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

BLACK VOTERS MATTER FUND, et al., Plaintiffs, vs. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia, et al., Defendants.	Civil Action No. 1:20-cv-1489-AT

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

This Court should grant Plaintiffs' motion for class certification to help foreclose the possibility of hundreds if not thousands of lawsuits raising identical challenges to the postage requirement all across the state. Part I addresses Defendants' procedural arguments and indicates where the parties agree and disagree. Part II addresses the BOR Class, Part III addresses the Voter Class, and Part IV addresses the Voter Subclass.

I. DEFENDANTS' PROCEDURAL ARGUMENTS

First, both DeKalb[1] and the Secretary argue that certification of a plaintiff class or plaintiff subclass is unnecessary because full relief can be provided without such certification. *See* Doc. 114 at 17; Doc. 115 at 11-12. Plaintiffs agree. Doc. 110-1 at 2-3. Plaintiffs nonetheless seek certification of the plaintiff class and subclass because the "benefits" are not "insubstantial." *M.R. v. Bd. of Sch. Comm'rs of Mobile Cty.*, 286 F.R.D. 510, 519 (S.D. Ala. 2012). As argued in Plaintiffs' recent brief, class certification should be granted should this Court, or a later court, find that BVM lacks standing.[2] Doc. 122 at 9.

Second, Plaintiffs do not oppose the Secretary's request that this Court resolve standing before determining class certification. Doc. 115 at 5-10.

Third, DeKalb asks this Court to permit DeKalb to "conduct discovery on the issue of the proposed class representatives' typicality of claims and defenses

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[1] "DeKalb" refers to Defendants DeKalb County Board of Registration & Elections, and Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, Baoky N. Vu, and Erica Hamilton, in their official capacities.

[2] And a defendant class is necessary should discovery reveal that the Secretary has no power to cause the postage requirement to be lifted. *Cf. Coleman v. McLaren*, 98 F.R.D. 638, 648 (N.D. Ill. 1983) (in some cases, "an action against the defendant class is simply a procedural alternative to challenging the constitutionality of a statute by suit against the state directly" (citation omitted)).

and adequacy of representation issue," should this Court not "deny Plaintiffs' Motion immediately." Doc. 114 at 19. Having conferred with DeKalb on this issue, Plaintiffs do not oppose allowing DeKalb to first conduct discovery on typicality and adequacy (i.e., on Plaintiffs' claims) in a reasonably prompt manner (i.e., that does not change the discovery deadline), and Plaintiffs will start with their discovery on the named Defendants only.

II. THIS COURT SHOULD CERTIFY A DEFENDANT CLASS OF COUNTY ELECTIONS OFFICIALS

DeKalb opposes certification of the BOR class, arguing that the proposed defendant class allegedly: (A) is not ascertainable; (B) does not satisfy typicality; (C) does not satisfy adequacy; and (D) does not satisfy Rule 23(b)'s requirements. Doc. 114 at 7-15. Each of DeKalb's arguments fail.

A. The BOR Class is Ascertainable and Includes Those Potentially Responsible for Imposing the Postage Requirement

DeKalb argues that the defendant class is not ascertainable because it fails to include "election superintendents" and "boards of elections." Doc. 114 at 7-8. But boards of registrars and absentee ballot clerks also have the power to procure supplies for absentee ballots. *See* O.C.G.A. § 21-2-384(a)(1) ("Envelopes and other supplies as required by this article ["Article 10: Absentee Voting"] may be ordered by the superintendent, the board of registrars, or the absentee ballot clerk for use in

the primary or election."). And the "election director" is the actual full-time employee that carries out these functions. *See* Doc. 110-1 at 3 n.1. Should this Court agree with DeKalb, Plaintiffs propose adding "boards of elections" and "election superintendents" to the list of those included in the class.

B. The BOR Class Satisfies Typicality Because Plaintiffs' Claims Are the Same Regardless of Each County's Financial Circumstances

DeKalb argues that the BOR Class does not satisfy typicality for purposes of the *Anderson-Burdick* claim, because different counties may have different fiscal or administrative justifications for the postage requirement. Doc. 114 at 9.

