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' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The June Primary was the most recent in an increasingly long list of warning signs that, unless this Court acts, thousands of Georgia voters, and particularly those who live in urban and minority communities, will once again be severely burdened—some to the point of disenfranchisement—by long lines in November. Defendants have not heeded that warning.

Now they seek to avoid entirely Plaintiffs' efforts to ensure that they do better by arguing that this Court has no place remedying these unconstitutional burdens on the right to vote. Defendants are wrong. Even now, Defendants fail to identify any concrete plans to resolve the unconstitutionally long lines. Instead, they continue to point the finger at one another, or assign blame to the COVID-19 pandemic.

But these issues have persisted in Georgia for years and, as Plaintiffs' extensive evidence demonstrates, there are concrete ways to address them. Even in a pandemic. Unless this Court acts, the past is doomed to repeat itself, burdening voters with entirely avoidable long lines in an election in which those lines threaten not only their right to vote, but their health. Plaintiffs have provided this Court with specific and narrow relief that *can* be implemented immediately. This Court should grant Plaintiffs' request for preliminary relief.

II. ARGUMENT

A. Plaintiffs are likely to succeed on the merits.

1. Factual background

Plaintiffs have submitted robust expert testimony detailing Georgia's history of long lines; the burdens they impose on voters (including the disparate impact on minority voters); how Defendants, despite having the power to do so, have systemically failed to remedy these burdensome lines; and specific and discrete recommendations for doing so. *See* ECF Nos. 93-61, 93-62. This evidence is supplemented by dozens of voter declarations and news articles, as well as a series of court orders, reaching across counties and over multiple years, requiring polling locations to stay open late because of long lines.[1] *See, e.g.*, ECF Nos. 93-1, 93-5, 93-

[1] The County Defendants argue that ordering polling locations to stay open late shows that the State has an "orderly (and timely) process to deal with problems opening or operating precincts on election day." ECF No. 108 at 5. But Georgia voters should not have to depend on emergency court orders to address this deeply troubling and recurring problem. The fact that voters have had to repeatedly resort to going to court (and that courts have repeatedly found in their favor), *see* Court Orders, ECF Nos. 93-41 through 93-58, demonstrates that the problems with long lines are systemic, and that especially those who live in urban and minority communities, are often not able to "timely" cast their ballot as a result. Further, while those orders may help voters who are in line when they are issued (and who can continue to stand in line, often for hours), they do nothing to remedy the injury to voters who encountered long lines earlier in the day and could not (or cannot) wait for hours to cast their ballots. Emergency litigation in the federal and state courts year after year, election after election, is hardly an "orderly (and timely) process." Rather it shows Defendants' *abject failure* to constitutionally administer elections.

7 through 93-10, 93-14, 93-19, through 93-22, 93-28, 93-31 through 93-35, 93- 41 through 93-44, 93-46 through 93-58.

Defendants do not seriously dispute this evidence, nor do they offer their own expert testimony. County Defendants complain about one study from the Bipartisan Policy Center on which the expert reports rely but the reports rely on multiple studies and sources of data, ECF No. 108 at 3. ECF No. 93-61 at 9-10, 15, 23. To the extent data is missing from certain Counties, it reflects those Counties' continued delay in responding to Plaintiffs' public records requests, served over two months ago.

Defendants' criticisms of Plaintiffs' evidence fall particularly flat given that only the Secretary and three of eight Counties provided declarations to support their oppositions, and *none* offer facts to dispute the history of long lines and the resulting cost to voters. Instead, the declarations rely on general conclusory complaints that judicial relief is not warranted. And although Defendants attempt to summarily dismiss the long lines as an unfortunate consequence of the COVID-19 pandemic, they fail to account for the evidence of long lines that pre-date the pandemic and have been plaguing Georgia elections for over a decade.[2]

[2] The recent special election further supports the conclusion that the June Primary was *not* a one-off and Defendants have *not* fixed the underlying problems. *See* Decl. of Amanda J. Beane, Ex. 1. A group of senior citizens had to wait three and a half hours to vote in the special election. *Id.* at ¶ 8. After waiting for over two hours at

2. Plaintiffs seek precise and manageable relief.

Rather than seriously engage on the facts or law, Defendants generally protest that the relief sought by Plaintiffs is a "judicially managed federal receivership." ECF No. 109 at 1. To the contrary, the requested relief is clear and requires little effort to implement and can be implemented in time for the General Election. Nothing in the general declarations submitted by Defendants suggests otherwise.

