UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VOTE.ORG; GEORGIA ALLIANCE FOR RETIRED AMERICANS; and PRIORITIES USA,

Plaintiffs,

v.

GEORGIA STATE ELECTION BOARD; EDWARD LINDSEY, JANICE W. JOHNSTON, SARA TINDALL GHAZAL, and MATTHEW MASHBURN, in their official capacities as members of the Georgia State Election Board; and CATHY WOOLARD, KATHLEEN D. RUTH, AARON V. JOHNSON, MARK WINGATE, and TERESA K. CRAWFORD in their official capacities as members of the Fulton County Registration and Elections Board,

Defendants.

Case No. 1:22-cv-01734-JPB

PLAINTIFFS' NOTICE OF FILING OF CORRECTED BRIEF IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS

Plaintiffs hereby notify the Court of the filing of their corrected Brief in Opposition to State Defendants' Motion to Dismiss, attached as **Exhibit 1** to this Notice. Plaintiffs' original brief, timely filed on July 27, 2022 [ECF No. 37] in opposition to State Defendants' pending motion to dismiss the Complaint, did not comply with LR 5.1(D), NDGA because it lacked a 1.5" margin at the top of each page. Plaintiffs respectfully submit their corrected brief, which includes only stylistic changes made to comply with this Local Rule and resulting changes in pagination in the Tables preceding argument, and which makes no changes to its substance. The corrections are shown in a redline comparison of the original and corrected briefs, attached as **Exhibit 2** to this Notice.

[**signature block on following page**]

Dated: July 29, 2022

Respectfully submitted,

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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' NOTICE OF FILING OF CORRECTED BRIEF IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS** 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: July 29, 2022

/s/ Uzoma N. Nkwonta
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Exhibit 1

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PLAINTIFFS' BRIEF IN OPPOSITION TO
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INTRODUCTION

Georgia's Senate Bill 202 ("SB 202") created a new requirement that voters applying for absentee ballots must sign their applications with "pen and ink" (the "Pen and Ink Rule"). The legislators who enacted SB 202 articulated no justification for the new Pen and Ink Rule. Nor could they: a digital or imaged signature serves all the same purposes as a wet signature, as evidenced by the fact that Georgia accepts a digital signature on almost every other official form. But even if Defendants could muster some rationale for demanding signatures in "pen and ink," the Civil Rights Act does not allow just *any* state interest to justify meaningless technicalities that serve as prerequisites to voting. Such requirements must be "material" to determining whether the person is eligible to vote. Affixing a pen and ink signature on an absentee ballot application bears no relation to a person's qualification to vote in Georgia. Any requirement untethered to voter eligibility violates the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B).

State Defendants' motion to dismiss makes no real effort to address this obvious issue, instead improperly presuming—as a matter of fact—that the Pen and Ink Rule will not disenfranchise any voters, because absentee voting is not the only means of voting in Georgia, and the statute offers at least a theoretical opportunity

to cure.[1] But as Plaintiffs allege in their Complaint, voting by mail is the only accessible means for many Georgia voters—including members of the Georgia Alliance for Retired Americans (the "Alliance")—who are away from home during the election or otherwise are unable to access their polling place. And the opportunity to re-submit a rejected application is illusory when the cure itself also requires a "pen and ink" signature. State Defendants' remaining arguments on the merits ask the Court to ignore binding precedent and find that private parties may not enforce the Materiality Provision, or that such a claim requires proof of intent; the Eleventh Circuit has already rejected both arguments and so should this Court.

Finally, State Defendants' objections to Plaintiffs' standing simply rehash their flawed arguments on the merits and misconstrue the scope of the standing inquiry. They argue, for instance, that the Alliance lacks associational standing because the Pen and Ink Rule does not deprive anyone of the right to vote. But the law is clear that Plaintiffs need only establish a cognizable *injury*—not outright disenfranchisement—to establish standing. Even so, the Complaint specifically alleges that many voters, including some Alliance members, rely on absentee ballots

[1] The State Defendants are Georgia State Election Board, Edward Lindsey, Janice W. Johnson, Sara Tindall Ghazal, and Matthew Mashburn. The remaining Defendants are referred to collectively as the County Defendants. They are not parties to the motion to dismiss currently before the Court.

to vote but lack access to printers and will have difficulty complying with the Pen and Ink Rule.

As for Plaintiffs Vote.org and Priorities USA ("Priorities"), both organizations allege that their efforts to engage voters have been impaired by the Pen and Ink Rule and they have been forced to divert resources in response. That is enough to establish standing at this stage of the litigation. The Court should reject State Defendants' call to disregard Plaintiffs' well-pleaded allegations and deny the motion to dismiss.

STANDARD OF REVIEW

"To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hill v. Equifax Info. Servs., LLC*, 491 F. Supp. 3d 1328, 1331 (N.D. Ga. 2020) (quotation marks omitted). A court deciding a Rule 12(b)(6) motion to dismiss must "accept[ ] the allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff." *Ga. State Conf. of the NAACP v. City of LaGrange*, 940 F.3d 627, 631 (11th Cir. 2019) (quotation marks omitted). When a defendant brings a facial challenge to the Court's subject-matter jurisdiction under Rule 12(b)(1), "a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion—the court must consider the

allegations of the complaint to be true." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . for on a motion to dismiss [the court] 'presum[es] that general allegations embrace those specific facts that are necessary to support the claim.'" *Jones v. Fam. First Credit Union*, 340 F. Supp. 3d 1356, 1360–61 (N.D. Ga. 2018) (alterations in original) (citation omitted).

ARGUMENT

I. Plaintiffs have standing.

An organization may establish Article III standing in one of two ways: either "to bring certain claims on behalf of its members" (associational standing) or "to allege certain injuries suffered directly by the organization" (organizational standing). *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991). The Alliance has standing under the former theory, while Vote.org and Priorities have standing under the latter.

A. The Alliance has associational standing.

"An organizational plaintiff has [associational] standing to enforce the rights of its members 'when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th

Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). State Defendants do not dispute that the Alliance satisfies all pre-requisites for associational standing: the organization has "tens of thousands of" members, many of whom do not own printers and will have to devise alternative means to apply for an absentee ballot in order to be able to comply with the Pen and Ink Rule and successfully request an absentee ballot. Complaint ("Compl.") ¶¶ 16, 17, ECF No. 1. Instead, the motion to dismiss argues that no one is *disenfranchised* by the Pen and Ink Rule—a merits determination that is irrelevant to the standing inquiry. *DeKalb Event Ctr., Inc. v. City of Chamblee*, 15 F.4th 1056, 1061 n.2 (11th Cir. 2021) ("Standing in no way depends on the merits of a plaintiff's contention.") (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). The relevant question is whether Plaintiffs have alleged "that at least one member faces a realistic danger of suffering an injury." *Arcia*, 772 F.3d at 1342 (quotation marks omitted). Cognizable injuries include having to overcome an additional burden or barrier to voting and do not require outright disenfranchisement. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005).

Here, "at least one member faces a realistic danger of suffering an injury." *See Arcia*, 772 F.3d at 1343 (quotation marks omitted). And while it is not required, the

Complaint alleges that "some Alliance members cannot vote in person, and an inability to successfully apply for an absentee ballot *will deny them their vote*." Compl. ¶ 17 (emphasis added). The Alliance also alleges "[s]ome of [its] members, including Alliance President Kenny Bradford, do not own a printer," requiring them to take additional "cumbersome," time-consuming, and "burdensome" steps to obtain absentee ballots and exercise their right to vote. *Id*. These allegations, which must be taken as true at this stage, constitute cognizable injuries. *See Common Cause/Ga.*, 554 F.3d at 1352; *Charles H. Wesley Educ. Found.*, 408 F.3d at 1352.