But Plaintiffs' legal theory does not depend on such differences. Plaintiffs argue that *any* financial justification for charging voters money to cover the government's stamp costs on a near one-to-one basis is categorically illegitimate. Doc. 84 at 18-21, Doc. 57 at 6. Otherwise, any county could violate the constitution just by manipulating the budget. DeKalb cites *Coleman v. McLaren*, 98 F.R.D. 638, 648 (N.D. Ill. 1983), but that case involved a lawsuit challenging the "particular manner in which each county . . . exercised its delegated power." *Id.*

at 649. Here, Plaintiffs challenge the exact same postage requirement being implemented in all counties. Thus, DeKalb's defenses are typical.[3]

C. The BOR Class Satisfies Adequacy Because There Is No Substantial Conflict of Interest

DeKalb next argues that the proposed defendant class does not satisfy adequacy because allegedly "the interests of each county in providing or not prepaid postage for absentee ballot mailings likely varies significantly." Doc. 114 at 11. Thus, DeKalb concludes, there are "substantial conflicts of interest." *Id.* at 10-11.

The conflict of interest test examines whether class members have "critical goal[s]" that "tug[] against" one another. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997). "[T]he existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350

[3] DeKalb fails to meaningfully distinguish the cases on which Plaintiffs rely. *See* Doc. 114 at 9-10. DeKalb correctly notes that *Wells v. HBO & Co.*, No. 87CV657JTC, 1991 WL 131177 (N.D. Ga. Apr. 24, 1991), involved a plaintiff class and not a defendant class, but both types of classes are governed by the same Rule 23. As for *Strawser v. Strange*, 307 F.R.D. 604, 612-13 (S.D. Ala. 2015), DeKalb does not dispute Plaintiffs' assertion that the postage requirement is being implemented statewide. *Harris v. Graddick*, 593 F. Supp. 128, 137 (M.D. Ala. 1984), also does not help DeKalb because issuing notice to absent class members does not undermine the need for class certification.

F.3d 1181, 1189 (11th Cir. 2003) (citation omitted). "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Id.* The conflict must be "more than merely speculative or hypothetical." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) (citation omitted).

DeKalb alleges conflict between counties who like the postage requirement and counties who don't, but that is entirely "speculative" because DeKalb provides no evidence of counties who want to lift the postage requirement. But even if such counties existed there is no conflict because each county's interests are limited to the respective county. Whether one county imposes or lifts the postage requirement has no direct impact on another county's decision to impose or lift the postage requirement. Thus, if there is any conflict at all, it isn't "substantial."[4]

[4] DeKalb relies on several cases, Doc. 114 at 11-12, all of which are distinguishable. In *Brown v. Kelly*, 609 F.3d 467, 480 (2d Cir. 2010), other class members "d[id] not share an interest" in the representatives' issues. But here, Plaintiffs' class-based attack is that *any* financial justification is illegitimate, so all counties have the same defense that financial justifications are indeed legitimate. In *Vargas v. Calabrese*, 634 F. Supp. 910, 920-21 (D.N.J. 1986), and *Coleman* , 98 F.R.D. at 648, other class members denied or would deny wrongdoing. There is no evidence here of any county not imposing the postage requirement, and the evidence is to the contrary. Doc. 75 at 92:13-16; Doc. 54-3; Doc. 50; Doc. 2-4. Furthermore, *Valley Drug Co.*, 350 F.3d at 1195, is inapplicable because an injunction in Plaintiffs' favor is unlikely to harm the hypothetical county who has wanted to lift the postage requirement all along. And *National Broadcasting Co. v.*

D. The BOR Class Satisfies Rule 23(b)(1)(A) and (b)(1)(B) Because the Secretary is Inextricably Implicated in Any Postage Lawsuit

Lastly, DeKalb argues that the proposed defendant class allegedly does not satisfy the requirements of Rule 23(b)(1)(A) or (b)(1)(B). Doc. 114 at 13-15. Yet DeKalb does not dispute that the Secretary is inextricably implicated in any postage lawsuit, *see* Doc. 110-1 at 11-13, which is the critical fact justifying certification under Rule 23(b)(1)(A) or (b)(1)(B). DeKalb's argument fails for that reason alone.

