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

NEW GEORGIA PROJECT, *et al.* *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, *et al*. *Defendants*.	Civil Action No. 1:24-cv-03412-SDG

STATE DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED FIRST AMENDED COMPLAINT

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INTRODUCTION

Despite using more than 100 pages in their response, Plaintiffs have not provided this Court with a single allegation that demonstrates it has jurisdiction over their claims, or even that they have actually stated a claim. Instead of responding to State Defendants' arguments, they mostly repeat language from their Complaint and reinforce their theory that the NVRA can somehow confer eligibility on ineligible individuals.

On the question of direct standing, the organizational Plaintiffs do not point to anything in their Complaint that differs from what was deemed insufficient to invoke the jurisdiction of federal courts in *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024). Instead, they rely on Eleventh Circuit cases that no longer apply given the clarification from the U.S. Supreme Court about the scope of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

Plaintiffs likewise do not have associational standing to pursue their claims, nor does the new invocation of third-party standing save their efforts here. They stretch mightily to grasp at an injury related to Plaintiff Huynh. But it is to no avail. And they have to admit that State Defendants have no role in the voter challenge process, but still endeavor to manufacture some kind of traceability and redressability by going beyond the legal bounds of what those concepts can bear.

Even if this Court had jurisdiction, Plaintiffs have not shown they have stated a claim. Faced with the reality that they misread the law, they return to their prior language, as if repeating the same legally misinformed perspective will lead to the creation of a claim under the NVRA. They continue to get the standard for constitutional claims involving election laws wrong. And they cannot show any claim exists under the Civil Rights Act.

This Court does not have jurisdiction and Plaintiffs have failed to state a claim for relief in this case. This Court should dismiss Plaintiffs' Complaint.

ARGUMENT AND CITATION OF AUTHORITY

I. Plaintiffs cannot demonstrate they have standing.

In federal court, "[s]tanding is 'built on a single basic idea—the idea of separation of powers.'" *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 378 (2024) (*AHM*); *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 422–23 (2021) (standing is "woven into" the Constitution through its structural separation of powers). Despite spending many pages searching for standing, Plaintiffs did not provide any basis for this Court to determine it has jurisdiction.

A. The organizations lack a direct injury.

Plaintiffs now root their organizational standing in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982), claiming they have been directly injured.

[Doc. 228 at 23].[1] But they continue to cite the types of organizational "injuries" that were insufficient in *AHM*, 602 U.S. at 394. Plaintiffs claim that *AHM* had no effect on any existing Eleventh Circuit precedent on standing. [Doc. 228 at 24–29]. But that makes little sense.

Eleventh Circuit decisions on organizational standing are directly contrary to *AHM* and cannot remain good law considering the Supreme Court's analysis there. For example, the Eleventh Circuit has previously found organizational standing for printing materials and educating voters. *Georgia Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1115 (11th Cir. 2022). It has also found an injury when an organization said it had to educate voters. *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009). Yet these are exactly the bases which the Supreme Court found were insufficient: "engaging in public advocacy and public education" is not a concrete injury and "[a]n organization cannot manufacture its own standing in that way." *AHM*, 602 U.S. at 394.

Faced with this reality, Plaintiffs attempt to sidestep the impact of *AHM* by saying that the Supreme Court didn't directly overrule prior Eleventh Circuit

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[1] All page number citations to filed documents refer to the court-generated blue numbers at the top of each page.

decisions. [Doc. 228 at 27–28]. But that is not the standard. *AHM* is "clearly on point" and controls the Eleventh Circuit's prior decisions. *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1292 (11th Cir. 2003). And after *AHM*, "organizations can no longer spend their way to standing based on vague claims that a policy hampers their mission." *Arizona All. for Retired Americans v. Mayes*, 117 F.4th 1165, 1170 (9th Cir. 2024). Each organization seeking to establish its own injury fails the test of *AHM*.

1. New Georgia Project (NGP), Ga. Muslim Voter Project (GVMP), and A. Philip Randolph Institute (APRI).

Plaintiffs NGP, GMVP, and APRI identify several categories of potential injuries in their collective allegations. Those alleged injuries are primarily related to the act of providing some level of education—educating voters, training staff, and monitoring boards of election. [Doc. 228 at 30–32]. But they cannot draw the connection between those self-inflicted activities and *Havens*. They never allege State Defendants are providing "false information" to them or that any activities of State Defendants impaired their "core business activities." *Havens*, 455 U.S. at 366, 368; *AHM*, 602 U.S. at 395. Instead, they try to reestablish the previous standard for diversion of resources—where federal courts found an injury whenever some law somehow related to an organization's activities prompted it to change its behavior in some way in response. [Doc. 228 at 33]. But that is no longer the standard because the mere fact an organization simply "incur[s] costs

to oppose" a government's actions is insufficient. *AHM*, 602 U.S. at 394. And it is similarly not enough to voluntarily undertake efforts to monitor the government, gather information, or educate people in response. *Id*. The medical associations in *AHM* alleged their core activities were affected by the FDA's actions and they undertook substantial efforts to curb those effects. But the Supreme Court concluded that wasn't enough. *Id*. Under the standard proposed by Plaintiffs here, "all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies"—and provided the dollar they spend relates to what Plaintiffs consider "core business activities." *Id*. at 395. That is not the law. Mission frustration is not enough. And the "intensity of the litigant's interest" or "strong opposition to the government's conduct" is not enough, either. *Id.* at 394. Plaintiffs NGP, GMVP, and APRI must allege a *direct* organizational injury and they have not, meaning there is no injury on which to base standing.