As an initial matter, the fact that County Defendants are making efforts to address location and staff shortages during a pandemic is, of course, commendable. But Plaintiffs have shown this alone is insufficient to resolve long lines, and Plaintiffs have not focused their relief here.[3] Rather, Plaintiffs have demonstrated that concrete changes are needed to the allocation of voting equipment among polling locations. This is because one of the biggest causes of voting lines, year after

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one polling location, they were turned away because the system was showing they had already voted even though they had not. *Id.* at ¶¶ 3-4. They encountered the same issue at a second polling location, and it took two supervisors to resolve the issue. *Id.* at ¶¶ 6-7. Georgia voters have *already* encountered hours-long wait times for early voting. Dave Huddleston, *Fulton County voters find trouble at polls during early vote*, WSB-TV2 (Sept. 9, 2020), https://www.wsbtv.com/news/local/fulton-county/fulton-county-voters-find-trouble-polls-during-early-voting/65WN7UHA4BHHTI7D5JPJSEZQBQ/?fbclid=IwAR0Y3HqOHCKHzrY_kYU-adzZT-yIAtnWuHEif0oBY1MmlE9LRrcc2XNR4QE.

[3] Plaintiffs did include in their initial Proposed Order a request that Defendants provide sufficient poll workers for the general election, but emphasize that machine allocation, emergency backup supplies, and training are the more important issues.

year, is that the number of voters assigned to single polling locations continues to increase, with no corresponding efforts to appropriately apportion equipment. ECF No. 93-62 at 52-55. While only one County Defendant (Gwinnett) provided a declaration stating that voting machines are being programmed, the declaration does not explain how long programming takes or how it impacts the feasibility of adding machines at certain locations. Moreover, Plaintiffs' expert can and will provide the calculations for allocating voting machines, without cost to Defendants.[4]

County Defendants do not dispute that it is their obligation to appropriately allocate equipment at each polling location, but they and State Defendants point to O.C.G.A. § 21-2-367(b) as if that solves the problem. That regulation, however, simply proscribes the *minimum* amount of voting machines per voters. Nothing stops Defendants from providing more.[5] Nor do Defendants explain (in declarations signed under penalty of perjury) why they could not allocate equipment pursuant to the expert recommendations in time for the election *and* comply with O.C.G.A. § 21-2-367(b). Plaintiffs seek an order directing Defendants to take this simple step because Defendants have offered no assurances that they otherwise will.

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[4] *See*, *e.g.*, ECF No. 93-62 at 40-45, 48-51, and analysis for Gwinnett County created by Plaintiffs' expert. Decl. of Amanda J. Beane, Ex. 2.

[5] As discussed below in Section II.A.3, there is evidence the State is not meeting this minimum obligation.

Likewise, Plaintiffs have asked the Court to issue an order regarding use of emergency backup voting mechanisms. While Defendants point to an existing regulation, ECF No. 109 at 13-14, they do not dispute that—as evidenced by hours-long lines—these regulations are not being implemented uniformly. *See* Ga. Comp. R. & Regs. 183-1-12-.11(2)(c-d) (providing for use of emergency paper ballots), 183-1-12.19(1) (providing for use of paper poll books). In addition, though the current regulations state that the "sufficient amount of emergency paper ballots" to be provided by the county superintendent is "10% of the number of registered voters to a polling place," Ga. Comp. R. & Regs. 183-1-12-.11(2)(c), there were multiple reports of machine malfunction causing polling places to run out of paper ballots.[6] More importantly, the regulation is unclear. It requires the use of emergency backup voting mechanisms when wait times reach 30 minutes, but it is not clear if that means the first voter in line, the last, or something else. Requiring use of emergency paper ballots when the last voter in line is waiting 30 minutes is a simple clarification that

[6] At Cross Keys High School, poll workers ran out of backup paper ballots after machines malfunctioned. https://www.gpb.org/news/2020/07/22/hourly-voting-data-shows-where-georgias-process-failed-and-flourished. Christian Fellowship Baptist Church ran out of provisional ballots by 10 a.m. https://www.nytimes.com/2020/06/09/us/politics/atlanta-voting-georgia-primary.html.

would reduce lines. ECF No. 93-62 at 55.[7]

Finally, no Defendant disputes that they have training obligations. While a few County Defendants explain that some training is under way, they do not describe this training in detail, explain how it is more robust than the training for the June Primary (other than vague references to "more hands-on opportunities"), nor explain why additional, supplemental training could not be provided in the weeks before the General Election. ECF Nos. 108-1 at ¶¶ 12-17, 108-2 at ¶ 8, 108-3 at ¶ 8.

