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

LUCILLE ANDERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION FILE
v.	)	
	)	NO. 1:20-CV-03263-MLB
BRAD RAFFENSPERGER, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants Brad Raffensperger (the "Secretary"), and State Election Board ("SEB") Members Rebecca N. Sullivan, David J. Worley, Matthew Mashburn, and Anh Le, (collectively, the "State Defendants") submit this Response Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, [Doc. 92].

INTRODUCTION

Plaintiffs Democratic Party of Georgia, the Democratic Senatorial Campaign Committee, and three individual Fulton County voters ask this Court to remove the authority to administer elections from state and local election administrators, placing the November 3, 2020 Election into a judicially managed federal receivership to require that Defendants:

- Utilize the "queue formula" of their purported expert to determine resource allocation or otherwise submit a similar formula for the Court's approval;
- Supply "sufficient" emergency paper ballots, paper poll pads, and drop boxes (collectively defined as "emergency backup supplies");
- "[E]nact" policies governing emergency backup supplies, and requiring poll workers' monitoring of lines every 30 minutes;
- "[E]nsure" that there are "sufficient," "adequately trained" poll workers and "sufficient technicians" that can be deployed to a polling location within 30 minutes; and
- Report back to this Court, within one month of the November 3, 2020 Election the wait times required to be recorded, average wait times, the number of voters, and "complaints received."

[Doc. 92-2 (Proposed Order Granting Plaintiffs' Motion for Prelim. Inj.)]. The detailed relief sought implicates significant federalism concerns and the jurisdictional limits of this Court. Further, Plaintiffs' Motion also obfuscates the explicit division of roles between State and local election administrators under Georgia law; ignores state-level remedies and procedures that are already available to address Plaintiffs' purported harms; and disregards that

COVID-19, not State law or policy, was the primary cause of problems experienced during the June 9, 2020 Primary.

In the light of these circumstances, Plaintiffs' latest lawsuit fails to meet the heavy burden required to impose a mandatory injunction against the State Defendants with an election commencing in mere weeks. Ultimately, Plaintiffs are seeking an eleventh-hour change to the rules of the game through litigation—and only for jurisdictions where they believe the results will favor them.[1]

ARGUMENT AND CITATION TO AUTHORITY

Plaintiffs' burden of proof is heavy and they have failed to meet it. They must "*clearly* establish[] the 'burden of persuasion'" as to each of the four requisites, *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (emphasis added) (citation omitted), and the burden is even further heightened since Plaintiffs seek a mandatory injunction, relief that is

[1] This is not the only litigation of this nature; Plaintiffs and their allies have now sought at least four different preliminary injunctions in this District during this calendar year regarding the 2020 elections. *See generally Black Voters Matter Fund v. Raffensperger*, No. 1:20-CV-1489-AT; *Coalition for Good Governance v. Raffensperger*, No. 1:20-CV-1677-TCB; *New Georgia Project v. Raffensperger*, No. 1:20-CV-1986-ELR; *Curling v. Raffensperger*, No. 1:17-CV-2989-AT. Another case pursuing to trial following discovery—now pending ruling on Motions for Summary Judgment—is particularly acute and directly alleges long lines as an unconstitutional burden. *Fair Fight Action v. Raffensperger*, No. 1:18-CV-5391-SCJ.

"particularly disfavored." *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th Cir. 1976).[2] Thus, Plaintiffs must *clearly establish* that the facts and law *clearly favor* them in demonstrating: (1) they have a substantial likelihood of success on the merits of their claims; (2) they will suffer irreparable harm in the absence of an injunction; (3) the balance of the equities favors the grant of relief; and (4) the grant of an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). They cannot do so.

