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

REPLY BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS

"States—not federal courts—are in charge of setting [the] rules" for the electoral process. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020 (*NGP I*). Yet Plaintiffs ask this Court to interfere with the reasonable election rules established by the State of Georgia. The Court should dismiss the First Amended Complaint because Plaintiffs lack standing and, moreover, have failed to state a claim.

I. Plaintiffs fail to demonstrate standing.

Although it is "[p]erhaps the most important of the Article III doctrines grounded in the case-or-controversy requirement[,]" Plaintiffs give standing short shrift. *Woodson v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1273 (11th Cir. 2001). More is required for Plaintiffs to satisfy their burden of demonstrating organizational and associational standing.

First, Plaintiffs' allegations are far too speculative. Plaintiffs rely on purported future injuries—a diversion of resources in response to SB 202. But Plaintiffs do not sufficiently allege an "imminent" or "certainly impending" injury from SB 202. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 401 (2013); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008). Rather, Plaintiffs rejoin that because "SB 202 is the law," there is necessarily a "substantial risk of harm." [Doc. 94 at 6]. In other words, Plaintiffs claim they need not identify a "certainly impending" injury because "there is nothing

'speculative' about S.B. 202." *Id.* at 5. Plaintiffs misunderstand their burden. Although SB 202 is certainly law, Plaintiffs must nonetheless identify a non-speculative, "certainly impending" injury *to them*. *Clapper*, 568 U.S. at 401.

Plaintiffs have not done so, opting instead to continue speculating that they will divert resources to certain projects at an indeterminate time in the future, relying on assumptions about SB 202's implementation.[1] *See, e.g.*, [Doc. 83 ¶¶ 34, 39, 43]. Those allegations fail. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014) (organization had "expended resources" in response to the challenged activity). Plaintiffs do not allege when or how their potential diversion of resources will occur. Plaintiffs' allegations are thus akin to the allegations of an "elevated risk" of a future event that the Eleventh Circuit found insufficient to establish standing in *Tsao v. Captiva MVP Rest. Partners, LLC,* 986 F.3d 1332, 1339 (11th Cir. 2021).

Second, Plaintiffs' diversion of resources argument also fails because they have not alleged that SB 202 will "impair [their] ability to engage in [their] own projects by forcing the organization[s] to divert resources in

[1] These speculative assertions are also fatal to Plaintiffs' associational standing, which requires Plaintiffs to show that their members "would otherwise have standing to sue in their own right." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1249 (11th Cir. 2020). Plaintiffs fail to do so because they rely on the same flawed allegations they offered in support of organizational standing. *See* [Doc. 94 at 6 n.4].

response." *Arcia*, 772 F.3d at 1341. Rather, Plaintiffs confirm that they will continue spending resources on the same activities. For example, Plaintiff AME Church says its core mission includes "encourage[ing] civic participation," "registering voters," and engaging in efforts to "increase voter turnout." [Doc. 83 ¶ 33]. AME Church then claims that SB 202 will require it to "assist[ ] its members . . . to comply with" and to "understand" SB 202—but those activities are entirely consistent with and obviously further its stated missions. *Id.* ¶ 34. The same is true of Plaintiff GAMVP, whose core mission includes "voter registration and voter education programs," *id.* ¶ 40, and who claims that it will need to spend resources helping "its members . . . understand" SB 202. *Id.* ¶ 43. Such allegations (and the others like them) show that Plaintiffs will continue spending resources on their core activities (*e.g.*, voter education), which further—and therefore cannot be an "impair[ment]" of—their "own projects." *Arcia*, 772 F.3d at 1341; *see also Ga. Ass'n of Latino Elected Officials v. Gwinnett Cty. Bd. of Registrations & Elections*, 499 F. Supp. 3d 1231, 1240 (N.D. Ga. 2020) (rejecting similar allegations).

If anything, Plaintiffs' hyperbolic allegations here may increase their fundraising capabilities, thereby enhancing the resources available to fund their core activities. Were an organization able to claim as an injury something that enables it to continue (and increase) carrying out its mission, Article III's

injury-in-fact requirement would be rendered a formality.