In an effort to aid the Court in crafting this relief, Plaintiffs have submitted a Supplemental Proposed Order. Decl. of Amanda J. Beane, Ex. 3.

3. Plaintiffs' harms are traceable to and redressable by Defendants.

The bulk of Defendants' jurisdictional arguments repeat arguments that were fully addressed in Plaintiffs' Oppositions to the Motions to Dismiss and are not repeated here, including traceability, redressability, whether Plaintiffs must sue all 159 counties, whether Plaintiffs have standing, and whether the political question

[7] The elections director for Fulton County agrees using up-to-date paper pollbook backups and emergency paper ballots would be easier than having all voters use the electronic poll pad check-in and electronic ballot-marking devices on election day, as he recently testified in another case concerning voting rights. See Testimony of Richard Barron, Hr'g Tr., *Curling v. Raffensperger*, No. 1:17-cv-2989-AT (N.D. Ga. Sept. 11, 2020) (ECF No. 905); *see also* Section II.A.3 *infra*.

doctrine applies.[8] *See, e.g.*, ECF No. 111 at 2-13, 18-23; ECF No. 112 at 2-8.

State Defendants also continue to claim that they should not be a party to this action at all. Through their "significant statutory authority to train local election officials and set election standards," however, State Defendants are able to "fully redress," on a statewide level, injuries that burden the right to vote. *New Ga. Project v. Raffensperger*, No. 1:20-CV-01986-ELR, 2020 WL 5200930, at *8 (N.D. Ga. Aug. 31, 2020) (citing O.C.G.A. § 21-2-31, 50(b)); *see also* ECF No. 112 at 4-6. State Defendants cannot avoid their authority by cherry picking responsibilities delegated to the Counties while ignoring their own statutory obligations, *see* ECF No. 92-1 at 6-7, as well as their duty to ensure that elections are uniform across the state, O.C.G.A. § 21-2-31, which they have abdicated as voters in urban and minority communities frequently encounter exceptionally long lines while voters in suburban

[8] State Defendants also argue, for the first time, that Plaintiffs do not have standing because two of the individual voter plaintiffs have requested (but not yet received) an absentee ballot, and another has not requested an absentee ballot. This overlooks the fact that many Georgia voters did not timely receive their absentee ballots for the June Primary and were forced to vote in person (many waiting in hours-long lines). ECF No. 109 at 18-19. Moreover, whether individual Plaintiffs have other options to cast their vote is irrelevant for purposes of establishing standing. *See* ECF No. 111 at 6-7. And injunctive relief is warranted if even only one plaintiff has standing. *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1333 (N.D. Ga. 2018) ("Where only injunctive relief is sought, only one plaintiff with standing is required."). Obviously, this evidence in no way proves that *all* DPG members can and will vote absentee during the general election, even if this was a relevant consideration.

and predominantly white communities do not. *See, e.g.*, ECF No. 93-61 at 2-6.

The State Defendants' statutory obligations demonstrate that, at a minimum, they can provide the relief outlined below:

Voting Equipment. The Secretary is responsible for allocating voting equipment to each county. O.C.G.A. § 21-2-300(a). State Defendants argue they have met this obligation, but provide no evidence in support. *See* ECF No. 110-5, ¶ 5 (simply claiming "the State has acquired and delivered election equipment to the counties"). The persistent shortage of voting machines throughout certain counties tells a different (and unrefuted) story. A polling location in Fulton County serving about 16,000 voters had roughly 15 voting machines, ECF No. 93-1, far from the statutory requirement of one voting booth per 200 voters.[9] O.C.G.A. § 21-2-367.

Training. State Defendants concede that the Secretary is responsible for training County election officials, who then train poll workers. ECF No. 109 at 12. And State Defendants do not dispute that poor training has caused long lines. They are silent however, as to whether the Secretary is improving training for the upcoming election, much less *how*. *See* ECF No. 109 at 12-13.

