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

SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, *et al.*, *Plaintiffs*, v. BRIAN KEMP, Governor of the State of Georgia, in his official capacity, *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:21-CV-01284-JPB

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

INTRODUCTION

While Plaintiffs amended their Complaint in response to State Defendants' Motion to Dismiss—adding nearly 50 additional pages—they did not amend their extreme rhetoric about reasonable changes to Georgia's election laws. Even after reflection, they continue to make the breathtaking charge that SB 202 is "an attack on democracy itself." [Doc. 83, ¶ 31].

But the reality of SB 202 is nowhere near this turbocharged rhetoric.[1] SB 202 added opportunities to vote and made meaningful reforms to help ensure the very interests Plaintiffs praise—a "safe and secure" election with "integrity" and continued high turnout. The changes it makes are well within the mainstream of other states' laws related to elections and are more voting-friendly than laws in many states. But Plaintiffs still ask this Court to advance their agenda by invalidating several provisions of SB 202. But that is not the purview of the courts because the judicial "sphere does not extend to second-guessing and interfering with a State's reasonable, nondiscriminatory election rules." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

[1] Plaintiff AME Church has now abandoned its claims of voting machines switching votes that it criticized in another case. Compare [Doc. 1, ¶ 153] with *Fair Fight Action v. Raffensperger*, Case No. 1:18-cv-05391-SCJ (N.D. Ga.) Amended Complaint, Doc. 41, ¶¶ 23, 102-104.

First, Plaintiffs' Amended Complaint is bloated beyond what the Federal Rules allow as Plaintiffs make claims hoping that something—anything—will stick. But shotgun pleadings are routinely dismissed by the federal courts and this one should be dismissed as well.

Second, Plaintiffs do not have Article III standing to invoke this Court's limited jurisdiction over state election laws because the injury they allege is not certainly impending nor substantially likely to occur, and ultimately rests on a speculative chain of events that neither Plaintiffs nor this Court can say are likely—much less substantially likely—to occur.

But even if this Court reaches the merits, there is no case here. SB 202[2] was the legislature's reasonable update of Georgia election laws. Far from being an "attack on democracy," SB 202 updated Georgia election law "applying the lessons learned from conducting an election in the 2020 pandemic." Ex. A at 6:146-7:148.

This Court should "follow the law as written and leave the policy decisions for others," *Ga. Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cty. Bd. of Reg. & Elections*, No. 1:20-CV-01587, 2020 U.S. Dist. LEXIS 211736, at *4 (N.D. Ga. Oct. 5, 2020) ("*GALEO*"), and dismiss this case.

[2] A copy of SB 202 is attached as Exhibit A, with references to page and line numbers.

ARGUMENT AND CITATION OF AUTHORITY

Plaintiffs ask this Court to nullify eight components of Georgia's new election law on a variety of grounds. *See generally* [Doc. 83]. Because Plaintiffs challenge a variety of practices, this brief first considers jurisdiction, explains the legal standards, and then considers the challenged practices individually.

The pertinent legal standards are clear: Where a motion to dismiss is brought pursuant to FRCP 12(b)(1), the Court is not limited to the four corners of the Complaint to adequately satisfy itself of jurisdiction over the matter. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 732 n.9 (11th Cir. 1982). In evaluating a 12(b)(1) motion, "no presumptive truthfulness attaches to plaintiff's allegations." *Id.* And, to survive a motion to dismiss under FRCP 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, 677 (2009). While this Court must assume the veracity of well-pleaded factual allegations, it is not required to accept legal conclusions "couched as [] factual allegation[s]." *Id.* at 678-79. This Court may consider any matters appropriate for judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Application of these settled standards requires dismissal.

I. Plaintiffs' Amended Complaint is an improper shotgun pleading.

Fed. R. Civ. P. 8(a)(2) requires that a complaint provide a "short and plain statement of the claim showing that the pleader is entitled to relief." This requirement is necessary so that the defendants can "'frame a responsive pleading.'" *Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021) (quoting *Weiland v. Palm Beach Cty. Sheriff's Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015)). Plaintiffs' first complaint was 91 pages and 268 paragraphs and State Defendants responded to it. [Docs. 1, 74]. Their new complaint adds 48 pages and 108 paragraphs. [Doc. 83].