B. Vote.org and Priorities have organizational standing.

Because the Alliance has standing and the Complaint seeks injunctive relief, the Court has jurisdiction and need not even "consider whether the other plaintiffs . . . have standing to maintain the suit." *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1124-25 (11th Cir. 2019) (quotation omitted). However, Vote.org and Priorities also have standing because they have had to divert resources in response to the Pen and Ink Rule. An organization suffers a cognizable injury where a "defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia*, 772 F.3d at 1341; *see also New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1284 (N.D. Ga. Aug. 31, 2020). Both Vote.org and Priorities satisfy this test.

Before the enactment of the Pen and Ink Rule, Vote.org had developed a web application that helped voters request an absentee ballot using an e-sign tool, whereby voters could "enter information into an online absentee ballot application; sign the form by uploading an image of their original signature into the web application; review their signed absentee ballot application; and fax the completed application to their county registrar as required by Georgia law." Compl. ¶ 14. With this tool, Vote.org helped roughly 8,000 Georgians request absentee ballots in 2018. *Id.* Now, Vote.org must "redesign its absentee ballot web application and employ more expensive (and less effective) means of achieving its voter participation goals in Georgia." *Id*. ¶ 15.

Likewise, Priorities must divert resources away from its mission of persuading and mobilizing citizens around key issues to educating voters about, and helping voters apply for, absentee ballots. *Id*. ¶ 19. This includes educating voters on the archaic Pen and Ink Rule. *Id.* Vote.org and Priorities have therefore alleged textbook organizational injuries sufficient to confer standing. *See Arcia*, 772 F.3d at 1340, 1342-43 (organizational standing established where organizations were required to divert resources to identify and assist eligible voters); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (similar); *New Ga. Project*, 484 F. Supp. 3d at 1287 (similar).

State Defendants' attempt to dismiss these injuries as "self-inflicted budgetary decisions" squarely contradicts longstanding precedent. State Defs.' Mot. to Dismiss ("Mot.") at 10, ECF No. 36-1. In fact, the Eleventh Circuit rejected this very argument in *Browning*. There, organizational plaintiffs challenging voter registration restrictions alleged standing based on their diversion of "scarce time and resources from registering additional voters" to assisting voters in curing defects in their registration applications. 522 F.3d at 1164-65. The defendant attempted to distinguish between laws that directly regulate and "negat[e] the efforts of an organization," and laws that "merely caus[e] the organization to voluntarily divert resources in response," and the defendant claimed that the latter did not create a cognizable injury. *Id.* at 1166. *Browning* concluded this distinction "finds no support in the law." *Id*. So too here.

Vote.org and Priorities allege injuries similar to those alleged by the *Browning* plaintiffs: diversion of time and resources away from registering and educating voters to ensuring that voters can still successfully apply for an absentee ballot under the Pen and Ink Rule. "The net effect" of these expenditures "is that the average cost of [helping] each voter [apply for an absentee ballot] increases, and . . . their noneconomic goals will suffer." *Id.* Vote.org and Priorities therefore have standing to seek redress of these injuries.

C. Third-party standing does not bar this suit.

State Defendants' invocation of the third-party standing doctrine fares no better because at least one plaintiff, the Alliance, brings suit on behalf of directly injured voters, and the prudential considerations that inform the third-party standing doctrine do not apply to Plaintiffs' Materiality Provision claim. In any event, Plaintiffs would also satisfy the third-party standing requirements if the Court were to apply them here.

1. The Alliance has properly asserted the rights of its members through associational standing.

At the outset, the Alliance's associational standing to bring claims on behalf of its members forecloses State Defendants' argument that the third-party standing doctrine bars this lawsuit. The Alliance filed suit to enforce the rights of its injured members directly, not as a "third party." *Browning*, 522 F.3d at 1159 n.7 (finding "third-party standing" doctrine did not bar suit where organizational plaintiffs established Article III standing "as representatives of their members and as organizations directly injured"). As such, the Court need not look any further to conclude that standing exists and that this case is justiciable. *Id.*

2. Third-party standing is inapplicable to Plaintiffs' statutory claim.

Even if the Court reaches this argument, third-party standing is no bar to Plaintiffs' claim under the Materiality Provision. As a threshold matter, *Lexmark*

International, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014), has cast doubt on the vitality of prudential standing, which includes the third-party standing restrictions, recognizing that the doctrine "is in some tension" with the Supreme Court's affirmation that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* at 126 (cleaned up); *see also*, *e.g.*, *Kentucky v. United States ex rel. Hagel*, 759 F.3d 588, 596 n.3 (6th Cir. 2014) (expressing skepticism of prudential standing in light of *Lexmark*); *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat'l Ass'n*, 758 F.3d 592, 603 n.34 (5th Cir. 2014) (same).

In any event, the limitations on third-party standing must yield to the statutory text of the Civil Rights Act, which confers a right of action that extends beyond the subset of voters who may be disenfranchised by the Pen and Ink Rule. Specifically, section 10101(d) provides that courts shall exercise jurisdiction over Materiality Provision claims "without regard to whether the party aggrieved" has exhausted other remedies. 52 U.S.C. § 10101(d). And the Supreme Court has held that the use of the term "party aggrieved" in defining the scope of any right of action reflects an intent to abrogate prudential standing requirements. *E.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998); *accord Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 363 (5th Cir. 1999) (finding use of term "aggrieved person"

sufficient to "extend standing under the Act to the maximum allowable under the Constitution"); *Ellis v. Cartoon Network, Inc.*, No. 1:14-CV-484-TWT, 2014 WL 5023535, at *2 (N.D. Ga. Oct. 8, 2014) ("Congress's use of the word 'aggrieved' indicates its intent to allow for broad standing."), *rev'd on other grounds*, 803 F.3d 1251 (11th Cir. 2015). "A court cannot . . . limit a cause of action that Congress has created merely because 'prudence' dictates," *Lexmark*, 572 U.S. at 128; therefore, State Defendants' third-party standing argument must fail.

3. Plaintiffs satisfy the requirements for third-party standing.

Even if the doctrine applied here, Plaintiffs would satisfy the third-party standing requirements. A party may assert the rights of someone not before the court where "(1) the plaintiff seeking to assert the third party's rights has otherwise suffered an injury-in-fact, (2) the relationship between the plaintiff and the third party is such that the plaintiff is nearly as effective a proponent of the third party's right as the third party itself, and (3) there is some obstacle to the third party asserting the right." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800 (11th Cir. 1993) (citing *Singleton v. Wulff,* 428 U.S. 106, 113-16 (1976)). Applying this framework, other courts have permitted organizations to enforce the Materiality Provision or other voting rights statutes on behalf of third parties. *See, e.g.*, *Tex. All. for Retired Ams. v. Hughs*, 489 F. Supp. 3d 667, 685 (S.D. Tex. 2020),

rev'd in part on other grounds, vacated in part, 28 F.4th 669 (5th Cir. 2022); *Richardson v. Tex. Sec'y of State*, 485 F. Supp. 3d 744, 773 (W.D. Tex. 2020), *rev'd in part on other grounds, vacated in part sub nom. Richardson v. Flores*, 28 F.4th 649 (5th Cir. 2022).

All three requirements are met here. Plaintiffs have suffered injuries in fact. *See supra* at 4-8. They are also nearly "as effective" proponents "of the right[s]" protected by the Materiality Provision as the impacted voters. *Singleton*, 428 U.S. at 115. On this point, "[t]he appropriate question is whether the identity of interests between plaintiff and the third party are 'sufficiently close,'" *Young Apts., Inc. v. Town of Jupiter*, 529 F.3d 1027, 1042 (11th Cir. 2008), or constitute "a substantial relationship." *Harris v. Evans*, 20 F.3d 1118, 1123 (11th Cir. 1994); *Ne. Ohio Coal. For the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251, at *34 (S.D. Ohio June 7, 2016), *aff'd in part, rev'd in part on other grounds*, 837 F.3d 612 (6th Cir. 2016) (finding identity of interests between nonprofits and homeless communities they "regularly work with" sufficiently close for third-party standing); *Craig v. Boren*, 429 U.S. 190, 196 (1976) (finding third-party standing for vendor to raise rights of buyer).

