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

COALITION FOR GOOD GOVERNANCE, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State; *et al.*,

Defendants.

CIVIL ACTION

FILE NO. 1:20-CV-01677-TCB

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

Secretary of State Raffensperger (the "Secretary") and State Election Board members Sullivan, Worley, Mashburn, and Le (collectively, "State Defendants") submit this Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction (the "Motion"). (Doc. 11.)

INTRODUCTION

This case is not about the COVID-19 pandemic, nor is it about anyone being unable to vote. Instead, Plaintiffs come to this Court using the virus as the latest means to continue advocating for hand-marked paper ballots. This is nothing new. *See Curling v. Raffensperger*, Case No. 1:17-cv-2989-AT

(alleging potential Russian hacking necessitated hand-marked paper ballots); *Coalition for Good Governance v. Gaston*, Case No. 20CV00077(S) (Sumter Cty. Sup. Ct. 2020) (alleging ballot secrecy necessitated hand-marked paper ballots); *Martin v. Fulton Cty. Bd. of Registration and Elections*, 307 Ga. 193 (2019) (complaint sought hand-marked paper ballots in new race for Lt. Governor). In each case, courts denied Plaintiffs' attempt to achieve their policy aims through judicial fiat. Plaintiffs now ask this Court to do what others refused.

Plaintiffs admit they do not know how long the virus will impact Georgians, and their uncertainty is the basis of Plaintiffs' purported injuries. (Doc. 1, ¶ 40.) They are "afraid" they may feel compelled to vote in person, (Doc. 20 at 109); "wonder" whether their absentee ballot will be counted (Doc. 20 at 115); "hesitat[e] to take action toward preparing to vote" (Doc. 20 at 132); are "concerned" (Doc. 20 at 159, 170, 215, 219, 224 (addressing security sleeve), (Doc. 20 at 207) (addressing feelings about election supervisors' workload); do not "relish the idea of having to travel to" the county election office (Doc. 20 at 170); and are generally "afraid" or "upset" that other voters will have a negative experience in the election. (Doc. 20 at 224.)

Compounding these emotions is Plaintiffs' disappointment that the Secretary did not adopt their policy suggestions of March 23. (Doc. 1, ¶ 30.)

After being rebuffed again by policymakers, they waited almost a month to file this lawsuit on April 20 and claimed an "urgent" need to adopt their policy recommendations. (Doc. 1.) Plaintiffs then waited more than a week to file their Motion, (Doc. 11), then they waited three additional days before filing a brief in support of their Motion. (Doc. 20.)

The Motion seeks an astounding degree of federal incursion into the minutiae of state and local election administration. It claims that the United States Constitution mandates an order outlining at least 26 discrete administrative changes for the 2020 general primary in Georgia, which range from, of course, mandating the use of hand-marked paper ballots in all future elections,[1] to subjecting poll workers to sanction if they fail to precisely mark distances between polling stations. (Docs. 11, 20-1.)

Defendants' Motion to Dismiss sets forth numerous threshold, jurisdictional bases to dismiss Plaintiffs' Complaint outright, and Defendants incorporate them into this Brief. (Docs. 32 and 32-1.) This Court should also deny Plaintiffs' Motion because it fails to satisfy the extraordinary burden of obtaining a mandatory injunction, days before an election.

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[1] Despite styling the case as a preliminary injunction, Plaintiffs' proposed order contains no time limit on the prohibition to use the new ballot marking devices ("BMDs") (Doc. 20-1), and the Complaint makes irrelevant and false claims that the BMDs cannot be audited. (Doc. 1 at ¶ 67.)

STATEMENT OF FACTS

A. Georgia adapts to an unprecedented pandemic to ensure secure and safe elections.

In March, Governor Brian Kemp issued Executive Order 03.14.20.01, which declared a Public Health State of Emergency in Georgia due to COVID-19.[2] That same day, Secretary Raffensperger announced that he was postponing the presidential preference primary from March 24 to May 19 to coincide with the then-scheduled general primary election. (Declaration of Chris Harvey, ¶ 8, attached as **Exhibit 1**.) Later, after Governor Kemp imposed a shelter-in-place requirement for populations that were particularly susceptible to the COVID-19 virus, the Secretary announced the unprecedented steps of mailing every voter on Georgia's active voter roll an absentee ballot request form and mailing absentee ballot packets to those who request them. (*Id.*, ¶ 29.) Typically, counties mail absentee ballot request forms and absentee ballots at the voters' request, not the State. (*Id.*, ¶ 27.)