The Amended Complaint (1) contains seven counts, each of which adopts the allegations of all preceding counts; (2) includes hundreds of paragraphs of "conclusory, vague, and immaterial facts"[3]; and (3) asserts seven counts against dozens of defendants without specifying which of the defendants are responsible for each count. [Doc. 83]. As a result, it is an improper shotgun pleading and should be dismissed. *See Barmapov*, 986 F.3d at 1324-25.

[3] Examples include discussions of "white primaries" and history dating back more than 140 years, [Doc. 83, ¶¶ 143-146]—despite the Eleventh Circuit's instruction that history cannot ban a "legislature from ever enacting otherwise constitutional laws about voting." *Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1325 (11th Cir. 2021) ("*GBM*"). Plaintiffs further include paragraphs on list maintenance, deadlines, and redistricting that they do not challenge; bills in other states; and long lines in the first pandemic election. [Doc. 83, ¶¶ 157, 160-163, 167, 181, 225, 307-308].

II. Plaintiffs do not have standing.

Another ground for dismissal is lack of standing. "Federal courts are not 'constituted as free-wheeling enforcers of the Constitution and laws.'" *Wood v. Raffensperger*, 981 F.3d 1307, 1313 (11th Cir. 2020) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006)). "To have a case or controversy, a litigant must establish that he has standing." *Jacobson v. Fla. Sec. of State*, 974 F.3d 1236, 1245 (11th Cir. 2020).

To demonstrate standing at the pleading stage of the litigation, Plaintiffs must allege "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson*, 974 F.3d at 1245. The party invoking federal jurisdiction bears the burden of establishing standing at the beginning and at each phase. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 570 n.5 (1992); *see also Johnson v. Bd. of Regents*, 263 F.3d 1234, 1267 (11th Cir. 2001). Plaintiffs, moreover, must show a concrete and particularized injury. *Wood*, 981 F.3d at 1314 (citing *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020)). And there must be a substantial risk of injury, or the alleged injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

Even assuming at least one of the Plaintiff organizations can establish an injury either by (1) showing they diverted resources in response to the

purportedly illegal acts of State Defendants, or (2) "stepping in the shoes" of its members, they cannot show the alleged injury prompting that diversion or affecting members is "certainly impending" or substantially likely to occur.

A. Plaintiffs have not alleged their purported injuries are certainly impending.

"When a plaintiff seeks prospective relief to prevent a future injury, it must establish that the threatened injury is certainly impending." *Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277, 1280 (11th Cir. 2020). "[A]llegations of *possible* future injury are not sufficient." *Clapper,* 568 U.S. at 409. "Nor is a 'realistic threat,' *Summers v. Earth Island Inst.*, 555 U.S. 488, 499– 500 (2009), [or] an 'objectively reasonable likelihood' of harm," *Anderson v. Raffensperger*, No. 1:20-cv-03263, 2020 U.S. Dist. LEXIS 188677, at *15 (N.D. Ga. Oct. 13, 2020) (quoting *Clapper*, 568 U.S. at 410). And while "the Supreme Court has said that literal certainty is not uniformly required," "[t]he required showing is ultimately a matter of degree." *Id.* (cleaned up). In the end, "[h]ow likely is enough is necessarily a qualitative judgment." *Fla. State Conference of N.A.A.C.P. v. Browning,* 522 F. 3d 1153, 1161 (11th Cir. 2008).

In this instance, Plaintiff's Amended Complaint fails to establish standing because any potential injury faced by the organizations or their members is based solely on a "highly attenuated chain of possibilities,"

Clapper, 568 U.S. at 410. Indeed, even when Plaintiffs amended their Complaint and added new parties, they failed to adequately allege any *certainly impending* injury. Each Plaintiff only claims it is necessary they take measures *at some point in the future* to ameliorate a possible future injury. But these claims rest on assumptions that have not yet, and may never, occur.