Third, Plaintiffs challenge electoral processes not traceable to or redressable by State Defendants. For instance, Plaintiffs focus on matters beyond the scope of State Defendants' authority, such as the activities of local election officials. *See, e.g.*, [Doc. 83 ¶¶ 296-98, 302-12] (lines at polling places). Such issues are neither traceable to nor redressable by State Defendants, and therefore cannot provide a basis for standing. *See* [Doc. 87-1 at 8-9]; *see also Anderson v. Raffensperger*, 497 F. Supp. 3d 1300, 1307 n.3 (N.D. Ga. 2020).

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

Nor have Plaintiffs properly pleaded any claim on which relief may be granted. Plaintiffs have not disputed Georgia's compelling interests in enacting SB 202: "(1) deterring and detecting voter fraud;" "(2) improv[ing] . . . election procedures;" (3) managing voter rolls; "(4) safeguarding voter confidence;" and (5) running an efficient and orderly election. *Brnovich v. DNC*, No. 19-1257, 2021 WL 2690267, *13, 20 (U.S. July 1, 2021); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Greater Birmingham Min. v. Sec'y of State for Ala.*, 992 F.3d 1299, 1319 (11th Cir. 2021) (*GBM*); *NGP I*, 976 F.3d at 1282; *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling opinion); SB 202 at 5:102-106. These compelling state interests must underlie any analysis of SB 202's lawfulness. And "a State may take action to prevent

[any election-related problem] without waiting for it to occur and be detected within its own borders." *Brnovich*, 2021 WL 2690267, *20. Further, facial challenges to election practices face a high bar because they "must fail where [a] statute has a plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Given these settled standards, none of Plaintiffs' claims should be allowed to proceed.

A. Intentional Discrimination Claims under the Fourteenth and Fifteenth Amendments (Counts I and II)

Plaintiffs conclusorily claim that, under the *Arlington Heights* factors, SB 202 is part of Georgia's "centuries-long" "unrelenting efforts to suppress" the franchise of "voters of color" in violation of both the Fourteenth and Fifteenth Amendments. [Doc. 94, at 1, 9] (cleaned up); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977). But establishing a violation of either amendment "require[s] proof of *both* an intent to discriminate and actual discriminatory effect." *GBM,* 992 F.3d at 1321. And Plaintiffs have not adequately alleged a basis for either conclusion.

The first *Arlington Heights* factor is the impact of the challenged law. But Plaintiffs have not adequately alleged that SB 202 has an impact or "pattern" that is "*unexplainable* on grounds other than race." 429 U.S. at 266 (emphasis added). They ignore that SB 202 was enacted to advance the State's

compelling interests. *See Brnovich*, 2021 WL 2690267, *13, 20.

As to the second factor—historical background and statements/actions: Nothing in the legislative record indicates a discriminatory intent behind SB 202's enactment. And Georgia's distant past does not render SB 202 racist. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *GBM,* 992 F.3d at 1328. Indeed, unless a legislator has spoken or acted in a discriminatory manner "during the same [legislative] session" as the allegedly discriminatory bill—and none did here—no such intent may plausibly be alleged. *Id.* at 1323. Finally, "partisan motives are not the same as racial motives." *Brnovich*, 2021 WL 2690267,*22.

As to the third *Arlington Heights* factor—the procedure leading up to the law's passage: Plaintiffs have not plausibly pleaded the requisite amount of irregularity that would raise concerns about SB 202. They suggest that SB 202's enactment soon after the 2020 elections shows discriminatory intent, and they chide the enactment process as "flawed and nontransparent." [Doc. 83, ¶¶ 207-45]. But even if true, that does not mean SB 202 was motivated by racial animus. Plaintiffs' argument is also a classic case of *post hoc ergo propter hoc*—after this, therefore because of this—a logical fallacy that "is not enough to support a finding of [discriminatory intent.]" *Gibson v. Old Town Trolley Tours of Wash., D.C., Inc.*, 160 F.3d 177, 182 (4th Cir. 1998) (cleaned up).