On April 9, 2020, in the light of the continued COVID-19 public health emergency, the Secretary announced he was postponing Georgia's general primary and the presidential preference primary again to June 9. (*Id.*, ¶ 11.)

[2] Office of Governor Brian Kemp, Executive Order No. 03.14.20.01 (March 14, 2020), *available at* https://gov.georgia.gov/document/2020-executive-order/03142001/download

This date was chosen for two reasons: it is latest date on which the presidential preference primary can be held under O.C.G.A. § 21-2-191; and (2) it represents the "latest date on which the general primary can be held because any further delays would make it impossible for overseas and military voters to participate in either the August 11 runoff or the November general election." (*Id.*, ¶¶ 12–15.) The Secretary has also prepared information for local officials to safely administer in-person voting, based on guidance from the CDC and health officials. (Harvey Decl. at ¶¶ 24–25).

B. The cost of the pandemic borne by the State.

The cost of mailing absentee ballot request forms and ballots to voters is projected to exceed $5.5 million. (Sterling Decl., ¶ 17, attached as **Exhibit 2**.) One-time federal funding was critical to achieving this policy goal. Beyond these measures, and prior to the filing of this lawsuit, the Secretary and the Georgia Emergency Management Agency utilized one-time federal funding to procure and send personal protective equipment ("PPE") to county election officials. (*Id.*, ¶ 7–9.) The Secretary is also attempting to procure shields to separate pollworkers from voters, and purchase orders are in place for styluses that allow voters to utilize the BMDs without actually touching

the screens.[3] (*Id.,* ¶ 10–11.) Moreover, counties are being provided with a $3,000 grant to purchase PPE on their own.[4] (*Id.*, ¶ 8.)

These decisions (and Plaintiffs' requested relief) must be viewed in the context of the current state budget. In Fiscal Year 2020, the Elections Division of the Secretary's Office was $6,118,907.[5] (Harvey Decl., ¶ 38.) The General Assembly has not yet passed a Fiscal Year 2021 budget (the 2021 Budget), which will fund state government from July 1, 2020, through June 30, 2021. (*Id.*) Last month, the Governor's Office of Planning and Budget ("OPB") and the House and Senate Appropriations Committee Chairmen each instructed agencies, including the Secretary's Office, to prepare 2021 budgets that spend 14% less than the Fiscal Year 2020 budget. (OPB Decl., ¶ 10, attached as **Exhibit 3**.) The State has already announced that revenues have plummeted 35.9% or $1.03 billion in April alone. (*Id.*, ¶ 11.) Falling revenues are not the end of the story. The pandemic will require state

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[3] Styluses would allow disinfection between each use and avoid the problem Plaintiffs presume of disinfecting the BMDs themselves.

[4] The cost of PPE is high: states are competing to replenish their supply of PPE, the price of which has skyrocketed. Daniella Diaz, Geneva Sands and Cristina Alesci, *Protective equipment costs increase over 1,000% amid competition and surge in demand*, CNN (Apr. 16, 2020), https://www.cnn.com/2020/04/16/politics/ppe-price-costs-rising-economy-personal-protective-equipment/index.html.

[5] This does not include the cost of new voting equipment, which is funded by a bond authorized by the General Assembly in 2019.

expenditures to increase due to enhanced need of public assistance programs. (*Id.*, ¶ 8.) As a balanced-budget state, policymakers frequently must choose between competing priorities like elections, healthcare, and education. (*Id.*, ¶ 6.) In sum, Georgia policymakers, including the Secretary, are going to be forced to do far more with much, much less. (*Id.*, ¶ 9.)

C. <u>The cost of Plaintiffs' requested relief.</u>

At this time, the Secretary cannot accurately estimate the full cost of Plaintiffs' requested relief. For example, ballots vary by county, which makes projecting the cost of shelving the recently purchased BMDs, printing ballots, and procuring ballot-markers (other than the BMDs), difficult to ascertain under these expedited circumstances. (Sterling Decl., ¶ 6.) Beyond the June primary, the State cannot predict the number of runoff elections that may result from the general primary, nor can counties currently predict expected outcome for the 2020 general election. It is also too early to know whether the current surge in absentee voting will remain for future elections. In addition to the more straightforward costs of physical equipment and ballots, the costs Plaintiffs' relief would impose on the State to train election superintendents throughout the state (and the counties' cost of their training of pollworkers) on an entirely new and different operating procedure—and alert voters regarding the same—in a matter of weeks is difficult to quantify at this point.