Plaintiff AME Church, for example, claims it "will have to divert more time, money and other resources," as a result of SB 202. [Doc. 83 ¶ 34]. Elsewhere, AME Church routinely claims only that *future* diversions or limitations will occur. *Id*. at ¶¶ 35-39. Not only are these purported diversions set to take place at some unknown time, they are also based upon purported effects of SB 202 that may never actually take place, for example: "AME Church *anticipates* that there will be more inquiries from pastors and members relating to SB 202, which *will mean* that AME Church *will be able* to devote less time to its other work." *Id*. at ¶ 38 (emphasis added).

Allegations that AME Church will at some point expend some resources it otherwise would not have are not sufficient to afford Article III standing. But even if AME Church had already incurred the purported future expenses they claim they will incur, it cannot use its subjective fears of future injury as a means to manufacture standing. "[I]f the hypothetical harm is not 'certainly impending,' or there is not a substantial risk of the harm, a plaintiff cannot

conjure standing by inflicting some direct harm on itself to mitigate a perceived risk." *Tsao v. Captiva MVP Rest. Partners, LLC,* 986 F. 3d 1332, 1339 (11th Cir. 2021) (quoting *Clapper,* 568 U.S. at 416).

The above analysis, which precludes AME Church from continuing its claims beyond the pleading stage of litigation, applies equally to the remaining Plaintiffs. GAMVP is susceptible to the very same jurisdictional shortcomings [Doc. 83, ¶¶ 40–46]. As are Plaintiffs WWA, *id*. at ¶¶ 47–52; LCF Georgia, *id*. at ¶¶ 53–58; Delta Sigma Theta Sorority, *id*. at ¶¶ 59–66; Georgia ADAPT, *id*. at ¶¶ 67–69; Georgia Advocacy Office, id. at ¶¶ 70–78; The Arc, *id*. at ¶¶ 79–84; and Southern Christian Leadership Conference, *id*. at ¶¶ 85–92. For these reasons, dismissal is required as to all Plaintiffs.

B. Plaintiffs challenge processes that are neither traceable to nor redressable by State Defendants.

Even if this Court found that Plaintiffs have diverted resources sufficient to establish an injury, many of Plaintiffs' claims should be dismissed anyway because they cannot establish that the alleged injuries are traceable to State Defendants. To satisfy the causation requirement of standing, a plaintiff's injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. Many of Plaintiffs' claims relate to "long lines"

at polling places, [Doc. 83, ¶¶ 296-298, 302-312], but these are outside the scope of State Defendants' authority and, thus, this Court's capacity to redress. *See Anderson*, 2020 U.S. Dist. LEXIS 188677, at *61.

III. Plaintiffs fail to state a claim on which relief can be granted.

A. Relevant legal standards.

1. Section 2 of the Voting Rights Act (Count I)

Section 2 of the Voting Rights Act prohibits jurisdictions from "impos[ing] or appl[ying]" any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]" 52 U.S.C. § 10301(a). "This analysis turns on whether, based on the totality of the circumstances, the challenged law violates Section 2(a) because it deprives minority voters of an equal opportunity to participate in the electoral process *and* to elect representatives of their choice." *GBM*, 992 F.3d at 1329 (emphasis in original). To make out a valid vote-denial[4] claim, the Eleventh Circuit requires (1) proof of disparate impact (a law results in a denial or abridgement) and (2) that the disparate impact is *caused* by racial bias. *Id.*;

[4] Vote-denial claims challenge specific election practices. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016).

see also Northeast Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 626-27 (6th Cir. 2016); *Dem. Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1012 (9th Cir. 2020); *Veasey*, 830 F.3d at 243-245; *League of Women Voters*, 769 F.3d at 240.

2. Intentional racial discrimination (Counts I and II).

Plaintiffs bring two intentional-discrimination counts: one under the Voting Rights Act and one under both the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment. [Doc. 83, ¶¶ 329-337]. Plaintiffs must allege first that "the State's decision or act had a discriminatory purpose and effect. . . . If Plaintiffs are unable to establish both intent *and* effect, their constitutional claims fail." *GBM*, 992 F.3d at 1321 (cleaned up and emphasis in original). Only if Plaintiffs establish that the State's act had a discriminatory intent or effect does "the burden shift[] to the law's defenders to demonstrate that the law would have been enacted without this [racial-discrimination] factor." *Id.* quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *see also Johnson v. Governor of Fla.*, 405 F.3d 1214, 1222 (11th Cir. 2005). Courts use the multi-factor approach of *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), to assess intent and effect. *GBM*, 992 F.3d at 1322.