DeKalb argues that Plaintiffs Gordon and Reid will not be subject to incompatible standards, but that argument is inapposite if this Court certifies the plaintiff class, whose members across the state have standing to challenge the actions of their respective counties. As one of the cases cited by DeKalb explains, it is not unusual for a court to simultaneously certify a defendant class and a plaintiff class where defendant government officials are "'enforcing or uniformly acting in accordance with . . . [a] common rule or practice of statewide application, which is alleged to be unconstitutional.'" *Coleman*, 98 F.R.D. at 648 (citation omitted); *see, e.g.*, *Strawser*, 307 F.R.D. at 614-15 (simultaneous certification of

Cleland, 697 F. Supp. 1204, 1216-17 (N.D. Ga. 1988) only strengthens the case for defendant class certification in an election case. *See* Doc. 110-1 at 13.

plaintiff and defendant class); *see generally Moore v. Comfed Sav. Bank*, 908 F.2d 834, 838-39 (11th Cir. 1990) (recognizing need for "bilateral class actions" in certain circumstances).

DeKalb additionally argues that the proposed defendant class does not satisfy Rule 23(b)(1)(B) because such classes cannot be certified based merely on the legal stare decisis consequences of an individual action, e.g., the risk that the first case that reaches the Eleventh Circuit will rule them all. Doc. 114 at 14-15 (citing *In re Arthur Treacher's Franchise Litig.*, 93 F.R.D. 590, 592 (E.D. Pa. 1982)). But Plaintiffs have never argued that certification is justified simply because one case might have legal stare decisis effect on another. Doc. 110-1 at 13-15. Instead, as noted above, Plaintiffs rely on the now-undisputed fact that the Secretary is implicated in any district court ruling given his role in promoting uniformity and issuing uniform guidance. Doc. 110-1 at 13-15. DeKalb also does not dispute Plaintiffs' assertion that the evidence or statements of the Secretary in this case could be used to prejudice counties in separate litigation. The risk that such statements would "substantially impair" the interests of other counties independently justifies Rule 23(b)(1)(B) certification. *See* Fed. R. Civ. P. 23(b)(1)(B) (can certify either because a ruling would be practically "dispositive"

"*or*" would "substantially impair or impede" other class members' interests (emphasis added)).

E. DeKalb Fails to Demonstrate the Need for a Rule 23(d)(1) Notice

DeKalb requests that, if this Court certifies the defendant class, notice be issued to other counties' elections officials to allow them to seek permission to participate in this case. Doc. 114 at 19-20 (citing Rule 23(d)(1)(B)(iii)). DeKalb fails to specify what such notice would say and fails to propose any timetable for defendant class members to respond (e.g., 3 days? 30 days?), and their request should be rejected on that basis alone.

Rule 23(d)(1) notice is neither mandatory nor automatic when a class is certified under Rule 23(b)(1) or (b)(2). *Cf.* Fed. R. Civ. P. 23(c) (mandating class notice when class is certified under Rule 23(b)(3)). By that point, the court has already found that the class members share common defenses and that the class representative can adequately represent the class, so it must be demonstrated why this is insufficient to protect class members' interests. *See Juris v. Inamed Corp.*, 685 F.3d 1294, 1319 n.23 (11th Cir. 2012) ("'in the degree that there is cohesiveness or unity in the class and the representation is effective, the need for [Rule 23(d)] notice to the class will tend toward a minimum'" (quoting Fed. R. Civ. P. 23 advisory committee's notes to 1966 amendments)).

DeKalb has given no reasons to suggest why Rule 23(d) notice is necessary after this Court has determined that Plaintiffs are asserting the same legal theory against every county regardless of their alleged finances, and that DeKalb's counsel can ably represent the class. The Secretary's involvement further makes Rule 23(d) notice unnecessary, because the Secretary has and will vigorously assert substantive defenses that apply to all counties. DeKalb has also failed to demonstrate why defendant class members cannot adequately protect their interests by filing a formal motion to intervene or a motion for leave to file an amicus brief.