2. *Ga. NAACP, Ga. Coalition for the People's Agenda (GCPA), and VoteRiders.*

The next group of Plaintiffs fares no better. They likewise rely on changing educational programming, printing materials, training staff, and alerting voters about changes in the law. [Doc. 228 at 34–37]. They do not explain or even claim they are engaged in any core business activities affected by SB 189, nor could they. Instead, they return to prior Eleventh Circuit cases instead of addressing the key

shortfall in their allegations: they cannot spend their way into an injury. *AHM*, 602 U.S. at 394–95. And SB 189 "has not required the plaintiffs to do anything or to refrain from doing anything." *Id*. at 385. For all the reasons the first group lacks an injury, Ga. NAACP, GCPA, and VoteRiders suffer the same fate.

3. Secure Families Initiative (SFI).

SFI's proposed injury is even more attenuated. It makes the same mistake common to all plaintiffs in this action—misunderstanding what constitutes an injury after *AHM*—but it also emphasizes that it does not know if it even will be injured under its more lenient (and incorrect) definition. Its injury is that it has to "determine whether" one of its members *might* be injured and then, *if* they find an affected member, educate them about the law. [Doc. 228 at 39]. Not only is that not a direct injury to the organization, it's also entirely speculation.

SFI alleges it assists voters in registering to vote. That's a noble mission, but rules about the standard for registration are not directed at SFI. Even though some courts have overread *Havens,* it did not create "interest-based" standing, as *AHM* has confirmed. *AHM,* 602 U.S. at 394. And SFI's allegations are materially different than successful standing arguments that involved a mission of "election security and… counsel[ing] voters to support Republican candidates," which was a mission directly affected by allegedly fraudulent voter registrations. *Republican Nat'l Comm. v. N. Carolina State Bd. of Elections*, 120 F.4th 390, 397 (4th Cir. 2024). At

root, SFI's alleged diversions are educational—they want to "better inform their members and the public" about SB 189. *AHM*, 602 U.S. at 394. That was insufficient in *AHM* and is insufficient here. None of the organizational plaintiffs has shown any injury to itself for purposes of standing.

B. The organizations cannot utilize associational standing.

Three organizations also rely on associational standing[2] to bring this action on behalf of their members. [Doc. 228 at 41]. While Plaintiffs correctly state the standard from the Eleventh Circuit, *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 771 (11th Cir. 2024), they gloss over the first requirement, which requires an organization to have members with standing to sue in their own right. That requires the member(s) to have an injury in fact that is concrete and particularized. *Id*. at 772. None of Plaintiffs' allegations establish this requirement.

1. Ga. NAACP.

The Ga. NAACP can only point to a "probability of harm" under SB 189 and only if they are right about their interpretation of the word "nonresidential." [Doc. 228 at 43]. State Defendants have explained (and many County Defendants have joined that explanation) that zoning maps are not the standard for determining if

[2] While associational standing is part of current law, Justice Thomas has noted the significant constitutional concerns allowing uninjured third parties to assert claims on behalf of others. *See AHM*, 602 U.S. at 397–405 (Thomas, J., concurring).

an address is nonresidential. *See* [Doc. 168-1 at 19, 45–46]. Even under an associational standing theory, the Ga. NAACP remains firmly in the realm of a speculative harm because that's where its members are. One of its members would only have a concrete injury to sue in his or her own right *if* a county adopted an improper definition of nonresidential, and *if* a challenge was filed by a voter and *if* the challenge was considered by the county board and *if* the voter was removed from the voter registration list. This "highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). Thus, without more, the Ga. NAACP cannot show it has a member who would have standing in his or her own right.

2. Ga. Coalition for the People's Agenda (GCPA).

Plaintiffs artfully reword their Complaint in an effort to save GCPA's associational standing. But GCPA never alleged it has 5,000 individual members—only that there are "more than 30 *organizations*" comprising its membership, which "*collectively* have more than 5,000 individual members." [Doc. 155 at ¶ 45] (emphasis added). Without an individual member who would have standing in his or her own right, GCPA's claim to associational standing fails.

But GCPA also claims that it need not name any members in its Complaint to have associational standing and relies on *Browning* for that proposition. [Doc.

228 at 47]. In so doing, GCPA missed an important point: the Eleventh Circuit has explained that "since *Browning*, the Supreme Court has rejected probabilistic analysis as a basis for conferring standing." *Ga. Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1204 (11th Cir. 2018). That is why the Supreme Court requires "plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). GCPA has not done that. Instead, it points to allegations in its complaints about students but never alleges these students are members. *See* [Doc. 228 at 47–48] (citing [Doc. 155 at ¶¶ 56–57, 59]). GCPA cannot rely on probabilistic allegations about a possibly affected member. *Ga. Repub. Party*, 888 F.3d at 1204. As a result, it has failed to sufficiently invoke associational standing because it does not identify an affected member or allege that any members would be affected by SB 189 and have standing to sue in their own right.

3. Secure Families Initiative (SFI).

Unlike GCPA, SFI claims it has individual members. [Doc. 155 at ¶ 71]. But its allegations still lack any reference to a member or members that will be certainly affected by SB 189. Instead, it continues to focus on the "risk that" its voters will be affected, even though controlling precedent plainly establishes that probabilistic allegations are not enough. *Compare* [Doc. 228 at 48] *with Ga. Repub. Party*, 888 F.3d at 1204. SFI's reliance on outdated law on the requirement to allege

it has a member who would have standing to sue in his or her own right does not save their associational standing claims.

