young Apartments*, 529 F.3d at 1041. Priorities realizes its mission of increasing voter turnout by providing voters with information and resources they need to cast their ballots, but the pen and ink rule

significantly impairs its efforts. SAMF ¶ 79; Grimsley Dep. at 42:1–25, 78:9–17.

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.*, SAMF ¶¶ 105–110; Stambler Dep. at 8:12–14, 24:14–17; 25:13–16; 25:23–27:2, 27:10–14, 33:7–8 (unable to complete cure affidavit after electronic signature rejection in time for ballot to be counted); Trapp Dep. at 28:20–29:12, 34:14–35:9, 36:18–37:5, 40:20–41:13 (same); Trapp Ex. 3. As a result, voters face practical timing-related obstacles to bringing an effective lawsuit. *Cf. Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (holding plaintiffs had standing to assert rights of third parties whose individual claims faced "obstacle" of "imminent mootness"); *Craig*, 429 U.S. at 192 (similar). Relatedly, the individual burdens of complying with the pen and ink rule—though sufficient for standing—pale in comparison to the burdens of litigation, thus leaving voters with little incentive to pursue the latter course. *Cf. Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding plaintiff had standing to assert rights of third parties who, due to "small financial stake involved and the economic burdens of litigation," "probably . . . possess[] little incentive to set in motion the arduous process needed to vindicate [their] own rights"). Accordingly, "the rights of the third party will be diluted or infringed if the litigant is not allowed to assert those rights on behalf of the third party." *Harris v. Evans*, 20 F.3d 1118,

1124 (11th Cir. 1994). And the pen and ink rule's interference with each organization's ability to support and mobilize voters is sufficient to confer third-party standing for both. *See Callanen*, 89 F.4th at 472 ("Vote.org's position as a vendor and voting rights organization is sufficient to confer third-party standing.").[6]

Despite framing their argument in part as a third-party standing issue, Defendants ignore the standard outlined above and focus on a different theory—whether Congress has authorized Vote.org and Priorities to sue for violations of the materiality provision. But this "zone of interest" analysis is intentionally lenient and "forecloses suit *only* when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (emphasis added) (cleaned up). And though they present a question of statutory interpretation, *id*. at 126–27, Defendants almost entirely ignore the relevant statutes.

[6] While Defendants' brief declares that Vote.org and Priorities "lack [] third-party standing," ECF No. 156-1 at 21, their arguments collapse all prudential standing theories under the Supreme Court's zone of interest analysis in *Lexmark*, and as a result they neither mention nor apply the test for third-party standing. To be sure, even *Lexmark* confirms that the zone of interest and third-party standing tests are distinct. 572 U.S. at 127 n.3 ("This case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day.").

For one, Defendants do not mention § 1983 anywhere in their analysis—even though Plaintiffs assert a cause of action under that provision. Section 1983 creates a private remedy against state actors that cause "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983; *see* ECF No. 96 ¶¶ 8, 34–40 (asserting claim under section 1983). And the statute expressly provides a cause of action to "injured parties"—not just impacted voters—which is confirmed by decades of precedent upholding § 1983 claims by plaintiffs invoking a third party's rights. *See, e.g.*, *Callanen*, 89 F.4th at 473 (citing cases and holding that "Section 1983 is an appropriate vehicle for third-party claims").

Apart from § 1983, the materiality provision itself contemplates causes of action by a class of plaintiffs that extends beyond individual voters. *See* 52 U.S.C. § 10101(d). Subsection (d) confers jurisdiction on federal district courts to adjudicate materiality provision claims "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." *Id*. The term "party aggrieved" and other similar iterations typically indicates Congress's intent "to extend standing under the [statute] to the maximum allowable under the Constitution," and therefore to abrogate any prudential standing limitations. *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 363 (5th Cir. 1999); *see FEC v. Akins*, 524 U.S. 11, 19 (1998); *Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205, 208–10 (1972) (finding the term "person aggrieved" conveyed

Congressional intent to define standing with respect to the Civil Rights Act of 1968 as broadly as constitutionally permissible).[7]

Contrary to Defendants' claims, it is of no consequence that Vote.org and Priorities are not voters. Both organizations have suffered injury to their voter engagement and support-based missions because of the pen and ink rule, *see supra* I.A.1, I.A.2; they seek to eradicate the denial of the right to vote for immaterial errors or omissions on absentee ballot applications; and their claim, which undoubtedly effectuates the purposes of the materiality provision and § 1983, falls squarely within each statute's zone of interests.