First, they fail on the merits as to State Defendants, since the issues which Plaintiffs allege cause their injury fall within county officials' purview and Plaintiffs have failed to show a statewide, systemic problem upon which to base relief against the State Defendants—as Plaintiffs' own expert admits.[3] [Doc. 93-61, p. 2 (noting that long lines were concentrated in eight

[2] The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

[3] Plaintiffs name as defendants all of the metro Atlanta counties cited in Dr. Rodden's report except Forsyth County, which generally votes in favor of Republicans. *See generally* [Complaint, Doc. 1]; **Ex. 1** (2018 Forsyth County Election Results); **Ex. 2** (2016 Forsyth County Election Results) Macon-Bibb County, on the other hand, was not identified by Dr. Rodden as a county wherein "problems were concentrated," [Doc. 93-61, p. 2], but is a named Defendant. Macon-Bibb voted 61.07% in favor of the Democratic Nominee for Governor in 2018. **Ex. 3**.

metro Atlanta counties and Chatham county, with lesser problems in two rural counties not named as defendants)].

Second, Plaintiffs will not suffer irreparable harm absent the issuance of an injunction. Any potential harm is purely speculative and voters (including the individual Plaintiffs) may avail themselves of Georgia's no-excuse absentee voting or three weeks (and one Saturday) of early in-person voting. Moreover, a number of new initiatives, including absentee ballot drop boxes and the new online absentee ballot request portal, have likewise been adopted to provide flexibility for voting during the pandemic.

Third, Plaintiffs cannot show the equities and public interest favor injunctive relief: Plaintiff Democratic Party of Georgia previously objected to the very relief they now seek, opposing a legislative measure (introduced in February 2020) designed to require new precincts where wait times exceeded one hour in prior elections. **Ex. 4.**[4] Further, Plaintiffs inexplicably waited until September 1, 2020, to raise their Motion—nearly a month after filing their Complaint in this case—implicating the equitable doctrine of laches.

Finally, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an

[4] All references to Exhibit Numbers refer to the Declaration of Carey Miller in Support of State Defendants' Response.

election."[5] *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, --- U.S. ---, 140 S. Ct. 1205, 1207 (2020) [hereinafter, "*RNC*"] (citations omitted). Here, Plaintiffs seek relief which would change the location of voters' polling places, at most, *forty-two (42) days* before the November Election (counting from the September 22, 2020 deadline for Plaintiffs' Reply) and *twenty-seven (27) days* before early voting commences. This alone necessitates denial of Plaintiffs' Motion.

I. Plaintiffs cannot clearly show a substantial likelihood of success on the merits of their claims against State Defendants.

Plaintiffs cannot "clearly" establish a substantial likelihood of success on the merits of their claims. *Robertson*, 147 F.3d at 1306. First, Plaintiffs cannot succeed on the merits of their claims because they lack standing to pursue their Undue Burden and Substantive Due Process claims against the State Defendants. And Plaintiffs cannot succeed on their equal protection claim because no state action has caused the vote of any Georgian to be valued over another who is similarly situated.[6]

---

[5] This case may have already progressed beyond the "eve of an election." The first batch of absentee ballots were sent out today, September 15, 2020, under provisions of state and federal law which mandate that UOCAVA ballots be mailed out between 49 and 45 days prior to election day.

[6] In the interest of efficiency, State Defendants incorporate into this response the arguments made in their Motion to Dismiss and Brief in Support, [Docs. 106 and 106-1].

A. Plaintiffs are not likely to succeed on their Undue Burden and Substantive Due Process claims (Counts I and II) against the State Defendants.

Initially, Plaintiffs are unlikely to succeed under either of their theories against the State Defendants, because State Defendants did not cause their alleged injury. Only if this Court determines Plaintiffs' claims are actionable against the State Defendants at all, are they then subject to the *Anderson-Burdick* test, which weighs the "character and magnitude" of the alleged burden against the government's interest in the challenged law.[7] *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983); *see also Burdick v. Takushi*, 504 U.S. 428, 434 245 (1992). "When a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788). Under *Anderson-Burdick*, the burden of

[7] Plaintiffs assert their claims under both an undue burden theory (1st and 14th Amendments) and Substantive Due Process (14th Amendment). The *Anderson-Burdick* analysis typically applies when voters allege violations of the First and Fourteenth Amendment (which Plaintiffs have not), but the Eleventh Circuit has applied the analysis in a decision involving claims arising only under the Fourteenth Amendment. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346,1352-53 (11th Cir. 2009).