For their part, Plaintiffs, who bear the burdens of persuasion and proof, have not provided any evidence or estimates to quantify the cost of their proposed relief.

D. Plaintiffs' allegations of absentee-by-mail voting complications.

Plaintiffs express concerns about two complications occurring during the State's unprecedented effort to provide absentee ballot applications and ballots to all active voters in the State—the inclusion of a secrecy sleeve in absentee ballot packets and incorrect absentee ballots mailed to Chatham County voters. (Doc. 20 at 9-10.) The Secretary learned about the secrecy sleeve after voters began receiving absentee ballots, and he implemented a number of responses. First, the Secretary directed the mailing vendor to include revised instructions with absentee ballot packets. (Sterling Decl., ¶ 15.) Then, on April 28, 2020, the Secretary provided guidance to counties through the Firefly system, the primary means for the Secretary to communicate with county election officials, explaining that election officials should treat the security sleeve as a traditional security envelope.

Plaintiffs also claim that incorrect absentee ballots were mailed to Chatham County voters residing in Chatham County School Board District 7. (Doc. 20 at 8.) The ballot-building database has been corrected and provided to the ballot printer. (Barnes Decl., ¶ 7, attached as **Exhibit 4**.) Chatham

County officials have already reissued ballots to all voters in District 7, and procedures have been implemented to ensure that only voters in District 7 will be allowed to vote in the District 7 school board election. (*Id.*, ¶¶ 9–10.)

STANDARD OF REVIEW

Because Plaintiffs seek the "extraordinary and drastic remedy" of a preliminary injunction, they must "clearly" satisfy the burden of persuasion, which is more than satisfying a preponderance of the evidence. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Further, Plaintiffs' request for a mandatory injunction is particularly "disfavored." *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976).[6] Last, in election cases, the burden imposed on plaintiffs is higher still and increases as an election approaches. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Under this precedent, Plaintiffs must at least "clearly" convince this Court that (1) there is a substantial likelihood of success on the merits of the complaint; (2) absent the preliminary injunction, the plaintiffs will suffer an irreparable injury; (3) the threatened injury outweighs the harm to the Defendants; and

[6] In *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1210 (11th Cir. 1981), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit adopted prior to October 1, 1981.

(4) granting the injunction would not be adverse to the public interest. *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-cv-4391-SCJ (N.D. Ga. Dec. 27, 2019) (Slip Op. at 9–10) (denying plaintiffs' motion for preliminary injunction).[7]

ARGUMENT AND CITATION TO AUTHORITY

In addition to the reasons set forth in Defendants' Motion to Dismiss, this Court should deny Plaintiffs' Motion because it fails to satisfy their heavy burden for several reasons. Plaintiffs fail to articulate a burden on their right to vote that does not implicate the Eleventh Amendment. The fiscal and administrative costs to the State of implementing Plaintiffs' policy recommendations are significant, and outweigh Plaintiffs' speculative harms. Finally, with early voting already having commenced, now is not the time to rewrite the rules of the June Primary.

I. Plaintiffs fail to clearly show they are likely to succeed on the merits.

Plaintiffs' Complaint alleges that holding the June Primary "knowingly burden[s] severely and infringe[s] upon the fundamental right to vote." (Doc. 1 at ¶ 153.) It is unclear whether Plaintiffs raise a procedural or substantive

[7] The *Fair Fight Action, Inc.* decision is attached as **Exhibit 5.**

due process claim. (Doc. 1 ¶¶ 151-56; Doc. 20 at 25-29.) Ultimately, both theories fail to identify any cognizable harm.

Plaintiffs' entire lawsuit depends on this Court's acceptance of a false choice—that absentee ballots are so problematic, voters must risk COVID-19 exposure to vote in-person or not at all. *See generally* Doc. 20 at 25–34. There are two essential problems with this approach: (1) the only evidence of a burden on use of absentee ballots is Plaintiffs' declarants' personal concerns that the secrecy sleeve undermines their "right" to a secret ballot[8]; and (2) Plaintiffs ignore that voters concerned about the United States Postal Serveice can simply hand delivery their absentee ballot to county election officials' office or newly-sanctioned drop boxes where voters will not come into contact with any other person. *See* Ga. Comp. R. & Regs. 183-1-14-0.6-.14.[9] The former has no basis in federal law, thus implicating the Eleventh Amendment and raising questions about this Court's jurisdiction, and the latter demonstrates there is no burden on Plaintiffs' right to vote. As