3. Fundamental right to vote (Count III).

Plaintiffs challenge eight regulations as facially unconstitutional. But

facial challenges to election practices are disfavored because "the proper [judicial] remedy—even assuming [the law imposes] an unjustified burden on some voters—[is not] to invalidate the entire statute." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) (controlling opinion) (cleaned up). Such challenges "must fail where the statute has a plainly legitimate sweep." *Washington State Grange v. Washington State Republican* Party, 552 U.S. 442, 449 (2008). "Regulations imposing severe burdens on the plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a state's 'important regulatory interests' will usually be enough to justify 'reasonable nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Courts distinguish severe burdens from non-severe ones, and ordinary burdens (such as photo identification laws) that "aris[e] from life's vagaries," fall into the latter category. *Crawford*, 553 U.S. at 191, 197-98 (controlling opinion). Significantly, lesser burdens impose no burden of proof or evidentiary showing on states. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009), *see also Munro*, 479 U.S. at 195.

4. Freedom of speech/expression (Count IV).

Plaintiffs bring their challenge to the prohibition against providing

things of value to voters in line as a violation of the First Amendment's protections for "core political speech." [Doc. 83, ¶ 345]. But the prohibition they challenge only applies in a specific location, meaning the First Amendment claim must be evaluated based on the forum. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U. S. 672, 678 (1992). On Election Day, a precinct is "a government-controlled property set aside for the sole purpose of voting." *Mansky*, 138 S. Ct. at 1886. As a result, the sole question is whether the provisions of SB 202 related to food and drink in line are "'reasonable in light of the purpose served by the forum': voting." *Id*. (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U. S. 788, 806 (1985)). Further, there is "no requirement of narrow tailoring in a nonpublic forum." *Id*. at 1888.

5. Disability claims (Counts V and VI).

Plaintiffs bring two counts under the Rehabilitation Act and the ADA, which "are governed by the same standards." *Goldberg v. Florida International University*, 838 F. App'x 487, 492 (11th Cir. 2020). To prevail, Plaintiffs must prove: "(1) that he is a qualified individual with a disability; (2) that he was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination

was by reason of the plaintiff's disability." *Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1101 (11th Cir. 2011) (quoting *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1081 (11th Cir. 2007)). Plaintiffs' disability claims are that the SB 202 changes are discriminatory, that they apply unlawful eligibility criteria to programs, and that they deny equal opportunity to participate in services on account of their disability. [Doc. 83, ¶¶ 353-354, 370-371].

6. Civil Rights Act claim (Count VII).

Finally, Plaintiffs claim that requiring identifying information with an absentee ballot, particularly a date of birth, violates the Civil Rights Act. While denying the right to vote based on nonmaterial[5] issues is prohibited, *see* 52 U.S.C. § 10101(a)(2)(B), SB 202 requires notice and an opportunity to cure the defect if the election official is unable to identify the individual. Ex. A at 63:1599-1612. Further, the processing of absentee ballots is not carried out by State Defendants. *Ga. Republican Party, Inc. v. Se';y of State of Ga.*, No. 20-14741-RR, 2020 U.S. App. LEXIS 39969, at *6 (11th Cir. Dec. 20, 2020).

B. Application to particular challenged practices.

1. Prohibition on mobile voting.

Plaintiffs begin with an attack on the limitations placed on mobile-voting

[5] There are times when a date of birth *is* material—for example, when two voters share the same name and address.

locations, which were utilized by one county for the first time in the 2020 elections to mitigate the effects of the COVID-19 pandemic. [Doc. 83, ¶¶ 246-248]. SB 202 specifically allows mobile voting units when needed in emergency situations, Ex. A at 31:774-778, but the limitations are consistent with other provisions that require specific advance notice of the location of a precinct, not an ever-shifting bus traveling around a county. Ex. A at 30:741-757 (posted notice of change), 60:1525-1535 (notice of early-voting location). Other than a conclusory allegation that limiting mobile units will "unduly and especially burden[] voters of color," apparently relying on the demographic makeup of Fulton County, [Doc. 83, ¶ 277], Plaintiffs do not identify any disparate impact or burden imposed by limiting an optional system used in an unusual election by one county. Plaintiffs fail to connect this claimed disparate impact of this particular provision of SB 202 with a "denial or abridgement of the right to vote on account of race." *GBM*, 992 F.3d at 1329. Without meeting this causal requirement, Plaintiffs have failed to state a claim under Section 2.