persuasion and proof remains on the Plaintiffs at all times. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009).

i. *Plaintiffs' purported harms are traceable to actions of local election superintendents and redressable by those local officials, not the State.*

In support of their Motion, Plaintiffs identify two broad categories of administrative shortcomings they allege cause the long lines for which they seek relief: too many voters assigned to polling places and inefficient/ insufficient allocation of resources to polling places. [Doc. 92-1, pp. 8–14]. However, both of these decisions are statutorily committed to county officials, and Georgia law and SEB Rules already address many of their complaints.

a. LOCAL OFFICIALS DETERMINE PRECINCTS AND POLLING LOCATIONS.

Georgia law provides that local election superintendents and local election boards determine precincts for voters. O.C.G.A. §§ 21-2-261 (creation of new precincts), -262 (division or consolidation of precincts). Concomitantly, the General Assembly has provided local governments and election superintendents with the *exclusive authority* to create, close, combine, or otherwise relocate polling places, and to assign voters to them. O.C.G.A. § 21-2-265(a).

The process happens in the absence of State Defendants: changes to polling places and precinct boundaries occur when a local superintendent,

"upon his or her own motion direct[s] the board of registrars to investigate the division or redivision" of a precinct, alteration of its boundaries, or formation of new precincts. O.C.G.A. § 21-2-262(a). Alternatively, local political party committees, individual electors, or the county board of registrars may request precinct boundary changes. O.C.G.A. § 21-2-262(a.1-b). Either way, the determination of whether to alter a precinct is made by the local superintendent. O.C.G.A. § 21-2-262(c). Local officials also determine the location of polling places, and the State has no authority to interfere with the process. O.C.G.A. § 21-2-265(a).[8]

The Secretary's only role in this process is receiving notice of a change of precincts, O.C.G.A. § 21-2-262(c), or change of polling place, but only if that polling place is located outside the boundaries of a precinct which requires notice to the State Election Board. O.C.G.A. § 21-2-265(e). The Secretary has absolutely *no* authority to direct or otherwise mandate a change to either polling places or precincts. This fact alone is dispositive under binding precedent in this Circuit. In *Jacobson v. Florida Secretary of State*, the

[8] Recognizing the necessity of notice to voters for any such change, Georgia law requires any such change to be published for two consecutive weeks, *id.*, and further prohibits the change of any polling place within sixty days prior to any primary or election and within thirty days prior to any special election, unless an emergency is present. O.C.G.A. § 21-2-265(f).

Eleventh Circuit determined that relief could not be had against the Florida Secretary in part because the challenged statute fell within the purview of independent local election officials and thus the alleged injury was not traceable to her. --- F.3d ---, 2020 WL 5289377 (11th Cir. Sep. 3, 2020) at *11–13. The same reasoning applies here: alleged injuries from local officials' determination of polling places are traceable to the actions of those officials and redressable only by relief ordered against them, not the State Defendants. "'Because the [Secretary] didn't do (or fail to do) anything that contributed to [their] harm,' the voters and organizations 'cannot meet Article III's traceability requirement.'" *Id.* at *11 (alteration in original) (quoting *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019)).

b. LOCAL OFFICIALS ARE RESPONSIBLE FOR SUPPLYING RESOURCES TO POLLING PLACES.

Plaintiffs next allege that the State Defendants burdened their right to vote by way of inefficient/insufficient allocation of resources to locally-determined polling places. [Doc. 92-1 at 16–20]. Yet again, Plaintiffs conflate the duties of the State Defendants and local election officials and further ignore state law that speaks directly to issues. Indeed, Plaintiffs' own expert notes that the issues he identified would be resolved by reallocation of resources *within the counties*, again a county responsibility. *See, e.g.*, [Doc.