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[8] Plaintiffs' other concerns, mail and the Secretary's webpage, are addressed below and are either purely speculative or based on Plaintiffs' misunderstanding. *See also, generally*, (Harvey Decl.), (Sterling Decl.)
[9] The SEB's Emergency Rule, adopted April 15, 2020, is attached as **Exhibit 6**. The rule is also publicly available on the Board's webpage: https://sos.ga.gov/admin/files/SEB%20Emergency%20Rule%20183-1-14-0.6-.14.pdf.

importantly, Plaintiffs' alleged harms are caused by a virus and not any decision of Defendants.

A. Plaintiffs are unlikely to succeed on the merits of their due process claims, whether substantive or procedural.

Plaintiffs have a constitutional right "to vote and in their vote being given the same weight as any other." *Jacobson v. Florida Sec'y of State*, 19-14552, 2020 WL 2049076, at *5 (11th Cir. Apr. 28, 2020). They do not have a right to vote by any means of their choosing. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). "In fact, the Constitution itself provides that states may prescribe the "Times, Places and Manner of holding Elections" and the United States Supreme Court has recognized that states retain the power to regulate their elections." *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1373 (S.D. Fla. 2004) (citing *id.*, *Siegel v. Lepore*, 234 F.3d 1163, 1179–80 (11th Cir.2000); U.S. Const. Art. I, § 4, cl. 1).

Plaintiffs do not claim that their right to vote has been extinguished or diluted. (Doc. 20 at 25 (describing a "severe burden").) What they are really arguing about (again) is the *process* or method by which voters will cast in-person or absentee ballots. Indeed, Plaintiffs' proposed remedies focus almost exclusively on procedural measures from drive-thru voting to using paper copies of drivers' licenses to vote. (Doc. 1 at 32-54.) Each of these proposals

speak to *how* ballots can be cast or counted not *if* ballots will be counted, which represents more of a procedural due process claim. "Procedural due process is, as its name suggests, 'a guarantee of fair procedure.'" *J.R. v. Hansen*, 803 F.3d 1315, 1320 (11th Cir. 2015) (citation omitted). Procedural due process claims require the court to balance the private interest at stake, the risk of an "erroneous deprivation of such interest through the procedures used," potential alternatives, and the government's interest involved, including the "fiscal and administrative burdens" that accompany Plaintiffs' requested relief. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

To the extent Plaintiffs allege a substantive due process claim, a distinct but similar analysis applies based on the Supreme Court's decisions in *Burdick* and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).[10] (Doc. 20 at 25.) These cases utilize a sliding scale balancing test that weighs the "character and magnitude" of the alleged burden against the government's interest in the challenged law. *Anderson*, 460 U.S. at 789. "If a State's election law imposes only 'reasonable, nondiscriminatory restrictions' upon

[10] The *Anderson-Burdick* analysis typically applies when voters allege violations of the First and Fourteenth Amendment (which Plaintiffs have not), but the Eleventh Circuit has applied the analysis in a decision involving claims arising only under the Fourteenth Amendment. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346,1352-53 (11th Cir. 2009).

the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Fair Fight Action, Inc.*, Slip Op. at 22 (citing *Burdick*, 504 U.S. at 434) (denying preliminary injunction). Under *Anderson/Burdick*, the burden of persuasion and proof remains on the Plaintiffs at all times. *Billups*, 554 F.3d at 1353.

i. *Plaintiffs fail to identify actionable state conduct.*

Both substantive and procedural due process claims require plaintiffs to allege some statute, regulation, or policy has interfered with their recognized rights. Except as specifically discussed below, Plaintiffs have not really identified any offensive statutes or regulations. This omission is fatal to their due process claims. On procedural due process, precedent requires that Plaintiffs identify actual "state action," and it is insufficient to present a claim that is based solely on the "risk" of being deprived of a right. *Arrington v. Helms*, 438 F.3d 1336, 1347, 1348 n.12 (11th Cir. 2006). Applied here, Plaintiffs' complain that there is a *risk* of voting in person (due to a virus) and a *risk* of voting absentee (cause unknown). The State is not responsible for either concern.

The same is true of Plaintiffs' substantive due process claims. The *Anderson/Burdick* analysis does not seem to have been applied outside the context of specific state action, and Plaintiffs have cited no case where it has.