II. The SEB is not entitled to sovereign immunity.

After failing to raise the issue in their motion to dismiss, then proceeding to discovery, and even presenting a 30(b)(6) representative to sit for a deposition, State Defendants argue for the first time that sovereign immunity bars Plaintiffs' claim against the State Election Board ("SEB"). ECF No. 156-1 at 9–10.[8] It is well settled that Congress may abrogate the States' sovereign immunity if it both (1) unequivocally expresses its intent to do so and (2) acts pursuant to a valid

[7] Reliance on *Vote.org v. Byrd* is also misplaced as the court explicitly refrained from deciding whether Vote.org lacked prudential standing. *Vote.org v. Byrd*, No. 4:23-CV-111-AW-MAF, 2023 WL 7169095, at *3–4 (N.D. Fla. Oct. 30, 2023).

[8] State Defendants do not argue that the individual members of the State Board sued in their official capacities are entitled to sovereign immunity.

exercise of constitutional power. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996). Both elements are established here. Congress unequivocally expressed its intent to abrogate sovereign immunity when it enabled private individuals to vindicate violations of voting rights by state actors, 52 U.S.C. § 10101(a)(2)(B), (d), and such legislation is an appropriate exercise of Congress's enforcement powers under the Fourteenth and Fifteenth Amendments.

As to the first factor, Congress need not use "magic[ ]words," nor must it "state its intent in any particular way," *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023) (quotation omitted); instead it may express its intent by allowing private parties to sue states for violations of federal rights. The materiality provision does precisely that by enabling private individuals to sue states for deprivations of voting rights. The provision regulates the conduct of "person[s] acting under color of law," 52 U.S.C. § 10101(a)(2)(B), and grants federal district courts jurisdiction over "proceedings instituted pursuant to [the materiality provision] without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." *Id*. § 10101(d). As the Eleventh Circuit acknowledged, such language was meant to "remove[] procedural roadblocks" to suits by private litigants. *Schwier*, 340 F.3d at 1296. And "a suit against a person acting under color of law is a suit against a government." *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020) (quotation omitted); *see also*

Ala. State Conf. of NAACP v. Alabama, 949 F.3d 647, 651 (11th Cir. 2020) (finding Congress unequivocally expressed intent to abrogate states' sovereign immunity based on § 2 of the VRA's application to states and political subdivisions, and § 3's reference to proceedings instituted by "an aggrieved person"), *vacated as moot*, *sub nom. Alabama v. Ala. State Conf. of NAACP*, 141 S. Ct. 2618 (2021).[9]

The second factor—whether Congress had the power to abrogate sovereign immunity—is similarly established. Because "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct," *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003), its power to enforce the Amendments "includes the authority both to remedy and to deter violation[s] of" constitutional rights "by prohibiting a somewhat broader swath of conduct, including that which is not forbidden by the Amendment's text." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). Defendants do not contend that the materiality provision exceeds the scope of Congress's authority, nor could they. In enacting the law, Congress sought to prohibit election officials "from using immaterial omissions, which were historically used to prevent racial minorities from voting, from blocking *any* individual's ability

[9] The decision was vacated on mootness grounds, not because the Supreme Court disagreed with its sovereign immunity analysis, as State Defendants imply, *see* ECF No. 156-1 at 9; *see also Ethredge v. Hail*, 996 F.2d 1173, 1177 (11th Cir. 1993) (vacating lower court opinion but noting opinion would have "persuasive value").

to vote"; "[t]hat prohibition is a congruent and proportional exercise of congressional power" under the Fourteenth and Fifteenth Amendments. *Callanen*, 89 F.4th at 486–87. And as the Eleventh Circuit noted, both the Fourteenth and Fifteenth Amendments "permit[] Congress to abrogate state sovereign immunity." *Ala. State Conf. of NAACP*, 949 F.3d at 654.

The only case Defendants cite to dispute this conclusion, *Texas Democratic Party v. Hughs*, 860 F. App'x 874 (5th Cir. 2021), does not bind the Court and is unpersuasive. Although the court there found that Congress did not abrogate sovereign immunity through the Civil Rights Act, the opinion's one-sentence analysis, which appears in a footnote, does not warrant this Court's deference.