Technicians. The Secretary claims he provided at least one technician to each

[9] Notwithstanding O.C.G.A. § 21-2-2(40), the terms Ballot Marking Device ("BMD") and voting machines are used interchangeably in this brief. *Compare* O.C.G.A. § 21-2-2(2), *with* O.C.G.A. § 21-2-2(40).

county for the Primary (which turned out to be not nearly enough) and purportedly aims to provide "additional technicians" for the upcoming election, notwithstanding his argument that deploying technicians falls solely on the Counties.[10] ECF No. 109 at 11-12. The Secretary's commitment is again not specific or made anywhere but press releases.[11] Because of the insufficiency of technicians, the Secretary should provide at least one technician for every 10 polling locations and ensure election supervisors train poll workers to address common voting machine technical issues.

Emergency Backup Guidelines. The Board is responsible for promulgating rules and regulations to achieve uniform election practices and "fair, legal and orderly conduct of primaries and elections." O.C.G.A. § 21-2-31(1), (2). If the Court orders, as requested, that emergency backup ballots be used when the last voter in line is waiting 30 minutes or more, the Board can issue guidance stating as much and ensure uniform implementation statewide. Defendants also incorrectly contend that the election rules already address Plaintiffs' demand for emergency paper poll books. ECF 108 at 8. However, that rule simply requires Defendants to have a "paper backup list of every registered voter assigned to that polling place," Ga. Comp. R.

[10] The Secretary has also taken credit for staffing polling places, *see* ECF No. 110-7, again in conflict with his argument that this is not his responsibility. ECF No. 109 at 13. This further proves the Secretary has the power to ensure election uniformity.
[11] *See* https://sos.ga.gov/index.php/elections (last visited Sept. 21, 2020).

& Regs. 183-1-12-.19(1), not a paper poll book showing who has and has not voted.

4. Plaintiffs' remedies are not barred by the Eleventh Amendment.

County Defendants allege that Plaintiffs' proposed remedies are barred by the Eleventh Amendment because they are "already covered by state law and regulations," so the Court would need to find that County Defendants are currently violating state law to grant Plaintiffs' requested injunction. ECF No. 108 at 12. But this misunderstands Plaintiffs' arguments. Plaintiffs are arguing that County Defendants' current conduct violates *federal* law.

The fact that state law assigns to County Defendants the duty to provide a fair an accessible election to Georgia's voters makes them proper defendants to this action, it does not make Plaintiffs' action one that sounds in state law. County Defendants' reliance on the Eleventh Amendment is misplaced. The *Ex parte Young* exception permits suits exactly like this one: claims for prospective relief against state officials to stop ongoing violations of federal law. 209 U.S. 123 (1908); *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002). Indeed, even County Defendants acknowledge this. *See* ECF No. 108 at 12.

There is thus no dispute that *Ex parte Young* allows a plaintiff to sue state actors for prospective relief to prevent them from engaging in further violations of federal law, provided they are "responsible for" and have "some connection" to the

unconstitutional act at issue. *Luckey v. Harris*, 860 F.2d 1012, 1015-16 (11th Cir. 1988). To determine whether the exception applies, the Court conducts a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645. Applying this standard, Plaintiffs' federal claims easily qualify.

Even a cursory review of Plaintiffs' Complaint and Motion for Preliminary Injunction makes clear that their arguments are grounded in allegations that Defendants' systematically poor election administration severely burdens the right to vote *in violation of the federal Constitution*, and their requested relief is narrowly tailored to remedy those violations. *See* ECF No. 1; ECF No. 92-1 at 2, 16. To allow Defendants to avoid review for their federal constitutional violations by claiming some nexus between an alleged violation of federal law and an existing state law makes that allegation a state law claim would render the exception (and the simple inquiry set forth in *Verizon*) meaningless. *See Grizzle v. Kemp*, 634 F.3d 1314, 1316 (11th Cir. 2011) (constitutionality of Georgia election law challenged under *Ex parte Young* exception).

Accordingly, the Court should reject the County Defendants' 11th Amendment argument. *See Curling v. Kemp*, 334 F. Supp. 3d 1303 (N.D. Ga. 2018) (applying *Ex parte Young* exception to § 1983 action regarding voting systems),

aff'd in part, appeal dismissed in part sub nom. Curling v. Sec'y of Georgia, 761 F. App'x 927, 934 (11th Cir. 2019) ("Undoubtedly, *Ex parte Young* suits are permitted when the plaintiff alleges that state election officials are conducting elections in a manner that does not comport with the Constitution.").