C. Third-party standing does not apply.

Plaintiffs next claim that at least some of them raised third-party standing based on their "non-member constituencies they represent and advocate for." [Doc. 228 at 50]. Not only is this new basis for standing only revealed by stringing together disparate portions of the Complaint, but seeking to establish standing for third parties applies only to a "narrow class of litigants."[3] *AHM*, 602 U.S. at 393 n.5. And it is not enough to be uninjured and assert the claims of others—to invoke third-party standing "the litigants themselves still 'must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.'" *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Thus, NGP, GMVP, and APRI can only proceed under third-party standing if they have an injury as an organization. *Id*. And for the reasons already discussed, they have not and cannot show that kind of injury.

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[3] At least one Justice on the Supreme Court has signaled that there are problems with third-party standing: "[o]ur third-party standing doctrine is mistaken… [and] a plaintiff cannot establish an Article III case or controversy by asserting another person's rights." *AHM,* 602 U.S. at 397-98 (Thomas, J., concurring). State Defendants recognize this Court is bound by precedent to apply the majority's view on third-party standing but raise this point to preserve the issue for appeal to the extent this Court agrees with Plaintiffs that third-party standing permits their claims.

Further, the "close relationship" of advocating for particular constituencies is not the type of relationship that has been found sufficient. *See Harris v. Evans*, 20 F.3d 1118, 1123 (11th Cir. 1994) (collecting cases of relationships like attorney-client, doctor-patient, vendor-vendee). Plaintiffs again seek to open a new front of standing doctrine, which would allow any organization to have "standing to challenge virtually every government action that they do not like" because it believes it is an advocate for people it believes are affected. *AHM*, 602 U.S. at 392. That is not the law.

Plaintiffs also do not cite to any portion of their Complaint that addresses the third prong required for third-party standing, which is an effect on the third party's rights if the litigant is not allowed to proceed. *Harris*, 20 F.3d at 1124. Without this third factor, they have not alleged a sufficient basis to invoke third-party standing even if the other factors were satisfied. Plaintiffs cannot identify anyone injured by SB 189. They are left speculating about its potential effects and that is not enough to provide them standing to challenge the statutory structure chosen by the legislature.

D. Plaintiff Huynh does not have a certainly impending injury.

In order to argue that Plaintiff Huynh has standing, Plaintiffs must return to their merits arguments and ignore the allegations in their Complaint. Plaintiff Huynh alleged he currently has a mailing address but is worried he might lose

access to it in the future. [Doc. 155 at ¶ 33]. That is the definition of speculative future harm. And even if that were not the case, only if Plaintiffs are right about their merits claim about Section 4—that the term "permanent address" means something other than a place to receive mail—would the allegations support an injury to Plaintiff Huynh. [Doc. 228 at 53–54]. Further, despite claiming Plaintiff Huynh is also challenging Section 5, the Complaint makes no allegations about potential voter challenges to Plaintiff Huynh and Plaintiffs cite to none. [Doc. 228 at 54].

E. Even if they existed, none of the alleged injuries regarding Section 5 are traceable to or redressable by State Defendants.

Plaintiffs stretch the concepts of traceability and redressability well beyond their limits hoping to locate some connection to State Defendants for Section 5, but there is none. Plaintiffs point to the Secretary's role as chief election official, but "general powers are insufficient to establish traceability." *Anderson v. Raffensperger*, 497 F. Supp. 3d 1300, 1329 (N.D. Ga. 2020) (citing *Jacobson v. Fla. Sec. of State*, 974 F.3d 1236, 1254, 1256–57 (11th Cir. 2020)). They claim that providing training and guidance is enough of a connection, but while the Secretary "may offer guidance and training to counties on how and when to" implement various components of election laws in Georgia, "county superintendents are free to ignore [his] advice," which breaks any link in a causal chain that might have led to the Secretary. *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2021

WL 9553855, at *13 (N.D. Ga. Feb. 16, 2021).[4] The key point is that county supervisors who decide voter challenges "are independent officials . . . not subject to the Secretary's control." *Jacobson*, 974 F.3d at 1253. The Secretary does not hire county superintendents, he has no role in firing or suspending them, and county superintendents are not part of state government. *Compare Jacobson*, 974 F.3d at 1253 *with* O.C.G.A. §§ 21-2-70 (outlining independent authority of election superintendents), 21-2-74 (no role of Secretary in appointing election superintendents), 21-2-50 (duties of Secretary includes providing information and training to superintendents, but no authority over them).[5] Because county superintendents are "independent officials not subject to the Secretary's control, their actions . . . may not be imputed to the Secretary for purposes of establishing traceability." *Jacobson*, 974 F.3d at 1253–54.

Plaintiffs next try to tie the SEB to their supposed injuries, but they have even less connection there. Plaintiffs rely on statements from the SEB Chair that

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[4] Plaintiffs rely in error on this decision for the concept that issues related to the voter list are traceable to the Secretary. [Doc. 228 at 58]. But the court in *Fair Fight Action* relied on the explicit assignment of responsibilities for list maintenance to the Secretary. 2021 WL 9553855 at *14. That is in sharp contrast to Section 5, which assigns no responsibility to the Secretary whatsoever.

[5] While the SEB has authority to temporarily suspend superintendents after certain standards and hearing requirements are met, O.C.G.A. § 21-2-33.2, it "must resort to judicial process," *Jacobson*, 974 F.3d at 1253, to enjoin the actions of superintendents. O.C.G.A. § 21-2-33.1(c).

the SEB might say something about voter challenges or should promulgate rules of some sort. [Doc. 228 at 57]. This is in service of saying their basis for traceability is the "fail[ure] to promulgate regulations." *Id*. But requiring state officials to promulgate regulations would "raise[] serious federalism concerns, and it is doubtful that a federal court would have authority to order it." *Jacobson*, 974 F.3d at 1257. Thus, there cannot be any traceability as a result of a failure to promulgate regulations.