93-62 at 21–22 ("demonstrat[ing] a different BMD allocation [in Henry County] with the same number of BMDs")]. Plaintiffs' identification of issues confirms not only the lack of traceability to the *State* Defendants, but also indicates other alleged injuries can otherwise be traced to the pandemic:

Allocation of voting machines. [Doc. 92-1 at 11–12]. The General Assembly empowered the Secretary to procure and provide the State's new voting machines (Ballot-Marking Devices or "BMDs," Scanners for the ballots, and "Poll Pads" for voter check-in) to counties. O.C.G.A. § 21-2-300. The Secretary has done so. **Ex. 5** at ¶ 3. *County* superintendents determine how to allocate the equipment within their borders. O.C.G.A. § 21-2-70(4). Counties are authorized to purchase additional BMDs if needed, O.C.G.A. § 21-2-300, and the State has made additional equipment available to counties upon request and demonstration of need. **Ex. 5** at ¶ 6. Even still, Plaintiffs' own expert notes that reallocation of *existing* equipment in Fulton and Henry Counties (the only counties studied) would remedy Plaintiffs' alleged harm regarding equipment allocation. [Doc. 93-62 at 21–22 (Henry County), 51 (noting that Fulton County has more than the requisite number of machines to implement the proposed plan)].

Alleged insufficient technicians. Plaintiffs further assert that "[a]nother problem was the State's failure to deploy adequate technicians." [Doc. 92-1 at

18]. Once again, state law is clear that each county must provide or contract for "adequate technical support for the installation, set-up, and operation of such voting equipment." O.C.G.A. § 21-2-300(c). In addition to this, the Secretary provided at least one technician to support each county for the 2020 Primary and has further committed to providing additional technicians for the November Election—nearing the Secretary's goal to have a technician available for each polling place. **Ex. 5** at ¶ 5.

Alleged inadequate training of poll workers and insufficient number of poll workers. [Doc. 92-1 at 13–14]. As a matter of Georgia law, local election superintendents are responsible for staffing polling places, O.C.G.A. §§ 21-2-70(6) (poll officers appointed by superintendents), and training those poll workers, O.C.G.A. § 21-2-99(a) ("election superintendent shall provide adequate training to all poll officers and poll workers"). The Secretary, on the other hand, only trains the trainer—the election superintendents and registrars. O.C.G.A. §§ 21-2-50(11), 21-2-100. And specific to the new equipment, the Secretary—through the voting system vendor—held hands-on training for all local county superintendents and has provided additional resources to assist counties in their use of the new equipment. **Ex. 5** at ¶ 4.

Regardless, Plaintiffs' complaints as to training and number of poll workers can be directly traced to the pandemic, not the actions of state

officials. As the Secretary noted in a public press release (and as has been widely reported by news outlets): "most poll workers have traditionally been over the age of 61," increasing their vulnerability to complications of COVID-19. **Ex. 6**. But even still, the State Defendants have gone above and beyond in assisting counties with their statutory duty to properly staff polling places, creating a poll worker recruitment website to refer willing citizens to counties. **Ex. 7**. While additional hands-on training for poll workers on election equipment would be ideal, it was the pandemic—not any act or omission on the part of the State Defendants—which interfered with the ability to provide that additional training.

Alleged insufficient emergency paper ballots and back-up paper poll books. [Doc. 92-1 at 19]. First, Plaintiffs correctly note that SEB regulations already provide for the use of back-up paper ballots in emergency situations, Ga. Comp. R. & Regs. 183-1-12-.11(c-d), but fail to inform the Court that the same rule requires each polling place to be equipped with such emergency ballots for at least 10% of the registered voters assigned to a polling place. *Id.* at (c). Plaintiffs have made no allegation—and offer no evidence—that jurisdictions adhering to this rule experienced issues. Even if they had, a county's failure to adhere to the rule is cause for a mandamus action in state court (or an SEB complaint) against individual counties—not a constitutional

claim against the State Defendants. Similarly, backup paper pollbooks are already required by SEB rule, Ga. Comp. R. & Regs. 183-1-12-.19(1), and Plaintiffs offer no evidence of any failure to follow this rule, only their expert's suggestion of a process already required. [Doc. 92-1 at 13].

