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 STATE DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

For over a decade, Georgia voters have been forced to stand in hours-long lines to exercise their fundamental right to vote. Since at least 2008, those lines have been some of the longest in the country, with voters in the State's urban and minority communities disproportionately bearing that burden. In the face of this unconscionable violation of the Constitution's guarantee of Equal Protection, State Defendants seek to close the courthouse doors to even a hearing on the merits. Despite their broad statutory duty to ensure that the State's election laws are administered uniformly, State Defendants deny any responsibility, urging that all blame must lie with individual counties. And they ask the Court to dismiss this case on the theory that federal courts have no role to play in ensuring that the State's election procedures comport with the Constitution. They are wrong on both counts, and the Court should deny the motion.

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. State Defendants are proper parties.

State Defendants are proper parties to this lawsuit. Just weeks ago, another judge in this district rejected a similar argument, recognizing that State Defendants "have broad powers to ensure the uniformity in the administration of election laws," *New Ga. Project v. Raffensperger*, No. 1:20-CV-01986-ELR, 2020 WL 5200930, at *8, n.16 (N.D. Ga. Aug. 31, 2020). That alone makes them proper defendants here. Despite having the power to do so, State Defendants have perpetually failed to ensure that voters in the subject Counties do not stand in lines significantly longer than voters in other Georgia counties. Compl. ¶¶ 26-36.

Indeed, State Defendants concede that, between them, *they* have the responsibility to oversee elections, promulgate regulations, and train the county superintendents—*not* County Defendants. ECF 106-1 at 7-9; *see also* Compl. ¶¶ 17-18. Plaintiffs' allegations are directly connected to State Defendants admitted powers: among other things, Plaintiffs allege that the long lines that Georgia voters have increasingly faced are the result of, at least in part, State Defendants' failure to

provide sufficient training to county superintendents and to promulgate standards and policies for using emergency backup supplies (such as those promulgated under Ga. Comp. R. & Regs. 183-1-12-.18) consistent with their powers under O.C.G.A. §§ 21-2-31 and 21-2-50. *See* Compl. ¶¶ 33, 40, 98, 127, 141, 155, 166, 173, 180, 188, 200, 207.

Jacobson v. Fla. Sec'y of State, No. 19-14522, slip op. at 37 (11th Cir. Sept. 3, 2020), does not require a different result. As another judge in this district recently held, the Eleventh Circuit's decision regarding redressability in *Jacobson* is distinguishable on precisely this point due to critical differences between Georgia and Florida law. In *New Georgia Project v. Raffensperger*, the court correctly found that the Secretary was a proper defendant in voting rights litigation, because, as noted above, he has the obligation to ensure uniformity in administration of election laws. 2020 WL 5200930, at *8 (citations omitted).[1] Similarly, in *Grizzle v. Kemp* the Eleventh Circuit found the Secretary to be a proper party in an election case because "the Secretary of State is, by statute, a member and the chairperson of the State Election Board. Ga. Code Ann. § 21–2–30 (a) & (d). Under Georgia law, '[t]he State Election Board is vested with the power to issue orders ... directing compliance with

[1] While *New Georgia Project* relied in the opinion published April 29, 2020, which has since been replaced by an opinion dated September 3, 2020, nothing in the new opinion changes this analysis.

[Chapter 2 of Georgia's election code] or prohibiting the actual or threatened commission of any conduct constituting a violation [of Chapter 2] ....' § 21–2–33.1(a)." *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011). Because State Defendants have the power to address the underlying causes of long voting lines in Georgia, they are accordingly a proper party to this suit.

B. Plaintiffs have alleged standing.

As set forth in Plaintiffs' opposition to County Defendants' Motion to Dismiss, and incorporated herein, Plaintiffs more than satisfy Article III standing. Plaintiffs' Opposition to County Defendants' Motion to Dismiss at III.A.