On redressability, Plaintiffs claim it is likely that State Defendants can redress their injuries, even though decisions on voter challenges are committed to county officials. [Doc. 228 at 58–59]. Although Plaintiffs are not clear, they apparently believe requiring the promulgation of regulations or requiring particular educational topics for county officials can provide redressability. But they are wrong because this Court cannot order those kinds of remedies. *Jacobson*, 974 F.3d at 1257. And the sole case Plaintiffs cite for the concept that the Secretary can require counties to reinstate voters does not support that statement. *Fair Fight Action*, 2021 WL 9553855 at *14. Unlike the question in *Fair Fight Action*, where "State law explicitly assigns responsibility . . . to the Secretary," *id*., the statutes at issue here explicitly assign responsibility for addressing voter challenges solely to county registrars. O.C.G.A. § 21-2-230.

Plaintiffs have not shown the State Defendants can redress any of their injuries. This Court should dismiss the Section 5 claims against State Defendants even if it finds an injury.

II. Plaintiffs have not stated a claim under the NVRA.

A. Plaintiffs admit they have not provided the required pre-suit notice for all Plaintiffs.

Plaintiffs are correct that actions solely bringing constitutional claims are not required to give pre-suit notice under the NVRA. They claim that VoterRiders falls into that category. [Doc. 228 at 77]. While no pre-suit notice was required for VoteRiders on the current version of the Complaint, it is not completely clear whether VoteRiders is asserting some NVRA claims: VoteRiders indicated it plans to send a "supplemental NVRA notice letter" and claimed to reserved rights to amend the complaint to include additional counties as defendants to pending NVRA claims. [Doc. 155 at 10 n.4].

Plaintiffs admit that Mr. Huynh and GMVP did not send an NVRA notice letter prior to joining as parties to this case. [Doc. 228 at 78]. And while Plaintiffs make a number of claims about what Mr. Huynh and GMVP did or did not do regarding notice, none of that is in the Complaint, and it therefore cannot be considered. *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1329 (11th Cir. 2006) ("A court is generally limited to reviewing what is within the four corners of the complaint on a motion to dismiss").

Plaintiffs' only real argument is to ask for this Court to waive the statutory notice requirements under the NVRA because the Secretary was already aware of the claims. But the Complaint does not allege Plaintiff Huynh and GMVP are "represented by . . . or . . . somehow situated similarly to" any of the Organizational Plaintiffs. *Georgia State Conf. of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1335 (N.D. Ga. 2012). The Complaint also makes no allegations that either of them are similarly situated, even though Plaintiffs argue that in their response. *Id*. Plaintiffs could have easily added an allegation to their Complaint that both Plaintiff Huynh and GMVP are similarly situated to all of the existing Plaintiffs, but chose not to do so. See *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014) (individual voter "cannot piggyback" on NVRA notice from organization). As a result, the NVRA claims by Plaintiff Huynh and GMVP must be dismissed until 90 days after they provide proper notice. 52 U.S.C. § 20510(b).

B. There is no violation of Section 8(d) of the NVRA (Count I).

On their first NVRA claim, Plaintiffs still cannot state a cause of action. Section 8(d) of the NVRA addresses removals that occur "*on the ground* that the registrant has changed residence…" 52 U.S.C. § 20507 (d)(1) (emphasis added). Plaintiffs claim that State Defendants have mixed up sections of the NVRA. [Doc. 228 at 62]. But Plaintiffs miss the point—a removal after an investigation by the county registrar following a challenge is *not* a removal solely because a person

changed residence. It is a removal based on the determination by county election officials about that voter's qualifications. That is why *Arcia v. Fla. Sec. of State*, 772 F.3d 1335, 1346 (11th Cir. 2014), applies. Under Plaintiffs' theory, a county registrar who has absolute proof following a thorough investigation that a voter has moved out of the jurisdiction must leave that voter on the rolls for at least four more years. *See* [Doc. 228 at 62–63] (claiming no exception for individualized inquiries). Keeping people confirmed to be ineligible on the voter list is not consistent with the NVRA. 52 U.S.C. § 20501(b)(2) (protections are for "eligible citizens"). And Plaintiffs further claim that an individual the county registrars has determined—after notice and hearing—no longer lives in the jurisdiction, must not only remain on the voter rolls for at least four years, he or she must still be allowed to vote in elections. [Doc. 228 at 65].

None of the cases Plaintiffs cite support this sweeping approach to keeping known ineligible individuals on the voter rolls and allowing them to vote after an individualized determination by election officials because none involved investigations by those officials. *See Common Cause Indiana v. Lawson*, 937 F.3d 944, 961 (7th Cir. 2019) (preliminary injunction affirmed when removals were based on "indirect information from a third-party database"); *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 386 (6th Cir. 2008) (preliminary injunction involving cancellation of voter registration following single piece of returned mail); *Common*

Cause/New York v. Brehm, 432 F. Supp. 3d 285, 318 (S.D.N.Y. 2020) (New York removed voters from the official list when single piece of mail was returned). In contrast to what Plaintiffs claim, "Congress did not intend to bar the removal of names from the official list of persons who were ineligible." *Bell v. Marinko*, 367 F.3d 588, 591 (6th Cir. 2004). That is why courts have upheld the individualized approach required by O.C.G.A. § 21-2-230.[6] *See Arcia*, 772 F.3d at 1346; *Bell*, 367 F.3d at 592. As a result, Plaintiffs have not stated a claim under Count I of their Complaint.