Just as with Plaintiffs' claims regarding polling locations, that all of these items are redressable by local election officials renders Plaintiffs' Motion fatally flawed. *Jacobson*, 2020 WL 5289377. And other issues are separately traceable to the COVID-19 pandemic, not any action or policy enforced by the State Defendants. *See Coalition for Good Governance,* 2020 WL 2509092 at *3, n.2 (N.D. Ga. May 14, 2020).

ii. *No burden is imposed by the State but even if this Court finds otherwise, any burden is slight given the numerous voting options available to Georgians.*

To the extent this Court finds that Plaintiffs can demonstrate Article III standing to pursue claims against the State Defendants, Plaintiffs have not identified a State policy that causes their alleged burden—the necessary first step under *Anderson-Burdick*. *See Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181, 205 (2008) (Scalia, J., concurring) ("Of course, [courts] have to identify a burden before [they] can weigh it.").[9] Instead, Plaintiffs

[9] Showing traceability and redressability for standing and causation on the merits are two distinct inquiries, and the latter carries a much heftier burden

apparently seek that the State simply "do more." But courts have "routinely rejected" inconveniences like long lines and long commutes as significant harm to a constitutional right absent evidence of improper intent, which Plaintiffs do not allege. *Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration and Elections*, 446 F. Supp. 3d 111, 1124 (N.D. Ga. 2020) (citing *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018), *Common Cause Ind. v. Marion Cnty. Election Bd.*, 311 F. Supp. 3d 949 (S.D. Ind. 2018), *Jacksonville Coal. For Voter Prot. v. Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004)).

Even assuming Plaintiffs have identified a concrete burden imposed by the State Defendants, any such burden is slight in the light of Georgia's expansive voting options, and the State's interest in efficient election administration under its own laws will be sufficient to uphold any challenged policy. *Burdick*, 504 U.S. at 434. To avoid the possibility of long lines, Plaintiffs can avail themselves of the three weeks of early in-person voting mandated in every county across the State, O.C.G.A. § 21-2-385, no-excuse absentee voting, O.C.G.A. § 21-2-381, secure absentee drop boxes, **Ex. 8**, and

---

for plaintiffs generally. *See Bennett v. Spear*, 520 U.S. 154 (1997). Here, all the same reasons Plaintiffs do not have standing show that the State Defendants did not cause the alleged harm.

the state's new online absentee ballot request portal. **Exs. 9, 10**. Indeed, national organizations have recognized the State Defendants' extraordinary actions to ensure voters have as many options as possible to exercise their constitutional rights in the midst of a pandemic. *See* **Ex. 11.**

To be clear, the State Defendants do not in any way condone excessive lines and wait times. To the contrary, the Secretary initiated its own investigation into Fulton County's issues with long lines during the June 9 Election, and the SEB voted to bind the matter over to the Attorney General for civil enforcement. *See* **Ex. 12**. This matters here for two reasons: 1) it further demonstrates that the burdens complained of are the result of actions by a handful of counties and not a systemic statewide problem; and 2) it offers a separate and distinct basis for denial of Plaintiffs' Motion—abstention. *See New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989).

B. Plaintiffs are not likely to succeed on their Equal Protection claim (Count III).

Plaintiffs additionally assert an Equal Protection claim under *Bush v. Gore*, 531 U.S. 98, 104–05 (2000), only against the State Defendants. *See* [Docs. 1 at ¶¶ 210–14, 92-1 at 25–27]. But it is Plaintiffs' requested relief (which can only be entered against 9 of the State's 159 counties) would itself

create unequal treatment—but only accruing to the benefit of voters in jurisdictions Plaintiffs believe are likely to vote for their preferred candidates.