III. The DeKalb County board members are proper defendants.

Individual members of the DeKalb County Board of Elections being sued in their official capacities ask the Court to be dismissed from this action because, as they contend, the claims against them are duplicative of those asserted against the DeKalb County Board of Elections, which is also a defendant in this action. *See* ECF No. 178 at 3–4. But they fail to mention that their Answer to Plaintiffs' Amended Complaint invokes sovereign immunity—a defense that could only apply, if at all, to the County Board of Elections, given that the "Eleventh Amendment does not insulate official capacity defendants from actions seeking prospective injunctive relief." *Cross v. Ala. State Dep't of Mental Health & Mental Retardation*, 49 F.3d

1490, 1503 (11th Cir. 1995) (quotation omitted).[10] Removing the individual county board members and leaving the County Board as the sole defendant from DeKalb County, while simultaneously invoking (or refusing to waive) sovereign immunity, threatens to foreclose all avenues of relief against DeKalb Defendants—notwithstanding that the County Board members are indisputably proper defendants.

To be sure, DeKalb Defendants do not point to any federal rule or authority beyond the Court's discretion that entitles the County Board members to dismissal, nor do they provide any reason why such action is appropriate at this stage of the case. Although the Eleventh Circuit has previously affirmed the dismissal of individual officers in a case where the city was also a defendant, *Busby v. City of Orlando*, 931 F.2d 764, 787 (11th Cir. 1991) (per curiam), the court looked to other factors not present here in exercising its discretion to remove those officers from the case—namely that "keep[ing] both the City and the officers sued in their official capacity as defendants in this case would have been redundant and possibly confusing to the jury." *Id.* at 776. This case presents no similar risk of confusion—no party has requested a jury trial—nor would dismissal of the County Board members foster judicial economy or avoid any prejudice in this case, where the Plaintiffs seek injunctive relief and the parties have already completed discovery.

[10] Defendants do not argue that sovereign immunity bars Plaintiffs' claims against DeKalb Defendants.

The Court should therefore deny DeKalb Defendants' request or, in the alternative, require that DeKalb Defendants disclaim their sovereign immunity defense before dismissing any individual County Board members sued in their official capacities.

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

As Plaintiffs' opening brief explained, ECF No. 159-1 at 14–15, Congress amended Section 101 of the Civil Rights Act to prohibit the denial of the right to vote based on immaterial paperwork errors. The provision states:

> 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.

52 U.S.C. § 10101(a)(2)(B). Thus, the statute's plain language prohibits election officials from: (1) denying an individual's right to vote (2) because of an error or omission on any record or paper relating to an application, registration, or other act requisite to voting, (3) if such error or omission is not material in determining whether the individual is qualified to vote under state law. Although the undisputed evidence compels the straightforward conclusion that the pen and ink rule is immaterial in determining voter qualifications, Defendants raise a litany of arguments that are foreclosed by binding precedent and statutory text.

A. Plaintiffs may enforce the materiality provision.

In *Schwier v. Cox*, the Eleventh Circuit held that private plaintiffs may enforce the materiality provision via § 1983; that ruling forecloses Defendants' argument that plaintiffs lack a private right of action. *See* ECF No. 156-1 at 23–25 (citing *Schwier*, 340 F.3d at 1297). And this Court must decline Defendants' invitation to take a "fresh look" at the same legal question conclusively resolved in *Schwier*, *see* ECF No. 156-1 at 24, because "courts in this Circuit must apply [Eleventh Circuit] caselaw when addressing issues of federal law," *Drazen*, 74 F.4th at 1340 n.2.

Defendants attempt to avoid *Schwier* by suggesting it has been undermined by a series of cases that do no such thing. For example, they cite *Gonzaga University v. Doe*, 536 U.S. 273 (2002), to support their contention that Congress has established a comprehensive enforcement scheme for the materiality provision in lieu of allowing private enforcement suits. ECF No. 156-1 at 24.[11] However, the *Gonzaga* Court explained that a statute is presumptively enforceable under Section 1983 unless Congress has specifically "shut the door to private enforcement" by creating a "comprehensive enforcement scheme that is *incompatible* with private

[11] As the Supreme Court has recognized, "§ 1983 can presumptively be used to enforce unambiguously conferred federal individual rights unless a private right of action under § 1983 would thwart any enforcement mechanism" that Congress created for protection of that right. Defendants do not dispute whether the materiality provision confers individual rights, instead their arguments focus solely on rebutting the presumption of private enforcement through § 1983. ECF No. 156-1 at 23.

enforcement." 536 U.S. at 284–85 & n.4 (emphasis added) (quotations omitted). But no such enforcement scheme exists here: Defendants' sole argument is that the Attorney General may file suit to enforce the statute, which courts have determined does not foreclose private enforcement, as aggrieved parties can also file directly in court without any preconditions or exhaustion requirements. 52 U.S.C. § 10101(d).