C. There is no violation of Section 8(b) (Counts II and IV).

Plaintiffs next claim that the "uniform and nondiscriminatory" requirements of Section 8(b) of the NVRA prohibit Sections 4 and 5 of SB 189. [Doc. 228 at 66–73]. But in doing so, it is Plaintiffs who are mixing up sections of the NVRA—that section by its terms relates only to a "program or activity to protect the integrity of the electoral process," 52 U.S.C. § 20507(b)(1), which is only

[6] The two cited examples of courts applying Section 8(d) to voter challenges do not provide the support Plaintiffs claim. In *N. Carolina State Conf. of NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172, at *4 (M.D.N.C. Aug. 7, 2018), the counties were cancelling voter registrations based on returned mail alone in a challenge—a process dramatically different than Georgia's. And an unpublished consent decree to resolve litigation is not binding precedent and cannot bind future legislative decisions, let alone judicial ones. [Doc. 228 at 65]; *see also Horne v. Flores*, 557 U.S. 433, 449–50 (2009).

applicable to "state removal programs." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 764 (2018). Plaintiffs try to limit this language from *Husted* as "dicta,"[7] [Doc. 228 at 68 n.16], but they ignore the text of the NVRA itself, which applies only to programs and activities "to protect the integrity of the electoral process." 52 U.S.C. § 20507(b)(1). While Plaintiffs claim these individualized decisions are systematic, [Doc. 228 at 67], their proposed approach would drain that word of its meaning. Challenges made under O.C.G.A. § 21-2-230 require a hearing process which is necessarily individualized (the elector is given "the opportunity to appear before the registrars and answer the grounds of the challenge").

In the face of this clear statutory language, Plaintiffs continue to rely on the same two cases they cited previously, neither of which assist the Court. And, worse, they still cannot explain how a decision that affects one voter at a time made by local officials who have the statutory duty to maintain voter rolls (as opposed to a database comparison or other comprehensive approach) is a "program" or "activity" subject to the requirements of Section 8(b).[8]

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[7] "However, there is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006).

[8] Plaintiffs also overstate the comparisons between *Mi Familia Vota v. Fontes*, 719 F. Supp. 3d 929 (D. Ariz. 2024) *aff'd in part, vacated in part, remanded* ___ F.4th ___, No. 24-3188, 2025 WL 598127, at *3 (9th Cir. Feb. 25, 2025). The court found the "Reason to Believe Provision" challenged in that case only applied to naturalized citizens and noncitizens. 2025 WL 598127 at *14. In any event, the

The same goes for the provisions about homeless voters. While all similarly situated voters should be treated the same, it is impossible "to ensure that *all* eligible voters are treated the same," as Plaintiffs urge.[9] [Doc. 228 at 71] (emphasis original). Election laws inherently require voters who are not similarly situated to be treated differently. For example, only in-person voters are required to present their physical photo ID to a poll worker. O.C.G.A. § 21-2-417(a). Likewise, absentee voters can vote anytime after receiving their ballot and before Election Day whereas in-person voters must vote at certain times and locations. O.C.G.A. §§ 21-2-403, 21-2-385. And voters with disabilities or who are over 75 years old who vote in person can move to the front of the line at certain times. O.C.G.A. § 21-2-409.1.

In the same way as differently situated voters are treated differently, providing a location for homeless voters without permanent addresses to receive mail is not a violation of the NVRA because those voters "enjoy the same rights to vote and designate their mailing address the same way as everyone else." [Doc. 228 at 72]. It is only if those voters are homeless and *do not have an address to receive mail* that SB 189 provides a location where those voters may receive the election

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Ninth Circuit did not consider whether the challenged provision was a program or activity. *Id.*

[9] As just one example, Plaintiffs recognize that voters subject to a domestic violence protective order must be treated differently for their own safety and there are specific laws that apply only to those voters. [Doc. 228 at 89 n.24].

mail to which they are entitled. Thus, even if the provisions were a program or activity, they treat all voters uniformly and Plaintiffs have not stated a claim.

D. There is no violation of the notice requirements (Count V).

Plaintiffs continue to insist that voters are deprived of notices under Section 4 as another NVRA violation. [Doc. 228 at 73–76]. But Plaintiffs fail to realize that the alternative is a situation where those voters' notices are sent to locations where they no longer live and get returned, which results in the voters becoming "inactive." *See* O.C.G.A. §§ 21-2-233, -235 (inactive status for returned mail). Plaintiffs call sending mail to a confirmed location where a homeless voter who cannot otherwise receive mail a "de facto violation" of the NVRA, [Doc. 228 at 74], but the case they cite says nothing of the kind. *Brehm*, 432 F. Supp. 3d at 318 (noting New York's practice of removing voters for returned mail alone).

Plaintiffs continue to ignore the text of Section 4 in search of an NVRA violation: it only applies to voters who are (1) homeless *and* (2) lack a permanent address. Thus, the provision does not apply to homeless individuals who have an address where they can receive mail, like Plaintiff Huynh, and it does not apply to individuals who do not have a permanent address but are not homeless.[10] While

[10] Plaintiffs' attempted application of this section to UOCAVA voters is defeated by recognizing that both factors must be true for Section 4 to apply. *Compare* [Doc. 228 at 76] *with* O.C.G.A. § 21-2-217(a)(11). The same goes for the

possibly interesting, the definitions of "homeless" that Plaintiffs reference in other Georgia statutes have no application to that term in the Election Code. *See* O.C.G.A. § 8-3-301(2) (limiting definition to Article 5 of Chapter 3 of Title 8), § 36-80-31(a)(2) (limiting definition to single Code section).[11]

For all of these reasons, Plaintiffs cannot demonstrate they have pleaded any cognizable claims under the NVRA. In order to state a claim under the NVRA, Plaintiffs must plead more than what they have cobbled together here and this Court should dismiss all counts regarding the NVRA as to State Defendants.