Further, the State's regulatory interests in orderly election administration, uniformity, precinct predictability, and voter confidence justify any slight burden on the right to vote by limitations placed on an option one county used on one election, eliminating Plaintiffs' constitutional claim. *Common Cause*, 554 F.3d at 1354; *Gwinnett Cty. NAACP v. Gwinnett Cty. Bd.*

of Registration & Elections, 446 F. Supp. 3d 1111, 1124 (N.D. Ga. 2020).

Finally, even assuming everything in the Complaint is true, Plaintiffs have not sufficiently alleged the factors in *Arlington Heights*, 429 U.S. at 266, as to these changes. The alleged impacts are minimal at best, the history relied on is far distant, the legislation went through normal channels, and the legislature explained exactly what it was doing in the first pages of the bill—and none of the statements by the legislature itself (or any legislator) were racially discriminatory. *Compare* [Doc. 83] and Ex. A, 4:69-7:148 *with GBM*, 992 F.3d at 1321-1328. Georgia's history does not forbid "its legislature from ever enacting otherwise constitutional laws about voting." *Id.* at 1325.

Plaintiffs apparently do not challenge this provision as a violation of the First Amendment, the ADA, Rehabilitation Act, or the Civil Rights Act.

2. Identification requirements for requesting absentee ballots.

Plaintiffs take issue with the use of an identification number for absentee ballot applications.[6] [Doc. 83, ¶¶ 249-254].[7] The General Assembly explained that the prior signature-matching process was subjective and

[6] Also, at least six other states utilize identification with absentee-ballot applications or ballots. *See* Code of Ala. § 17-9-30(b); A.C.A. § 7-5-412(a)(2)(B) (Arkansas); K.S.A. § 25-1122(c) (Kansas); Minn. Stat. Ann. § 203B.07(3); Ohio Rev. Code Ann. § 3509.03(B), .04(B); Wis. Stat. § 6.87(1).

[7] While mentioning other changes to absentee ballots, Plaintiffs apparently do not challenge those provisions. [Doc. 83, ¶¶ 331, 335, 358, 370].

challenged by both Democratic and Republican groups. Ex. A at 4:73-75. The SB 202 process is objective and includes safeguards for voters who lack identification. Ex. A at 38:949-39:956; 51:1297-52:1305. Plaintiffs allege that there is a disproportionate impact on minority and disabled voters based on rates of usage of absentee voting in one election cycle, [Doc. 83, ¶¶ 278-285], apparently wrongly assuming that a photo ID is required to vote absentee, but the Eleventh Circuit and Supreme Court have already determined there is no unconstitutional burden on the right to vote by requiring photo identification. *Crawford*, 553 U.S. at 181; *GBM*, 992 F.3d at 1320. Thus, even if there is a slight burden, it is more than justified by the state's regulatory interests. SB 202's verification requirement closely matches the voter-identification requirements of federal law when registering to vote by mail, which Plaintiffs do not challenge. *See* 52 U.S.C.S. § 21083(b)(2).

Plaintiffs also do not connect this purported disparate impact, [Doc. 83, ¶¶ 278-285], with "the denial or abridgement of the right to vote on account of race." *GBM*, 992 F.3d at 1329. Without meeting this causal requirement, Plaintiffs have failed to state a claim under Section 2.

For the reasons stated above in Section B.1., Plaintiffs have not sufficiently alleged intentional discrimination. Further, there is no right to vote in any particular manner, *Burdick*, 504 U.S. at 433, and disabled voters

have multiple options to vote. Making changes to existing absentee processes, while maintaining other accessible options to vote eliminates any claim that disabled voters are being discriminated against by any provision of SB 202. Plaintiffs do not challenge this provision as a violation of the First Amendment.

