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

LUCILLE ANDERSON, SARA ALAMI, GIANELLA CONTRERAS CHAVEZ, DSCC, and DEMOCRATIC PARTY OF GEORGIA, INC.,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and the Chair of the Georgia State Election Board; REBECCA N. SULLIVAN, DAVID J. WORLEY, MATTHEW MASHBURN, and ANH LE, in their official capacities as Members of the Georgia State Election Board; MARY CAROLE COONEY, MARK WINGATE, VERNETTA NURIDDIN, KATHLEEN RUTH, and AARON JOHNSON, in their official capacities as Members of the FULTON County Board of Registration and Elections; SAMUEL E. TILLMAN, ANTHONY LEWIS, SUSAN MOTTER, DELE LOWMAN SMITH, and BAOKY N. VU, in their official capacities as Members of the DEKALB County Board of Registration and Elections; PHIL DANIELL, FRED AIKEN, JESSICA M. BROOKS, NEERA BAHL, and DARRYL O. WILSON, JR., in their official capacities as Members of the COBB County Board of Elections and Registration; JOHN MANGANO, BEN SATTERFIELD, WANDY TAYLOR, STEPHEN DAY, and

Civil Action No. 1:20-cv-03263-MLB

ALICE O'LENICK, in their official capacities as Members of the GWINNETT County Board of Registrations and Elections; THOMAS MAHONEY III, MARIANNE HEIMES, MALINDA HODGE, ANTWAN LANG, and DEBBIE RAUERS, in their official capacities as Members of the CHATHAM County Board of Elections; CAROL WESLEY, DOROTHY FOSTER HALL, PATRICIA PULLAR, DARLENE JOHNSON, and DIANE GIVENS, in their official capacities as Members of the CLAYTON County Board of Elections and Registrations; DONNA CRUMBLEY, DONNA MORRIS-MCBRIDE, ANDY CALLAWAY, ARCH BROWN, and MILDRED SCHMELZ, in their official capacities as Members of the HENRY County Board of Elections and Registration; MYESHA GOOD, DAVID C. FEDACK, ROBERT PROCTOR, DANIEL ZIMMERMANN, and MAURICE HURRY, in their official capacities as Members of the DOUGLAS County Board of Elections and Registration; and RINDA WILSON, HENRY FICKLIN, HERBERT SPANGLER, CASSANDRA POWELL, and MIKE KAPLAN, in their official capacities as members of the MACON-BIBB County Board of Elections,

Defendants.

PLAINTIFFS' OPPOSITION TO COUNTY DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Georgia's systemic problem with long voting lines—the longest in the country—is demonstrable, quantifiable, and unconstitutional. It is hardly, as County Defendants astonishingly suggest, "hypothetical," "ambiguous," or "political." (Just ask those who have had to wait in lines for up to 8 hours or until the early hours of the morning to vote how "hypothetical" the problem is). Nor are the Counties' persistent, systemic failures beyond the reach of this Court to redress. This case falls squarely within the federal courts' well-established constitutional power to adjudicate cases where voters' rights are clearly and repeatedly burdened by a state or county's election administration or practices. The Court should reject County Defendants' arguments to the contrary and deny their motion to dismiss.

II. LEGAL STANDARD

When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must "accept[] the allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff." *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016). Under the liberal pleading standard of Federal Rule of Civil Procedure 8(a), to survive a motion to dismiss "the complaint need only give the defendant fair notice of what the plaintiff's claim is and the

grounds upon which it rests." *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781. F.3d 1245, 1260 (11th Cir. 2015) (citations omitted).

III. ARGUMENT

A. Plaintiffs have standing.

Standing is "undemanding" and requires "only a minimal showing of injury." *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008). "When the defendant challenges standing via a motion to dismiss, both trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993) (quotations and citations omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct" suffice to establish standing, because the court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations and citations omitted). Further, "the law is abundantly clear that so long as at least one plaintiff has standing to raise each claim," the case may proceed and the court "need not address whether the remaining plaintiffs have standing." *Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom.*

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). Plaintiffs have alleged that they have or imminently will suffer injuries in fact that are traceable to County Defendants' actions and are redressable by this Court, firmly establishing their standing to proceed with this case. *See Lujan*, 504 U.S. at 560-61.