See Crawford v. Marion Cty. Elec. Bd., 553 U.S. 181, 190 n.8 (2008) (photo identification requirement); *Burdick*, 504 U.S. at 434 (statutory prohibition on write-in candidates); *Anderson*, 460 U.S. at 789 (early filing deadline). In essence, Plaintiffs urge this Court to make the state "do more." But, as Judge Grimberg recently held, a government's willingness to exceed its statutory obligations does not provide a constitutional basis to require the government go further. *Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elections*, 1:20-CV-00912-SDG, 2020 WL 1031897, at *7 (N.D. Ga. Mar. 3, 2020).

ii. *Plaintiffs' absentee ballot concerns implicate the Eleventh Amendment.*

It is axiomatic that a preliminary injunction must be decided on evidence and not argument. *See Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995). Plaintiffs here have provided no evidence that voting absentee constitutes a burden (in fact, most of Plaintiffs declarants routinely vote absentee). (Harvey Decl. ¶¶ 39–48.) Instead, other than a few declarants who make unsubstantiated claims about the efficacy of the United States Postal Service (not a party to this suit), most declarants complain that the security sleeve deprives them of their "right" to a secret ballot; some then explain that this concern may make them choose to vote in-

person and risk acquiring COVID-19. *See generally,* (Doc. 20, at pp. 101-09, 111-16, 126-39, 157-61, 167-71, 205-07, 215-16, 218-20, 222-25.)

The problem for Plaintiffs, however, is that any right to a secret ballot is based in state law and not federal law. *Compare John Doe No. 1 v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (identifying no federal right to a secret ballot), *with* Ga. Const. art. II, § 1, ¶ I (guaranteeing a secret ballot). Thus, in order to decide that absentee voting imposes some kind of burden on the Plaintiffs' rights, this Court must necessarily decide—ifor the first time—that the security sleeve violates Georgia's constitution.

The Eleventh Amendment precludes this result.[11] While *Ex Parte Young* provides an exception to the Eleventh Amendment immunity of the State, it does so only for prospective injunctive relief grounded in *federal* law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105–106 (1984). Thus, *Ex Parte Young* is "inapplicable in a suit against state officials on the basis of state law." *Id.* Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 113, 106. *See also Fair Fight*

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[11] As a legal matter, O.C.G.A. § 21-2-384(b) authorizes the Secretary to determine the "size and shape" of the security envelope. Further, O.C.G.A. § 21-2-386(c), provides that failure use the security envelope does not spoil and absentee ballot.

Inc., Slip Op. at 12-17 (addressing Eleventh Amendment and rejecting plaintiffs' attempts to force the federal court to adjudicate a matter of state law);[12] *Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1345 (N.D. Ga. 2018) (citing *Harris v. Birmingham Bd. of Educ.*, 817 F.2d 1525, 1528 n.15 (11th Cir.1987)).

Put simply, Plaintiffs' purported burden on absentee voting exists only if there is a violation of a state (and not federal) right. And, absent a cognizable burden on absentee voting, Plaintiffs' cannot reasonably claim that their absentee ballots will not be "given the same weight as any other" ballot. *Jacobson*, 2020 WL 2049076, at *5. Put another way, Plaintiffs' claims regarding in-person voting fail because they cannot show a likelihood of success on the merits of their absentee voting claims. *Cf. McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994) (concluding that a procedural due process claim fails if the state provides an adequate remedy to a constitutional violation). This is fatal to the Motion.[13]

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[12] Judge Jones also concluded that the federal court was not the "preferable way to obtain resolution of" state law issues of first impression based on general abstention doctrines. *Fair Fight, Inc.*, Slip Op. at 17-20.

[13] In the light of this reality, Plaintiffs' Brief seeks to expand the "unconstitutional conditions" doctrine to elections cases for the first time despite citing no authority where it has been used in a lawsuit involving voting. *See* (Doc. 20 at 25-28) (citing *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004). Defendants have found no cases that apply the doctrine to

iii. *Plaintiffs have not demonstrated any comparative burden to voting or, in the alternative, any alleged burden is slight.*

Plaintiffs have not alleged any material burden on their right to vote, as demonstrated by the remedies they seek:

1) MOVING THE PRIMARY DATE. Given the inclusion of the presidential preference primary, the timing of the June Primary must be no later "than the second Tuesday in June." O.C.G.A. § 21-2-191.[14] Nothing about the date of the election inherently burdens the Plaintiffs' opportunity to vote. Indeed, not one declarant indicated that they would have less of a burden voting in person on June 30 instead of June 9. (Doc. 20, 101-09, 111-16, 126-39, 157-