3. Identification requirements for casting absentee ballots.

Plaintiffs make the same complaints about the requirement of using identification for the return of absentee ballots. [Doc. 83, ¶¶ 255-259]. Like the allegations for absentee-ballot applications, Plaintiffs' allegations do not support an "unjustified leap from *the disparate inconveniences* that voters face when voting to *the denial or abridgement of the right to vote*" for purposes of a Section 2 claim. *GBM*, 992 F.3d at 1330 (cleaned up). Plaintiffs have also not alleged any burden on the right to vote that is not justified by the State's regulatory interests, *Crawford*, 553 U.S. at 181, have not sufficiently alleged intentional discrimination based on Section B. 1., and are not challenging these provisions as a violation of the First Amendment.

Further, Plaintiffs have not sufficiently alleged a claim for discrimination under the ADA or Rehabilitation Act because disabled voters still have multiple accessible options to participate. Further, the Civil Rights Act claim fails because rejections are carried out at the county level and there are times when a date of birth is material, dooming their facial challenge.

4. Parameters on the use of drop boxes.

Plaintiffs also challenge "restrictions" on outdoor drop boxes, [Doc. 83, ¶¶ 260-267]—a voting method that did not exist in Georgia law prior to SB 202 and was only *optional* in 2020 under an emergency rule designed as a temporary public-health measure due to COVID-19. Ex. A at 5:113-118; Ga. Comp. R. & Regs. r. 183-1-14-0.8-.14; 183-1-14-0.10-.16; 183-1-14-.08-.14; *see also* O.C.G.A. § 50-13-4(b). SB 202 *requires*[8] every county to have at least one drop box and allows them to be moved outside during emergencies. Ex. A at 47:1172-1174, 1188-1191. The sole race-related claim (apart from a conclusory introductory statement) is that Black voters will be deterred because of the in-person surveillance requirements for boxes.[9] [Doc. 83, ¶¶ 288-290]. But there is no right to vote in any particular manner, *see Burdick*, 504 U.S. at 433, and changes[10] to some pieces of voting access, while retaining others, is a minimal burden at best, *see Ohio Democratic Party v. Husted*, 834 F.3d 620, 630 (6th Cir. 2016). And where there are multiple options from which a voter can select, the right to vote is not implicated at all. *See, e.g., New Ga. Project*, 976 F.3d at

[8] The emergency rules adopted by the State Election Board merely *permitted* a county to establish drop boxes but did not *require* that they have one.
[9] The emergency rules required continuous video surveillance of drop boxes.
[10] Given the large number of locations to drop off mail, which is the primary option for returning absentee ballots, O.C.G.A. § 21-2-385(a) ("personally mail or personally deliver"), there is no elimination of any access in SB 202.

1281. In SB 202, Georgia expanded the number of mandatory early-voting days, maintained no-excuse absentee balloting, and required drop boxes in every county. Plaintiffs still fail to show that the State's first-ever statutory authorization of drop boxes places any burden whatsoever on the right to vote—the fact that SB 202 arguably may not be as expansive as a temporary emergency rule (which expired before the 2022 election cycle will commence) is more than justified by the State's regulatory interests. *See Common Cause*, 554 F.3d at 1354; *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1124.

The claim of intimidation may be the closest Plaintiffs get to alleging that this claimed disparate impact from this provision of SB 202 "cause[s] the denial or abridgement of the right to vote on account of race." *GBM*, 992 F.3d at 1329. But they still have not adequately pleaded this requirement and thus have failed to state a claim under Section 2. For the reasons outlined in Section B.1, Plaintiffs have not sufficiently alleged intentional discrimination. And Plaintiffs' sole disability-discrimination allegation is apparently that drop boxes are required by the ADA and Rehabilitation Act—which is not the law, especially when other accessible options exist. Plaintiffs do not challenge this provision as a violation of the First Amendment or the Civil Rights Act.