1. Voter Plaintiffs sufficiently allege injuries-in-fact.

Voter Plaintiffs all plan to vote in the November election but that right is threatened by the County Defendants' repeated failure to administer elections in a way to minimize the risk that Voter Plaintiffs will have to wait in unconscionably long lines to cast their ballots. Indeed, Voter Plaintiffs have been victims of this persistent problem before, waiting in exceedingly long lines in the June Primary and prior elections. Compl. ¶¶ 12-14. Should they encounter excessively long lines again in November, it will not be just their fundamental right to vote at stake, but, because of the pandemic, potentially their health and the health of those with whom they come into close contact. *Id.*

These threats are more than sufficient to satisfy Article III's injury-in-fact requirement. "Past wrongs do constitute evidence bearing on whether there is a real and immediate threat of repeated injury which could be averted by the issuing of an injunction." *Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984), *see also O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (same); *Dunn v. City of Fort Valley*, No. 5:19-

CV-00287-TES, 2020 WL 2544792, at *17 (M.D. Ga. May 19, 2020) (pleading a complaint for prospective relief does not require "oracular vision"). The Complaint is replete with allegations about Georgia's history of long lines as well as County Defendants' ongoing failures to remedy these long lines. Compl., ¶¶ 20-50, 77-98; 105-13; 119-26; 134-40; 148-54; 163-65; 169-72; 176-79; 184-87. Voter Plaintiffs' threatened injuries are far from hypothetical or speculative. Indeed, these long lines occurred just *three months ago*, with prominent press coverage describing them, accurately, as a "hot flaming mess,"[1] and a "meltdown."[2] Long voting lines for Voter Plaintiffs are hardly an illusion.

County Defendants argue that Voter Plaintiffs' threatened future injuries are hypothetical and speculative because they are based on long lines they experienced in past elections and it is unknown precisely how burdensome long lines will be in November. Mot. to Dismiss at 5-7. However, this argument overlooks well-established Supreme Court and Eleventh Circuit precedent that "[p]ast wrongs do constitute evidence bearing on whether there is a real and immediate threat of repeated injury which could be averted by the issuing of an injunction." *Lynch*, 744

[1] https://www.politico.com/news/2020/06/09/georgia-primary-election-voting-309066.
[2] https://www.nytimes.com/2020/06/09/us/politics/atlanta-voting-georgia-primary.html.

F.2d at 1456, *see also O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (same). And that is all the more likely when past wrongs—like Georgia's long lines— are not isolated incidents. The Complaint is replete with allegations regarding Georgia's history of long lines—especially those experienced during the June Primary—as well as County Defendants' ongoing failures to remedy these long lines, and therefore Voter Plaintiffs' threatened injuries are far from hypothetical or speculative. Compl., ¶¶ 20-50.

By County Defendants' logic, threatened future injuries would *always* be hypothetical and speculative because there is no way of knowing precisely how burdensome long lines will actually be until the election occurs. The fact that the election has not yet occurred—and that there is therefore some degree of uncertainty as to exactly how long the lines will be—does not allow County Defendants to evade judicial scrutiny of their repeated failures in election administration that cause these long lines. *See, e.g.*, *DeMaio v. Democratic Nat. Committee*, 555 F.3d 1343, 1345 (a case is not moot if "the situation is capable of repetition, yet evading review") (citations omitted).

Voter Plaintiffs' injuries are not rendered hypothetical or speculative simply because County Defendants have posited the wildly optimistic and wholly unrealistic suggestion that the COVID-19 pandemic may be a non-issue in a matter

of weeks. Indeed, this argument underscores Defendants' pattern of miscalculating what is necessary to ensure that voters are not burdened by excessively long lines.[3] Indeed, the court in *New Georgia Project* recently rejected this very argument, recognizing that the pandemic is poised to impact voting—and severely so—in November. *New Ga. Project v. Raffensperger*, No. 1:20-CV-01986-ELR, 2020 WL 5200930, at *8 (N.D. Ga. Aug. 31, 2020). That County Defendants apparently are proceeding as if it will not be an issue is evidence of the very problem that Plaintiffs have identified, not reason to dismiss their Complaint.