Priorities and Vote.org have a close relationship with Georgia voters who wish to vote absentee because of their ongoing work and advocacy to assist those

voters. Vote.org developed a web application to allow Georgia voters to apply for absentee ballots using an imaged signature; likewise, Priorities educates Georgians about the voting process, including the steps required to vote absentee, and gives them the tools they need to apply for and cast absentee ballots. These relationships bear little resemblance to the "*hypothetical* attorney-client relationship" found insufficient in *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (emphasis in original). Given the organizations' extensive knowledge of voting procedures in Georgia and their stated mission of helping people vote, both Plaintiffs are "fully, or very nearly, as effective a proponent of the right" as the voters affected. *Singleton*, 428 U.S. at 113-16.

There is also some hindrance to the voters themselves bringing suit given the "small financial stake involved and the economic burdens of litigation." *Powers v. Ohio*, 499 U.S. 400, 415 (1991); *cf. Husted*, 2016 WL 3166251, at *25 (finding hindrance where third parties in question "suffer[ed] disproportionately from" social problems and had "limited financial resources," making litigation difficult).

Plaintiffs, however, are "uniquely positioned" to advance these claims. They are sophisticated organizations capable of maintaining protracted litigation, and the organizational injuries they have suffered, along with their commitment to protecting the right to vote, gives Plaintiffs "strong incentives to pursue this lawsuit."

Young Apts., 529 F.3d at 1044; *see supra* at 6-8. In sum, Plaintiffs' claims are "central to [their] purpose," *Richardson*, 485 F. Supp. 3d at 774, and they are well suited to vindicate the rights of the voters they represent.

II. Plaintiffs have stated a claim upon which relief can be granted.

A. Plaintiffs can enforce the Materiality Provision.

Both the Eleventh Circuit and courts in this district have repeatedly found that private plaintiffs can enforce the Materiality Provision. *E.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1371 (N.D. Ga. 2005) (finding private plaintiffs can enforce Materiality Provision because "[t]he Court is bound to apply [*Schwier*]"); *cf. Browning*, 522 F.3d at 1164 (concluding organizations had standing to bring Materiality Provision claim); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308 (N.D. Ga. 2018) (finding private plaintiffs likely to succeed on merits of Materiality Provision claim).

State Defendants do not dispute that *Schwier* is binding, nor do they offer any reason to believe that *Schwier* has lost its vitality. And, in fact, many courts have since followed *Schwier*'s reasoning, including most recently the Third Circuit, which held that a meaningless date requirement on an absentee ballot envelope violated the Materiality Provision. *See Migliori v. Cohen*, 36 F.4th 153, 159 (3d Cir. 2022); *see also Billups*, 406 F. Supp. 2d at 1371; *Martin*, 347 F. Supp. 3d at 1308; *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 858-860 (W.D. Tex. 2020), *rev'd*

and remanded on other grounds, 860 F. App'x 874 (2021). All that State Defendants marshal in support of their invitation to reject established precedent is a vague citation to *Vega v. Tekoh*, 142 S. Ct. 2095 (2022), which found Section 1983 an inappropriate vehicle for suing over a violation of *Miranda*. *Id*. at 2101, 2107. *Vega* did not undermine *Schwier*—indeed, it did not mention it at all. *Vega* simply restated the relevant test for determining whether a statute is privately enforceable through Section 1983, *id*. at n.6—the same test the Eleventh Circuit adopted in *Schwier*, 340 F.3d at 1296, and which other courts have since applied to reach the same result. *E.g*., *Migliori*, 36 F.4th at 159.

Finally, the Court should reject State Defendants' argument that Plaintiffs are not among the Materiality Provision's "class of beneficiaries." "[L]ooking to the language of the statute itself," *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689 (1979), reveals that Section 10101 contemplates a broad class of persons capable of enforcing its provisions, as evidenced by the statute's reference to "part[ies] aggrieved" in Section 10101(d). *See supra* at 10. Both Vote.org and Priorities fall within this broad scope because they have suffered injuries flowing from Defendants' violation of the Materiality Provision. *See supra* at 6-8. It is therefore little surprise that other courts have permitted organizations to enforce this law. *E.g.*, *Hughs*, 489 F. Supp. 3d at 685; *Richardson*, 485 F. Supp. 3d at 773.

B. The Pen and Ink Rule is not material to determining an applicant's eligibility to vote.

Next, citing state interests unrelated to determining a voter's qualifications, State Defendants suggest that the Pen and Ink Rule is "material" to determining "whether [an] individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). Not so.

The Eleventh Circuit has identified two possible standards for determining "materiality." Under the first, the information must be relevant to determining eligibility; under the second, the information must be "close[] to outcome-determinative" in determining eligibility. *Browning*, 522 F.3d at 1174 (11th Cir. 2008). The court has not indicated a preference between these two standards, but the Pen and Ink Rule falls short under either because the specific instrument used to sign an absentee ballot application—whether by "pen and ink" or a digitized or imaged signature—bears no relation to any of the qualifications to vote under Georgia law, which consist only of "U.S. citizenship, Georgia residency, being at least eighteen years of age, not having been adjudged incompetent, and not having been convicted of a felony." *Schwier*, 340 F.3d at 1297 (citing O.C.G.A. § 21-2-216)); *Martin*, 347 F. Supp. 3d at 1308 (same); *cf. Migliori*, 36 F.4th at 164 (finding requirement of dating ballot envelope immaterial); *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D.

Fla. 2006) (identifying using wrong "color of ink . . . in filling out the form" as example of immaterial omission).

State Defendants make little attempt to explain the relationship between pen usage and voter qualifications, and instead insist that the requirement is "material" because it advances *other* state interests. Mot. at 19. But aside from a state's interest in determining a voter's eligibility under state law, "state interests" are irrelevant to the Materiality Provision analysis. *See, e.g.*, *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (finding social security number requirement violates Materiality Provision regardless of usefulness in "prevent[ing] voter fraud") *aff'd*, 439 F.3d 1285 (11th Cir. 2006); *Migliori*, 36 F.4th at 163 (similar); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270-71 (W.D. Wash. 2006) (similar).

What's more, State Defendants' purported interests in the Pen and Ink Rule are not credible. Digital or imaged signatures are just as effective at "certif[ying] . . . that the signer has read the document" or ensuring the signer has "taken [it] seriously," Mot. at 18-19, as demonstrated by the fact that Georgia law permits the use of digital or imaged signatures in almost every other context. *See* Ga. Code Ann. § 10-12-7 ("A record or signature shall not be denied legal effect or enforceability solely because it is in electronic form."); Compl ¶¶ 28 (observing ability to use e-signature to register to vote when filing application for hunting, fishing, or trapping

license), 29 (noting permissible use of e-signatures in real estate deeds and other transactions). State Defendants have not advanced a single, plausible justification for demanding the use of "pen and ink" in entering signatures that would comply with the Materiality Provision.

C. The Pen and Ink Rule denies the right to vote.

The Pen and Ink Rule denies individuals their right to vote, especially those who depend on absentee ballots to participate in Georgia's elections. This includes elderly or disabled voters who cannot travel to a polling place to vote in person, military and overseas voters, and other Georgians who are temporarily located out-of-state or outside their voting jurisdiction during the election. Compl. ¶ 35. If these voters fail to use pen and ink when signing their absentee ballot application, they will be denied an absentee ballot and disenfranchised as a result.

State Defendants gloss over this sequence of events by arguing that voters may either re-apply or figure out some other way of voting. For some voters, though, there is no alternative to absentee voting. *Id.* And the Materiality Provision makes no exception merely because a voter might, through their own effort, reclaim their vote. Indeed, this Court has expressed skepticism that "the opportunity to cure an error rehabilitates any potential violation" of the Materiality Provision and found such claims unsupported at the motion to dismiss stage. *Sixth Dist. of Afr. Methodist*

Episcopal Church v. Kemp, No. 1:21-CV-01284-JPB, 2021 WL 6495360, at *14 (N.D. Ga. Dec. 9, 2021) (lead case *The New Ga. Project v. Raffensperger*, No. 1:21-MI-55555-JPB). The same is true here. While State Defendants suggest—without support—that applicants who fail to comply with the Pen and Ink Rule may receive another chance to sign and resubmit their application, Mot. at 17, this purported cure opportunity does not resolve the Materiality Provision violation. In either scenario—the original application or the resubmission—a voter who fails to sign in "pen and ink" will be denied their ballot.

