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

VOTE.ORG, *et al.*,

Plaintiffs,

v.

GEORGIA STATE ELECTION BOARD, *et al.*,

Defendants.

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

STATE DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Georgia provides voters many ways to vote—including, as the Eleventh Circuit has noted, "the option to mail in absentee ballots," which "increases the opportunities for voters to cast ballots." *Black Voters Matter Fund v. Sec'y of State for Ga.*, 11 F.4th 1227, 1235 (11th Cir. 2021) (cleaned up). Of course, Georgia county officials must ensure that any individual requesting such an absentee ballot is who she says she is and is qualified to vote. To achieve that, Georgia requires a person requesting an absentee-ballot application to sign the application. O.C.G.A. § 21-2-381(a)(1)(C)(i). And, to ensure that the attestation is intentional and that the applicant is qualified to receive a ballot, Georgia requires voters to sign the application with pen and ink. Such administrative requirements help to ensure the integrity of the absentee-ballot process. They do not discriminate against voters "who choose to vote absentee by mail [and] do not mean that Georgia" denies Georgians the right to vote or that Georgia "is discriminating against various groups of absentee voters." *Black Voters Matter Fund*, 11 F.4th at 1235.

For these reasons, Plaintiffs' Opposition suffers from the same problems as their Complaint. Plaintiffs lack standing to challenge the Signature Oath Requirement and, in any event, they fail to state a claim on which relief can be granted. That is because, even if everything in the Complaint were accepted as

true, there is no sufficient allegation that the Signature Oath Requirement denies anyone the right to vote, is requisite to voting, or, in any event, is immaterial to the State's interests. On its face, that requirement merely confirms that voters who choose to request and obtain a live, votable absentee ballot are who they claim to be and are eligible to vote in Georgia. The Complaint should therefore be dismissed.

ARGUMENT

I. Plaintiffs Lack Standing.

A. Plaintiff Georgia Alliance for Retired Americans lacks standing.

At the outset, Georgia Reliance for Retired Americans' (GARA) reliance on associational standing (at 4–6) fails because, as State Defendants showed (at 12-13), GARA suggests only that one of its members might struggle to obtain an absentee ballot. But such speculation regarding possible future harm fails to confer Article III standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). GARA has no answer for *Clapper*.

Instead, GARA relies on the unsupported allegation that some of its members will not be able to vote if they cannot apply for an absentee ballot. But in both the Complaint and the Opposition, GARA fails to allege any plausible reason why the Signature Oath Requirement would prevent such

GARA members from obtaining absentee ballots. Instead, they argue only (at 6) that doing so will be "'cumbersome', time-consuming, and 'burdensome.'" (quoting Compl. ¶ 17). Plaintiffs fail to plausibly allege that any GARA members will certainly or even foreseeably be injured in the future, as required by decisions like *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

Desperate to save its claims, GARA suggests (at 5) that disenfranchisement is unnecessary to establish standing. But that is clearly incorrect for a claim under 52 U.S.C. § 10101(a)(2)(B), a statute violated *only* when a law will "deny the right of any individual to vote." *Id.* Thus, to have standing, GARA members must actually be disenfranchised by the Signature Oath Requirement, not merely burdened by it. Because GARA has failed to assert (1) that the Requirement will disenfranchise its members or (2) that any potential harm to its members is more than speculative, GARA lacks standing.

B. Plaintiffs Vote.org and Priorities USA lack standing.

The other Plaintiffs lack standing for similar reasons. They assert standing based solely on speculative claims of diverted resources, rather than "imminent" or "certainly impending" injury. *Clapper*, 568 U.S. at 401, 409; *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (the alleged injury must be "likely to occur immediately"). Plaintiff Vote.org claims (at 7) that it might redesign its website. But it does not claim that

redesigning its website will make it unable to help Georgians vote. Such vague allegations "are not enough to confer standing," *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1343 (11th Cir. 2021), even under a diversion-of-resources theory. Instead, to have standing under that theory, Vote.org needed to allege facts showing that the diversion will "impair [its] ability to engage in its own projects." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014). Vote.org failed to make that sort of allegation. Instead, it alleges (at 6-7) that its resources may be diverted from its goal of helping Georgians vote absentee by changing *how* they help Georgians vote absentee. Vote.org thus will continue spending resources on the same activities as before SB 202. Even *Browning*'s view of diversion of resources is not that expansive.