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elections, and this makes sense. Courts applying the unconstitutional conditions doctrine typically review situations where, unlike this case, one constitutional right has to be completely surrendered to exercise another right. *See Thomas v. Rev. Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (addressing denial of unemployment benefits due to free expression of religion); *Elrod v. Burns*, 427 U.S. 347, 360-64 (1976) (addressing First Amendment implications to patronage system and public employment); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (addressing public university tenure); *United States v. Snipes*, 611 F.3d 855, 867 (11th Cir. 2010) (surrendering Fifth Amendment right against self-incrimination against Sixth Amendment right to have venue proven); *Adams v. James*, 784 F.2d 1077, 1080 (11th Cir. 1986) (jailhouse employment). Here, Plaintiffs acknowledge they have not surrendered their right to vote. Moreover, the unconstitutional conditions doctrine also applies only where the choice imposed by government is intentional and based on impermissible motives. *James*, 784 F.2d at 1080. Plaintiffs' lawsuit does not mention intent.

[14] As discussed more fully below, federal law also warrants having the election on June 9 instead of June 30 as Plaintiffs' request. (Harvey Decl. ¶ 14.) The United States Justice Department agrees. (Doc. 24, at 8–9).

61, 167-71, 205-07, 215-16, 218-20, 222-25.) This absence of evidence warrants the denial of Plaintiffs' requested relief to move the primary date. *See Levi Strauss & Co.*, 51 F.3d at 985 (discussing need for evidence to grant a preliminary injunction). The Plaintiffs also provide *only speculation* that the COVID-19 situation will improve materially between June 9 and June 30. This should preclude any order moving the date of the June Primary.

2) REPLACING NEW TECHNOLOGY WITH PAPER BALLOTS. The use of BMDs does not represent an unconstitutional burden on voting either. Plaintiffs decry the numerous times they will have to touch something to vote with a BMD, but ignore numerous types of contact required when using hand-marked paper ballots, like handling the ballot and disposable pen. The same is true of Plaintiffs' preference that local officials use laptops or paper pollbooks instead of up-to-date PollPads, as there is no reason to believe that someone will touch a laptop or notebook any less than they do a tablet device. *See* (Doc. 20-1 at 4.) And *no* Declarant testifies that use of hand-marked paper ballots or PollPad alternatives would allay their in-person voting concerns.

That Plaintiffs' proposed order is not limited to the June Primary makes clear they seek nothing short of a ban on BMDs in all elections.[15] (Doc. 20-1 at 2-7.) This is not surprising, as this lawsuit is just Plaintiffs' latest attempt to override the will of the General Assembly and its decision to use technology in elections.[16] Whatever the merits of Plaintiffs' policy arguments may be, the federal courts do not provide a backup to failed legislative advocacy and the Constitution does not convert Plaintiffs' policy disagreements into actionable legal claims. *See Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986).

3) DISREGARDING STATE LAW GOVERNING THE NUMBER OF BMDS REQUIRED AT EACH POLLING PLACE. State law requires counties to provide at least one BMD-based voting station for every 250 voters and Plaintiffs fear this will cause overcrowding somehow burdening. *See* O.C.G.A. § 21-2-367(b); Doc. 20 at 17. This Court should dispense with this argument quickly

[15] To the extent that Plaintiffs seek to change the August and November elections based on COVID-19, those claims are not ripe. Plaintiffs' confessed inability to predict the status of the outbreak in the coming months renders their concerns insufficiently "concrete, to permit effective decisionmaking by the court." *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995). In other words, Plaintiffs demand that this Court to impermissibly render a decision that is "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

[16] Plaintiffs also repeat their mantra that BMD's do not provide an audit trail. (Doc. 1 ¶ 67.) This is demonstrably false.

because the allegation is absent from Plaintiffs' Complaint. The inquiry into likelihood of success on the merits focuses on the complaint—not the motion. *Fair Fight, Inc.*, Slip Op. at 9 n.8 (citations omitted).

Even if this Court did consider the issue, upholding Georgia's statute will not cause "unnecessary crowding of poll locations." (Doc. 20 at 16.) The evidence is showing the contrary to be true, as over one million voters are choosing to vote absentee and do not share Plaintiffs' unsubstantiated concerns. (Sterling Decl., ¶ 16.) This necessarily reduces the number of in-person voters and means that Plaintiffs have failed to "clearly establish" that the statute would impose a material burden on their right to vote.