Beyond that, State Defendants' argument faces a more practical problem: Georgia has no explicit cure period. O.C.G.A. § 21-2-381(b)(4). By contrast, the Texas law considered in *Vote.org v. Callanen* provides a ten-day cure period from the date a rejection notice is delivered, regardless of whether the statewide deadline for registering has passed. No. 22-50536, 2022 WL 2389566, *2 (5th Cir. July 2, 2022); Tex. Elec. Code § 13.073.[2] Georgia law merely allows a voter to resubmit their absentee ballot application if they can do so before the statewide deadline for

[2] At several points in their motion, State Defendants cite *Callanen*, in which the Fifth Circuit granted a stay of a preliminary injunction enjoining a "wet signature" rule similar to that at issue here. 2022 WL2389566, at *1. That out-of-circuit stay order is not binding on this court. Furthermore, its reasoning conflicts both with Eleventh Circuit precedent, *e.g.*, *Schwier*, 340 F.3d at 1284, and well-reasoned out-of-circuit authority, *e.g.*, *Migliori*, 36 F.4th at 153.

applications.

State Defendants also suggest that "the right to vote" under the Materiality Provision does not extend to absentee voting, but that argument relies on (and misinterprets) precedent applying the Fourteenth Amendment, not the Materiality Provision. In *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), the lone case Defendants offer in support of the argument, the Court considered the contours of the *constitutional* right to vote, not any *statutory* rights. *Id*. at 808. Under the Civil Rights Act, Section 10101 defines the word "vote" broadly to include "all action necessary to make a vote effective including, but not limited to . . . *casting a ballot*[.]" 52 U.S.C.A. § 10101(e) (emphasis added). Recognizing this, courts have found rules governing absentee voting to violate the Provision. *See*, *e.g.*, *Migliori*, 36 F.4th at 162-164 (requirement of hand-written date on ballot envelope violated Provision); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1340 (N.D. Ga. 2018) (rejection of absentee ballots due to incorrect birth year likely violated Provision); *Martin*, 347 F. Supp. 3d at 1309 (same); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640 (W.D. Ark. Nov. 15, 2021) (errors or omissions during absentee voting process likely fell within the Provision). And even in the constitutional context, courts have repeatedly rejected State Defendants' interpretation of *McDonald*. *Infra*

at 24.

D. The Materiality Provision covers absentee ballot applications.

State Defendants next offer a tortured reading of the Materiality Provision to suggest that a signature on an absentee ballot application is not an "act requisite to voting," 52 U.S.C. § 10101(a)(2)(B), but rather a prerequisite to obtaining an absentee ballot. The provision's plain language rejects this theory; it expressly covers "an error or omission on *any* record or paper *relating to* any application, registration, or other act requisite to voting." *Id*. Individuals who rely on absentee ballots must successfully submit an absentee ballot application in order to exercise their right to vote, which makes the application "requisite to voting." It makes no difference that obtaining an absentee ballot is not the last possible step in the voting process. Accepting State Defendants' theory would mean that even a voter registration application would fall outside of the Materiality Provision's scope because it simply allows voters to receive a ballot at the polls. *But see Schwier*, 340 F.3d at 1297 (applying Materiality Provision to voter registration forms). Tellingly, State Defendants cite no authority that has endorsed their radical interpretation and exempted absentee ballot applications from the Materiality Provision's reach.

E. Materiality Provision claims do not require any showing that the challenged rule was adopted with "improper motive."

State Defendants next ask this Court to add by judicial fiat a new element to Materiality Provision claims: that the challenged practice was "adopted with improper intent." Mot. at 21. The statutory language, however, makes no mention of an intent requirement—though the preceding provision does: Section 10101(a)(1) prohibits discrimination in voting because of "race, color, or previous condition of servitude." 52 U.S.C. § 10101(a)(1). In other words, Congress "knew how to draft" such an intent requirement "when it wanted to," *Chicago v. Env't Def. Fund*, 511 U.S. 328, 337-38 (1994), but purposefully elected not to do so for the Materiality Provision.

State Defendants invoke *Browning*'s discussion of the history of the Materiality Provision and the kinds of practices Congress sought to prevent to support their argument that materiality claims require ill intent. But *Browning* held the *exact opposite*. It explained that "[t]he text of the resulting statute, and not the historically motivating examples of intentional and overt racial discrimination, is thus the appropriate starting point of inquiry in discerning congressional intent." *Browning*, 522 F.3d at 1173. To be sure, in enacting the Materiality Provision, Congress intended to combat specific evils. But having witnessed a century of brutal discrimination in voting, Congress was well aware of the adaptability of

disenfranchisement methods and did not presume to know all their manifold forms. Accordingly, in its wisdom, Congress chose a "broader remedy." *Id*. The Court should effectuate that intent—and the plain text of the law.

F. The Pen and Ink Rule violates the Materiality Provision in all its applications.

State Defendants urge the Court to construe Plaintiffs' Materiality Provision claim as a "facial challenge" because Plaintiffs seek to invalidate the Pen and Ink Rule in its totality. But the "facial" versus "as-applied" distinction has no bearing on Plaintiffs' statutory claim because "[t]he concept of facial and as-applied challenges comes from constitutional law." *Am. Ass'n of Cosmetology Schs. v. Devos*, 258 F. Supp. 3d 50, 66 n.6 (D.D.C. 2017). State Defendants fail to cite a single case construing an action to enjoin a state law under the Civil Rights Act as a facial challenge requiring the plaintiffs to "establish that no set of circumstances exists under which the Act would be valid." *Cf. United States v. Salerno*, 481 U.S. 739, 745 (1987). In any event, Plaintiffs have stated a plausible claim for relief even under the heightened standard applicable to facial challenges. The Pen and Ink Rule is immaterial to determining a voter's qualifications in Georgia and thus violates the Civil Rights Act in all its applications. *See supra* at 15-17; *Martin*, 347 F. Supp. 3d

at 1308.[3]

G. Reading the Materiality Provision to bar the Pen and Ink Rule would not violate the U.S. Constitution.

Perhaps realizing that the plain meaning of the Materiality Provision is not in their favor, State Defendants argue that reading the Materiality Provision to bar the Pen and Ink Rule would exceed Congress's enumerated powers. As State Defendants see it, a Fourteenth Amendment claim cannot be predicated on the denial of access to an absentee ballot, and therefore Congress has no power to make a law protecting such access. The argument is meritless on both counts.

It is well settled that Congress has "broad power" under Section 5 of the Fourteenth Amendment to enforce that amendment's guarantees, including through "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (quoting *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727–728 (2003)). Congress is not limited to simply parroting the rights associated with the Fourteenth Amendment. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). Rather, "Congress' [sic] power 'to enforce' the [Fourteenth] Amendment includes the

[3] Defendants also argue that Plaintiffs' "facial challenge" cannot survive dismissal because the Pen and Ink Rule serves legitimate state interests. But as explained above, such considerations are irrelevant to claims asserted under the Materiality Provision. *See supra* at 15-16.

authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id*.

State Defendants' anemic interpretation of Section 1, for which they rely on *McDonald*, also fails. As an initial matter, *McDonald* preceded *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and its progeny. As the Court has since made clear, there is no "'litmus test' that would neatly separate valid from invalid restrictions" on the right to vote. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008); *Sixth Dist. of African Methodist Episcopal Church*, 2021 WL 6495360, at *11 (rejecting argument that *McDonald* requires foregoing *Anderson-Burdick*). Even if that were not so, *McDonald* "rested on a failure of proof" at summary judgment; when presented with the requisite evidence in another case challenging restrictions on absentee voting soon after, the Court reached a different conclusion. *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974). *Skinner*, *Anderson*, and other decisions that have followed *McDonald* eliminate any doubt that a restriction on absentee voting can run afoul of the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the Court should deny State Defendants' motion to dismiss.