Priorities USA likewise suggests (at 7) only vague injuries about moving resources "from its mission of persuading and mobilizing citizens" to helping voters apply for absentee ballots. But neither in the Complaint nor the Opposition does it provide any information about *what* resources (time, personnel, etc.) will be diverted, nor does it explain *how* those diverted resources are needed to "educat[e] voters about, and help[] voters apply for, absentee ballots." *Id.* Priorities USA's one-sentence invocation of harm is also far too vague under Eleventh Circuit precedent. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020). Indeed, Priorities USA has provided

neither "specific allegations identifying the steps it is taking" to respond to the Signature Oath Requirement nor even sufficiently "broad allegation[s]" that have been enough to satisfy such standing in other cases. *Georgia Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1115 (11th Cir. 2022).[1]

In sum, none of the Plaintiffs' unsupported references to potential harm —neither in the Complaint nor in the Opposition—shows how the Signature Oath Requirement "concrete[ly]" disadvantages them. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). All three lack standing.

II. The Complaint Should Be Dismissed for Failure to State a Claim.

Even if Plaintiffs had standing, they have failed to state a claim for relief.

A. The Opposition does not change the reality that the Signature Oath Requirement does not violate § 10101(a)(2)(B).

Preliminarily, as explained in the Motion (at 16-21) the Signature Oath Requirement denies no one the right to vote, is not requisite to voting, and is a

[1] As to third-party standing, *Kowalski v. Tesmer*, 543 U.S. 125 (2004), forecloses Plaintiffs' arguments. Nothing in the Complaint suggests Georgia voters are unable to bring their own claims, and Plaintiffs cannot create a close relationship with voters "who wish to vote absentee" just because Plaintiffs advocate for absentee voting. Opp'n at 11-12. The attorneys in *Kowalski* were advocating for their would-be clients just like Plaintiffs are advocating for would-be absentee voters. But that was insufficient. *Kowalski*, 543 U.S. at 131.

"material" requirement.

1. *The Requirement does not "deny" the right to vote.* Rather than meaningfully contest this point, Plaintiffs begin with the implausible suggestion (at 17) that the Signature Oath Requirement denies the right to vote to those who depend on absentee ballots to participate in Georgia's elections. Not so. As three Justices explained when addressing the materiality of a Pennsylvania statute imposing a rule on absentee ballots, "When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.'" *Ritter v. Migliori*, No. 21A772, 2022 WL 2070669, at *2 (U.S. June 9, 2022) (Alito, J., dissenting). If that is true for a mail-in ballot, it is all the more true for a ballot *application*, which is even more removed from the right to vote than the ballots. But even indulging Plaintiffs' parade of horribles (Compl. ¶ 17), a voter is prevented from voting only if "he or she did not follow the rules" for applying to vote absentee. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissenting). The failure to follow basic rules "constitutes the forfeiture of the right to vote, not the denial of that right." *Id.*; *accord Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973).

For this reason, Plaintiffs' claim (at 18) that some voters have "no alternative to absentee voting" must be rejected. Indeed, Plaintiffs' Opposition confirms as much. *See, e.g.,* Opp'n at 17 (arguing that some voters may be out

town on Election Day, overlooking that those voters may still vote during early voting). But even accepting this as true, Plaintiffs incorrectly point to the Signature Oath Requirement, rather than other, unrelated circumstances, as the cause of voters being unable to obtain an absentee ballot.