County Defendants next argue that Voter Plaintiffs' injuries are speculative because they are based on apprehensions about in-person voting, which is a method of voting they are not required to use. Mot. to Dismiss at 7. But whether Plaintiffs have other means to vote is not relevant to standing. *See*, *e.g.*, *Curling v. Raffensperger*, 403 F. Supp .3d 1311, 1339-42 (N.D. Ga.) (holding Plaintiffs had standing to challenge constitutionality of voting method even though other means of

[3] *See* N.Y. Times, Georgia COVID Map and Case Count, https://www.nytimes.com/interactive/2020/us/georgia-coronavirus-cases.html (last visited Sept. 15, 2020). Regardless, the Complaint alleges that the pandemic will be ongoing during the general election, *see* Compl., ¶¶ 190-196, and these allegations must be accepted as true for purposes of the Motion to Dismiss. Plaintiffs are not required to predict the exact state of lines in November. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) ("[T]he injury in fact requirement under Article III is qualitative, not quantitative, in nature," and the injury "need not be substantial.").

voting were permitted), *see also Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012). "[A] voter always has standing to challenge a statute that places a requirement on the exercise of his or her right to vote," even if they are not disenfranchised. *People First of Ala. v. Merrill*, No. 2:20-cv-00619-AKK, 2020 WL 3207824 at *6-7 (N.D. Ala. June 15, 2020) (citing *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009)). And County Defendants ignore the Complaint's allegations that thousands of voters never received their absentee ballot for the June Primary, *see* Compl. ¶¶ 13, 44, 94, and recent case law recognizing that as many at 7,281 voters were disenfranchised when they attempted to vote absentee. *New Ga. Project*, 2020 WL 5200930, at *24. For the voters who do not timely receive their absentee ballots in time for the general election, in-person voting will be the *only* means of voting available to them.

2. Organizational Plaintiffs have sufficiently alleged injury-in-fact.

i. *Diversion of Resources.*

An organization "has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014). Organizations may establish standing in elections cases by showing they "will need to divert resources from general voting initiatives or other missions

. . . to address the impacts of election laws or policies." *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1266 (N.D. Ga. 2019); *see also Arcia*, 772 F.3d at 1341. At the motion to dismiss stage, an organization only needs to show that the challenged action "'compel[s]' it to divert more resources to accomplishing its goals." *Browning*, 522 F.3d at 1165. Organizations are not required to quantify a specific monetary cost in order to satisfy the injury-in-fact requirement. *Id.* ("[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury").

Organizational Plaintiffs have more than satisfied this requirement. Both DSCC and the Democratic Party of Georgia ("DPG") are working to elect Democratic candidates in the upcoming election and will need to turn out their core constituencies and supporters to vote, including Georgia's Black voters, Hispanic and Latinx voters, and young voters. Compl. ¶¶ 15-16. Many Georgia voters, especially from these constituencies, are severely burdened if not disenfranchised by long lines. *Id.* To combat the effects of long lines, DSCC will divert funds and resources to voter turnout that would have otherwise been spent on other activities, such as polling, in Georgia and other states. Compl., ¶ 15. DPG will divert resources to provide support for voters to help them avoid disenfranchisement and overcome the burdens they face because of long lines—resources it would otherwise use for

purposes such as educating voters about issues and individual candidates. Compl., ¶ 16. These allegations establish injury-in-fact at the motion to dismiss stage.[4] *Fair Fight Action,* , 413 F. Supp. 3d at 1267 ("The diversion of resources from general voting initiatives or other missions of the organization to programs designed to address the impact of the specific conduct of the Defendants satisfies the injury-in-fact prong."); *New Ga. Project*, 2020 WL 5200930, at *9 (same).