Dated: July 27, 2022

Respectfully submitted,

/s/ Uzoma N. Nkwonta

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CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused to be electronically filed a copy of the foregoing **PLAINTIFFS' BRIEF IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS** 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: July 27, 2022

/s/ Uzoma Nkwonta
Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFFS' BRIEF IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS** 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: July 27, 2022

/s/ Uzoma Nkwonta
Counsel for Plaintiffs

Exhibit 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VOTE.ORG; GEORGIA ALLIANCE FOR RETIRED AMERICANS; and PRIORITIES USA,

Plaintiffs,

v.

GEORGIA STATE ELECTION BOARD; EDWARD LINDSEY, JANICE W. JOHNSTON, SARA TINDALL GHAZAL, and MATTHEW MASHBURN, in their official capacities as members of the Georgia State Election Board; and CATHY WOOLARD, KATHLEEN D. RUTH, AARON V. JOHNSON, MARK WINGATE, and TERESA K. CRAWFORD in their official capacities as members of the Fulton County Registration and Elections Board,

Defendants.

Case No. 1:22-cv-01734-JPB

PLAINTIFFS' BRIEF IN OPPOSITION TO
STATE DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

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Georgia's Senate Bill 202 ("SB 202") created a new requirement that voters applying for absentee ballots must sign their applications with "pen and ink" (the "Pen and Ink Rule"). The legislators who enacted SB 202 articulated no justification for the new Pen and Ink Rule. Nor could they: a digital or imaged signature serves all the same purposes as a wet signature, as evidenced by the fact that Georgia accepts a digital signature on almost every other official form. But even if Defendants could muster some rationale for demanding signatures in "pen and ink," the Civil Rights Act does not allow just *any* state interest to justify meaningless technicalities that serve as prerequisites to voting. Such requirements must be "material" to determining whether the person is eligible to vote. Affixing a pen and ink signature on an absentee ballot application bears no relation to a person's qualification to vote in Georgia. Any requirement untethered to voter eligibility violates the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B).

State Defendants' motion to dismiss makes no real effort to address this obvious issue, instead improperly presuming—as a matter of fact—that the Pen and Ink Rule will not disenfranchise any voters, because absentee voting is not the only means of voting in Georgia, and the statute offers at least a theoretical opportunity

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to cure.[1] But as Plaintiffs allege in their Complaint, voting by mail is the only accessible means for many Georgia voters—including members of the Georgia Alliance for Retired Americans (the "Alliance")—who are away from home during the election or otherwise are unable to access their polling place. And the opportunity to re-submit a rejected application is illusory when the cure itself also requires a "pen and ink" signature. State Defendants' remaining arguments on the merits ask the Court to ignore binding precedent and find that private parties may not enforce the Materiality Provision, or that such a claim requires proof of intent; the Eleventh Circuit has already rejected both arguments and so should this Court.

Finally, State Defendants' objections to Plaintiffs' standing simply rehash their flawed arguments on the merits and misconstrue the scope of the standing inquiry. They argue, for instance, that the Alliance lacks associational standing because the Pen and Ink Rule does not deprive anyone of the right to vote. But the law is clear that Plaintiffs need only establish a cognizable *injury*—not outright disenfranchisement—to establish standing. Even so, the Complaint specifically alleges that many voters, including some Alliance members, rely on absentee ballots

[1] The State Defendants are Georgia State Election Board, Edward Lindsey, Janice W. Johnson, Sara Tindall Ghazal, and Matthew Mashburn. The remaining Defendants are referred to collectively as the County Defendants. They are not parties to the motion to dismiss currently before the Court.

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to vote but lack access to printers and will have difficulty complying with the Pen and Ink Rule.

As for Plaintiffs Vote.org and Priorities USA ("Priorities"), both organizations allege that their efforts to engage voters have been impaired by the Pen and Ink Rule and they have been forced to divert resources in response. That is enough to establish standing at this stage of the litigation. The Court should reject State Defendants' call to disregard Plaintiffs' well-pleaded allegations and deny the motion to dismiss.

STANDARD OF REVIEW

"To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hill v. Equifax Info. Servs., LLC*, 491 F. Supp. 3d 1328, 1331 (N.D. Ga. 2020) (quotation marks omitted). A court deciding a Rule 12(b)(6) motion to dismiss must "accept[ ] the allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff." *Ga. State Conf. of the NAACP v. City of LaGrange*, 940 F.3d 627, 631 (11th Cir. 2019) (quotation marks omitted). When a defendant brings a facial challenge to the Court's subject-matter jurisdiction under Rule 12(b)(1), "a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion—the court must consider the

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allegations of the complaint to be true." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . for on a motion to dismiss [the court] 'presum[es] that general allegations embrace those specific facts that are necessary to support the claim.'" *Jones v. Fam. First Credit Union*, 340 F. Supp. 3d 1356, 1360–61 (N.D. Ga. 2018) (alterations in original) (citation omitted).

ARGUMENT

I. Plaintiffs have standing.

An organization may establish Article III standing in one of two ways: either "to bring certain claims on behalf of its members" (associational standing) or "to allege certain injuries suffered directly by the organization" (organizational standing). *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991). The Alliance has standing under the former theory, while Vote.org and Priorities have standing under the latter.

A. The Alliance has associational standing.

"An organizational plaintiff has [associational] standing to enforce the rights of its members 'when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th

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Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). State Defendants do not dispute that the Alliance satisfies all pre-requisites for associational standing: the organization has "tens of thousands of" members, many of whom do not own printers and will have to devise alternative means to apply for an absentee ballot in order to be able to comply with the Pen and Ink Rule and successfully request an absentee ballot. Complaint ("Compl.") ¶¶ 16, 17, ECF No. 1. Instead, the motion to dismiss argues that no one is *disenfranchised* by the Pen and Ink Rule—a merits determination that is irrelevant to the standing inquiry. *DeKalb Event Ctr., Inc. v. City of Chamblee*, 15 F.4th 1056, 1061 n.2 (11th Cir. 2021) ("Standing in no way depends on the merits of a plaintiff's contention.") (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). The relevant question is whether Plaintiffs have alleged "that at least one member faces a realistic danger of suffering an injury." *Arcia*, 772 F.3d at 1342 (quotation marks omitted). Cognizable injuries include having to overcome an additional burden or barrier to voting and do not require outright disenfranchisement. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005).

Here, "at least one member faces a realistic danger of suffering an injury." *See Arcia*, 772 F.3d at 1343 (quotation marks omitted). And while it is not required, the

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Complaint alleges that "some Alliance members cannot vote in person, and an inability to successfully apply for an absentee ballot *will deny them their vote*." Compl. ¶ 17 (emphasis added). The Alliance also alleges "[s]ome of [its] members, including Alliance President Kenny Bradford, do not own a printer," requiring them to take additional "cumbersome," time-consuming, and "burdensome" steps to obtain absentee ballots and exercise their right to vote. *Id*. These allegations, which must be taken as true at this stage, constitute cognizable injuries. *See Common Cause/Ga.*, 554 F.3d at 1352; *Charles H. Wesley Educ. Found.*, 408 F.3d at 1352.

B. Vote.org and Priorities have organizational standing.

Because the Alliance has standing and the Complaint seeks injunctive relief, the Court has jurisdiction and need not even "consider whether the other plaintiffs . . . have standing to maintain the suit." *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1124-25 (11th Cir. 2019) (quotation omitted). However, Vote.org and Priorities also have standing because they have had to divert resources in response to the Pen and Ink Rule. An organization suffers a cognizable injury where a "defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia*, 772 F.3d at 1341; *see also New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1284 (N.D. Ga. Aug. 31, 2020). Both Vote.org and Priorities satisfy this test.