As to the fourth factor—foreseeability and knowledge of disparate

impact: Plaintiffs have pleaded nothing to indicate that the General Assembly could reasonably have predicted or knew of a racially disparate impact. Nor do Plaintiffs plausibly allege that any such impact is racially disparate.

The final factor—availability of less discriminatory alternatives—also does not help Plaintiffs. The State reasonably believed that its compelling interests could only be achieved by enacting SB 202. *See* Part II – Preamble. It is up to a State to decide whether to tackle a problem incrementally or in "one fell swoop." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015).

Plaintiffs also cannot plausibly allege a racially disparate impact. Further, Plaintiffs have failed to plead a sufficiently plausible causal connection between SB 202 and any race-based "denial or abridgement of the right to vote." *GBM*, 992 F.3d at 1330. Finally, SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, so this claim cannot succeed as a facial attack on SB 202's constitutionality, *see United States v. Williams*, 553 U.S. 285, 303 (2008). For all these reasons, these claims should be dismissed.

B. Undue Burden on the Right to Vote (Count III) under the First and Fourteenth Amendments and Voting Rights Act (VRA)-Based Discriminatory Results (Count I) Claims

Undue Burden on the Right to Vote (Count III). Plaintiffs also contend that the challenged provisions of SB 202 unduly burden Georgia voters' right to the franchise. *See* [Doc. 94, at 11-21]. Yet they overlook that,

with respect to "[l]esser burdens" on the right to vote, "a state's important regulatory interests will . . . justify reasonable nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (cleaned up).

Moreover, casting a *secret* ballot by nature cannot be expressive, *see Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as forums for political expression."). Nor, of course, is voting uniquely associative. Thus, as to both points, either the First Amendment is inapplicable or, at most, the restrictions must be upheld as reasonable and nondiscriminatory.

The challenged provisions advance compelling governmental interests, *see* Part II – Preamble, and are, at most, lesser burdens and routine inconveniences. *See Timmons*, 520 U.S. at 358. For instance, the ***drop box*** and ***mobile-voting unit*** provisions as well as the ***ID requirements for absentees*** help the State run elections in an orderly and organized fashion, keep track of voters, avert and deter fraud, instill greater voter confidence, manage its voter rolls, reduce voters' and the election officials' burdens and confusion, and more. The ***voter-challenge provision*** helps manage the voter rolls, and instills voter confidence in elections by weeding out ineligible persons. *See Crawford*, 553 U.S. at 191. The provisions concerning ***early voting during runoff elections*** and ***line-warming*** help the State run orderly elections, avert fraud and foul play, and structure the electoral apparatus efficaciously.

Finally, since SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, this claim cannot succeed as a facial challenge. Thus, Plaintiffs' 1st and 14th Amendment claim of undue burden should be dismissed.

VRA Discriminatory Results (Count I). Nor have Plaintiffs adequately pleaded a claim for discriminatory results under the VRA. As an initial matter, it is an open question whether "the [VRA] furnishes an implied cause of action under § 2." *Brnovich*, 2021 WL 2690267, *22 (Gorsuch, J., concurring). There is no support in Section 2's text or legislative history for Plaintiffs' cause of action, which must be found in the statute Congress enacted. *See Alexander v. Sandoval*, 532 U.S. 275, 286-91 (2001). Accordingly, this Court should dismiss this claim for want of jurisdiction.

On the merits: When a law is based on valid interests but imposes "modest burdens" and its "disparate impact" is "small [in] size," it does not violate Section 2. *Brnovich*, 2021 WL 2690267, *18. Governmental interests such as those mentioned in Part II – Preamble are afforded strong deference. *See id.* *13, 20. As *Brnovich* held, "a voting system that is equally open and that furnishes an equal opportunity to cast a ballot must tolerate the usual burdens of voting." *Id.* *12 (cleaned up). SB 202 is consistent with Section 2.