Defendants' reliance on *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), is equally unpersuasive, as the statutes at issue there had "unusually elaborate enforcement provisions, conferring authority to sue . . . on government officials and private citizens." *Id.* at 13–14. More importantly, the court cited language that closely mirrors the materiality provision's "party aggrieved" designation, which reveals contemplation of private enforcement. *See id.*; *Schwier*, 340 F.3d at 1296; 52 U.S.C. § 10101(d). Moreover, both *Gonzaga* and *Middlesex County Sewerage Authority* predate *Schwier*, so there is no reason to believe that *Schwier*'s holdings were, or are, inconsistent with those cases; in fact, the *Schwier* court discussed *Gonzaga* at length, *see Schwier*, 340 F.3d at 1290–96. Lastly, *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), held only that the Attorney General had sole authority to enforce the VRA's § 2. *Id.* at 1215–16. The court did not analyze the Civil Rights Act's materiality provision, nor did it foreclose claims brought under § 1983. *See id.* at 1218; ECF No. 96 ¶¶ 8, 34–40 (asserting claim under section 1983).

In any event, precedent in this circuit dictates that the materiality provision is enforceable by private right of action via § 1983, and that should be the end of the matter. *In re Georgia Senate Bill 202*, No. 1:21-CV-01259-JPB, 2023 WL 5334582, at *9 n.16 (N.D. Ga. Aug. 18, 2023) ("*S.B. 202*") ("[T]he Eleventh Circuit has already held that the Materiality Provision can be enforced by a private right of action under § 1983.").

B. The State's interests are irrelevant under the materiality provision.

Defendants' misguided attempt to brainstorm reasons why a pen and ink signature might be useful is irreconcilable with the materiality provision's plain text and its singular focus on voter qualifications. The law categorically prohibits the denial of an individual's the right to vote based on paperwork errors on an "application" *unless* those errors are "material in determining whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). The Court must assess materiality not in the abstract, as Defendants suggest, but solely in relation to voter qualifications. *See id*. Here, the pen and ink rule provides election officials with none of the information that they need to make that assessment, and it is simply irrelevant whether the challenged practice furthers other interests like fraud prevention. *See Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006); *see also Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006).

While the Court's analysis properly ends there, it would reach the same

conclusion even if it considered Defendants' proffered interests. First, Defendants' vague suggestions that the pen and ink signature somehow serves to "confirm" an applicant's identity wrongly elides the county's administrative process of identity *confirmation* with the signature's ceremonial *affirmation* of the oath. ECF No. 156-1 at 26. Confirming an applicant's identity is a statutorily governed process which relies on a voter's name, DOB, and ID, none of which are revealed by the writing instrument a voter elects to use in entering a signature. SAMF ¶ 10; Brittian Dep. at 33:19–34:6, 39:19–40:2; Smith Dep. 38:1–17, 40:19–41:13, 53:4–17; Williams Dep. at 53:7–23, 65:18–22. And the County Defendants have confirmed that they complete the identity confirmation process without the use of the pen and ink signature. SAMF ¶ 40; Brittian Dep. 40:25–41:5; Williams Dep. 73:20–75:19; Smith Dep. 40:19–41:1, 41:14–42:5, 70:16–71:9, Smith Dep. 71:16–72:2; Williams Dep. 76:15–77:11; Lindsey Dep. 26:5–10, 39:9–41:2.

Second, Defendants' assertions that the signature serves to deter fraud or ensure that voters take the application "seriously" lack any meaningful support. *See* ECF No. 156-1 at 26–27. Defendants' proffered expert had never assessed or studied the reliability, effectiveness, materiality, or purpose of a handwritten or pen and ink signature before he was retained in this case. *See* Srivastava Dep. 200:5-201:2. In support of his opinion, he cited just three studies, all of which are inapt. The first study involved students, not voters, being tested in a low-stakes setting. The study's

author noted that results might change in settings with higher moral or social stakes. *Id*. at 176:24–75:20. The second study was a stripped down "replication" of the first, not an original study. *Id*. at 180:9–12. The authors stated that further study was needed to determine whether their findings applied in a "government" setting. *Id*. at 183:17–85:16. The third study considered only the recipient's perception of the signature, not the honesty of the person signing. And Dr. Srivastava would only state that the studies were peer reviewed, but not that they were "generally accepted within the field." *Id*. at 187:14–25.