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Before the enactment of the Pen and Ink Rule, Vote.org had developed a web application that helped voters request an absentee ballot using an e-sign tool, whereby voters could "enter information into an online absentee ballot application; sign the form by uploading an image of their original signature into the web application; review their signed absentee ballot application; and fax the completed application to their county registrar as required by Georgia law." Compl. ¶ 14. With this tool, Vote.org helped roughly 8,000 Georgians request absentee ballots in 2018. *Id.* Now, Vote.org must "redesign its absentee ballot web application and employ more expensive (and less effective) means of achieving its voter participation goals in Georgia." *Id.* ¶ 15.

Likewise, Priorities must divert resources away from its mission of persuading and mobilizing citizens around key issues to educating voters about, and helping voters apply for, absentee ballots. *Id.* ¶ 19. This includes educating voters on the archaic Pen and Ink Rule. *Id.* Vote.org and Priorities have therefore alleged textbook organizational injuries sufficient to confer standing. *See Arcia*, 772 F.3d at 1340, 1342-43 (organizational standing established where organizations were required to divert resources to identify and assist eligible voters); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (similar); *New Ga. Project*, 484 F. Supp. 3d at 1287 (similar).

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State Defendants' attempt to dismiss these injuries as "self-inflicted budgetary decisions" squarely contradicts longstanding precedent. State Defs.' Mot. to Dismiss ("Mot.") at 10, ECF No. 36-1. In fact, the Eleventh Circuit rejected this very argument in *Browning*. There, organizational plaintiffs challenging voter registration restrictions alleged standing based on their diversion of "scarce time and resources from registering additional voters" to assisting voters in curing defects in their registration applications. 522 F.3d at 1164-65. The defendant attempted to distinguish between laws that directly regulate and "negat[e] the efforts of an organization," and laws that "merely caus[e] the organization to voluntarily divert resources in response," and the defendant claimed that the latter did not create a cognizable injury. *Id.* at 1166. *Browning* concluded this distinction "finds no support in the law." *Id*. So too here.

Vote.org and Priorities allege injuries similar to those alleged by the *Browning* plaintiffs: diversion of time and resources away from registering and educating voters to ensuring that voters can still successfully apply for an absentee ballot under the Pen and Ink Rule. "The net effect" of these expenditures "is that the average cost of [helping] each voter [apply for an absentee ballot] increases, and . . . their noneconomic goals will suffer." *Id.* Vote.org and Priorities therefore have standing to seek redress of these injuries.

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C. Third-party standing does not bar this suit.

State Defendants' invocation of the third-party standing doctrine fares no better because at least one plaintiff, the Alliance, brings suit on behalf of directly injured voters, and the prudential considerations that inform the third-party standing doctrine do not apply to Plaintiffs' Materiality Provision claim. In any event, Plaintiffs would also satisfy the third-party standing requirements if the Court were to apply them here.

1. The Alliance has properly asserted the rights of its members through associational standing.

At the outset, the Alliance's associational standing to bring claims on behalf of its members forecloses State Defendants' argument that the third-party standing doctrine bars this lawsuit. The Alliance filed suit to enforce the rights of its injured members directly, not as a "third party." *Browning*, 522 F.3d at 1159 n.7 (finding "third-party standing" doctrine did not bar suit where organizational plaintiffs established Article III standing "as representatives of their members and as organizations directly injured"). As such, the Court need not look any further to conclude that standing exists and that this case is justiciable. *Id.*

2. Third-party standing is inapplicable to Plaintiffs' statutory claim.

Even if the Court reaches this argument, third-party standing is no bar to Plaintiffs' claim under the Materiality Provision. As a threshold matter, *Lexmark*

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International, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014), has cast doubt on the vitality of prudential standing, which includes the third-party standing restrictions, recognizing that the doctrine "is in some tension" with the Supreme Court's affirmation that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id*. at 126 (cleaned up); *see also*, *e.g.*, *Kentucky v. United States ex rel. Hagel*, 759 F.3d 588, 596 n.3 (6th Cir. 2014) (expressing skepticism of prudential standing in light of *Lexmark*); *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat'l Ass'n*, 758 F.3d 592, 603 n.34 (5th Cir. 2014) (same).

In any event, the limitations on third-party standing must yield to the statutory text of the Civil Rights Act, which confers a right of action that extends beyond the subset of voters who may be disenfranchised by the Pen and Ink Rule. Specifically, section 10101(d) provides that courts shall exercise jurisdiction over Materiality Provision claims "without regard to whether the party aggrieved" has exhausted other remedies. 52 U.S.C. § 10101(d). And the Supreme Court has held that the use of the term "party aggrieved" in defining the scope of any right of action reflects an intent to abrogate prudential standing requirements. *E.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998); *accord Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 363 (5th Cir. 1999) (finding use of term "aggrieved person"

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sufficient to "extend standing under the Act to the maximum allowable under the Constitution"); *Ellis v. Cartoon Network, Inc.*, No. 1:14-CV-484-TWT, 2014 WL 5023535, at *2 (N.D. Ga. Oct. 8, 2014) ("Congress's use of the word 'aggrieved' indicates its intent to allow for broad standing."), *rev'd on other grounds*, 803 F.3d 1251 (11th Cir. 2015). "A court cannot . . . limit a cause of action that Congress has created merely because 'prudence' dictates," *Lexmark*, 572 U.S. at 128; therefore, State Defendants' third-party standing argument must fail.

3. Plaintiffs satisfy the requirements for third-party standing.

Even if the doctrine applied here, Plaintiffs would satisfy the third-party standing requirements. A party may assert the rights of someone not before the court where "(1) the plaintiff seeking to assert the third party's rights has otherwise suffered an injury-in-fact, (2) the relationship between the plaintiff and the third party is such that the plaintiff is nearly as effective a proponent of the third party's right as the third party itself, and (3) there is some obstacle to the third party asserting the right." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800 (11th Cir. 1993) (citing *Singleton v. Wulff,* 428 U.S. 106, 113-16 (1976)). Applying this framework, other courts have permitted organizations to enforce the Materiality Provision or other voting rights statutes on behalf of third parties. *See, e.g.*, *Tex. All. for Retired Ams. v. Hughes*, 489 F. Supp. 3d 667, 685 (S.D. Tex. 2020),

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rev'd in part on other grounds, vacated in part, 28 F.4th 669 (5th Cir. 2022); *Richardson v. Tex. Sec'y of State*, 485 F. Supp. 3d 744, 773 (W.D. Tex. 2020), *rev'd in part on other grounds, vacated in part sub nom. Richardson v. Flores*, 28 F.4th 649 (5th Cir. 2022).

All three requirements are met here. Plaintiffs have suffered injuries in fact. *See supra* at 4-8. They are also nearly "as effective" proponents "of the right[s]" protected by the Materiality Provision as the impacted voters. *Singleton*, 428 U.S. at 115. On this point, "[t]he appropriate question is whether the identity of interests between plaintiff and the third party are 'sufficiently close,'" *Young Apts., Inc. v. Town of Jupiter*, 529 F.3d 1027, 1042 (11th Cir. 2008), or constitute "a substantial relationship." *Harris v. Evans*, 20 F.3d 1118, 1123 (11th Cir. 1994); *Ne. Ohio Coal. For the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251, at *34 (S.D. Ohio June 7, 2016), *aff'd in part, rev'd in part on other grounds*, 837 F.3d 612 (6th Cir. 2016) (finding identity of interests between nonprofits and homeless communities they "regularly work with" sufficiently close for third-party standing); *Craig v. Boren*, 429 U.S. 190, 196 (1976) (finding third-party standing for vendor to raise rights of buyer).

Priorities and Vote.org have a close relationship with Georgia voters who wish to vote absentee because of their ongoing work and advocacy to assist those

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voters. Vote.org developed a web application to allow Georgia voters to apply for absentee ballots using an imaged signature; likewise, Priorities educates Georgians about the voting process, including the steps required to vote absentee, and gives them the tools they need to apply for and cast absentee ballots. These relationships bear little resemblance to the "*hypothetical* attorney-client relationship" found insufficient in *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (emphasis in original). Given the organizations' extensive knowledge of voting procedures in Georgia and their stated mission of helping people vote, both Plaintiffs are "fully, or very nearly, as effective a proponent of the right" as the voters affected. *Singleton*, 428 U.S. at 113-16.