Indeed, the Fifth Circuit recently rejected this very argument in Plaintiff Vote.org's challenge to Texas' wet-signature requirement, holding that Texas's requirement imposes "at most a very slight burden" on the right to vote. *Vote.org v. Callanen*, 39 F.4th 297, 306, 308 (5th Cir. 2022). More specifically, the Fifth Circuit held that, because a noncompliant voter can cure a deficiency with his registration form and because "there are plenty of alternative means to register," "it is hard to conceive how the wet signature rule deprives anyone of the right to vote." *Id.*[2] So too here.

Plaintiffs' only response to *Callanen* (at 19 n.2) is that it is not binding and that, they say, it conflicts with *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003) (*Schwier I*), and *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022)

[2] Plaintiffs' suggestion (at 18) that Georgia's law requiring voters to be notified of their failure to follow the Signature Oath Requirement and given a chance to cure must be treated differently than Texas' because Texas expressly allows a ten-day cure period finds no basis in *Callanen* and ignores that the Fifth Circuit found the availability of alternative means dispositive. 39 F.4th at 306.

(subsequent history omitted). But while *Callanen* is not binding, it is far more persuasive that *Schwier I* and *Migliori*, both of which are readily distinguishable. For example, *Schwier I* did not address the standard for when a law denies a person the right to vote. But even if it had, *Schwier I* involved a requirement on a voter-registration form. 340 F.3d at 1297. If a citizen could not register to vote, they obviously had no other option to vote. Similarly, in *Migliori*, the allegedly immaterial requirement was on the mail-in ballot. Even ignoring Justice Alito's response to the Third Circuit's flawed analysis, *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissenting), the Third Circuit found that votes were denied because they were not counted if the voter did not comply with the requirement. 36 F.4th at 164. Here, by contrast to both cases, a voter who does not receive an absentee ballot can still vote in person or cure the form. Accordingly, Plaintiffs cannot plausibly claim that the Signature Oath Requirement actually denies the right to vote.

2. *The Requirement is not an act "requisite to voting."* Moreover, Plaintiffs barely make any effort to show—as they must—that the Signature Oath Requirement is an act "requisite to voting." Rather, Plaintiffs devote a mere paragraph (at 20-21) to this point, ignoring the obvious fact that the Signature Oath Requirement cannot be "requisite to voting" because anyone may vote without satisfying it: They may simply vote at their polling place or

any early voting location in their county during the mandatory 17-day early voting period, which includes two mandatory Saturday voting days and allows Sunday voting at the county's discretion. To Plaintiffs, the fact that some voters choose to vote absentee means that other options are unavailable. But they could not plausibly plead this. Georgia makes other avenues widely available.

Plaintiffs' further suggestion (at 20) that State Defendants' reading would excise even voter-registration applications from the grasp of the statute's Materiality Provision is self-refuting. State Defendants have not argued that the Signature Oath Requirement is not requisite to voting *merely* because it is "not the last possible step in the voting process." Opp'n at 20. To the contrary, even a voter who registers at the polls is required to follow the full panoply of registration rules. By contrast, no Georgia voter must comply with the Signature Oath Requirement to vote because the voter can choose to vote on Election Day or during the early voting period. The absentee-ballot application's placement in the voting process—as merely one option for voting in Georgia—is not relevant to that point.

3. *The Requirement is "material."* Plaintiffs also mistakenly contend (at 15-17) that the Requirement is immaterial to determining whether someone is qualified to vote. On this point, Plaintiffs rely on a handful of nonbinding cases

addressing far less material laws. Those provisions—like the date on the ballot envelope or the color of ink—do not help determine the qualifications to vote under Georgia law like the Signature Oath Requirement does. To be sure, that Requirement also "advances other state interests." Opp'n at 16. But it does not, as Plaintiffs suggest, do so at the exclusion of also helping confirm a voter's eligibility to vote.[3]

Moreover, the cases Plaintiffs cite are readily distinguishable. For example, Plaintiffs do not acknowledge that the social-security-number requirement in *Schwier II* was immaterial because the Privacy Act preempted Georgia's ability to ask for it. *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006) (*Schwier II*).[4]