Defendants also fail to offer any meaningful evidence in support of their assertion that the pen and ink rule assists in detecting fraud after it has occurred. *See* ECF No. 156-1 at 27. For this claim, Defendants again rely on Dr. Srivastava, but by his own admission he is not an expert in "fraud detection" and so his testimony on the subject is inadmissible under Fed. R. Evid. 702. Srivastava Dep. 111:24–112:6. Even if it were admissible, Dr. Srivastava testified that detecting fraud as an application was processed would require comparing the application signature with one in the voter's records, the very process the legislature abolished and that counties confirmed no longer takes place. *Id*. at 111:16–22, 112:3–15.

C. The materiality provision applies to absentee ballot applications.

Given Defendants' concession that the instrument used to sign an absentee ballot application is immaterial in determining voter qualifications, *see* ECF No.

156-1 at 32, the only question left for the Court is whether the materiality provision applies to those applications. Congress and this Court have made clear that it does.

In a recent order granting a preliminary injunction against enforcement of a DOB requirement on absentee ballot envelopes, the Court explained that "[t]he text of the Materiality Provision does not distinguish between . . . 'an act requisite to voting *absentee* and an act requisite to voting *in person*.'" *S.B. 202*, 2023 WL 5334582, at *10. The Court also rejected Defendants' argument that "the Materiality Provision [only] appl[ies]" when "the paper or record . . . is [] used to determine whether an individual is qualified to vote." *Id*. In doing so, the Court explained:

> It has never been the law that the Materiality Provision only applies to that initial determination of whether a voter is qualified to vote. Moreover, interpreting the Materiality Provision in the manner Responding Defendants suggest would essentially render the provision meaningless. In other words, a state could impose immaterial voting requirements yet escape liability each time by arguing that the very immateriality of the requirement takes it outside the statute's reach.

Id. The statute's plain language confirms this. The materiality provision applies to 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) (emphasis added). It also defines "vote" to include any "other action required by State law prerequisite to voting, [or] casting a ballot . . . ."[12] *Id.* § 10101(e). The "paper" that

[12] Despite Defendants' assertion, the materiality provision cannot apply to "virtually any rule" because its language limits it only to papers and records requisite to voting.

voters must sign with pen and ink is an "application," and for absentee voters, the application's completion is an "act requisite to voting." *Id*. § 10101(a)(2)(B). The statute's text thus provides no wiggle room: as this Court held in denying State Defendants' motion to dismiss, "the absentee ballot application squarely constitutes a 'record or paper' relating to an 'application' for voting." ECF No. 59 at 17; *see also 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) ("*LUPE*"), *stayed pending appeal sub nom. United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023).

Defendants' arguments are largely unconstrained by the statutory text, as they invite this Court to impose limitations that Congress did not. Specifically, they argue that the materiality provision's protections end with voter registration, leaving states free to circumvent the Civil Rights Act just by shifting the prohibited conduct to later stages of the voting process. *See* ECF No. 156-1 at 31. But they never explain what to make of the materiality provision's explicit reference to "any record or paper relating to *any application*, registration, *or other act requisite to voting*," 52 U.S.C. § 10101(a)(2)(B), or its definition of the term "vote," which includes "registration or any other action required by State law prerequisite to voting," *id*. § 10101(e).[13]

[13] Nor does the statute permit an exception for immaterial paperwork errors that deny the right to vote because someone "failed to comply with a '[m]ere inconvenience associated with the State's 'reasonable means of pursuing legitimate interests.'" ECF

Rather than grapple with the materiality provision's full text, Defendants string together cherrypicked excerpts and attempt to construct a different statute than the one Congress wrote. They claim, for instance, that the materiality provision "applies only to an 'error or omission' in an 'application, registration, or other act requisite to voting' that affects a 'determina[tion] whether such individual is qualified under State law to vote,'" ECF No. 156-1 at 31 (quoting 52 U.S.C. § 10101(a)(2)(B)); but that's not what the statute says. It prohibits the denial of the right to vote based on an error or omission "*if such error or omission is not material in determining* whether such individual" is qualified to vote. 52 U.S.C. § 10101(a)(2)(B) (emphasis added). The language Defendants omitted, not coincidentally, is their undoing: it demonstrates that a paperwork error is not permissible grounds for denying the right to vote unless *that error* is material in determining the voter's qualifications. "[T]he fact that the [pen and ink signature] is not used to determine voter qualifications merely reinforces the immateriality of the [pen and ink rule]." *S.B. 202*, 2023 WL 5334582, at *10.