III. Plaintiffs have not stated a claim under the U.S. Constitution.

Plaintiffs further claim that because *Anderson-Burdick* is a balancing test, that this Court cannot or should not dismiss such a claim on a motion to dismiss. [Doc. 228 at 83]. But "where the plaintiffs' arguments fail[] as a matter of law," courts properly dismiss those cases. *Comm. to Impose Term Limits on Ohio Supreme Ct. & to Preclude Special Legal Status for Members & Emps. of Ohio Gen. Assembly v. Ohio Ballot Bd.*, 885 F.3d 443, 448 (6th Cir. 2018); *see also Daunt v. Benson*, 999 F.3d 299, 313 (6th Cir. 2021) (courts have not "shied away from disposing of *Anderson-Burdick* claims

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unusual concept that interpreting the Code section would allow Defendants "to veto multiple fields of the Federal Voter Registration Form." [Doc. 228 at 75 n.19].

[11] While Plaintiffs cite it, [Doc. 228 at 77], there is no O.C.G.A. § 3-7-23.1(a)(3), which would otherwise be located in the section of the Code dealing with sale of distilled spirits by private clubs.

at the motion-to-dismiss stage where a plaintiff's allegations 'failed as a matter of law.'"); *Election Integrity Project California, Inc. v. Weber*, 113 F.4th 1072, 1089 (9th Cir. 2024) (affirming grant of motion to dismiss *Anderson-Burdick* claim); *Mi Familia Vota v. Hobbs*, 608 F. Supp. 3d 827, 852, 856 (D. Ariz. 2022) (granting motion to dismiss *Anderson-Burdick* claim). This Court should consider and dismiss the constitutional claims because they fail as a matter of law.

A. Section 4 of SB 189 complies with the Constitution (Count VIII).

Plaintiffs advance two primary arguments for a burden on the right to vote from Section 4: (1) that frequent travel to the registrar is required, and (2) that the provisions apply more broadly as a matter of law. [Doc. 228 at 83–87]. Neither applies here.

First, Plaintiffs fail to address the primary problem with their claim—a constitutionally cognizable burden requires an increase over the *usual burdens of voting*. *Curling v. Raffensperger*, 50 F.4th 1114, 1123 (11th Cir. 2022). Homeless voters who have a permanent mailing address already have to make multiple trips to the post office or other location to check their mail because they cannot receive mail at the place where they reside. Thus, while making multiple trips to the county registrar's office may be inconvenient, it's no different than making multiple trips to a location to check mail if the homeless voter had a permanent mailing address. As a result, this is not an increase over the usual burdens of voting. *Id.*

Second, Plaintiffs continue to advocate for the most restrictive reading of Section 4. But only voters who are homeless *and* do not otherwise have a location to receive mail are affected by that provision. Plaintiffs seek to manufacture a burden by adding a different word to "permanent address" so it means the same thing as homeless (not having a permanent *residential* address) instead of as another condition to limit the application of Section 4. That makes little sense and results in surplusage. *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (cannot use surplusage to make unambiguous statute ambiguous).

Turning to the justification for Section 4, Plaintiffs miss the point that a minimal burden does not require an evidentiary showing by the State and can be justified by "the State's important regulatory interests." *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Plaintiffs offer no response to the point made by State Defendants that they have failed to provide any "reliable evidence that quantifies the extent and scope of the [alleged] burden imposed by the Georgia statute." *Billups*, 554 F.3d at 1354. They are instead still left speculating about the impact and the potential scope of the claimed burden.

Without allegations about the scope of the alleged burden, the State's regulatory interests in providing homeless voters with an address to receive mail to protect them from arbitrary removal from the voting rolls is sufficient to justify

any minimal burden on the right to vote for this small subset of voters. As a result, Plaintiffs have failed to state a claim on Count VIII of their Complaint.

B. Section 5 of SB 189 complies with the Constitution (Count VI and VII).

Plaintiffs carry forward their misunderstanding of *Anderson-Burdick* in their arguments related to Counts VI and VII.[12] Plaintiffs claim voters are potentially burdened by (1) late notice of hearings, (2) removals in error,[13] and (3) possible additional burdens faced by military voters. [Doc. 228 at 87-92]. None of these are any additional burden either.

There is no burden on the right to vote by requiring voters to provide an acceptable address, especially when being a resident is a longstanding requirement to be registered to vote. O.C.G.A. § 21-2-216(a)(4). At most, it is nothing more than an "ordinary and widespread burden" which requires the "nominal effort of everyone." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring). The burdens Plaintiffs identify only exist if a long

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[12] Plaintiffs tacitly admit their traceability and redressability problems as to State Defendants by acknowledging in this section that the burden they identify is that "a county" might sustain a challenge in error and that *counties* are making decisions they believe are inconsistent. [Doc. 228 at 89].

[13] Plaintiffs acknowledge State Defendants' correction of their original errors describing the operation of the VoteSafe program, [Doc. 228 at 89 n.24], but they again ask this Court to find a constitutional violation because the legislation does not sufficiently constrain the discretion of county officials in their view.

chain of events come to pass—*if* a voter provides a place where people cannot live as their residential address and *if* that voter is challenged and *if* a county provides late notice and *if* the voter is ultimately removed from the rolls. That chain of events is too speculative to constitute an actionable burden. And Plaintiffs continue to ignore that military and overseas voters are known to county registrars—and Section 5 does not require challenges to "be sustained," [Doc. 228 at 92], it requires that probable cause be found when voters are providing a nonresidential address. Registrars can then address the individual situation of each voter at that point.