[3] Plaintiffs cite no binding cases to suggest that the State's interests are irrelevant to the materiality analysis. Nor could they, as any burden on the right to vote can be justified by the State's interest and proper tailoring. *Dem. Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019), *appeal dismissed as moot,* 950 F.3d 790 (11th Cir. 2020). Thus, for the same reason that Plaintiffs' reading of the Materiality Provision is unconstitutional, if it is true that a State's interest cannot overcome the Materiality Provision under any context, then that provision is unconstitutional for that reason too.

[4] Similarly, Plaintiffs cite (at 16) *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006), without explaining that the case did not involve a "color of ink" requirement. Plaintiffs' citation to *Migliori* fares no better, as the Pennsylvania ballot-dating requirement there was found immaterial because "voter declarations with inaccurate dates were counted in this election," *Migliori*, 36 F.4th at 165 (Matey, J., concurring in judgment), and because, whether dated or not, defendants themselves "timestamped the ballots"

Plaintiffs also have no serious response to State Defendants' showing (at 21) that Georgia' treatment of digital signatures elsewhere is irrelevant here. As important as they are in their own spheres, the forms that lead to a hunting, fishing, or trapping license pale in importance compared to the absentee-ballot application, which leads to the issuance of a live ballot and the exercise of the right that preserves all other rights. Given the statewide importance of ensuring that only eligible voters vote, Georgia has reasonably determined that the Signature Oath Requirement is material to voting.

B. The Complaint does not allege that the Signature Oath Requirement was enacted with improper intent.

Plaintiffs' only response to State Defendants' showing (at 21) that the Materiality Provision requires improper intent is that *Browning* says *Congress's* intent in enacting that provision is irrelevant to a proper interpretation of its text. Opp'n at 21-22 (quoting *Browning*, 522 F.3d at 1173). But Plaintiffs do not dispute that *Schwier I* held that discriminatory intent is required under the Materiality Provision. *See* Motion at 21-22. And *Browning*

"[u]pon receipt," *id.* at 164 (majority). Inconsistent enforcement, then, coupled with the State's action that "render[ed] whatever date was written on the ballot superfluous and meaningless" undercut any argument that the requirement was material. *Id.* Plaintiffs do not claim that, since SB 202, absentee ballots were sent to voters who failed sign or that State Defendants take any action to render the signature superfluous as the defendants did in *Migliori*.

did not purport to (and could not) overrule *Schwier I*'s holding on this point. *Schwier*, 340 F.3d at 1294. Despite its other flaws, *Schwier I*'s holding on this point binds this Court just as it bound the Eleventh Circuit in *Browning*.

C. Plaintiffs' facial challenge to the Signature Oath Requirement fails because of the requirement's legitimate sweep.

Plaintiffs also contest (at 22) State Defendants' showing that Plaintiffs' facial challenge to the Signature Oath Requirement must fail because the requirement has legitimate applications.

Plaintiffs first argue that the distinction between "facial" and "as-applied" challenges does not apply to their statutory claim. But it would push the judicial power beyond its limits if a federal court could invalidate *all* applications of a state law even when some applications comply with § 10101(a)(2)(B). Plaintiffs are not injured by the Signature Oath Requirement as applied to people who would not be burdened by it.

Plaintiffs' sole argument on the merits is that the Requirement is not material and is thus facially invalid. But that puts the cart before the horse. Even if the requirement were immaterial, an immaterial requirement only violates § 10101(a)(2)(B) if it denies a person the right to vote and is related to an act requisite to voting. Because nothing in the Complaint or the Opposition suggests that *every person* subject to the Signature Oath Requirement will find

it so burdensome to print and sign a form that they will be denied the asserted right to vote absentee, Plaintiffs' facial challenge fails.

D. Section 10101(a)(2)(B) does not create a private right of action and may not be enforced by organizations like Plaintiffs.