There are also significant downsides, particularly for this Court. Improper notice could encourage 158 other counties to flood this court with requests to participate because all the notice requires is for the county to raise their hand. Each chirp snowballs into collateral and duplicative motions practice over whether that county should be allowed to participate and in what capacity. *See Sapia v. Bd. of Educ. of Chi.*, No. 14-cv-07946, 2018 WL 1565600, *9 (N.D. Ill. Mar. 31, 2018) (notice "should not be used merely as a device for the undesirable solicitation of claims," or here, defenses (quoting Fed. R. Civ. P. 23 advisory committee notes to 1966 amendments)). And since Plaintiffs' claims are not dependent on each county's self-reported problems with their budget, there is little likelihood that another county will pipe up with a defense not already made by DeKalb.

III. THIS COURT SHOULD CERTIFY A PLAINTIFF CLASS OF ALL GEORGIA REGISTERED VOTERS

Both Defendants oppose certification of the Voter Class on Rule 23(a) grounds. Doc. 114 at 15-16; Doc. 115 at 14-18. The Secretary additionally argues that a plaintiff class of all Georgia registered voters is not ascertainable for purposes of Plaintiffs' as-applied *Anderson-Burdick* claim. Doc. 115 at 13-14. Lastly, the Secretary argues that the Voter Class allegedly does not satisfy Rule 23(b)'s requirements. Doc. 115 at 18-19.

These arguments fail largely for the same reason. Just as DeKalb erroneously believes that Plaintiffs' legal theory is dependent upon the ever-changing finances of 159 different counties, both Defendants erroneously believe that Plaintiffs' legal theory is dependent upon the ever-changing finances of 7+ million registered voters. It is not.

A. The Voter Class Satisfies Rule 23(a)[5] Because All Raise the Same Legal Theory Based on the Same Set of Facts

The Secretary argues that the Voter Class allegedly does not satisfy Rule 23(a) with respect to Plaintiffs' as-applied *Anderson-Burdick* claim. Doc. 115 at

[5] Defendants formally invoke commonality, typicality, and/or adequacy, but their main underlying arguments are the same. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011) (factors overlap).

16, 18.[6] The Secretary starts by creating a straw man that mischaracterizes Plaintiffs' as-applied *Anderson-Burdick* claim as being based purely on a voter's unique economic circumstances or the number of stamps they possess. The Secretary then knocks the straw man down and argues that Plaintiffs have no claim because they are not in poverty and have stamps. Doc. 115 at 16 ("Plaintiff Gordon has stamps and can use them . . . [and thus] has no claim under an *Anderson/Burdick* analysis"); *id.* ("[Reid] has stamps now" and "can afford more stamps," and thus has no "cognizable burden").

Plaintiffs' *Anderson-Burdick* legal theory, however, is based on common burdens: that all voters expose themselves to COVID-19 when they go outside to vote in-person or buy postage, that voters are required to affix postage, and that all voters must spend the same amount of money when buying postage. Contrary to the Secretary's straw man, Plaintiffs' legal theory is not dependent on individual economic circumstances or how many stamps a voter has at any one time. *See*

[6] The Secretary concedes that certifying a Voter Class is appropriate for Plaintiffs' facial poll tax claim but argues that Plaintiffs' facial *Anderson-Burdick* claim and as-applied poll tax claim do not exist. Doc. 115 at 2 n.1. But *Crawford* expressly dealt with a "facial" *Anderson-Burdick* challenge, *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 202-03 (2006), which considers the "broad application" of the challenged voting restriction to "all . . . voters." *See also* Doc. 84 at 4-6; 17-21. Plaintiffs' as-applied poll tax claim is asserted in the alternative to their facial poll tax claim.

Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1357 (11th Cir. 2009) (class must involve "same event or pattern or practice" (citation omitted)).

Plaintiffs also advance the "same legal theory" for every voter's *Anderson-Burdick* claim, *Williams*, 568 F.3d at 1357—that these universal burdens are never justified by the government's interest in saving stamp money. Even if these burdens are incorrectly characterized as "slight," "slight" burdens "must [still] be justified by relevant and legitimate state interests." *Crawford*, 553 U.S. at 191. Saving stamp money is not one of them. Doc. 84 at 18-21.