Even still, as discussed in State Defendants' Motion to Dismiss, Plaintiffs have failed to allege discriminatory intent, have not alleged disparate treatment *by the State*, cite no application of laws that differs between jurisdictions, and their claims have *nothing* to do with valuing the vote of one over another. *See* [Doc. 106-1 at 23–24]. Plaintiffs' allegation (and threadbare evidence) of disparate impact is also insufficient—discriminatory intent is required, which Plaintiffs do not allege. *Democratic Exec. Comm. v. Lee*, 915 F.3d 1312, 1319 n.9 (11th Cir. 2019) (distinguishing traditional equal protection claims which require discriminatory intent from *Anderson-Burdick* claims).

II. Plaintiffs will not suffer irreparable harm in the absence of an injunction against the State Defendants.

Plaintiffs offer very little to support their heavy burden of clearly showing irreparable harm, flippantly stating that without relief, "individual plaintiffs, Georgia voters, and the organizational plaintiffs will suffer irreparable harm." [Doc. 92-1 at 23]. As an initial matter, the relevant inquiry here is whether the *Plaintiffs* will suffer irreparable harm—Plaintiffs

here have not sought class certification and cannot obliquely refer to unnamed Georgians to meet their burden. But even as to the Plaintiffs in this case, the only potential injuries are remote and speculative, not "actual and imminent" as precedent in this Circuit demands. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000).

As to the organizational Plaintiffs, both assert associational standing (without naming any Plaintiff-member) and standing under a diversion-of-resources theory. Both are insufficient. Like the organizational plaintiffs in *Jacobson*, the organizational Plaintiffs here allege harm that "is based on nothing more than 'generalized partisan preferences,'" which is insufficient to establish standing. *Jacobson*, 2020 WL 5289377 at *9 (quoting *Gill v. Whitford*, --- U.S. --- 138 S. Ct. 1916, 1933 (2018)). With respect to a harm occasioned by diversion of resources, the organizational Plaintiffs offer little distinction between typical activities and their purported new plans to "divert resources into 'line warming,'" which apparently involves phone calls to encourage persons to "stay in line to vote," [Doc. 93-60, ¶ 18 (DPG)], or "providing additional support to its partners running a coordinated campaign," [Doc 93-63, ¶ 11 (DSCC)].

The individual Plaintiffs fare no better. Ms. Contreras Chavez requested an absentee ballot for the November 3, 2020 Election on August 28,

2020 (the date the Secretary's Absentee Ballot Portal went live), her application has been accepted, and her ballot will be mailed September 18, 2020. **Ex. 13** (attachments C and D). Presumably, Ms. Contreras Chavez will vote that absentee ballot—again, already applied for and processed—avoiding her "concern[]" that "[she] will have to wait in a long line." [Doc. 93-32, ¶ 8].

Ms. Anderson has similarly already had an absentee ballot application accepted because she is over 65 and requested an absentee ballot for the August 11, 2020 Primary Runoff. **Ex. 13** (attachments B and D); *see also* O.C.G.A. § 21-2-381(a)(1)(G), Ga. Comp. R. & Regs. 183-1-14-.01(1). Ms. Anderson's declaration does not mention her absentee ballot request for the August 11 Runoff and she apparently did not return that ballot, but returning her November 3 ballot will avoid any harm occasioned by her "concern[]" that she will have to wait in a long line. [Doc. 93-30, ¶ 9].

Ms. Alami also plans to vote by absentee ballot in November. [Doc. 93-31, ¶ 8]. Ms. Alami states in her declaration that she requested an absentee ballot for the June 9, 2020 Election but never received it. *Id.* at ¶ 4. However, her absentee ballot report shows no such request. **Ex. 13** (attachments C and D). Accordingly, Ms. Alami apparently chose not to utilize the absentee ballot application mailed by the Secretary to all Georgia voters and, at best, is among those Fulton County absentee ballot requests which were never

processed.[10] Ms. Alami has apparently not yet requested an absentee ballot for the November election, **Ex. 13** (attachments C and D), but the harm that a request she has not yet made will not be processed and the yet-to-be issued ballot will not be received is too attenuated to establish standing, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013), much less irreparable harm.[11]