C. Plaintiffs have alleged redressability.

State Defendants, citing *Jacobson*, argue that Plaintiffs seek relief that is not redressable because they have not sued all 159 of Georgia's counties. The argument fails for several reasons. First, *Jacobson* most certainly did not hold that a voting rights plaintiff needs to sue every county in the state to obtain relief. It simply held that under Florida's particular elections regime, and specifically its assignment of roles between the Secretary of State and county elections officials as it related to the order of candidates on the ballot, the court lacked Article III jurisdiction because any injuries caused by ballot order were not traceable to the Secretary or redressable by a judgment against her under Florida law because she did not enforce the challenged

law, which is instead enforced by county election officials. *Jacobson*, slip op. at 11. That is a far cry from the situation at bar. Another judge in this district recently rejected a remarkably similar argument noting important differences between Georgia and Florida law. *New Georgia Project*, 2020 WL 5200930, at * 8 n.16.

Moreover, State Defendants ignore that Plaintiffs' claims are not just that large segments of Georgia's voting population have repeatedly experienced unjustifiably long lines to exercise their right to vote, but that the voters in certain counties have suffered that fate *disparately*. Thus, State Defendants' newfound concern about the disparate experiences of voters encountering long lines across counties actually supports Plaintiffs' claims—it does not provide reason to dismiss their Complaint. *See* Mot. to Dismiss at 11-12 (asserting that injunctive relief issued against only certain counties would result in a "patchwork of election administration" in violation of the Equal Protection Clause). Even more importantly, State Defendants fail to explain how remedying long lines in the Defendant Counties—which represent the counties in which Georgia voters have encountered the most serious issues with long lines and where voters are disparately burdened—will impose burdens on the right to vote for voters in non-party counties where voters have not historically had to wait hours in order to cast their ballots.

The Equal Protection Clause is violated by the disparate burdens Georgia voters currently face in exercising their right to vote. Voters who live in Defendant Counties have to wait in extremely long lines to cast their vote, oftentimes resulting in disenfranchisement, while voters in the State's more suburban, rural and white counties encounter little to no wait times to vote. Compl., ¶¶ 213-14. Alleviating the severe burdens faced by voters who live in the Defendant Counties, many of whom are minorities, *see* Compl., ¶¶ 4, 20, 58-59, would not violate the right to equal protection of voters in the State's suburban, rural, and white counties, who do not face the same burdens. *See, e.g.*, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (equal protection mandates that "all persons similarly situated should be treated alike").

And injunctive relief entered against State Defendants can and should be applied on a statewide level. In other words, if State Defendants are indeed concerned about "patchwork" injunctive relief, they have the power to implement the same reforms statewide if needed through their broad powers to ensure uniformity. *See* Section III.A, *supra*. That State Defendants are not inclined to do so hardly makes Plaintiffs' injuries in the Defendant Counties *non-redressable* by State Defendants for Article III purposes.

D. Plaintiffs' claims are justiciable.

For the reasons set forth in Plaintiffs' Opposition to County Defendants' Motion to Dismiss, Plaintiffs' claims do not fall within the political question doctrine. *See* Pls.' Opp. to County Defs.' Mot. to Dismiss, at 19–23.

Nor does the decision in *Georgia Shift* control. Unlike the Plaintiffs here, the *Georgia Shift* plaintiffs broadly framed their request for injunctive relief as requiring the defendants in that case to "take all necessary actions to carry out their functions so as not to impinge on voters' federal constitutional rights." *Georgia Shift v. Gwinnett Cnty.*, No. 1:19-cv-01135-AT, 2020 WL 864938 at *5 (N.D. Ga. Feb. 12, 2020). But the allegations in the Complaint in this case make it clear that Plaintiffs request specific, not generalized relief, including actions related to training and use of backup emergency supplies—all concrete matters that State Defendants *concede* are specifically within their control. Compl. at ¶¶ 17-18, p. 79, ¶¶ a-b, *see also* Section III.A, *supra*, Mot. to Dismiss at 7-8. Moreover, as discussed above, it is State Defendants' very job to ensure uniformity in Georgia's election, which Plaintiffs concretely allege they have failed to do by allowing lines to increase year after year in the Defendant Counties. Compl., ¶¶ 17-18, Section III.A, *supra*, *see also New Georgia Project*, 2020 WL 5200930, at *8 (Secretary and State Election Board "have the ability to fully redress Plaintiffs' injuries statewide"). This level of

specificity is more than enough to survive a motion to dismiss. *Fair Fight Action v. Raffensperger*, 413 F. Supp. 3d 1251, 1280 (N.D. Ga. 2019); *see also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008) (allegations that Ohio's election system, including long lines, malfunctioning polling equipment, and improperly trained poll workers, burdened the right to vote, were sufficient to survive motion to dismiss).