5. Plaintiffs are likely to succeed on their undue burden claim.

Plaintiffs have established that Defendants' actions have imposed (and absent relief, will continue to impose) a substantial burden on the right to vote that is not justified by any state interest. *See* ECF No. 92-1 at 16-19, 21-22. County Defendants do not dispute this. State Defendants boldly assert that although they do not "condone excessive lines and wait times" (despite their longstanding failure to do anything about them), waiting in line for up to eight hours imposes only a "slight" burden, or amounts to a mere "inconvenience[]," because voters have options other than in-person voting. ECF No. 109 at 14-16. Candidly, it is an astonishing position and perhaps more revealing than the State Defendants might have wished.

Plaintiffs are aware of no authority that holds that the State can ignore a burden on the right to vote in person by pointing to absentee voting and the State offers none. In contrast, the Eleventh Circuit has held that "[a] plaintiff need not have the franchise wholly denied to suffer injury." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005); *see also Obama for Am. v.*

Husted, 697 F.3d 423 (6th Cir. 2012).

Furthermore, the State's argument ignores the undisputed fact that even in the most recent June Primary many voters never received their absentee ballots, making voting in-person their *only* choice. *See* ECF No. 1, at ¶ 13. State Defendants *admit* that some number of absentee ballot applications *were never even processed* in at least one county. ECF No. 109, at 19-20. As a result, those voters, too, had no option to exercise their right to vote other than to appear in person. Defendants also ignore the risks that a voter's ballot will be rejected due to a technical error when they vote absentee, as opposed to in person. *See* ECF No. 59-1 at 3, June 10, 2020, No. 1:20-CV-01986-EL0052. As another judge in this district recently found, as many as 7,281 voters were disenfranchised when they attempted to vote absentee in the June Primary. *New Ga. Project*, 2020 WL 5200930, at *24. In light of these highly publicized and recent failures of Georgia's elections system, it is perfectly reasonable for a voter to feel like absentee voting is not a viable option for them to ensure that their vote is counted.[12] The State also does not offer any interest that

[12] The State Defendants have presented a moving target when it comes to issues with absentee and in-person voting. Here, State Defendants argue that injuries related to in-person voting are not so bad because voters can vote absentee. But in cases involving issues with absentee voting, State Defendants flip their argument back around to allege that in-person voting options alleviate any injuries related to absentee voting. *New Ga. Project v. Raffensperger*, Northern District of Georgia Case No. 1:20-CV-01986-ELR, ECF No. 83-1 at 5, 10, 25.

would justify continued election administration failures that result in long lines.

6. Plaintiffs are likely to succeed on their Equal Protection claim.

In response to Plaintiffs' Equal Protection claim, County Defendants again do not engage, while State Defendants rely entirely on the incorrect proposition that Plaintiffs need to show discriminatory intent to prevail. Plaintiffs' Equal Protection claim is evaluated under *Anderson-Burdick*, and while discriminatory *impact* is relevant, *intent* is not. *See, e.g., Curling v. Raffensperger*, 403 F. Supp. 3d 1311, 1336 (N.D. Ga. 2019) (Equal Protection claims based on undue burden on the right to vote are reviewed under *Anderson-Burdick* instead of "traditional equal protection inquiry"); *Husted*, 697 F.3d at 430 (same); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 234 n. 13 (6th Cir. 2011) ("[W]e reject ORP's argument that there can be no violation of the Equal Protection Clause . . . without evidence of intentional discrimination."); *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018) (*Anderson-Burdick* considers disparate impact of facially nondiscriminatory laws and practices). State Defendants cite only *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019), but that case held the exact opposite of what they claim. *Id.* at 1319 ("To establish an undue burden on the right to vote under the *Anderson-Burdick* test, Plaintiffs need not demonstrate discriminatory intent[.]").

No Defendant disputes Plaintiffs' evidence of disparate impact. During the June Primary, the average minimum wait time was 51 minutes at polling places where minorities constituted more than 90% of active registered voters. ECF No. 93-61 at 3. But when whites constituted more than 90% of registered voters, the average wait time was approximately 6 minutes. *Id.* This is unacceptable, and Plaintiffs are likely to succeed on their Equal Protection claim.