To be sure, a divided panel of the Third Circuit recently concluded that the materiality provision applies only to voter registration—the initial determination of

No. 156-1 at 32 (quoting *Brnovich*, 141 S. Ct. at 2338, 2341). And in contending otherwise, it is unclear why Defendants rely on *Brnovich*, which concerned § 2 of the Voting Rights Act, not the materiality provision. *See* 141 S. Ct. at 2330.

voter qualifications. *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, No. 23-3166, 2024 WL 1298903, at *3 (3d Cir. Mar. 27, 2024) ("*Pa. NAACP*"). The ruling departs from the same court's prior decision in *Migliori*, which found that the materiality provision's plain text—and specifically the phrase "other act requisite to voting"—extended its reach beyond voter registration to include the declaration form on an absentee ballot envelope. *Migliori v. Cohen*, 36 F.4th 153, 162 n.56 (3d Cir.) (quoting 52 U.S.C. § 10101(a)(2)(B)), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022). Ultimately, *Pa. NAACP* should not guide this Court's decision because it repeats many of the same statutory interpretation errors that Defendants commit here.

First, *Pa. NAACP's* focus on voter registration alone fails to give independent meaning to each of the different types of "records" explicitly contemplated by the materiality provision—"application, registration, or other act requisite to voting"—and instead adopts a reading that renders the entire phrase redundant and the term "other act requisite to voting" meaningless. Second, the court's analysis all but disregards the statutory definition of "vote," which provides clear and overwhelming evidence of Congress's intent to reach beyond voter registration. As noted, the materiality provision defines "vote" to encompass "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(e) (emphasis added). Third, the court's limitation on the scope of the materiality provision relies on a phrase ("in determining whether such individual is qualified") that simply describes the types of errors or omissions that cannot be used to deny an individual the right to vote—i.e., those errors that are "not material in determining" voter qualifications. Interpreting this phrase to limit the overall scope of the materiality provision, despite plain language to the contrary, assumes Congress hid an elephant in a mousehole. *But see Patterson v. Ga. Pac., LLC*, 38 F.4th 1336, 1348 (11th Cir. 2022) (noting "Congress does not generally hide elephants in mouseholes," particularly "where the elephant would have to trample the ordinary and plain meaning of the words Congress did choose" (quotation omitted)). Worst of all, the *Pa. NAACP* ruling undermines the materiality provision precisely in the manner that this Court rejected. It "essentially render[s] the provision meaningless" by allowing a state to "impose immaterial voting requirements yet escape liability each time by arguing that the very immateriality of the requirement takes it outside the statute's reach." *S.B. 202*, 2023 WL 5334582, at *10. The Court correctly rejected this atextual interpretation in *In re Georgia Senate Bill 202* and should do so again here.

Finally, Defendants suggest that applying the materiality provision as written—and consistent with this Court's interpretation—would obliterate nearly "every rule governing how citizens [would] vote." ECF No. 156-1 at 33. Putting

aside the absence of any authority or even a concrete example to support their hypothetical parade of horribles, Defendants misunderstand the individualized nature of a materiality provision claim. *See* ECF No. 156-1 at 33–34. Here, all Defendants agree that they do not use pen and ink signatures in determining voter qualifications or even identity, SAMF ¶ 40; Brittian Dep. 40:25–41:5; predictions about the fate of other election regulations, the mechanics of which may vary from one state to the next, is highly speculative and irrelevant to this Court's interpretation of unambiguous statutory terms.

D. The instrument used to sign an absentee ballot application is not material in determining one's qualification to vote in Georgia.