State Defendants' suggestion that an injunction cannot be crafted here because the precise relief sought in the Complaint is not found in the U.S. Constitution is without basis. Mot. to Dismiss at 14-16. 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 number of voting machines and related equipment designated for 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).

Indeed, courts grant injunctive relief all the time in constitutional challenges, notwithstanding the lack of explicit constitutional text outlining the precise contours of the remedial injunctive relief.[2]

E. *Burford* Abstention does not apply.

State Defendants incorrectly argue that the Court should abstain under *Burford* abstention, a basis for abstention that is so extraordinary that the Eleventh Circuit and courts in the Northern District of Georgia have all been consistently and decidedly hesitant to deny jurisdiction on its invocation. In fact, after diligent search, Plaintiffs are unable to identify even *a single case* in which the Eleventh Circuit has decided in favor of *Burford* abstention.[3]

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[2] *Hoots v. Com. of Pa.*, 703 F.2d 722, 725–26 (3d Cir. 1983) ("Injunctions issued to enforce school desegregation orders are part of the equity powers of federal courts, and the scope of these remedial powers is broad."); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 950 (M.D.N.C. 2017) ("The appropriate remedy for a law that violates the one-person, one-vote principle is an injunction against elections conducted under the Act's unconstitutional redistricting."); *Rubin v. Young*, 373 F. Supp. 3d 1347, 1354 (N.D. Ga. 2019) (granting preliminary injunction enforcing First Amendment by enjoining law enforcement officers from banning buttons that had profanity on them in publicly accessible areas of Capitol Square property).

[3] Plaintiffs could find only one case out of 23—an inapposite telephone utility case from 1986, *Coin Call, Inc. v. S. Bell Tel. & Tel. Co.*, 636 F. Supp. 608 (N.D. Ga. 1986)—in which the Northern District of Georgia partially granted *Burford* abstention. Rather, when considering the issue, the Eleventh Circuit and this district have almost always found it was inappropriate. *See, e.g.*, *Rindley v. Gallagher*, 929

When properly invoked, *Burford* abstention represents an "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and is only appropriate where "adjudication in a federal forum would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Siegel v. LePore*, 234 F.3d 1163, 1173 (11th Cir. 2000). In assessing whether to abstain under *Burford*, a court must consider: "(1) the federal importance of the constitutional challenge;" (2) "the 'intricacy' and importance of the state's regulatory scheme"; (3) whether the state has created a centralized system of judicial review allowing its courts to develop expertise in interpreting the scheme and the industry; (4) the speed and adequacy of state court review; and (5) the likelihood of "[d]elay, misunderstanding of local law, and needless federal conflict

F.2d 1552, 1556 (11th Cir. 1991) (overturning Florida district court's decision to abstain under *Burford* and noting that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy"); *Siegel*, 234 F.3d at 1173 (rejecting *Burford* abstention and noting that "[t]he case before us does not threaten to undermine all or a substantial part of Florida's process of conducting elections and resolving election disputes"); *S. Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 530 (11th Cir. 1983) (finding district court abused its discretion by granting *Burford* abstention); *Nasser v. City of Homewood*, 671 F.2d 432, 440 (11th Cir. 1982) (rejecting *Burford* abstention and finding that (1) the state had not concentrated decision-making on zoning matters in a particular or centralized forum, and (2) the federal issues in the case were easily separable from any state questions requiring the special competence of state courts).

with the state policy." *Moore, ex rel. Moore v. Medows*, No. CIVA 107-CV-631-TWT, 2007 WL 1876017, at *2 (N.D. Ga. June 28, 2007).