4) MANDATES ON NONPARTY LOCAL OFFICIALS REGARDING IN-PERSON VOTING. The United States Constitution entrusts state governments—not the federal judiciary and not individual or organizational plaintiffs—to establish the "manner" of elections and local election officials' statutory discretion and authority. U.S. Const., Art. I, § 4, cl. 1. Georgia's election law also provides significant discretion to local government officials. *See* (Doc. 32-1 at 9–11.)

Ignoring the law, Plaintiffs ask this Court for sweeping relief to dictate the minutiae of local election administration, requiring the Secretary to: (1) "authorize" local election officials to have more early voting days; (2) "direct" local election officials to provide a drive-thru voting option and mandate that

larger counties have multiple such locations[17]; (3) "direct" the use of "pop-up" temporary polling locations where one was recently closed; (4) "require" local election officials to allow voters to complete absentee ballots in-person at polling locations; (5) "require" pollworkers to wear PPE (and provide them with the masks and gloves they may need), use tape to mark off six foot increments, and provide other distancing techniques at polling locations; (6) "direct superintendents to allow appointed pollwatcher activities;" and (7) "instruct" superintendents on how to report voter information into the Secretary's website. (Doc. 20-1 at 3-7.) Relief is not warranted on any of these claims. First, no local official is a party to this action, and binding precedent recognizes that this precludes the relief Plaintiffs seek. *See Jacobson*, 2020 WL 2049076 at *9-13 (denying relief where it would be ordered against a nonparty local government).

Second, the State is already providing counties with PPE and assistance in procuring PPE. (Sterling Decl. ¶¶ 7–8.) Plaintiffs make no allegation that the State's current efforts are inadequate, and their requested relief is moot. *United States v. Georgia*, 778 F.3d 1202, 1204 (11th Cir. 2015). Similarly, Mr. Sterling's declaration explains Plaintiffs' misunderstanding

[17] Plaintiffs provided no analysis on how they arrived at their number of requiring counties to provide at least one drive-thru for every 100,000 voters.

about the Secretary's website, so there is no relief to be ordered on that point either. (Sterling Decl. ¶ 14.)

Third, Plaintiffs' Complaint raises no issue regarding poll watchers or moved polling locations, which precludes the Plaintiffs from seeking this kind of relief now. *Fair Fight, Inc.*, Slip Op. at 9, n. 8.

Fourth, Plaintiffs have provided no evidentiary support that the absence of a state mandate to take various prophylactic or website measures will cause any of the declarants to vote in person. Nor have they shown that the absence of the specific types of relief sought (e.g., the lack of drive-thru voting locations) is all that stands between a Georgia voter (much less any of the Plaintiffs) and that voter's decision to vote in person or absentee.

Fifth, Plaintiffs ignore that local election officials can already accept absentee ballots at multiple locations. Ga. Comp. R. & Regs. 183-1-14-.08(2).[18] Indeed, Plaintiffs' claim is that government should just "do more" to satisfy Plaintiffs' policy demands, but another court in this District recently rejected similar demands, because the Constitution does not require governments "to maximize the convenience of all voters." *Gwinnett Cty.*

[18] This address concerns of declarants like Elizabeth Throop, who would like to vote by a hand-marked absentee ballot and return it to a county election official. (Doc. 20 at 115-16.)

NAACP, 2020 WL 1031897, at *7-8 (citing *Ohio Democratic Party v. Husted*, 834 F.3d 620, 629 (6th Cir. 2016)).

Sixth, while the impact of the COVID-19 virus is significant, the cost of protecting oneself against possible exposure at a polling location (e.g., using hand sanitizer, washing hands after voting, wearing a mask) is relatively low, and Plaintiffs have not alleged that they are unable to take the preventative measures they describe. Under these circumstances, an extraordinary mandatory injunction from a federal court dictating every detail of a polling location and subjecting poll workers to possible sanction is incongruous and unwarranted. (Doc. 20-1 at 5.)

Other courts have found that imposing tangential costs on in-person voting (putting aside the opportunity to vote absentee) is not actionable. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring); *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1354 (N.D. Ga. 2006). Or, as held by another court in this District just last week: Plaintiffs' proffered safeguards:

> may very well be the best public policy … The problem with this argument, however, is that it is not the law. And, it is not the job of this Court to write the law or to decide this case in favor of the party who articulates the most desirable outcome. The Court must follow the law as written and leave the policy decisions for others.