The cases cited by County Defendants are inapposite because they do not address standing at the motion to dismiss stage, when all allegations of injury-in-fact must be accepted as true and construed in the light most favorable to Plaintiffs. *See Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1336 (N.D. Ga. 2018) (addressing standing in connection with motion for preliminary injunction); *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377 at *8-9 (11th Cir. Sept. 3, 2020) (same); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (evaluating standing at preliminary injunction stage and concluding that "[l]ike us, [our sister circuits] have found that the organizations demonstrated the necessary injury in fact in the form of the unwanted demands on their resources").

[4] Declarations filed by Organizational Plaintiffs in support of Plaintiffs' Motion for Preliminary Injunction further support standing. *See* ECF Nos. 93-60, 93-63.

The only cases cited by County Defendants addressing standing at the motion to dismiss stage confirm that Organizational Plaintiffs have adequately alleged injury-in-fact. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 ("If, *as broadly alleged*, petitioners' steering practices have *perceptibly* impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, *there can be no question* that the organization has suffered injury in fact." (emphasis added)); *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 371 F. Supp. 3d 1150, 1165 (N.D. Ga. 2019) ("Even if these allegations may be generic to a degree, the injuries associated with reissuing payment cards are concrete and easily ascertainable. Therefore, the Court finds these allegations sufficient to establish standing as to these Plaintiffs.").

County Defendants also argue that DSCC and DPG have not been injured by diverting resources for voter turnout efforts because such efforts are consistent with their organizational missions. Mot. to Dismiss at 8-9. They cite not a single case in support of this proposition and, by County Defendants' logic, an organization would have to divert resources towards efforts *inconsistent* with or beyond the scope of its mission to establish standing. Courts have not required such gymnastics to find organizational standing: it is enough that organizations allege that they are

redirecting resources to address the burden on voting at the expense of other programs. *See, e.g.*, *Fair Fight Action*, 413 F.Supp.3d at 1267.

ii. *Associational Standing*.

County Defendants concede that an organizational plaintiff can establish injury-in-fact through associational standing, Mot. to Dismiss at 7-8, and "need only show that its members face a probability of harm in the near and definite future to establish injury [] sufficient to confer standing to seek prospective relief."[5] *Crittenden*, 347 F. Supp. 3d at 1336. Because Voter Plaintiffs and DPG's members across the state, *see* Compl. ¶ 16, face a probability of harm in the near future (they have had to wait in long lines in the past and are likely to face long lines in the near future), *supra* at Section III.A.1, DPG has associational standing to seek prospective relief. *See Curling v. Kemp*, 334 F. Supp. 3d 1303, 1319 (voters' organization had associational standing where its members alleged harm to their constitutional rights).

3. All Plaintiffs have alleged redressability.

Although redressability "must not be speculative, it need only be 'likely,' not certain." *Alabama-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1256 (11th Cir. 2003). Even a showing that a plaintiff's injury is indirectly caused by a

[5] The other elements of associational standing are easily met here: the interests at stake are germane to DPG's purpose and the participation of its individual members is not required in this lawsuit. *Crittenden*, 347 F. Supp. 3d at 1336.

defendant's actions is sufficient. *Id.* "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, [because courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286 (11th Cir. 2010) (quoting *Lujan*, 504 U.S. at 561).

i. Plaintiffs do not need to join all Georgia Counties.

Plaintiffs reference and incorporate their response to the State Defendants' misguided argument that all Georgia Counties need to be joined made in their opposition to the State Defendants' Motion to Dismiss. Plaintiffs' Opposition to State Defendants' Motion to Dismiss at Section III.C.

Additionally, as to the Defendant Counties, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a *discrete injury to himself*." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis added). Plaintiffs have sued the counties causing the most harm to themselves and their missions—those with the most egregious wait times in the State and a long history of failing to remedy the underlying issues that cause long lines. Seeking injunctive relief against the counties with the most significant wait times to vote—some of which are the most populous in the state—will undoubtedly redress a significant portion of Organizational Plaintiffs' injuries caused by long lines. Voter

Plaintiffs also meet this standard because they have sued the counties in which they reside and are registered to vote—Fulton and Cobb Counties—and are seeking injunctive relief to remedy long lines in those counties. Compl. ¶¶ 12-14.

ii. Plaintiffs seek specific injunctive relief.