Every single one of these factors weighs in favor of *not* abstaining under *Burford* in this case. For instance, the federal importance of the constitutional challenge at issue here could not be clearer. The Supreme Court has declared that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In *Williams v. Rhodes*, the Supreme Court reiterated that the right to vote "rank[s] among our most precious freedoms." 393 U.S. 23, 30 (1968).[4]

Tellingly, State Defendants ignore *all* but one of the *Burford* factors and focus solely on whether there is an alternative state-court pathway for relief. ECF 106-1 at 17. State Defendants' failure to explain why the other factors favor abstention is reason alone to deny its request, but even on this sole factor, they cannot meet their burden. Specifically, State Defendants argue that the Court should abstain because

[4] As another example, the "speed" of the SEB complaint review process hardly weighs in its favor. At the most recent SEB meeting, the Board considered cases that were first filed as far back as 2013. *See* Agenda, State Election Board Meeting at 2-5, *available at* https://sos.ga.gov/admin/files/Agenda%20-%20September%2010,%202020.pdf (last visited Sept. 15, 2020).

Georgia provides a mechanism for making election complaints through the State Election Board ("SEB"), but this argument falls apart upon even the most cursory inspection. Georgia law is clear: the SEB has the power "[t]o investigate, or authorize the Secretary of State to investigate, when necessary or advisable the administration of primary and election laws and frauds and irregularities in primaries and elections and to report violations of the primary and election laws either to the Attorney General or the appropriate district attorney," but that same provision explicitly states that "[n]othing in this paragraph shall be so construed as to require any complaining party to request an investigation by the board before such party might proceed to seek any other remedy available to that party under this chapter or any other provision of law." Ga. Code Ann. § 21-2-31. Further, Plaintiffs raise *constitutional* challenges, not violations of the primary and election laws. But in any event, the fact that complaints regarding elections administration may be brought to the SEB, and the SEB may investigate and refer violations of law to Georgia's prosecuting attorneys does not constitute a "centralized system of judicial review allowing [the state's] courts to develop expertise in interpreting the scheme and the industry," so as to provide the basis for *Burford* abstention. *Moore, ex rel. Moore*, 2007 WL 1876017, at *2. Indeed, even State Defendants admit that, under Georgia

law, filing a complaint to the SEB "is not a prerequisite to filing suit." ECF 106-1 at 17.

In such cases, where there was a clear lack of any "centralized system of judicial review," courts have found this factor—the sole factor on which State Defendants hang their argument—to weigh *against Burford* abstention, not for it. *See, e.g.*, *Moore, ex rel. Moore*, 2007 WL 1876017, at *3 (finding *Burford* abstention inappropriate because, *inter alia*, there was "no central state court provided with sole authority to review all [claims in question]" and that, "[t]o the contrary . . . . the Plaintiff could have challenged that decision in *either* Fulton County Superior Court *or* in her home county superior court") (emphasis added); *see also B.J. v. Gwinnett Cnty. Sch. Dist.*, No. 1:08-CV-1539-TCB, 2008 WL 11292876, at *4 (N.D. Ga. Aug. 19, 2008) (finding regulatory scheme was not too sophisticated to warrant *Burford* abstention and that state had not established a centralized system of review); *Brogdon ex rel. Cline v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1344 (N.D. Ga. 2000) ("In sum, the state grievance procedure is not the sort of comprehensive regulatory system that would warrant application of *Burford* abstention.").

F. Plaintiffs have stated claims for Undue Burden on the Right to Vote, Substantive Due Process, and Equal Protection.

1. Undue Burden on the Right to Vote

State Defendants' argument that Plaintiffs have not sufficiently alleged an undue burden on the right to vote misstates the law and ignores the ample facts pled in the Complaint. *See* Mot. to Dismiss at 18-21. Under *Anderson-Burdick*, a court considering such a challenge must carefully balance the character and magnitude of injury to the constitutional rights that the plaintiff seeks to vindicate against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celbrezze*, 460 U.S. 780, 789 (1983)). Where plaintiffs have plausibly alleged that the challenged practice imposes a burden on voters, the allegations are sufficient to survive a motion to dismiss. *League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1288 (N.D. Fla. 2018) ("It is sufficient for a 12(b)(6) motion that Plaintiffs have alleged [that the challenged laws] have burdened their voting rights."); *see also Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 3077047, at *5 (W.D. Wis. June 10, 2020); *see also Miller v. Doe*, 422 F. Supp. 3d 1176, 1185-86 (W.D. Tex. 2019) (refusing to dismiss claim subject to *Anderson-Burdick* test where plaintiffs alleged ballot access

provisions were unconstitutional); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008).