Plaintiffs do not suggest that Defendants' straw-man version of Plaintiffs' *Anderson-Burdick* claim could not be a viable legal theory in another case. *See Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("Plaintiffs' [*Anderson-Burdick*] approach is potentially sound if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort. The right to vote is personal . . . ."). Indeed, millions of voters all across the state can bring separate lawsuits on this individualized theory, arguing why their unique economic circumstances requires an exemption from the postage requirement (thus inundating the courts). But that is not Plaintiffs' legal theory. Plaintiffs have instead put forward a class-based legal theory based on universal burdens that would allow all such claims to be resolved in one stroke in favor of the

fundamental right to vote, regardless of any individual voter's economic circumstances. If this Court certifies the Voter Class and Plaintiffs prevail, judges, voters, counties, and the Attorney General's Office will be spared from dealing with countless individualized lawsuits.[7]

B. DeKalb's Adequacy Argument Fails

DeKalb's argument against certification of the Voter Class appears to focus on adequacy, arguing that some voters "prefer in-person voting." Doc. 114 at 15. But this hardly demonstrates a "substantial conflict of interest." *Valley Drug*, 350 F.3d at 1189. Personal preferences about voting are irrelevant as to whether the underlying legal and factual questions are the same, which they are as established

[7] The Secretary relies on *Taylor v. Screening Reports, Inc.*, 294 F.R.D. 680, 689 (N.D. Ga. 2013), which observed that "a class including both injured and non-injured consumers cannot satisfy the commonality requirement of Rule 23(a)." Doc. 115 at 15. But under Plaintiffs' legal theory, every voter has been "injured" because every voter is required to affix postage. And even if there is a voter who was relieved of the postage requirement because a kindhearted election official happened to give them a free stamp in one election, "fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016). This is also not a situation where, for instance, the postage requirement is only imposed on a "small segment" of the population. *Id.*; *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 14 (1st Cir. 2015) ("[C]lass certification is permissible even if the class includes a de minimis number of uninjured parties.").

above. Every member of the Voter Class has "the same interest" in removing needless obstacles to voting. *Gunnells*, 348 F.3d at 431. Moreover, there are not multiple types of relief on the table that conflict with one another like in *Amchem*. There is only one type of relief on the table: using prepaid postage for absentee ballot envelopes and applications, and this relief is not at odds with making in-person voting easier.

Defendants allege that some voters "would prefer for the state and county resources at issue to be directed to the improvement of the in-person voting process, rather than absentee voting." Doc. 114 at 16. But this is not a zero-sum game where lifting the postage requirement is hopelessly irreconcilable with improving in-person voting.[8] As such, any supposed "conflict" does not go "to the very heart of the litigation." *Cent. States Se. & Sw. Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 246 (2d Cir. 2007); *see also In re EpiPen Mktg., Sales, Practices, and Antitrust Litig.*, No. 17-md-2785-DDC-TJJ,

[8] Adopting DeKalb's argument would mean that plaintiff class actions challenging government action are never appropriate simply because correcting the government action *might* result in a budgetary shift from another priority a class member might consider important. Governments would be able to defeat class actions simply by holding hostage something that is important to voters (say, education), in exchange for voters' willingness to forgo class actions challenging unconstitutional conduct.

2020 WL 1180550, at *18-19 (D. Kan. Mar. 10, 2020) (finding that class members' divergent product "prefer[ences]" does not vitiate class commonality in price scheming claim).[9]

C. The Voter Class is Ascertainable By Reading Georgia's Registration Lists

The Secretary inexplicably argues that the proposed plaintiff class of "all registered Georgia voters" is not "ascertainable." Doc. 115 at 13-14. The class of "all registered Georgia voters" can be ascertained just by looking at Georgia's registration rolls.