Even assuming these vague allegations amount to a showing of irreparable harm absent an injunction, it does nothing to show irreparable harm absent an injunction issued against *the State Defendants*. As discussed, only an injunction against Plaintiffs' counties of residence could *potentially* remedy anything. And to the extent an injunction obligating the State Defendants to promulgate rules or issue orders would *potentially* address it, such relief implicates "serious federalism concerns, and it is doubtful that a federal court would have authority to order it." *Jacobson*, 2020 WL 5289377 at *14 (citing *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)). In any event, Plaintiffs offer little to show that their litany "best practices" will conclusively remedy anything, and offer no explanation for

[10] Just recently, the State Election Board referred an investigation on this matter to the Attorney General for continued investigation and prosecution. **Ex. 14**.

[11] Additionally, and particularly as to the individual Fulton County Plaintiffs, Fulton County recently announced changes to more than 40 polling places in an effort to reduce long lines in that county. **Ex. 15**.

why this Court should involve itself in the details of election administration. *See Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986).

III. The balance of the equities and the public interest do not clearly favor Plaintiffs.

Preliminary injunctions are never entered as a matter of right, even if a Plaintiff can show substantial likelihood of success on the merits. *Benisek v. Lamone*, --- U.S. ---, 138 S. Ct. 1942, 43–44. Instead, when considering whether to grant a preliminary injunction, the Court must consider the balance of the equities carefully along with the consideration of the public interest. *Winter*, 555 U.S. at 26. Setting aside Plaintiffs' failure to clearly meet their burden on the first two prongs, their Motion is still due to be denied because equity and the public interest tilt decidedly against them.

A. Equitable considerations, including the doctrine of laches, do not tilt in Plaintiffs' favor.

"[A] party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere." *Benisek*, 138 S. Ct. at 1944 (citations omitted). In their Motion, Plaintiffs assert their purported harm has been longstanding, alleging problems with long wait times that date as far back as 2008, [Doc. 92-1 at 2–3], and arguing that Defendants have had "*years* to fix this problem." *Id.* at 4 (emphasis in original). Yet Plaintiffs offer no explanation for why they waited until August

6, 2020, to file their Complaint and then another month to pursue their Motion. "A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm." *Wreal, LLC v. Amazon, Inc.*, 840 F.3d 1244 at 1248 (11th Cir. 2016). Plaintiffs cannot "bury their heads in the sand," to borrow a phrase, [Docs. 1 at ¶ 34, 92-1 at 29–30, n. 10], about the necessity of diligence: Plaintiffs' counsel has active cases pending in nineteen different states, featured as part of the "Democracy Docket," with the majority of those cases (if not all) seeking preliminary injunctive relief. **Ex. 16**.

Moreover, it was Plaintiffs and their allies who successfully opposed a measure seeking to remedy their alleged harm. On February 28, 2020, legislation was introduced in the Georgia Senate that would have required counties split precincts or otherwise provide additional voting equipment to those containing more than 2,000 electors and where voters had to wait in line longer than one hour during the prior election.[12] **Ex. 17**. In direct contradiction to the stance they now take before this Court, Plaintiff Democratic Party of Georgia and other Democratic political figures staunchly

[12] Existing law already obligates counties to take action as to any precinct where the last voter cast their ballot more than an hour after the scheduled close of polls in the previous general election, but requires such action be taken at least *sixty days* prior to the next election. O.C.G.A. § 21-2-263.

opposed the bill. Fair Fight Action called SB 463 "Georgia's anti-voting rights bill" and opposed the relevant provision because it "could allow last-minute precinct splitting," **Ex. 18**, Plaintiff Democratic Party of Georgia echoed the refrain, dubbing SB 463 "Georgia Republicans' anti-voting rights bill" and asking its followers to call their Senators to vote against it. **Ex. 19**. Unsurprisingly, no Democratic Senator voted for the legislation. **Ex. 20**.