There is also some hindrance to the voters themselves bringing suit given the "small financial stake involved and the economic burdens of litigation." *Powers v. Ohio*, 499 U.S. 400, 415 (1991); *cf. Husted*, 2016 WL 3166251, at *25 (finding hindrance where third parties in question "suffer[ed] disproportionately from" social problems and had "limited financial resources," making litigation difficult).

Plaintiffs, however, are "uniquely positioned" to advance these claims. They are sophisticated organizations capable of maintaining protracted litigation, and the organizational injuries they have suffered, along with their commitment to protecting the right to vote, gives Plaintiffs "strong incentives to pursue this lawsuit."

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Young Apts., 529 F.3d at 1044; *see supra* at 6-8. In sum, Plaintiffs' claims are "central to [their] purpose," *Richardson*, 485 F. Supp. 3d at 774, and they are well suited to vindicate the rights of the voters they represent.

II. Plaintiffs have stated a claim upon which relief can be granted.

A. Plaintiffs can enforce the Materiality Provision.

Both the Eleventh Circuit and courts in this district have repeatedly found that private plaintiffs can enforce the Materiality Provision. *E.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1371 (N.D. Ga. 2005) (finding private plaintiffs can enforce Materiality Provision because "[t]he Court is bound to apply [*Schwier*]"); *cf. Browning*, 522 F.3d at 1164 (concluding organizations had standing to bring Materiality Provision claim); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308 (N.D. Ga. 2018) (finding private plaintiffs likely to succeed on merits of Materiality Provision claim).

State Defendants do not dispute that *Schwier* is binding, nor do they offer any reason to believe that *Schwier* has lost its vitality. And, in fact, many courts have since followed *Schwier*'s reasoning, including most recently the Third Circuit, which held that a meaningless date requirement on an absentee ballot envelope violated the Materiality Provision. *See Migliori v. Cohen*, 36 F.4th 153, 159 (3d Cir. 2022); *see also Billups*, 406 F. Supp. 2d at 1371; *Martin*, 347 F. Supp. 3d at 1308; *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 858-860 (W.D. Tex. 2020), *rev'd*

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and remanded on other grounds, 860 F. App'x 874 (2021). All that State Defendants marshal in support of their invitation to reject established precedent is a vague citation to *Vega v. Tekoh*, 142 S. Ct. 2095 (2022), which found Section 1983 an inappropriate vehicle for suing over a violation of *Miranda*. *Id*. at 2101, 2107. *Vega* did not undermine *Schwier*—indeed, it did not mention it at all. *Vega* simply restated the relevant test for determining whether a statute is privately enforceable through Section 1983, *id*. at n.6—the same test the Eleventh Circuit adopted in *Schwier*, 340 F.3d at 1296, and which other courts have since applied to reach the same result. *E.g.*, *Migliori*, 36 F.4th at 159.

Finally, the Court should reject State Defendants' argument that Plaintiffs are not among the Materiality Provision's "class of beneficiaries." "[L]ooking to the language of the statute itself," *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689 (1979), reveals that Section 10101 contemplates a broad class of persons capable of enforcing its provisions, as evidenced by the statute's reference to "part[ies] aggrieved" in Section 10101(d). *See supra* at 10. Both Vote.org and Priorities fall within this broad scope because they have suffered injuries flowing from Defendants' violation of the Materiality Provision. *See supra* at 6-8. It is therefore little surprise that other courts have permitted organizations to enforce this law. *E.g.*, *Hughs*, 489 F. Supp. 3d at 685; *Richardson*, 485 F. Supp. 3d at 773.

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B. The Pen and Ink Rule is not material to determining an applicant's eligibility to vote.

Next, citing state interests unrelated to determining a voter's qualifications, State Defendants suggest that the Pen and Ink Rule is "material" to determining "whether [an] individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). Not so.

The Eleventh Circuit has identified two possible standards for determining "materiality." Under the first, the information must be relevant to determining eligibility; under the second, the information must be "close[] to outcome-determinative" in determining eligibility. *Browning*, 522 F.3d at 1174 (11th Cir. 2008). The court has not indicated a preference between these two standards, but the Pen and Ink Rule falls short under either because the specific instrument used to sign an absentee ballot application—whether by "pen and ink" or a digitized or imaged signature—bears no relation to any of the qualifications to vote under Georgia law, which consist only of "U.S. citizenship, Georgia residency, being at least eighteen years of age, not having been adjudged incompetent, and not having been convicted of a felony." *Schwier*, 340 F.3d at 1297 (citing O.C.G.A. § 21-2-216)); *Martin*, 347 F. Supp. 3d at 1308 (same); *cf. Migliori*, 36 F.4th at 164 (finding requirement of dating ballot envelope immaterial); *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D.

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Fla. 2006) (identifying using wrong "color of ink . . . in filling out the form" as example of immaterial omission).

State Defendants make little attempt to explain the relationship between pen usage and voter qualifications, and instead insist that the requirement is "material" because it advances *other* state interests. Mot. at 19. But aside from a state's interest in determining a voter's eligibility under state law, "state interests" are irrelevant to the Materiality Provision analysis. *See, e.g.*, *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (finding social security number requirement violates Materiality Provision regardless of usefulness in "prevent[ing] voter fraud") *aff'd*, 439 F.3d 1285 (11th Cir. 2006); *Migliori*, 36 F.4th at 163 (similar); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270-71 (W.D. Wash. 2006) (similar).

What's more, State Defendants' purported interests in the Pen and Ink Rule are not credible. Digital or imaged signatures are just as effective at "certif[ying] . . . that the signer has read the document" or ensuring the signer has "taken [it] seriously," Mot. at 18-19, as demonstrated by the fact that Georgia law permits the use of digital or imaged signatures in almost every other context. *See* Ga. Code Ann. § 10-12-7 ("A record or signature shall not be denied legal effect or enforceability solely because it is in electronic form."); Compl ¶¶ 28 (observing ability to use e-signature to register to vote when filing application for hunting, fishing, or trapping

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license), 29 (noting permissible use of e-signatures in real estate deeds and other transactions). State Defendants have not advanced a single, plausible justification for demanding the use of "pen and ink" in entering signatures that would comply with the Materiality Provision.

C. The Pen and Ink Rule denies the right to vote.

The Pen and Ink Rule denies individuals their right to vote, especially those who depend on absentee ballots to participate in Georgia's elections. This includes elderly or disabled voters who cannot travel to a polling place to vote in person, military and overseas voters, and other Georgians who are temporarily located out-of-state or outside their voting jurisdiction during the election. Compl. ¶ 35. If these voters fail to use pen and ink when signing their absentee ballot application, they will be denied an absentee ballot and disenfranchised as a result.

State Defendants gloss over this sequence of events by arguing that voters may either re-apply or figure out some other way of voting. For some voters, though, there is no alternative to absentee voting. *Id.* And the Materiality Provision makes no exception merely because a voter might, through their own effort, reclaim their vote. Indeed, this Court has expressed skepticism that "the opportunity to cure an error rehabilitates any potential violation" of the Materiality Provision and found such claims unsupported at the motion to dismiss stage. *Sixth Dist. of Afr. Methodist*

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Episcopal Church v. Kemp, No. 1:21-CV-01284-JPB, 2021 WL 6495360, at *14 (N.D. Ga. Dec. 9, 2021) (lead case *The New Ga. Project v. Raffensperger*, No. 1:21-MI-55555-JPB). The same is true here. While State Defendants suggest—without support—that applicants who fail to comply with the Pen and Ink Rule may receive another chance to sign and resubmit their application, Mot. at 17, this purported cure opportunity does not resolve the Materiality Provision violation. In either scenario—the original application or the resubmission—a voter who fails to sign in "pen and ink" will be denied their ballot.