Plaintiffs allege that, because of Defendants' failures in election administration, Georgia voters waited up to eight hours to vote in the June Primary, sometimes waiting until early the next morning to cast their ballot, while other voters were disenfranchised because of the long lines. *See e.g.*, Compl., ¶¶ 12, 47, 78, 125, 213. Plaintiffs also allege that long lines have been a problem in the Defendants Counties in Georgia for *years*, steadily increasing until becoming the longest in the country. Compl., ¶¶ 20-50. State Defendants dismiss these extraordinary long waits as "nominal" and "incidental." Mot. to Dismiss at 19. But nothing could be further from the case—or perhaps more to the point, further from the *specific allegations of the Complaint*. Plaintiffs' allege that these long lines impose severe burdens on voters, including widespread disenfranchisement and disparate burdens on minority voters. *See e.g.* Compl., ¶¶ 51-62. These allegations are specific, detailed, must be taken as true at this stage in the proceedings, and more than adequately state a claim. *See* Section III.B, *supra*.

State Defendants' argument on causation is similarly unavailing. The Complaint details specific failures in election administration pursuant to the State Defendants' duty to administer uniform elections and other statutory obligations.

See Section III.A, *supra*, s*ee also* Compl. ¶¶ 4, 20, 25. Plaintiffs do not ask that State Defendants "exceed" statutory requirements but, rather, that they actually meet them by, for example, providing required training on voting machines, *see* Compl. ¶ 6, 20, 209, and promulgating uniform standards for use of emergency backup materials, *see* Compl., ¶¶ 200, 207. And, State Defendants willfully ignore that the Complaint details *years* of their failures—not just one bad election caused by COVID-19. Compl., ¶¶ 20-50. Even where COVID-19 is an exacerbating factor to election administration difficulties, State Defendants cannot simply throw up their hands and avoid their responsibility to oversee and ensure uniform elections throughout the State, so that voters in the Defendant Counties do not stand in lines for hours longer than voters in Georgia's other 150 counties. Compl., ¶ 213. And this is especially true for the upcoming November Election, which will take place during the COVID-19 pandemic and be subject to these same "exacerbating" factors.

The attitude evidenced by State Defendants' arguments in their Motion—including that hours-long lines to vote do not harm voters, that the State's chief elections officials bear no responsibility for these routine and serious failures in elections administration, and that these problems, despite having persisted for years, are all connected to the current pandemic—only serves to demonstrate why relief from this Court is so sorely needed. Plaintiffs' Complaint far exceeds "a short and

plain statement of the claim showing that the pleader is entitled to relief" and clearly is sufficient to survive a motion to dismiss. *Brunner*, 548 F.3d at 475 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

State Defendants' reliance on *Georgia Shift* is misplaced.[5] Plaintiffs there only complained about one election in 2018, not a historical problem, and their complaint largely centered on voting machines which were on the verge of being replaced. *Georgia Shift*, 2020 WL 864938, at *1. Moreover, unlike there, Plaintiffs here have identified specific issues that cause long lines and seek injunctive relief that is narrowly tailored to redressing those precise issues. *See* Section III.D, *supra*. Importantly, the court in *Georgia Shift* 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.

[5] The other cases they cite are also inapposite. *See Coalition for Good Governance v. Raffensperger*, No. 1:20-cv-1677-TCB, 2020 WL 2509092 at *2 (N.D. Ga. May 14, 2020) (district court assumed, without deciding, that the plaintiffs had standing and instead based its ruling on political question doctrine); *Swanson v. Pitt*, 330 F. Supp. 2d 1269 (M.D. Ala. 2004) (decided on summary judgment and did not include any analysis under *Anderson-Burdick*).