[9] DeKalb's cases are distinguishable. In *Alberghetti v. Corbis Corp.*, 263 F.R.D. 571, 577 (C.D. Cal. 2010), one plaintiff desired enjoinment of all uses of her image, while another plaintiff wanted some images to be released because they would be profitable. Such preferences were irreconcilable whereas here, both improving absentee voting and improving in-person voting can together be achieved. In *Burka v. N.Y.C. Transit Auth.*, 110 F.R.D. 595, 602 (S.D.N.Y. 1986), the court found that a claim was "best asserted" by one group of class members while other claims were "best asserted" by another group. But here there's little indication that Plaintiffs' claims are "best asserted" by someone else because Plaintiffs' claims do not depend upon an individual's economic circumstances. And in *Dierks v. Thompson*, 414 F.2d 453, 456 n.5 (1st Cir. 1969), the conflict among class members was made clear by the "substantial number" of members who "filed papers disassociating themselves from the suit and asking to be excluded from any judgment." None of the statements cited by DeKalb suggest that voters wish to continue paying a poll tax for fear that being relieved of it will make in-person voting worse. This is unsurprising, because voters want to improve voting in all respects.

Instead, the Secretary again mischaracterizes Plaintiffs' as-applied *Anderson-Burdick* claim by arguing that the alleged burden is "economic" and thus it is impossible to identify which voter "can afford a stamp and which cannot." Doc. 115 at 13-14. But as established above, Plaintiffs' as-applied *Anderson-Burdick* claim is not premised on income level or the affordability of stamps. It is instead based on the universal fact that all voters must expose themselves to COVID-19 if they vote in-person or buy stamps at the Post Office. There is thus no need to root out the unique economic circumstances of over 7 million registered voters. For that same reason, the Secretary's reliance on *Levy v. Miami-Dade County*, 358 F.3d 1303, 1305 (11th Cir. 2004), is inapposite. *Levy* involved a class which had "no viable remedy." *Id.* But here, providing prepaid postage for absentee ballot envelopes for everyone in the Voter Class is logistically viable. Doc. 88 ¶ 35 (noting states that already do this).[10]

D. The Voter Class Satisfies Rule 23(b) Notwithstanding the Secretary's Continued Mischaracterization of Plaintiffs' Claims

The Secretary also asserts that the Voter Class does not satisfy Rule 23(b)'s requirements, repeating the false assertion that Plaintiffs' as-applied *Anderson-*

[10] The Secretary makes the non-sequitur that the U.S. Postal Service's alleged "policy of delivering official election mail without sufficient postage" is "uncontested." Doc. 115 at 13. But, in fact, it is contested. *See* Doc. 57 at 10-11.

Burdick claims depend on "the individual voters' economic and health circumstances." Doc. 115 at 19. As noted above, Plaintiffs' as-applied *Anderson-Burdick* claims do not change depending on individualized economic or health circumstances. It is true that Plaintiffs' claims are premised on the "economic" cost of buying postage, but that cost of postage ($1.10 to $1.60 per election mailing) applies to everyone equally. It is true that Plaintiffs' claims are premised on "health circumstances," but those circumstances apply to every member of the Voter Class; they all face exposure to COVID-19 when they go outside to buy stamps or vote in-person. (In the alternative, Plaintiffs' claims are premised on the same COVID-19 high-risk status that all members of the Voter Subclass have.)

The Secretary lastly argues, without citing any authority, that "Plaintiffs' as-applied theory cannot satisfy Rule 23(b)(2), because a broad injunction for all Georgia voters is not appropriate to the as-applied claims." Doc. 115 at 19. But if Plaintiffs' as-applied *Anderson-Burdick* claim with respect to the Voter Class—which is based on the dangers of the COVID-19 pandemic to all voters—succeeds, then an injunction for all Georgia voters is entirely appropriate.

For these reasons, this Court should certify the Voter Class.

IV. THIS COURT SHOULD CERTIFY A PLAINTIFF SUBCLASS OF GEORGIA VOTERS SUSCEPTIBLE TO COVID-19

If this Court were to rule that only voters who are particularly susceptible to COVID-19 should obtain injunctive relief during the pandemic under a narrowed version of Plaintiffs' as-applied claims, Plaintiffs propose a Voter Subclass of all "Georgia registered voters who satisfy at least one of the COVID-19 risk factors identified by the Center for Disease Control ("CDC")." *See* Doc. 110-6.

A. The Voter Subclass is Ascertainable Through Self-Identification

Both Defendants argue that the Voter Subclass is not ascertainable because it is allegedly not administratively feasible or violates privacy. Doc. 115 at 14, Doc. 114 at 17-18. But there is an administratively feasible method right under their noses. It is found on the absentee ballot application form, which already asks voters to self-identify if they are "elderly" or "disabled" without having to provide birth certificates or medical records. Doc. 122-3. Such voters are automatically mailed an absentee ballot for the rest of the election cycle. O.C.G.A. § 21-2-381(a)(1)(G); Ga. Comp. R. & Regs. 183-1-14-.01(1)-(2).