7. Plaintiffs are likely to succeed on their substantive due process claim.

County Defendants, again, do not present any arguments regarding substantive due process, and State Defendants only assert the same argument made in response to the undue burden claim: that other methods of voting can somehow avoid a due process violation. Because this is not the case, and because exceptionally long wait times severely burden, if not completely disenfranchise, voters, the State's voting system is "fundamentally unfair" in violation of the Due Process Clause. *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012).

B. Plaintiffs will suffer irreparable harm without an injunction.

As another judge in this district recently observed, "[i]t is well-settled that an infringement on the fundamental right to vote amounts to an irreparable injury." *New Ga. Project*, 2020 WL 5200930, at *26 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). In a voting rights case, courts presume irreparable harm

because harms to the constitutional right to vote "cannot be undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987).

These constitutional injuries are hardly, as State Defendants charge, "remote and speculative," ECF No. 109 at 17-21, or, as County Defendants assert, a "daisy chain arising from 'life's vagaries.'" ECF No. 108 at 15 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008)). Georgia's history of long lines dates back decades and has continued through the most recent election, in which Georgia attained the dubious honor of now having the longest average wait times for voters anywhere in the entire country. *See* ECF No. 111, at 3-7. These long lines pre-date the pandemic by more than a decade. *See* ECF Nos. 93-2, 93-3. Although the pandemic exacerbated many of the problems, the issues causing long lines—*e.g.*, misallocation of voting equipment and supplies and improper training—are independent of it. *See* ECF No. 93-62 at 51-55. And the experience of Georgia voters in the June Primary (as well as Defendants' continued attempt to avoid responsibility for it) only amplifies the need for relief, it does not lessen it.

It is all but certain these lines will occur again without Court intervention. *See* ECF No. 93-61 at 65-67 (confirming long lines are likely to recur, given State's history of long lines and Defendants' inability or refusal to remedy the problem); ECF No. 93-62 at 42 (concluding if Henry County uses same machine allocation at

polls with similar numbers of voters assigned, the same problems *will* be repeated). (Indeed, they are already occurring as early voting begins). Supreme Court and Eleventh Circuit precedent establish that these "[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 v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984); *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (same).

State Defendants also argue that the Individual Plaintiffs have not established irreparable harm because they can avoid lines altogether if they simply vote absentee. ECF No. 109 at 18-20. But, as explained in Section III.A.5, above, that argument ignores both the facts and the law, including that many voters did not receive their absentee ballots in the June Primary.[13]

Organizational Plaintiffs will also suffer irreparable harm if an injunction does not issue.[14] To fulfill their missions of electing Democratic candidates,

[13] Defendants claim Plaintiffs can avoid long lines simply by voting early. ECF No. 109 at 15. But Georgia voters have encountered long lines during early voting, too, and this year, early voting turnout is likely to exceed expectations, as it has already in other states. *See* https://www.cnn.com/2020/09/18/politics/early-voting-minnesota-south-dakota-virginia-wyoming/index.html (last visited Sept. 19, 2020). Further, election officials consistently cite high levels of early voting as part of their surprise at election day turnout while failing to recognize Georgia's voting population grows as its number of polling places shrinks. Rodden Rpt., ECF No. 93-61 at 23-24, 49-50. This is not a one-off experience caused solely by the pandemic.

[14] Plaintiffs incorporate by reference the arguments they have raised regarding injury-in-fact. ECF No. 111 at 7-11.

Organizational Plaintiffs must divert significant resources to ensuring that voters stay in line to vote—resources that would otherwise be spent on other election-related activities. *See* ECF No. 93-60 ¶¶ 2, 17-18; ECF No. 93-63. ¶¶ 3, 10-11. Courts routinely find that the diversion of an organization's resources constitutes irreparable harm in voting-rights cases. *See Ga. Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1268 (N.D. Ga. 2018) (finding irreparable harm because "Plaintiffs' organizational missions, including registration and mobilization efforts, will continue to be frustrated and organization resources will be diverted."); *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1339 (S.D. Fla. 2006) (finding irreparable harm when organizations "significantly scaled back their voter registration operations and are losing valuable time … to add new registrants to Florida's voter rolls").[15]

When voters encounter hours-long lines to vote, the unmistakable conclusion is that the harm is irreparable. Voting should not require sacrificing jobs, school, child care costs, or one's health. *See* ECF No. 93-61, at 14. The wait time to vote

[15] Cases cited by Defendants do not support a contrary result. State Defendants rely on *Siegel v. Lepore*, but, that case, unlike this one, did not involve plaintiffs who had been "prevented from voting." 234 F.3d 1163, 1177 (11th Cir. 2000). And *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018), and *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377, at *7 (11th Cir. Sept. 3, 2020), are inapposite. *See* ECF No. 109, at 18. Those cases concerned standing, not the standard for granting a preliminary injunction.

should not cause disenfranchisement. It is a "basic truth that even one disenfranchised voter—let alone several thousand—is too many[.]" *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014).