Finally, and fatally, State Defendants have not identified any state interest that purportedly justifies their repeated failures to remedy long lines in the Defendant Counties, Mot. to Dismiss at 22. Circuit courts across the country have reversed the dismissal of *Anderson-Burdick* claims before the evidentiary record was developed. *See, e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) ("[W]ithout any factual record at this stage, we cannot say that the Secretary's justifications outweigh the constitutional burdens on [plaintiff] as a matter of law."); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (explaining, in reversing lower court's dismissal, that while plaintiffs offered little evidence about the burden that election law imposed, "[f]or our initial purposes, it is important only that there is at least some burden on the voter-plaintiffs' rights"); *Wood v. Meadows*, 117 F.3d 770, 776 (4th Cir. 1997); *Duke v. Cleland*, 5 F.3d 1399, 1405-06 & n.6 (11th Cir. 1993) (noting it was "impossible for [the Court] to undertake the proper" *Anderson-Burdick* analysis without a record).

2. Substantive Due Process

State Defendants appear to suggest that a substantive due process claim in the election context would constitute an "expansion" of the "concept" of substantive due process. ECF 106-1 at 23. This argument is without merit. As courts have recognized, the right to vote is fundamental and protected by the Due Process Clause,

and undue burdens on that right form a sufficient basis for a substantive due process claim. *See*, *e.g.*, *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (a denial of substantive due process occurs if an election is "conducted in a manner that is fundamentally unfair"); *see also Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (finding due process violation in context of an election); *Burton v. State of Ga.*, 953 F.2d 1266 (11th Cir. 1992) (analyzing whether ballot language rules constituted due process violation). State Defendants, on the other hand, cite no cases for their assertion.

A substantive due process claim is more than supported by Plaintiffs' allegations. The fact that wait times in Georgia have increased year after year, voters in Georgia face the longest average wait times to vote in the country, and that many voters in the June Primary waited up to *eight hours* to vote or were entirely *disenfranchised* because of excessive waiting lines is absolutely "arbitrary or conscience shocking in a constitutional sense," *Swanson v. Pitt*, 330 F. Supp. 2d 1269, 1278 (M.D. Ala. 2004), as is the disparity between minority voters and white voters. Compl. ¶ 58. "The Due Process Clause protects against extraordinary voting restrictions that render the voting system 'fundamentally unfair.'" *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012). Lines faced by voters

in the Defendant Counties are nothing short of extraordinary restrictions not faced by voters in other counties or across the country.

3. Equal Protection

Count III states a claim under the Equal Protection Clause, which prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. It requires that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause's protections extend to voting: "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). "When a state adopts an electoral system, the Equal Protection Clause . . . guarantees qualified voters a substantive right to participate equally with other qualified voters in the electoral process." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1185 (11th Cir. 2008) (citations omitted). By failing to remedy the long lines in the Defendant Counties, State Defendants have denied residents of those counties the equal right to vote, and their arguments do not provide a basis for dismissal.

First, and perhaps most obviously, the standards that Plaintiffs propose would not create "disparate treatment" between Georgia's counties. *See* Section III.C,

supra. Voters in suburban, white counties, who are not presently forced to stand in long lines to cast their ballots, would not be burdened by requiring State Defendants to take action to protect minority and urban voters from repeatedly facing long and burdensome lines in the Defendant Counties.

Second, State Defendants have cited no authority requiring a plaintiff to allege "intentional discrimination," and another judge in this district has recently rejected that very argument.[6] *Curling v. Raffensperger*, 403 F. Supp. 3d 1311, 1323 (N.D. Ga. 2019); *id.* at 1338 (rejecting similar argument that plaintiffs failed to state an Equal Protection claim in part because they had not "allege[d] they have been the victims of intentional discrimination."). A claim will lie under the Equal Protection Clause "[w]hen a state accords arbitrary and disparate treatment to voters, those voters are deprived of their constitutional rights to due process and equal protection." *Id.* at 1342 (quoting *Bush*, 531 U.S. at 107); *see also Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 234 n.13 (6th Cir. 2011) ("[W]e reject ORP's argument that

[6] Instead, State Defendants rely solely on a dissenting opinion in a case that ultimately affirmed that "arbitrary and disparate treatment. . . violate[s] the Equal Protection Clause," with no need for intentional discrimination. State Br., ECF No. 106-1, at 24 (citing *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1335 (11th Cir. 2019) (Tjoflat, J., dissenting); *id.* at 1341 (quoting *Bush*, 531 U.S. at 104–05).

there can be no violation of the Equal Protection Clause here without evidence of intentional discrimination.").