The state has a strong interest in accurate voter rolls. *Curling*, 50 F.4th at 1121. Plaintiffs ignore that interest and apparently believe county registrars are going to violate their statutory duty to maintain accurate voter rolls by blindly removing voters from eligibility. And even if that were to happen, any incorrect decision could be challenged in court without facing the hypothetical and speculative claims at issue in this litigation. There is no severe burden here, but even if there was, the ability of county registrars to review voter rolls is paramount and more than outweighs any burden. Plaintiffs have failed to state a claim under Counts VI and VII.

C. *Anderson-Burdick* controls the procedural due process claims (Counts IX and X).

Plaintiffs double down on their claim that procedural due process claims are governed by a standard other than *Anderson-Burdick*. [Doc. 228 at 94–97]. State Defendants cited a merits-panel opinion in *Jacobson*, 974 F.3d at 1261 and a collection of cases from this Court applying *Anderson-Burdick* to procedural due process claims, *Bell v. Raffensperger*, No. 1:21-CV-02486-SEG, 2022 WL 18243320, at *10 n.12 (N.D. Ga. Dec. 6, 2022) (applying *Anderson/Burdick* to procedural due process claim); *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2021 WL 9553856, at *29 (N.D. Ga. Mar. 31, 2021) (same). Plaintiffs are left complaining that one of the cited cases, *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (quoting *Jacobson*, 974 F.3d at 1261), is a stay-panel opinion. [Doc. 228 at 95 n.25]. In response to those cases, Plaintiffs cite—surprisingly—a single-judge pre-*Jacobson* concurrence in a *stay-panel* opinion, *Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1267 (11th Cir. 2019) (Pryor, J., concurring). The other cases they cite do not help their cause. They misread *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020), which only assumed the right to vote was a liberty interest but concluded it did not apply because the deprivation took place through legislative action. And the other district court cases they cite are either pre-*Anderson* (*U.S. v. Texas*, 252 F. Supp. 234, (W.D. Tex. 1966) and *Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982)) or pre-*Jacobson* (the other cited cases) and did not

seriously grapple with the question of the proper standard. None of Plaintiffs' cases demonstrate that in this Circuit, anything other than *Anderson-Burdick* applies to their constitutional claims.

The only supposed hooks Plaintiffs can muster to include State Defendants in an adjudicative action that might be subject to the procedural due process standard in *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976), is that the Secretary "is responsible for providing guidance to counties" and the SEB is responsible for promulgating regulations. [Doc. 228 at 97 n.26]. But, as noted above, relying on "general powers [is] insufficient to establish traceability." *Anderson*, 497 F. Supp. 3d at 1329 (citing *Jacobson*, 974 F.3d at 1254, 1256–57). Plaintiffs get it right when they identify that O.C.G.A. § 21-2-230 "sets out an adjudicative process by which *counties* determine the eligibility of a Georgia voter whose eligibility has been challenged." [Doc. 228 at 97–98] (emphasis added). Thus, even to the extent *Mathews* applies, the only defendants to which it could apply are County Defendants because they are the sole participants in an adjudicative decision regarding voter eligibility in a challenge.

Plaintiffs then pivot to a general challenge to the provisions of O.C.G.A. § 21-2-230 which their Complaint does not make: they question the notice requirements for *all* challenges, when a hearing is required for *all* challenges, and the alleged lack of accommodations for military and overseas voters. [Doc. 228 at

99–100]. But Plaintiffs' Complaint does not challenge every part of the process. It only challenges the lower probable-cause standard in SB 189. [Doc. 155 at ¶¶ 329 (only challenging process as to Section 5 of SB 189), 345 (relying on lesser probable cause standard, not existing notice and hearing process pre-SB 189)]. As a result, Plaintiffs cannot broaden their challenge to the entirety of the longstanding voter challenge process.

Ultimately, there is no procedural due process violation and the only potential violation Plaintiffs identify would result from an uncertain chain of decisions made by County Defendants, not State Defendants. As a result, this Court must dismiss Counts IX and X of Plaintiffs' Complaint as to the State Defendants.

D. *Anderson-Burdick* controls the Equal Protection claim (Count XI).

Plaintiffs also continue to maintain that *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), governs their Equal Protection claim because it is "part of a tradition of constitutional law." [Doc. 228 at 102 n.28]. But where the Eleventh Circuit has cited *Dunn* in cases involving the Equal Protection Clause, it cites it for the importance of the right to vote, then explains that *Anderson-Burdick* governs the claim. *See Billups*, 554 F.3d at 1352 (citing *Dunn* then applying *Anderson-Burdick* to Equal Protection claim); *Wexler v. Anderson*, 452 F.3d 1226, 1231–33 (11th Cir. 2006) (same); *see also Cowen v. Sec'y of State of Georgia*, 22 F.4th 1227, 1235 (11th Cir. 2022)

(applying *Anderson* to Equal Protection challenge to ballot-access law). Even the Sixth Circuit case cited by Plaintiffs evaluated an Equal Protection claim using *Anderson-Burdick*. *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 238 (6th Cir. 2011). Plaintiffs also rely on a single-judge partial dissent[14] in *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1186 (11th Cir. 2008) (Barkett, J., concurring in part and dissenting in part).