Defendants' last grasp at preserving the pen and ink rule asks the Court to treat every single voting requirement a state may impose as a "qualification." ECF No. 156-1 at 34–39. This too would render the materiality provision meaningless by converting every state requirement into a qualification to vote, and it would contradict rulings from this Court and others that have enforced the materiality provision by determining whether the challenged state law was material to voter qualifications. *See, e.g.*, *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006) (state statute requiring social security disclosure for voter registration); *see also LUPE*, 2023 WL 8263348, at *14–18 (state statute requiring disclosure of ID number); *S.B. 202*, 2023 WL 5334582, at

*1–2 (state statute requiring DOB on absentee ballot outer envelope); *Wash. Ass'n of Churches*, 492 F. Supp. 2d at 1270–71 (statute requiring state to match potential registrants' social security number or drivers' license number prior to registration).

These cases reflect an almost universal recognition that voter qualifications are defined by substantive characteristics, like citizenship, residence, and age. Indeed, Defendants rely on the Fifth Circuit's materiality analysis in *Callanen* but fail to mention that the court explicitly "reject[ed]" the notion "that States may circumvent the Materiality Provision by defining all manner of requirements, no matter how trivial, as being a qualification to vote and therefore 'material.'" 89 F.4th at 487. To be material, the information must bear some relevance to the question of eligibility. *LUPE*, 2023 WL 8263348, at *14; *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018). Adopting Defendants' view would give states unchecked authority to require all manner of irrelevant information and enable election officials to reject applications based solely on the failure to comply—creating the exact arbitrary and erroneous disenfranchisement that the materiality provision is meant to prevent. [14]

[14] Nor do the Defendants' citations to easily distinguishable cases, ECF No. 156-1 at 37-38, support their circular proposition that the pen and ink rule is material simply because Georgia has enacted it into law. *See Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 802–03 (W.D. Mo. 2020) (concluding plaintiffs were unlikely to succeed on materiality claim challenging rejection of deficient absentee

Defendants also urge this Court to follow *Callanen*'s and *Byrd*'s conclusions about the materiality of a wet signature on voter registration applications but ignore the glaring distinction highlighted by Defendants' own concessions in this case: the pen and ink signature requirement on absentee ballot applications has nothing to do with voter qualifications. *E.g.*, ECF No. 156-1 at 32 (conceding that voter "qualifications are determined at registration"). *Callanen* and *Byrd* concerned requirements on voter registration applications—forms that election officials use to determine voter eligibility. Those courts thus deemed the wet signatures material under the totality of very different circumstances. *See Callanen*, 89 F.4th at 489; *see also Byrd*, 2023 WL 7169095, at *6–7.

The remaining authorities Defendants cite for support are either inapposite or demonstrate why the pen and ink rule is immaterial in determining voter qualifications. Defendants' reliance on *Howlette v. City of Richmond*, is misplaced because the petition signatures in that case were collected without any additional identifying information which one could use to verify the voter's eligibility, making the notarization requirement the only means of doing so. 485 F. Supp. 17, 21–23

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ballot applications and ballot envelopes rather than any specific requirement that was immaterial to the determination of voter qualifications); *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (concluding that "an individual is not qualified to vote without a compliant ID" where plaintiffs provided no argument or citation to the contrary).

(E.D. Va.), *aff'd*, 580 F.2d 704 (4th Cir. 1978). By contrast, here, Defendants do not use an applicants' signature to verify their eligibility at all. And *Diaz v. Cobb* in fact demonstrates why the pen and ink rule is immaterial. 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006). There, plaintiffs challenged the materiality of check-boxes on a voter registration application which affirmed specific qualifications as duplicative of the more general oath found at the bottom of the application. *Id*. at 1212–13. The court reasoned that because the boxes and oath served similar yet different purposes in affirming an applicant's eligibility, both requirements were indeed material. *Id.* But the court went on to explain that the failure to comply with a needlessly technical requirement, "such as the color of ink to use in filling out the form" is an example of an immaterial omission under the materiality provision. *Id.* at 1213.

* *

In sum, the pen and ink rule imposes an unnecessary trivial requirement that is immaterial to voter qualifications and serves no purpose but to reject applications of otherwise eligible voters, in violation of the Civil Rights Act. *S.B. 202*, 2023 WL 5334582, at *7–8.

CONCLUSION

For the foregoing reasons, the Court should deny State Defendants,' Intervenor-Defendants, and DeKalb Defendants' Motions for Summary Judgment and grant Plaintiffs' Motion.

Dated: April 11, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **Plaintiffs' Consolidated Response to State and DeKalb Defendants' Motions 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: April 11, 2024

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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' Consolidated Response to State and DeKalb Defendants' Motions 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: April 11, 2024

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