Because the State already relies on self-identification to relieve the burdens of absentee voting on vulnerable voters, the same form can be used to identify voters who satisfy one of the CDC high-risk criteria and relieve similar burdens. Thus, this method is "case-specific and demonstrably reliable." *Karhu v. Vital*

Pharm., Inc., 621 Fed. Appx. 945, 949 n.5 (11th Cir. June 9, 2015). Self-identification also does not require this Court to "engage in individualized determinations in order to ascertain a person's membership in the class." *Shuford v. Conway*, 326 F.R.D. 321, 329-30 (N.D. Ga. 2018). This method further protects voters' privacy, because not all voters have to self-identify, and those who do will not be required to submit reams of medical records.

As discussed in Plaintiffs' Notice of Supplemental Authority, a recent Eleventh Circuit decision confirms the feasibility of self-identification of voters who satisfy one of the CDC high-risk criteria. Doc. 122 at 10-11 (citing Doc. 122-1). In addition, the full en banc panel of the Fifth Circuit noted that this kind of self-identification method could be appropriate for purposes of deciding which voters are entitled to an exemption from a voting restriction—there, the Texas's voter ID law. *See Veasey v. Abbott*, 830 F.3d 216, 270-72 (5th Cir. 2016) (en banc). Specifically, the Fifth Circuit observed that Texas's voter ID law could allow voters to self-identify as having a "reasonable impediment" or as being "indigent," which would then exempt such voters from showing photo ID. *Id.* at 270 (noting that such a mechanism is also used in North Carolina and Indiana). It is highly unlikely that the Fifth Circuit would suggest something that is not administratively feasible or "otherwise problematic." *Karhu*, 621 Fed. Appx. at

948; *see also South Carolina v. United States*, 898 F. Supp. 2d 30, 35-39 (D.D.C. 2012) (Kavanaugh, J.) (upholding South Carolina's voter ID law primarily because it allowed voters to be exempt from showing ID if they self-identify as having a "reasonable impediment" to obtaining ID, which included medical conditions as broad as "health problems that have prevented [the voter] from traveling").[11]

The Fifth Circuit furthermore proposed this self-identification method even though courts have held that Voter ID furthers the government's important interest in preventing voter fraud. *See Veasey*, 830 F.3d at 270 (recognizing the legislature's desire to "reduce the risk of in-person voter fraud"); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009). If self-identification is an appropriate mechanism even when the government's interest is at its zenith, then self-identification is appropriate *a fortiori* when the government's interest is as base as saving stamp money. Given such low stakes for the government, and the government's existing willingness to facilitate absentee voting for voters who self-

[11] For these reasons, *Bussey v. Macon County Greyhound Park, Inc.*, 562 F. App'x 782 (11th Cir. Apr. 2, 2014), and *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970), which both Defendants' case citations trace back to, are distinguishable. The classes in both cases failed ascertainability because the plaintiffs provided neither an "indication," *Bussey*, 562 F. App'x at 788, nor "evidence," *DeBremaecker*, 433 F.2d at 734, that there was a way to ascertain the class. Here, Georgia's own absentee ballot request form provides both an "indication" and "evidence" that the Voter Subclass can be ascertained.

identify as elderly or disabled, this method does not unduly infringe on Defendants' due process rights. *See Karhu*, 621 F. App'x at 949.

Implicit in Defendants' arguments is the suggestion that anytime a class is certified, everyone in the class must be identified immediately so we know who is in the universe of those who will receive relief. "'However, the court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding.'" *Seeligson v. Devon Energy Prod. Co.*, 761 F. App'x 329, 333 (5th Cir. 2019) (per curiam) (quoting Newberg on Class Actions § 3:3 (5th ed. 2011)). The Voter Subclass can be ascertained at the moment when voters self-identify as satisfying one of the CDC risk factors on the absentee ballot request form. And it is obviously impossible to identify immediately all voters who will fall into the Voter Subclass in the future. *Cf. Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (affirming certification of class which "includes future and deterred job applicants, which of necessity cannot be identified").