As State Defendants also demonstrated (at 13-15), properly understood, § 10101(a)(2)(B) does not create a private right of action at all.[5] And even if it did, Plaintiffs cannot invoke it because they are not voters.

Plaintiffs' only response is to cite two out-of-circuit district court decisions. Opp'n at 15 (citing *Richardson v. Tex. Sec'y of State*, 485 F. Supp. 3d

[5] As State Defendants demonstrated (at 14), the Eleventh Circuit's *Schwier I* decision from nearly 20 years ago conflicts with subsequent Supreme Court decisions. Plaintiffs largely agree, failing to offer any defense of *Schwier*'s holding on this point, instead arguing only (at 13-14), that the decision remains binding. But that argument fails to address the fact that, as State Defendants showed (at 14 n.3), the U.S. Attorney General is the proper party to enforce the Materiality Provision by the statute's plain terms. *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) ("Section 1971 is enforceable by the Attorney General, not by private citizens.").

Although Plaintiffs suggest that *Migliori* also recently found that § 10101(a)(2)(B) creates a private right of action, as the concurring judge there recognized, it did so without any adversarial process, which undermines its usefulness here. *Migliori*, 36 F.4th at 165 (Matey, J., concurring in judgment) ("Appellees did not challenge the argument that § 10101(a)(2)(B) creates an individual federal right. At all." (cleaned up)). Because the issue was uncontested, the Third Circuit had no reason to conclude otherwise. *T.P. ex rel. T.P. v. Bryan Cnty. Sch. Dist.*, 792 F.3d 1284, 1291 (11th Cir. 2015) ("[A]ppellate courts do not sit as … boards of legal inquiry and research, but … as arbiters of legal questions presented and argued by the parties[.]").

744, 773 (W.D. Tex. 2020); *Texas Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 858-860 (W.D. Tex. 2020)). But Plaintiffs overlook the Fifth Circuit case cited by State Defendants (at 15) suggesting that Plaintiff Vote.org was not the right party to raise this claim in the very similar circumstances there. *Vote.org*, 39 F.4th at 305 n.5 (suggesting, but not deciding, that Vote.org is the wrong plaintiff to challenge Texas's wet-signature requirement). This Court should follow the Fifth Circuit's lead: Because Plaintiffs are organizations, not voters, they are not the correct parties to challenge the Signature Oath Requirement under § 1983 even if the Court concludes they otherwise have Article III standing.

E. Plaintiffs' reading of § 10101(a)(2)(B) would make the statute unconstitutional.

Plaintiffs next try (at 23-24), but fail, to avoid the conclusion that their reading of § 10101(a)(2)(B) would make that statute unconstitutional. None of the cases they cite can save their reading. For example, they make no attempt to respond to State Defendants' showing (at 25) that Congress's ability to take remedial action under the Fourteenth Amendment's Enforcement Clause is not "unlimited" and cannot "work a substantive change in the governing law." *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (citation omitted). As State Defendants showed, any reading of § 10101(a)(2)(B) that faults a state for

denying a proposed right to vote absentee marks a clear change in the governing law, as there is no general federal right to vote absentee. *O'Brien v. Skinner*, 414 U.S. 524 (1974)—Plaintiffs' only case for the claim that there *is* a federal right to vote absentee—was an Equal Protection case that did not afford a right to vote absentee, but instead addressed whether voters must be allowed that right if *the State* denies them "comparable alternative means to vote." *Black Voters Matter Fund*, 11 F.4th at 1234-35. As Georgia provides alternatives to absentee voting, *O'Brien* is of no moment.

CONCLUSION

Plaintiffs' various attempts to avoid dismissal rest on misdirection as well as a fundamental misunderstanding of the proper role of federal courts in our federalist system. This Court should grant the motion to dismiss.

Respectfully submitted this 10th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

Under L.R. 7.1(D), the undersigned hereby certifies that the foregoing State Defendants' Reply Brief in Support of Their Motion to Dismiss has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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