County Defendants argue that Plaintiffs have not adequately alleged redressability because the requested injunctive relief is purportedly limited to only requiring them to obey the law. Mot. to Dismiss at 16-17. However, they overstate the case law on this point, and, in any event, the cases they rely upon are distinguishable. At the motion to dismiss stage, it is premature for a court to review the precise nature of any type of injunction, including whether it would constitute an "obey the law" injunction. *Fair Fight Action*, 413 F. Supp. 3d at 1280 (premature to review injunction at motion to dismiss stage because "it remains possible that the Plaintiffs will seek injunctive relief that is specific and narrow enough that the parties would be afforded sufficient warning to conform their conduct"). Nor is an injunction an impermissible "obey the law" injunction simply because it requires a party to comply with its legal obligations where it has not done so voluntarily. *Jefferson Cnty. Bd. of Educ. v. Bryan M.*, 706 F. App'x 510, 516 (11th Cir. 2017) ("The whole point of issuing an injunction is to direct a party to do what they are legally obligated to do.").

And *Elend*, 471 F.3d 1199, is distinguishable. There, the Eleventh Circuit held that, because of the "inchoate nature of the claim," the requested injunction would do nothing more than command the defendant "to obey the First Amendment," and therefore plaintiffs' injuries lacked redressability. *Id.* at 1209. In that case, plaintiffs attempted to protest near a presidential rally, but police officers told them they had to stand in a "First Amendment zone" further away from the rally. *Id.* at 1203. Their claims against the U.S. Secret Service were dismissed because plaintiffs' injuries were "at the highest order of abstraction." *Id.* at 1206. It was speculative whether plaintiffs would protest again and, if so, "where, at what type of event, with what number of people, and posing what kind of security risk," such that injunctive relief would have been "the judicial equivalent of shooting blanks in the night."[6] *Id.* at 1206-07.

In other words, *Elend* did not hold that all injunctions requiring state officials to follow the law are prohibited, but instead found that a broad, amorphous request that sought nothing more than an order to "obey the constitution" lacking. Other courts have distinguished *Elend* on this very basis. *See, e.g.*, *United States v. Georgia*, No. 1:16-CV-03088-ELR, 2020 WL 3496783 at *9 (N.D. Ga. May 13,

[6] The case cited in *Elend* regarding "obey the law" injunctions was decided on summary judgment, not on a motion to dismiss. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999).

2020) (plaintiff requested "specific relief which calls for enjoining tangible, continuous, and ongoing injury[,]" and therefore, unlike the relief requested in *Eland*, did not seek an "obey the law" injunction).

Georgia Shift also does not compel a different result. Unlike the Plaintiffs here, the *Georgia Shift* plaintiffs broadly framed their request for injunctive relief as requiring defendants to "take all necessary actions to carry out their functions so as not to impinge on voters' federal constitutional rights." 2020 WL 864938 at *5. Importantly, the district court noted that "[*i*]*f* or *when* the County elections officials (or the State for that matter) fail to constitutionally carry out their duties to properly conduct and administer the 2020 elections, an action can be brought to seek a tailored remedy of an actual injury by affected voters or advocacy groups[.]" *Id.* at *6. That time has come.

Plaintiffs do not seek a vague injunction that County Defendants should "obey the constitution." Plaintiffs identify County Defendants' specific statutory obligations to administer elections and allege that they have failed to meet these obligations, causing long lines to increase year after year. Compl., ¶¶ 19-50. Plaintiffs have submitted expert reports that lay out explicitly what Defendants can and should be required to do to comply with those duties and meaningfully reduce

the risk that Georgia's voters once again face unconscionably long lines in November.[7]

But the allegations in the Complaint alone make it clear that Plaintiffs request relief specifically with respect to polling place consolidation, machine allocation, training, and use of backup emergency supplies—all concrete matters within the direct control of County Defendants. Compl. at ¶ 19, p. 79. This level of specificity is more than enough to survive a motion to dismiss. *Fair Fight Action*, 413 F. Supp. 3d at 1280; *see also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008) (allegations that State's election system, which included long lines, malfunctioning polling equipment, and improperly trained poll workers, burdened the right to vote, were sufficient to survive motion to dismiss). Multiple other courts have *granted* injunctive relief to remedy long lines based on similar, if not broader, parameters. *See, e.g.*, *Fleming v. Gutierrez*, No. 13-CV-222 WJ/RHS, 2014 WL 12650657, at *11 (D.N.M. Sept. 12, 2014) (ordering defendants to comply with voting machine allocations set forth in board resolution and forbidding them from lowering the amount of voting machines and related equipment designated for