B. The Voter Subclass Satisfies Rule 23(a) and the Secretary Again Mischaracterizes Plaintiffs' Claim

The Secretary further argues that the Voter Subclass allegedly does not satisfy Rule 23(a), Doc. 115 at 17-18, because Plaintiff Reid satisfies the CDC's risk criteria solely because of age. Thus, the Secretary argues, she allegedly cannot

represent the Voter Subclass. However, as Plaintiffs previously argued, Reid can represent the Voter Subclass because all its members are similarly situated in that they are all at high-risk under the CDC's criteria. Doc. 122 at 11. Furthermore, all members of the Voter Subclass are subject to "the same policy"—the postage requirement. *See Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012) (affirming class certification of "Disney customers who have a mobility disability," even though the extent of each customer's disability varied widely, because the claims "all stem from the same policy prohibiting the use of Segways within Disney Resorts"); *Monroe v. Meeks*, No. 18-cv-00156-NJR, 2020 WL 1057890, at *4-5, --- F.R.D. ---- (S.D. Ill. Mar. 4, 2020) (certifying class of inmates with "gender dysphoria" even though there is "a wide range of variation between prisoners with gender dysphoria," because every member is allegedly harmed by "the same policies and practices").

The remainder of the Secretary's subclass attack consists of several merits-based arguments that seem irrelevant to class certification. They fail in any event.

The Secretary suggests that the Voter Subclass's claims fail on the merits because "there is no competent medical evidence that shows that there is a high risk associated with voting in person." Doc. 115 at 17. But there is. *See* Doc. 57-1 ¶

17 ("Due to the transmission of the virus via contaminated environmental surfaces, polling locations are highly likely to cause increased infection.").

The Secretary next insists that voters at risk of dying from COVID have no meritorious claim because "Georgia counties have been encouraged to follow" certain CDC guidelines related to polling places. Doc. 115 at 17. Yet those polling place guidelines continue to urge "mail-in methods of voting if allowed in the jurisdiction." Doc. 115-1 at 2. The Secretary proclaims that because "COVID-19 does not generally spread on surfaces," "Plaintiffs' concerns about voting in person" are "undermine[d]." Doc. 115 at 18. But in the same breath, those guidelines say that "[t]ransmission of coronavirus in general occurs much more commonly through respiratory droplets than through contact with contaminated surfaces." Doc. 115-1 at 2; *see also* Doc. 122-1 at 18 (COVID-19 "can spread between people who are never physically in the same room because it stays in the air for up to 14 minutes"). Moreover, almost every single recommendation in the CDC polling place guidelines can only be carried out by elections officials and poll workers who are sufficiently moved by the CDC's "encourage[ment]." *See* Doc. 115-1. Whether they do so is completely outside the voter's control.[12]

[12] Plaintiffs will soon be filing a supplemental brief attaching relevant evidence from the June 2020 primary, as this Court has requested. Doc. 95 at 12; Doc. 101

Lastly, the Secretary speculates that the pandemic could lift by November. Doc. 115 at 18. This is essentially a regurgitation of the Secretary's old ripeness argument, Doc. 67-1 at 17-21, which fails for the same reasons Plaintiffs have previously provided, Doc. 84 at 29-34. In any event, as Plaintiffs have stated before, if circumstances materially change, then classes may be redefined to account for such new circumstances. *See* Doc. 110-1 at 5 (citing *Local 703, I.B. v. Regions Fin. Corp.*, 762 F.3d 1248, 1260 n.8 (11th Cir. 2014) (classes can change with new circumstances)). The Secretary fails to address this commonsense solution.

CONCLUSION

For the above reasons, Plaintiffs' motion for class certification should be granted.

Respectfully submitted this 29th day of June, 2020.

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at 3. Among other things, it will show that some polling places did not follow CDC guidelines.

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CERTIFICATE OF COMPLIANCE

Pursuant to N.D. Ga. Local Civil Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with N.D. Ga. Local Civil Rule 5.1(C) in Times New Roman 14-point typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on the above date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

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