With respect to ***mobile voting units*** and ***drop boxes***, Plaintiffs do not plausibly allege any racially disparate impact traceable to SB 202. *See*, *e.g.*,

[Doc. 94, at 14-15]. Nor do they allege any comparable datapoints that would sufficiently plead racial disparity. *See GBM,* 992 F.3d at 1329-31. Plaintiffs cannot even "clear the hurdle of demonstrating that minority voters are less likely than white voters" to be able to vote due to these provisions. *Id.* at 1329.

With respect to ***ID requirements for absentee voting***, ***early voting during runoff elections***, ***line-warming***, and ***out-of-precinct ballots***, Plaintiffs have pleaded no allegations that these provisions "*caused* the denial or abridgement of the right to vote" *due to race*. *GBM*, 992 F.3d at 1330. And Plaintiffs' reliance on the fact that SB 202 was enacted after the 2020 elections, *see* [Doc. 94, at 16], is just another example of *post hoc ergo propter hoc*. Furthermore, SB 202's safeguards minimize potential for arbitrariness and discrimination. *See* SB 202 at 4:73-75; 38:949-39:956; 51:1297-52:1305.

Moreover, Plaintiffs' challenge to SB 202's **out-of-precinct voting** provision is precluded by *Brnovich*, in which the Supreme Court upheld Arizona's materially indistinguishable measure. 2021 WL 2690267, *18. Plaintiffs, accordingly, have not adequately pleaded their Section 2 claims.

C. First Amendment Claim (Count IV)

Plaintiffs further allege that the line-warming restriction's "appli[cation]" under *some* circumstances "to public streets and sidewalks adjacent to polling places" violates the First Amendment. [Doc. 94, at 21-22].

This allegation is refuted by *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), and *Burson v. Freeman,* 504 U.S. 191 (1992) (plurality opinion).

The voting location is a *nonpublic* forum, *see* [Doc. 87-1, at 12, 22], where a speech restriction will be upheld so long as it is "reasonable." *Mansky*, 138 S. Ct. at 1886 (cleaned up). But whether the line-warming restriction involves a public forum, *see* [Doc. 94, at 21], or a nonpublic one, it is permissible: States may impose facially content-based restrictions in and around polling locations. *See Mansky*, 138 S. Ct. at 1886, 1888 (law prohibiting the wearing of certain political apparel within a polling precinct is permissible so long as its scope is clear); *Burson,* 504 U.S. at 198 (plurality opinion) (law prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place is permissible). SB 202's restriction—applicable within 150 feet of a polling place or within 25 feet of any queuing voter, *see* O.C.G.A. § 21-2-414(a)(1)[2]—is eminently reasonable.

Georgia has both the compelling interest to enact the line-warming restriction and has narrowly tailored its statute. As the Supreme Court held in *Brnovich,* "[e]nsuring that every vote is cast freely, without intimidation or

[2] Voters may still receive water from a cooler stationed within the 150-foot buffer and SB 202 requires election officials to make changes to avoid long lines. SB 202 at 74:1887-1889; 29:721-734.

undue influence, is . . . a valid and important state interest." *Brnovich*, 2021 WL 2690267, *13. Not only might handing objects to voters standing in line be a pretext to defraud, intimidate, or pressure them, *see* SB 202 at 6:126-129, but preventing the enforcement of voter intimidation techniques once the elector has *already* voted would be very difficult. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009). This restriction is narrowly tailored because SB 202 adopts the "most expeditious if not the only practical method of law enforcement" to combat a problem. *New York v. Ferber*, 458 U.S. 747, 759-60 (1982). So the line-warming restriction easily passes muster.

And finally, since SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, this claim cannot succeed as a facial challenge, *see Williams*, 553 U.S. at 303. Consequently, this claim should be dismissed.

D. Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act Claims (Counts V and VI)

Plaintiffs further contend that SB 202's "ID requirements and restrictions on drop boxes, in-county ballots, and absentee ballot assistance are [in]valid" under the ADA and Section 504. [Doc. 94, at 23, 24] (quoting Doc. 87-1, at 25). Plaintiffs also contend that "[a]bsentee voting, drop box voting, and in-person voting are *each* distinct programs, and *each* must [independently] be accessible to disabled voters." [Doc. 94, at 23]. Plaintiffs are wrong—and have

failed to adequately plead a violation of these provisions.