[7] The expert reports of Dr. Jonathan Rodden and Dr. Muer Yang submitted by Plaintiffs in support of their motion for preliminary injunction provide concrete data and suggestions for appropriate remedies, ECF Nos. 93-61, 93-62, which have been incorporated into Plaintiffs' request for preliminary injunctive relief. ECF No. 92-2.

each voting centers); *Jefferson Cnty. Bd. of Educ.*, 706 F. App'x at 516 (holding order directing school district to reconsider student's individualized education program, as required by the Individuals with Disabilities Education Act, was not an "obey the law" injunction).

B. Plaintiffs state a claim against County Defendants.

County Defendants are also wrong to contend that Plaintiffs do not state a claim for relief. *See* ECF 105-1 at 18. In support, County Defendants inexplicably cite to *Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 583 (E.D. Va. 2015), *partially modified after reconsideration on other grounds by Lee v. Va. State Bd. of Elections*, Civil Action No. 3:15CV357-HEH, 2016 U.S. Dist. LEXIS 185846, at *5 (E.D. Va. Feb. 2, 2016), for the proposition that "long lines, standing alone, are not a practice or procedure of voting for purposes of Section 2 of the Voting Rights Act." ECF 105-1 at 18. That case (which is of course non-binding) is totally inapposite. Plaintiffs have not brought a Voting Rights Act claim here.

Rather, Plaintiffs contend that the perpetual, egregiously-long voting lines in the Defendant Counties constitute (1) an undue burden on their right to vote in violation of the First and Fourteenth Amendments to the Constitution, (2) a violation of their substantive due process rights in violation of the Due Process Clause, and (3) a violation of the Equal Protection Clause. In support, Plaintiffs allege specific

factual allegations that state a claim under the *Anderson-Burdick* test (applicable to Plaintiffs' undue burden and equal protection claims) and the due process clause. Those allegations are more than sufficient to survive a motion to dismiss. *See League of Women Voters of Ohio*, 548 F.3d at 468; *see also Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 3077047, at *5 (W.D. Wis. June 10, 2020); *Miller v. Doe*, 422 F. Supp. 3d 1176, 1185-86 (W.D. Tex. 2019); *League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1288 (N.D. Fla. 2018).

C. Plaintiffs' claims are not barred by the political question doctrine.

Nor does the political question doctrine present a bar to this case. "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)). *See also Cohens*, 19 U.S. at 404 ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). The Supreme Court has recognized a "narrow exception to that rule, known as the 'political question' doctrine," *Zivotofsky*, 566 U.S. at 195, which "is primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962). That doctrine is inapplicable here, in a case that involves no separation-of-powers issues, and where the Court can decide the case

under well-established constitutional principles and judicially manageable standards. [8]

Defendants badly misread the political question doctrine as doctrine of federalism. *Baker v. Carr*, the seminal case involving the political question doctrine (and on which County Defendants rely heavily), does not support their arguments. In that case, the Supreme Court rejected the notion that a challenge to Tennessee's apportionment statute presented a nonjusticiable political question. In doing so, the Court noted that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Baker*, 369 U.S. at 210. The Court proceeded to review the state's election laws over the state's objection, holding that "the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Id.*

More recently, the Supreme Court has affirmed *Baker*'s holding that "the political-question doctrine . . . has no applicability to the federal judiciary's relationship to the States." *Elrod v. Burns*, 427 U.S. 347, 352 (1976). Thus, courts (including in this district) routinely reject the argument that County Defendants press

[8] Plaintiffs incorporate by reference their Opposition to the State Defendants' Motion to Dismiss, at 11–12.