If nothing else, Plaintiff Democratic Party of Georgia's actions in this regard warrant denial of their motion under the equitable doctrine of unclean hands. Plaintiffs cannot be permitted to malign and successfully oppose a legislative remedy in the name of "voter suppression," then request a Federal Court grant the same relief months later—to avoid what Plaintiffs now claim is a violation of the U.S. Constitution, no less, while seeking both the previously derided remedy *and* attorneys' fees to reward their behavior. *See Nader v. Blackwell*, 2007 WL 2744357 (S.D. Ohio Sep. 19, 2007), *rev'd on other grounds Nader v. Blackwell*, 545 F.3d 459 (7th Cir. 2008). And

"[a]pplication of the doctrine "lies within the sound discretion of the district court." *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1355 (11th Cir. 1983) (citing *Wolf v. Frank*, 477 F.2d 467, 474 (5th Cir. 1973).

B. The relief sought would likely introduce significant voter confusion and burden the efficient administration of elections, on the eve of the election.

Setting aside Plaintiffs' delay in bringing their Motion and inconsistent positions, the public interest does not favor Plaintiffs. Indeed, members of Plaintiff Democratic Party of Georgia have already made the arguments as to why the public interest is not favored while opposing SB 463. Then, however, the proposal was being discussed months ahead of an election and with the legislature in (pre-pandemic) session to consider any additional funding necessary. Now, Plaintiffs seek to impose what their colleagues described would be confusing to voters, as Lauren Groh-Wargo, CEO of Fair Fight Action stated: "They're going to sow a lot of confusion here[.]" **Ex. 21**. And, as WABE attributed to Georgia Democrats, the proposed relief is "an unfunded mandate that would require the hiring of more poll workers at a time when bodies are hard to come by and county elections budgets are already stretched thin." **Ex. 4**. In sum, as members and allies of Plaintiff Democratic Party of Georgia recognized months ago: a quick change of this nature can be disastrous if done without proper notice to voters and planning by election

officials. But shockingly, Plaintiffs' requested relief here is far more expansive than SB 463 and ignores the timing and notice provisions of SB 463.

Finally, the United States Supreme Court has consistently cautioned against court ordered experimentation with election processes, particularly when such experimentation is ill-defined and occurs in close proximity to the election itself. *RNC*, 140 S. Ct. at 1207 (2020) (citing *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam). When other district courts have entered injunctive relief in close proximity to elections this year, the Supreme Court and Circuit Courts across the country have repeatedly stayed those orders.[13] Indeed, the only time the Supreme Court has denied (or not affirmed) an application for a stay is when the state did not seek one. *Republican Nat. Comm. v. Common Cause RI*, 20A28, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020). This alone warrants denying Plaintiffs' Motion and vague relief in the midst of a heated election, leaving no time to implement it.

[13] *See id.*; *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897, at *2 (U.S. July 30, 2020); *Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049, *1 (U.S. July 2, 2020); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (denying motion to vacate stay); *Thompson v. DeWine*, No. 19A1054, 2020 WL 3456705, at *1 (U.S. June 25, 2020) (denying motion to vacate stay); *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020) (per curiam); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. June 4, 2020).

Respectfully submitted, this 15th day of September 2020,

Christopher M. Carr
Attorney General
GA Bar No. 112505
Russell D. Willard
Senior Assistant Attorney General
GA Bar No. 760280
Charlene McGowan
Asst. Attorney General
Ga. Bar No. 697316
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334

/s/ Josh Belinfante
Josh Belinfante
Georgia Bar No. 047399
jbelinfante@robbinsfirm.com
Vincent R. Russo
Georgia Bar No. 242628
vrusso@robbinsfirm.com
Carey Miller
Georgia Bar No. 976240
cmiller@robbinsfirm.com
Robbins Ross Alloy Belinfante Littlefield LLC
500 14th Street NW
Atlanta, GA 30318
Telephone: (678) 701-9381
Facsimile: (404) 856-3250

Attorneys for State Defendants

L.R. 7.1(D) CERTIFICATION

I certify that this **DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). Specifically, this Brief has been prepared using 13-pt Century Schoolbook font.

/s/ Josh Belinfante
Josh Belinfante
Georgia Bar No. 047399