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Beyond that, State Defendants' argument faces a more practical problem: Georgia has no explicit cure period. O.C.G.A. § 21-2-381(b)(4). By contrast, the Texas law considered in *Vote.org v. Callanen* provides a ten-day cure period from the date a rejection notice is delivered, regardless of whether the statewide deadline for registering has passed. No. 22-50536, 2022 WL 2389566, *2 (5th Cir. July 2, 2022); Tex. Elec. Code § 13.073.[2] Georgia law merely allows a voter to resubmit their absentee ballot application if they can do so before the statewide deadline for

[2] At several points in their motion, State Defendants cite *Callanen*, in which the Fifth Circuit granted a stay of a preliminary injunction enjoining a "wet signature" rule similar to that at issue here. 2022 WL2389566, at *1. That out-of-circuit stay order is not binding on this court. Furthermore, its reasoning conflicts both with Eleventh Circuit precedent, *e.g.*, *Schwier*, 340 F.3d at 1284, and well-reasoned out-of-circuit authority, *e.g.*, *Migliori*, 36 F.4th at 153.

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applications.

State Defendants also suggest that "the right to vote" under the Materiality Provision does not extend to absentee voting, but that argument relies on (and misinterprets) precedent applying the Fourteenth Amendment, not the Materiality Provision. In *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), the lone case Defendants offer in support of the argument, the Court considered the contours of the *constitutional* right to vote, not any *statutory* rights. *Id*. at 808. Under the Civil Rights Act, Section 10101 defines the word "vote" broadly to include "all action necessary to make a vote effective including, but not limited to . . . *casting a ballot*[.]" 52 U.S.C.A. § 10101(e) (emphasis added). Recognizing this, courts have found rules governing absentee voting to violate the Provision. *See*, *e.g.*, *Migliori*, 36 F.4th at 162-164 (requirement of hand-written date on ballot envelope violated Provision); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1340 (N.D. Ga. 2018) (rejection of absentee ballots due to incorrect birth year likely violated Provision); *Martin*, 347 F. Supp. 3d at 1309 (same); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640 (W.D. Ark. Nov. 15, 2021) (errors or omissions during absentee voting process likely fell within the Provision). And even in the constitutional context, courts have repeatedly rejected State Defendants' interpretation of *McDonald*. *Infra*

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at 24.

D. The Materiality Provision covers absentee ballot applications.

State Defendants next offer a tortured reading of the Materiality Provision to suggest that a signature on an absentee ballot application is not an "act requisite to voting," 52 U.S.C. § 10101(a)(2)(B), but rather a prerequisite to obtaining an absentee ballot. The provision's plain language rejects this theory; it expressly covers "an error or omission on *any* record or paper *relating to* any application, registration, or other act requisite to voting." *Id*. Individuals who rely on absentee ballots must successfully submit an absentee ballot application in order to exercise their right to vote, which makes the application "requisite to voting." It makes no difference that obtaining an absentee ballot is not the last possible step in the voting process. Accepting State Defendants' theory would mean that even a voter registration application would fall outside of the Materiality Provision's scope because it simply allows voters to receive a ballot at the polls. *But see Schwier*, 340 F.3d at 1297 (applying Materiality Provision to voter registration forms). Tellingly, State Defendants cite no authority that has endorsed their radical interpretation and exempted absentee ballot applications from the Materiality Provision's reach.

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E. Materiality Provision claims do not require any showing that the challenged rule was adopted with "improper motive."

State Defendants next ask this Court to add by judicial fiat a new element to Materiality Provision claims: that the challenged practice was "adopted with improper intent." Mot. at 21. The statutory language, however, makes no mention of an intent requirement—though the preceding provision does: Section 10101(a)(1) prohibits discrimination in voting because of "race, color, or previous condition of servitude." 52 U.S.C. § 10101(a)(1). In other words, Congress "knew how to draft" such an intent requirement "when it wanted to," *Chicago v. Env't Def. Fund*, 511 U.S. 328, 337-38 (1994), but purposefully elected not to do so for the Materiality Provision.

State Defendants invoke *Browning*'s discussion of the history of the Materiality Provision and the kinds of practices Congress sought to prevent to support their argument that materiality claims require ill intent. But *Browning* held the *exact opposite*. It explained that "[t]he text of the resulting statute, and not the historically motivating examples of intentional and overt racial discrimination, is thus the appropriate starting point of inquiry in discerning congressional intent." *Browning*, 522 F.3d at 1173. To be sure, in enacting the Materiality Provision, Congress intended to combat specific evils. But having witnessed a century of brutal discrimination in voting, Congress was well aware of the adaptability of

disenfranchisement methods and did not presume to know all their manifold forms. Accordingly, in its wisdom, Congress chose a "broader remedy." *Id*. The Court should effectuate that intent—and the plain text of the law.

F. The Pen and Ink Rule violates the Materiality Provision in all its applications.

State Defendants urge the Court to construe Plaintiffs' Materiality Provision claim as a "facial challenge" because Plaintiffs seek to invalidate the Pen and Ink Rule in its totality. But the "facial" versus "as-applied" distinction has no bearing on Plaintiffs' statutory claim because "[t]he concept of facial and as-applied challenges comes from constitutional law." *Am. Ass'n of Cosmetology Schs. v. Devos*, 258 F. Supp. 3d 50, 66 n.6 (D.D.C. 2017). State Defendants fail to cite a single case construing an action to enjoin a state law under the Civil Rights Act as a facial challenge requiring the plaintiffs to "establish that no set of circumstances exists under which the Act would be valid." *Cf. United States v. Salerno*, 481 U.S. 739, 745 (1987). In any event, Plaintiffs have stated a plausible claim for relief even under the heightened standard applicable to facial challenges. The Pen and Ink Rule is immaterial to determining a voter's qualifications in Georgia and thus violates the Civil Rights Act in all its applications. *See supra* at 15-17; *Martin*, 347 F. Supp. 3d

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at 1308.[3]

G. Reading the Materiality Provision to bar the Pen and Ink Rule would not violate the U.S. Constitution.

Perhaps realizing that the plain meaning of the Materiality Provision is not in their favor, State Defendants argue that reading the Materiality Provision to bar the Pen and Ink Rule would exceed Congress's enumerated powers. As State Defendants see it, a Fourteenth Amendment claim cannot be predicated on the denial of access to an absentee ballot, and therefore Congress has no power to make a law protecting such access. The argument is meritless on both counts.

It is well settled that Congress has "broad power" under Section 5 of the Fourteenth Amendment to enforce that amendment's guarantees, including through "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (quoting *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727–728 (2003)). Congress is not limited to simply parroting the rights associated with the Fourteenth Amendment. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). Rather, "Congress' [sic] power 'to enforce' the [Fourteenth] Amendment includes the

[3] Defendants also argue that Plaintiffs' "facial challenge" cannot survive dismissal because the Pen and Ink Rule serves legitimate state interests. But as explained above, such considerations are irrelevant to claims asserted under the Materiality Provision. *See supra* at 15-16.

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authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id*.

State Defendants' anemic interpretation of Section 1, for which they rely on *McDonald*, also fails. As an initial matter, *McDonald* preceded *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and its progeny. As the Court has since made clear, there is no "'litmus test' that would neatly separate valid from invalid restrictions" on the right to vote. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008); *Sixth Dist. of African Methodist Episcopal Church*, 2021 WL 6495360, at *11 (rejecting argument that *McDonald* requires foregoing *Anderson-Burdick*). Even if that were not so, *McDonald* "rested on a failure of proof" at summary judgment; when presented with the requisite evidence in another case challenging restrictions on absentee voting soon after, the Court reached a different conclusion. *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974). *Skinner*, *Anderson*, and other decisions that have followed *McDonald* eliminate any doubt that a restriction on absentee voting can run afoul of the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the Court should deny State Defendants' motion to dismiss.

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Dated: July 27, 2022

Respectfully submitted,

/s/ Uzoma N. Nkwonta

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CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused to be electronically filed a copy of the foregoing **PLAINTIFFS' BRIEF IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS** 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: July 27, 2022

/s/ Uzoma Nkwonta
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFFS' BRIEF IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS** 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: July 27, 2022

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