Plaintiffs seem intent on importing cases involving counties using different voting equipment to create an Equal Protection standard different from *Anderson-Burdick*. Plaintiffs rely on a case involving Ohio voting machines that was vacated. *Stewart v. Blackwell*, 444 F.3d 843, 852 (6th Cir. 2006), *vacated* (July 21, 2006), *superseded*, 473 F.3d 692 (6th Cir. 2007). Likewise, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008), dealt with voting machines and the portion cited by Plaintiffs is to the plaintiff's description of their own claims. Plaintiffs also rely on a case from this Court also involving voting machines but that case also used the *Anderson-Burdick* standard for evaluating plaintiffs' Equal Protection claims. *See Curling v. Raffensperger*, 403 F. Supp. 3d 1311, 1336 (N.D. Ga. 2019). Finally, the Sixth Circuit case Plaintiffs cite makes clear "when a state

[14] State Defendants pointed out that Plaintiffs were not relying on a majority opinion in this case in their brief, [Doc. 168-1 at 68 n.17], but Plaintiffs relied on that partial dissent again in their response without further identification. [Doc. 228 at 101, 102 n.28].

regulation is found to treat voters differently in a way that burdens the fundamental right to vote, the *Anderson–Burdick* standard applies." *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012).

In short, Plaintiffs cannot point to a single case that remains good law that applied the standard they seek with the exception of *Bush v. Gore*, 531 U.S. 98 (2000). But even that case made clear that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may *develop different systems* for implementing elections." *Id.* at 109 (emphasis added). Different systems could of course encompass different ways of resolving voter challenges consistent with Georgia law. And again, *Bush* involved counting votes—not voter registration. *Id.* Because *Anderson-Burdick* controls Plaintiffs' Equal Protection claim, they have not stated a claim for all the reasons discussed in III.A. and B. *above*.

IV. Plaintiffs have not stated a claim under the Civil Rights Act (Count XII).

State Defendants will not rehash their arguments about the private right of action under the Civil Rights Act, because those issues have been thoroughly addressed in their principal brief. But Plaintiffs have still failed to state a claim, even if a private right of action exists.

A. Allegations of racial discrimination are required to state a claim under the Uniformity Provision.

Plaintiffs admit that they make no allegations of racial discrimination regarding their Uniformity Provision claim. [Doc. 228 at 106]. Instead, they claim

no such allegations are required, citing a series of more than 40-year-old cases for that proposition. But this is not supported by the text or precedent. The text expressly targets voting rights in the context of "race, color, or previous condition of servitude." 52 U.S.C. § 10101(a)(1). And the *entirety* of subsection (a) explains the rights and privileges covered, not just paragraph (2). *See* 52 U.S.C. § 10101(c) (noting who can bring an action to stop someone from engaging in an action that "would deprive any other person of any right or privilege *secured by subsection (a)* or (b)" (emphasis added)); (e) (explaining what to do when "any person has been deprived on account of race or color of any right or privilege *secured by subsection (a)*" (emphasis added)).[15] The recently overturned case of *Mi Familia Vota,* 719 F. Supp. 3d at 995, *aff'd in part, vacated in part, remanded*, No. 24-3188, 2025 WL 598127 (9th Cir. Feb. 25, 2025), also does not provide support for Plaintiffs' approach because both the district court and the Ninth Circuit relied on national-origin discrimination. *See* 719 F. Supp. 3d at 995–96; 2025 WL 598127, at *22.

The other more-recent cases Plaintiffs cite do not authorize a discrimination-free version of the Civil Rights Act that Plaintiffs propose. *See Voto Latino v. Hirsch*,

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[15] Plaintiffs' attempted reliance on the Eleventh Circuit's interpretation of the Materiality Provision of the Civil Rights Act is unavailing. That court did not find that racial discrimination was irrelevant in *Browning*, 522 F.3d at 1175, because it determined there was no preemption of the challenged Florida law by the text. The citation to *Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006) only upheld the district court decision without further explanation.

712 F. Supp. 3d 637, 662 (M.D.N.C. 2024) (noting that "the parties have not argued, and this court thus does not hold, that the CRA applies only to certain protected classes"); *La Union del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725, 763 (W.D. Tex. 2023) (reliance on Materiality Provision alone); *Vote.org v. Byrd*, 700 F. Supp. 3d 1047, 1055 (N.D. Fla. 2023) (dismissing claim on lack of sufficient alleged facts after discussing Materiality Provision).

Plaintiffs have not alleged any racial discrimination resulting from Section 5 of SB 189. Without those allegations, they have failed to state a claim under the Civil Rights Act.

B. Section 5 complies with the Civil Rights Act.

Plaintiffs' claim that voters are treated differently based on their address makes even less sense. They assert that federal law dictates that there can be no difference in how a registrar treats a registration form that lists a P.O. Box as a residence as compared to a registration form that lists a place where someone can reside. [Doc. 228 at 110]. A person who registers to vote at an address where someone cannot live has not shown that he or she meets the qualifications to vote. O.C.G.A. § 21-2-216(a)(4) (requiring voter to be a "resident" of county and state). Plaintiffs wrongly claim that locations like campus dormitories and nursing homes are nonresidential—when they are clearly places where people can live and thus are appropriate addresses. There are no different procedures for voters who

are similarly situated. Instead, the procedures differ when someone reports that they are *not* similarly situated. And that is entirely within the bounds of state and federal law, meaning to the extent any claim exists under the Civil Rights Act, Section 5 complies with those provisions.

CONCLUSION

Plaintiffs have not shown this Court has jurisdiction nor have they shown that any claim can survive dismissal. This Court should dismiss the Complaint in its entirety and allow the legislature's policy decisions to continue to govern Georgia elections.

Respectfully submitted this 7th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned certifies that the foregoing Brief has been prepared in Book Antiqua 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Bryan P. Tyson
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