C. The balance of the equities favors Plaintiffs.

The equities favor relief. Plaintiffs are asking for simple, manageable relief that can be implemented before the General Election. On the other hand, history shows that if Defendants do not make these changes, Plaintiffs, their members, and other voters *will* be burdened and disenfranchised by long lines.

Defendants complain that Plaintiffs are too late, but Plaintiffs have given Defendants the chance to resolve these issues on their own. The history of escalating long lines, culminating in the meltdown in the June Primary, warrants judicial intervention at this time.[16] Plaintiffs have diligently pursued this action since the June Primary (and in the face of many County Defendants' delay in providing key data needed for Plaintiffs' experts).[17]

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[16] A prior action regarding Georgia's long lines was dismissed as, in effect, being too early, with an invitation: "If, 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[.]" *Ga. Shift v. Gwinnett Cnty.*, No. 1:19-CV-01135-AT, 2020 WL 864938, at *6 (N.D. Ga. Feb. 12, 2020). That time is now.

[17] Defendants suggest that this case is like *Benisek v. Lamone*, 138 S. Ct. 1942 (2018), but there, plaintiffs waited more than three years after filing their complaint

Purcell v. Gonzalez, 549 U.S. 1 (2006), does not say otherwise, and the Court should decline Defendants' invitation to transform the case into a shield for unconstitutional voting restrictions in election years. *Purcell* concerns itself with last-minute election changes that threaten to sow widespread *voter confusion* that could result in voter disenfranchisement. *See id*. at 4. The relief Plaintiffs seek would do precisely the opposite, helping remedy the serious burden and disenfranchisement caused by the Defendants' perpetual refusal to address long lines.

Moreover, *Purcell* does not impose a black letter rule that federal courts may never issue orders that protect against disenfranchisement even right on top of an election. Indeed, the Supreme Court's decision in *RNC v. DNC* (on which State Defendants' rely) proves as much. There, in an order issued the *day before* the April 7, 2020 Wisconsin primary, the Supreme Court endorsed the revision of Wisconsin's election day receipt deadline to impose a postmark deadline. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020). Federal courts

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to move for a preliminary injunction. *Id*. at 1944. In any event, there is no requirement that voting rights plaintiffs bring suit as soon as they are aware of a constitutional violation. *Cf. Democratic Exec. Comm. of Fla.*, 915 F.3d at 1326 (plaintiff need not "search and destroy every conceivable potential unconstitutional deprivation, but could catch its breath, take stock of its resources, and study the result of its efforts"). Plaintiffs were right to ensure they had sufficient data from the counties to conclude that the causes of long lines were systemic, concrete, and well within the purview of this Court to redress before filing suit.

regularly hear and grant motions for temporary injunctions to protect voting rights in the weeks and months before an election and issue relief much closer to a pending election than requested here. *See, e.g.*, *Ga. Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (granting emergency injunction *four days* before the election to permit voting by certain voters ruled ineligible to vote by the Georgia Secretary of State); *Ga. State Conf. NAACP v. Georgia*, No. 1:17-cv-1397-TCB, 2017 WL 9435558, at *6 (N.D. Ga. May 4, 2017) (enjoining voter registration requirements and extending voter registration deadline approximately six weeks before election); *Democratic Nat'l Committee v. Bostelmann*, No. 20-cv-249, 2020 WL 5627186 (W.D. Wis. Sept. 21, 2020) (enjoining certain statutory deadlines for mail-in registration and absentee voting seven weeks before election); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 966 (D. Nev. 2016) (granting preliminary relief and ordering counties to open additional in-person voter registration and early voting locations approximately four weeks before election); *Fla. Democratic Party v. Detzner*, No. 16-CV-607-MW/CAS, 2016 WL 6090943, at *9 (N.D. Fla. Oct. 16, 2016) (requiring cure period for ballots with signature mismatches approximately three weeks before election); *League of Women Voters of N.C.*, 769 F.3d at 248–49 (enjoining in part omnibus election law approximately five weeks before election); *Bryanton v. Johnson*, 902 F. Supp. 2d 983, 1006 (E.D. Mich. 2012) (preliminarily

enjoining inclusion of a citizenship verification question on absentee ballot and voter registration applications approximately four weeks before election); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1377 (N.D. Ga. 2005) (preliminarily enjoining state's voter ID requirement approximately three weeks before election).