5. Shortening runoff elections.

Plaintiffs next challenge the shortening of the timeline for runoff

elections. [Doc. 83, ¶¶ 268, 294]. Again, there is nothing unusual about a four-week runoff—this was already the timeline for all runoffs in Georgia before a 2014 change to federal elections after a court decision,[11] and state offices still utilized a four-week runoff after that. O.C.G.A. § 21-2-501(a)(3) and (4) (2020). SB 202 adopted a system similar to that used in Alabama, which uses ranked-choice voting for overseas voters to hold runoffs on the same four-week timeline. *See* Code of Ala. §§ 17-13-8.1 (instant runoff voting ballots); 17-13-18 (runoff on fourth Tuesday after election). Plaintiffs' only complaint about this change is that it shortens the early-voting period, [Doc. 83, ¶ 268, 294], but SB 202 leaves the current early-voting period for four-week runoffs in place—it just provides for *all* runoffs to be held then. Further, there is no right to early voting and any changes are only minimally burdensome. *Ohio Democratic Party*, 834 F.3d at 631. As a result, the State's interests in "easing the burden on election officials and on electors," Ex. A at 5:119-6:122, more than justify the changes. *See Green v. Mortham*, 155 F.3d 1332, 1335 (11th Cir. 1998).

Further, Plaintiffs make only a passing reference to this change having any disparate impact on minority voters, [Doc. 83, ¶ 294], dooming their

[11] Extended runoffs were required for federal elections due to federal-law requirements for overseas and military voters. *See U.S. v. Georgia*, 892 F. Supp. 2d 1367, 1375 (N.D. Ga. 2012).

Section 2 and intentional-discrimination claims. *See GBM*, 992 F.3d at 1329. Plaintiffs do not challenge this provision as a violation of the First Amendment, the ADA, the Rehabilitation Act, or the Civil Rights Act.

6. Ban on giving anything of value inside the 150-foot zone.

Plaintiffs spend a large portion of their Complaint focused on the prohibition on third parties giving anything of value to voters in line. [Doc. 83, ¶¶ 269-270, 296-298, 307-319]. The General Assembly explained that "many groups" approached voters in line during the 2020 elections and clarified the rules around electioneering within 150 feet of a polling place because of the importance of "[p]rotecting electors from improper interference, political pressure, or intimidation while waiting in line to vote." Ex. A at 6:126-129. Otherwise, offering or approaching voters with things of value almost certainly would be or could be seen as a pretext (or worse) for buying votes or conducting unlawful electioneering.[12] This is not unusual among states—New York has a similar prohibition on providing food or drink to voters, *see* NY CLS Elec § 17-140, and the Supreme Court has recognized that campaign speech can be restricted near polling locations and precincts. *See Mansky*, 138 S. Ct. at 1886;

[12] Notably, Plaintiffs do not challenge the constitutionality of Georgia's long-standing bans on electioneering within 150 feet of the polling place or on candidates not being present within 150 feet of a polling place except to vote.

Burson v. Freeman, 504 U.S. 191, 193-94 (1992). The important regulatory interests of the state more than justify the minimal burden of a voter not being approached in line with an offer of food from a third party.[13] *Common Cause*, 554 F.3d at 1354; *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1124.

The sole allegation of a disparate racial impact related to this provision is that voters of color tend to wait in longer lines. [Doc. 83, ¶¶ 297, 305-319]. But, as noted above, long lines are not an injury traceable to State Defendants. *Anderson*, 2020 U.S. Dist. LEXIS 188677, at *64. Without this causal connection, the Section 2 claim and intentional-discrimination claims related to the restrictions on providing something of value to voters in line evaporates. *GBM*, 992 F.3d at 1329.

Finally, the First Amendment claims also fail. The sole question about the nonpublic forum of a voting location is whether the goal of "[p]rotecting electors from improper interference, political pressure, or intimidation while waiting in line to vote," Ex. A at 6:126-129, is "'reasonable in light of the purpose served by the forum': voting." *Mansky*, 138 S. Ct. at 1886 (quoting *Cornelius*, 473 U.S. at 806). Given the broad protections and context of the

[13] Voters can still receive water from a cooler stationed within the 150-feet buffer and SB 202 specifically requires election officials to make changes to avoid long lines during in-person voting. Ex. A at 74:1887-1889; 29:721-734.

restriction, it is eminently reasonable—Plaintiffs can approach voters and offer food and water outside 150 feet—and Georgia is not required to find the most narrowly tailored solution. *Id.* at 1888. Plaintiffs have failed to state a claim for relief under the First Amendment. Plaintiffs do not challenge these provisions as violations of the ADA, Rehabilitation Act, or Civil Rights Act.