Facilitating elections *is* the service, program, and activity under the ADA and Section 504; the means of providing it is up to policymakers. *Cf. Brnovich*, 2021 WL 2690267, *12. As *Brnovich* held, "courts must consider the opportunities provided by a State's *entire* system of voting when assessing the burden imposed by a challenged provision." *Id.* *13 (emphasis added). ADA regulations, too, state that a public entity is obligated to make its services, programs, or activities—"*when viewed in [their] entirety*"—"readily accessible" to disabled individuals. 28 C.F.R. § 35.150 (emphasis added). But even if the different mechanisms of voting were viewed independently, SB 202 has not deprived disabled voters of participating in the franchise on equal terms.

SB 202 gives disabled voters multiple accessible options. Regarding ***drop boxes***, SB 202's approach readily enables disabled voters to vote in precincts,[3] with absentee ballots, and using drop boxes. Essentially for the same reasons, SB 202's approach to ***mobile voting units*** does not make voting problematic for disabled voters. The same is true of the ***ID requirements for absentee voting***, documents that the disabled easily may obtain.

As for ***early voting during runoff elections***, there is no imposition on

[3] Georgia's Dominion voting machines allow for voters with disabilities to use a variety of accessible voting options without assistance.

the ready access of disabled voters to cast their votes. Similarly, SB 202's ***line-warming*** restrictions do not impair their ready access to vote either because they may bring necessary items and can receive water if needed. If anything, these restrictions *protect* the disabled from undue pressure and intimidation.

Finally, SB 202's provision on ***out-of-precinct provisional ballots*** does not inconvenience disabled voters because they are most likely to be near their own homes; and they may also cast absentee ballots, place their ballots into drop boxes, and vote in their home precincts. Accordingly, Plaintiffs' ADA and Section 504 claims should be dismissed.

E. Civil Rights Act (CRA) Claim (Count VII)

Plaintiffs further allege that SB 202 denies voters "the right to vote based on an 'error or omission [that] is not material in determining' whether an individual is qualified to vote" under 52 U.S.C. § 10101(a)(2)(B). [Doc. 94, at 24-25]. Plaintiffs so contend because, in their view, "information on [voters'] absentee ballot, . . . most particularly their date of birth . . . is immaterial to voter qualifications." *Id.* at 25; *see also* [Doc. 83 ¶¶ 372-76].[4] Wrong again.

A voter's date of birth (DOB), which is required by almost every official

[4] Before a ballot can be rejected, Georgia law gives voters notice and an opportunity to cure the defect if the election official is unable to verify the individual. SB 202 at 63:1599-1612.

form, *is* material to voter eligibility for numerous reasons—all of which State Defendants invoke as valid justifications for SB 202. DOB may help pinpoint the identity of the voter in question when multiple voters share the same name and address. DOB, when taken together with other identifiers, can also narrow the possibilities down to a limited number of persons as well as deter and catch fraud. *See Brnovich*, 2021 WL 2690267, *13, *20.[5]

The DOB requirement protects election integrity, a compelling state interest. *See id.* *19; *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). A DOB requirement would not increase the number of errors since no one forgets their own date of birth, and voters have the opportunity to cure their ballot if they inadvertently forget to include their DOB. It also follows that a facial challenge to this requirement is without merit. *See Williams*, 553 U.S. at 303. Thus, Plaintiffs have not adequately pleaded their CRA claim.

CONCLUSION

Plaintiffs lack standing to pursue this action and have failed to plead legally cognizable claims. The Court should dismiss this case in its entirety—and with prejudice.

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[5] Since the materiality of any requirement depends on its relationship with state law, Plaintiffs' reliance on *Martin v. Crittenden*, 347 F. Supp. 3d 1302 (N.D. Ga. 2018), is misplaced. *See* [Doc. 94, at 25]. Here, state law *itself*—not a separate policy without state-law support (as in *Martin*)—requires the DOB.

Respectfully submitted this 6th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

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

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