Courts have repeatedly affirmed this principle in voting rights cases arising under the Equal Protection Clause. *Wexler v. Anderson*, 452 F.3d 1226, 1231–32 (11th Cir. 2006) (finding a non-uniform voting practice that makes it "less likely" a person in one county will "cast an effective vote" than a voter in another county is a question "of constitutional dimension"); *Ne. Ohio Coal.*, 696 F.3d at 598 (plaintiff may state equal protection claim by alleging lack of statewide standards results in a system that deprives citizens of right to vote based on where they live); *Stewart v. Blackwell*, 444 F.3d 843, 876-77 (6th Cir. 2006) (allegations of disproportionate use of unreliable voting equipment among counties stated equal protection violation), *superseded as moot*, 473 F.3d 692 (6th Cir. 2007) (case mooted after Ohio agreed to stop using the unreliable equipment); *Common Cause S. Christian Leadership Conf. of Greater L.A. v. Jones*, 213 F. Supp. 2d 1106, 1109 (C.D. Cal. 2001) (allegations that some counties adopted more reliable voting procedures than others stated equal protection claim for "unreasonable and discriminatory" treatment).

Third, State Defendants mischaracterize Plaintiffs' allegations. Plaintiffs have alleged that "State Defendants' continued failure to prevent or remedy extremely long lines at polling locations within the Georgia Counties as compared to other

counties in Georgia places widely different burdens on voters across the State." Compl., at ¶ 213. *See also id.* ¶¶ 40, 98, 114, 123, 137, 141, 155, 166 (alleging denial of Equal Protection based on unequal allocation of resources); *Brunner*, 548 F.3d at 477–78 (allegations of disproportionate allocation of voting machines among counties stated equal protection claim; "[v]oting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others.").

As the Eleventh Circuit has held, after granting the right to vote, a state "must also ensure that qualified voters are given an equal opportunity to participate in elections." *Browning*, 522 F.3d at 1185. By failing in their duty to ensure a uniform voting system across the state, State Defendants have denied residents of the Defendant Counties the "minimum procedures necessary to protect the fundamental right of each voter." *Bush*, 531 U.S. at 109. They have neglected to provide "uniform rules" and "specific standards" to ensure fair and equal "treatment" of voters. *Id.* at 106-07. This disparate treatment violates the Equal Protection Clause.

State Defendants are also incorrect to suggest that Count III fails because Plaintiffs "challenge no law at all." Mot. to Dismiss at 24. The Equal Protection Clause does not require voting-rights plaintiffs to challenge specific statutes or regulations that "are applicable in different places." Mot. to Dismiss at 24. Indeed,

Bush v. Gore itself did not invalidate a specific unconstitutional statute; that case concerned the unconstitutionality of a state's "standards," *Bush*, 531 U.S. at 134, "procedures," *id.* at 105, "rules," *id.* at 106; and the "treatment" it afforded to voters, *id.* at 105. And *Gamza v. Aguirre*, which State Defendants cite for support, contains no such restriction either: that case recognized that "patterns of state action that systematically deny equality in voting" could form the basis for an Equal Protection challenge. 619 F.2d 449, 453 (5th Cir. 1980).

Plaintiffs have alleged a longstanding pattern in the Defendant Counties of arbitrary treatment, depending on where voters happen to reside—including the inadequate provision of voting machines, Compl., at ¶¶ 13, 33; poor training of poll workers, *id.* at ¶ 39, 41, 86; "irresponsible polling place consolidation, chronic understaffing of polling locations, inadequate poll worker training, voting equipment failures, lack of technical support, and insufficient back-up supplies such as emergency paper ballots when machines malfunction," *id.* at ¶ 86. Plaintiffs allege a deprivation based on "systematic and ongoing failure" to guarantee equal access to the franchise, *id.* at ¶ 200, in a trend that has lasted "for years," *id.* at ¶ 22, 65. This systematic failure to ensure the equality of the franchise gives rise to an Equal Protection violation.

IV. CONCLUSION

For all of these reasons, Plaintiffs respectfully request that the Court deny the State 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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