7. Parameters for casting out-of-precinct provisional ballots.

Plaintiffs challenge the limitations placed on out-of-precinct ballots. [Doc. 83, ¶¶ 271-273, 291-293]. But almost half of the States do not count a provisional ballot cast out of precinct at all.[14] Georgia legislators explained that voters who vote out of precinct "add to the burden on election officials and lines for other electors because of the length of time it takes to process a provisional ballot in a precinct" and are prevented from voting "in all elections for which they are eligible," Ex. A at 6:135-138. The statutory provision also explicitly permits the counting of out-of-precinct ballots for voters who arrive after 5:00 P.M. and cannot get to their home precinct before 7:00 P.M. *Id.* at 75:1914-1919. The sole racial allegation from Plaintiffs is that Black voters are more likely to vote an out-of-precinct ballot because they tend to move within the

[14] *Provisional Ballots*, National Conference of State Legislatures (September 17, 2020) *available at* https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx#partial

county more often, [Doc. 83, ¶ 292]—but SB 202 expressly requires the voter to be *directed* to his or her correct precinct if it is before 5:00 P.M. Ex. A at 74:1902-75:1907. Given opportunities to vote ahead of Election Day and after 5:00 P.M. out of precinct on Election Day, any burden is minimal at best and justified by the State's interests. *Ohio Democratic Party*, 834 F.3d at 630.

Plaintiffs also do not connect this claimed disparate impact from this provision to "the denial or abridgement of the right to vote on account of race." *GBM*, 992 F.3d at 1329. Without meeting this causal requirement, Plaintiffs have failed to state a claim under Section 2 and for all the reasons outlined in Section B.1., they have not stated an intentional-discrimination claim. For their disability-discrimination claims, Plaintiffs have only alleged that *if* a disabled voter goes to the wrong polling place, it may be difficult to get to the correct polling place. [Doc. 83, ¶ 293]. This is insufficient when multiple other accessible options exist for disabled voters. Plaintiffs do not challenge this provision as a violation of the First Amendment or the Civil Rights Act.

8. Limitations on absentee ballot assistance.

Plaintiffs also claim that providing criminal penalties for already-illegal activities is a violation of the ADA and Rehabilitation Act. [Doc. 83, ¶¶ 274, 358, 370]. Plaintiffs' theory is apparently that, because disabled voters are already violating existing law by having non-family members assist them,

adding a penalty for that conduct is discriminatory. *Id*. at ¶ 301. To the extent this is could even be a valid claim, Plaintiffs have not stated a claim that unlimited assistance for disabled voters is *required* by the ADA or Rehabilitation Act and State Defendants have found no authority supporting that claim. Multiple other accessible options to vote exist for disabled voters in Georgia and Plaintiffs have not stated a claim under these provisions. Plaintiffs do not challenge this provision as a violation of Section 2, the First Amendment, the Civil Rights Act, or as intentionally discriminatory.[15]

9. Cumulative intentional racial discrimination.

Finally, Plaintiffs throw in the claim that everything in SB 202 put together is discriminatory. [Doc. 83, ¶¶ 324, 328, 336]. But for all the reasons outlined in Section B.1, Plaintiffs have not sufficiently alleged and pleaded the factors in *Arlington Heights*, 429 U.S. at 266.

CONCLUSION

SB 202 is a reasonable regulation of election processes—protecting the foundation of democracy by ensuring safe and secure elections. The Court should dismiss this case.

[15] Plaintiffs also mention in passing that changing timelines for absentee ballots is a violation of these same provisions. [Doc. 83, ¶¶ 358, 370]. But those claims fail for the same reasons.

Respectfully submitted this 7th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Brief in Support of State Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint 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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