Contrary to Defendants' assertions, *Purcell* urged courts to take careful account of considerations unique to the election context before intervening, such as whether the change is likely to broadly confuse voters, undermine confidence in the election, or create insurmountable administrative burdens on election officials. *See Purcell*, 549 U.S. at 4. Defendants have not shown any of that applies here, and Plaintiffs' evidence demonstrates precisely the opposite, *see, e.g.*, ECF No. 93-61, at 15 ("[L]ong lines undermine voters' confidence in elections.").

Defendants also incorrectly argue that Plaintiffs' claims are barred by the doctrine of laches. But "laches serves as a bar only to the recovery of retrospective damages, not to prospective relief." *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1321 (11th Cir. 2008); *see also Env't Def. Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981) (finding "laches may not be used as a shield for future, independent violations of the law"). This includes when prospective relief is sought "in close temporal proximity to an election." *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1026 (N.D. Fla. 2018) *aff'd*

915 F.3d 1312 (11th Cir. 2019) (collecting cases).[18]

Finally, State Defendants also bizarrely argue that Plaintiffs are not entitled to relief in this case because the Democratic Party of Georgia (DPG) did not support a bill introduced by the Georgia Senate and supported by the Secretary that proposed changes to election administration. ECF No. 109, at 22-24. Setting aside that the DPG had substantive concerns about the bill, which is simply not relevant to this litigation, it ultimately did not proceed to passage by the Republican-dominated state legislature.[19] Ga. Gen. Assembly, SB 463, http://www.legis.ga.gov/Legislation/en-US/display/20192020/SB/463 (last visited Sept. 21, 2020). None of the Plaintiffs in this case have the lawmaking authority required to pass that bill—and this is neither the time nor the place for State Defendants to air their grievances about "Democratic

[18] Even if laches could apply, Defendants cannot satisfy its requirements. The Eleventh Circuit has recognized laches is an "extraordinary" remedy that only applies when the party invoking the defense can prove (1) the plaintiff unreasonably and inexcusably delayed, and (2) that delay resulted in material prejudice. *Letterese*, 533 F.3d at 1321. Defendants cannot show inexcusable delay. More fundamentally, none of the potential prejudices Defendants identify, *see* ECF No. 109 at 21-24, are a result of Plaintiffs bringing this suit later than Defendants preferred.

[19] DPG was by no means the only opponent to SB 463, which was referred to voting rights groups as the "anti-voting rights bill of 2020." https://www.ajc.com/news/state--regional-govt--politics/bill-add-georgia-precincts-faces-unexpected-opponent-voting-groups/CqngPZCnA9mSNBqQcRYyxO/ (last visited Sept. 22, 2020); *see also* https://www.commoncause.org/georgia/press-release/committee-urged-to-reject-amendment-pass-sb-463/ (last visited Sept. 22, 2020).

Senator[s]," ECF No. 109, at 23; "other Democratic political figures," *id.* at 22; and political organizations who are not present in this case, *id.* at 23.

D. The public interest favors Plaintiffs.

As demonstrated repeatedly over the last decade, Georgia voters in the Defendant Counties stand in inexcusable, excessively long lines to cast their ballots. Defendants refuse to acknowledge this problem or take even simple, straightforward steps to remedy it. Even when presented with a clear plan and scientifically sound solution from a well-respected expert like Dr. Yang, Defendants do nothing more than make excuses, minimize 8-hour lines as mere trifles, "vagaries," and minor "inconveniences," and continue to shift the blame. It's no wonder that Georgian voters' right to vote continues to be unconstitutionally burdened and disenfranchised. How could it not?

An injunction such as the one proposed by Plaintiffs would be easily implemented and would ensure that long lines no longer disenfranchise Georgia voters. This is always in the public interest. *Purcell*, 549 U.S. at 4 (noting the public has a "strong interest in exercising the fundamental political right to vote.").

III. CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Preliminary Injunction.

Dated: September 22, 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 22, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 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 22, 2020

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