here. *See, e.g.*, *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1292 (N.D. Ga. 2001), *aff'd in part, rev'd in part*, 276 F.3d 1244 (11th Cir. 2001); *see also Williams v. Rhodes*, 393 U.S. 23, 28 (1968) (in case regarding ballot access, holding "Ohio's claim that the political-question doctrine precludes judicial consideration of these cases requires very little discussion. That claim has been rejected in cases of this kind numerous times"); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 399 (5th Cir. 2020) (declining to apply the political question doctrine to a voting-rights case, noting that "federal courts routinely entertain suits to vindicate voting rights."); *New Ga. Project*, 2020 WL 5200930, at *10 n.18 (rejecting a political question argument in a case challenging the constitutionality of several aspects of Georgia's absentee voting system).

The State's constitutional power to administer elections is beside the point; indeed, one of the cases cited by County Defendants for the (incorrect) implication that the Tenth Amendment somehow precludes judicial review in a voting rights case is one of the seminal cases that sets the very *standard* for such judicial review. *See* Mot. at 21. In *Burdick v. Tashuki*, the Supreme Court held that federal courts adjudicating voting rights cases "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State

as justifications for the burden imposed by its rule,'" to determine whether a state's voting restrictions violate the Constitution. 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Neither *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), nor the 11th Circuit's recent decision in *Jacobson* alters this result. *Jacobson*, 2020 WL 5289377. Neither purports to overrule *Anderson* or *Burdick* or end decades of voting rights litigation. In *Rucho*, the Supreme Court held partisan redistricting claims present political questions beyond the reach of federal courts because "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id.* at 2507.

County Defendants' reliance on that case is misplaced for multiple reasons. First, the unique history of partisan gerrymandering, an issue with which courts had for decades "struggled without success" to devise a judicially manageable standard, *id.* at 2491, led the Court to conclude that partisan gerrymandering presented the "rare circumstance," *id.* at 2508, where the political question doctrine barred judicial review. Further, this case does not require the Court to "reallocate political power between the two major political parties" like a redistricting case; in other words, unlike *Rucho*, this case does not force the Court to choose sides between political

parties. *Id.* at 2507. Likewise, in *Jacobson*, the Eleventh Circuit dismissed a ballot-order case on political-question grounds, noting that "complaints of unfair partisan advantage based on the order in which candidates appear on the ballot." *Jacobson*, 2020 WL 5289377, at *1. Unable to "determine what constitutes a 'fair' allocation of the top ballot position," the court dismissed that case as nonjusticiable for substantially the same reasons. *Id.*

Here, by contrast, Plaintiffs have not requested relief to remedy a perceived inequality in "partisan advantage," *id.* at *20; or to "reallocate political power between the two major political parties," *Rucho*, 139 S. Ct. at 2507. This case does not involve competing "visions of fairness," *id.* at 2484, which will require the Court to exercise its "own political judgment about how much representation particular political parties deserve," *id.* at 2499. This case involves an obvious, measurable, and constitutionally untenable disparity in wait times between counties, and the solutions for fixing those problems, *see supra* Section A.3.ii, are "clear, manageable and politically neutral." *Id.* at 2500 (2019) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 269–70 (2004) (plurality opinion). As the Eleventh Circuit recognized in *Jacobson*, the standards for evaluating burdens on the right to vote are well-established and familiar: "under *Anderson* and *Burdick*, [the Court should] weigh the burden imposed by the law against the state interests justifying that burden." *Jacobson*, 2020

WL 5289377, at *19; *see also New Ga. Project*, 2020 WL 5200930, at *10 n.18 (quoting *Texas Democratic Party*, 961 F.3d at 399 ("The standards for resolving such claims are familiar and manageable, and federal courts routinely entertain suits to vindicate voting rights."). Because long lines make it more difficult for individuals to vote, the applicable standards are familiar and well-defined.

III. CONCLUSION

For all of these reasons, Plaintiffs respectfully request that the Court deny County Defendants' Motion to Dismiss.

Dated: September 15, 2020

Respectfully submitted,

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

LUCILLE ANDERSON, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, *et al.*, Defendants.	Civil Action No. 1:20-cv-03263-MLB

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a point size of 14.

Dated: September 15, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: September 15, 2020

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