GALEO v. Gwinnett Cty. Bd. of Registrations and Elections, No. 1:20-cv-1587-WMR (N.D.Ga., May 9, 2020) (Slip Op. at 2).[19]

Finally, there is no logical link (much less actual evidence of a link) between much of what Plaintiffs request (e.g., enhanced pollwatcher activities) and the COVID-19 virus. There is certainly no citation to any authority supporting the idea that the Constitution mandates such relief.

5) ABSENTEE BALLOT CHANGES. Shifting their focus from in-person voting to absentee-by-mail voting, Plaintiffs also demand that the Secretary mandate a series of absentee ballot reforms to be implemented by local officials. These include: (1) allowing counties to begin counting (if not tabulating) ballots before 7:00am on election day; (2) identifying voters who received absentee ballot request forms at their residential (not mailing) address and mail them another packet to their mailing address; (3) ordering local election officials to "refrain from rejecting as untimely cast" absentee ballots that are postmarked on or prior to election day (or not postmarked at all) and received "up to three days" later; and (4) accepting UOCAVA ballots that are postmarked by election day and received by the final day before the superintendent's certification of the election. (Doc. 20-1 at 3-4.) These issues

[19] A filed copy of the Slip Opinion in *GALEO* is attached as **Exhibit 7.**

have either already been addressed or will be addressed by the time of the hearing on Plaintiffs' Motion.

Further, the Secretary is considering additional actions to permit early scanning of absentee-by-mail ballots by local officials. Also, the Secretary has already mailed absentee ballot request forms to voters who received them at their residential address instead of their mailing address. (Sterling Decl., ¶ 13.) These claims for relief are, therefore, moot. *United States v. Georgia*, 778 F.3d at 1204.

This leaves only Plaintiffs' claims for extending the time to return absentee ballots and the necessary striking (or judicial rewriting) of O.C.G.A. § 21-2-386(c).[20] Here, Plaintiffs' Complaint cites an unsubstantiated "indication that the U.S. Mail in Georgia will continue to be much slower than normal." (Doc. 1 at 107; *see also* Doc. 20 at 170 (citing "frequent complaints" of problems with mail).) There is no evidence, however, that supports this claim. No declarant said that imposing the remedy would make them any more or less likely to vote. And, they can always return their absentee ballots in person, which alleviates the concern altogether.

[20] An exception for overseas and military voters allows their absentee ballots to be counted so long as they reach the county election office within three days of the closing of the polls. Ga. Comp. R. & Regs. 183-1-14-.10.

There is also no legal basis to impose a blunt judicial order against the State for perceived or actual acts of the United States Postal Service. *See Georgia Shift*, 2020 WL 864938, at *5 (declining to use federal judicial power to address every conceivable electoral harm). Under these circumstances, *Billups* is also on point: plaintiffs' inability to "locate a single voter who would bear a significant burden[] 'provides significant support for a conclusion that [the challenged law] does not unduly burden the right to vote." 554 F.3d at 1354.

6) COUNTING MARCH ABSENTEE BALLOTS. Finally, Plaintiffs ask that the Secretary count both ballots from voters who voted in the March Presidential Preference Primary and will vote in the June Primary. (Doc. 20-1 at 6.) To prevent duplicate voting (and unconstitutional vote dilution), the Secretary will disregard the March ballots for voters who vote in the June Primary, as their June Primary ballot will contain the Democratic or Republican nominees for President, based on which ballot the voter chose. (Doc. 19, at 2). This presents no burden, because government officials are presumed to obey the law, *United States v. Matta*, 937 F.2d 567, 568 (11th Cir. 1991), and Plaintiffs have not articulated or shown any contrary intent.

iv. *The State's interests are important.*

Only if this Court finds that Plaintiffs have provided competent evidence of an actual burden does it consider the government's interest. Plaintiffs do not allege that the acts or omissions they challenge are facially discriminatory or generally unreasonable, so "important regulatory interests" are sufficient to uphold the current election laws. *Burdick*, 504 U.S. at 434. This is also true because of the "minimal" nature of the Plaintiffs' alleged burden. *See Timmons*, 520 U.S. at 358; *De La Fuente v. Padilla*, 930 F.3d 1101, 1105 (9th Cir. 2019) (citing *Timmons*), *cert. denied*, 140 S. Ct. 676, 205 L. Ed. 2d 440 (2019). Under these circumstances, the "State need not establish a compelling interest to tip the constitutional scales in its direction." *Burdick*, 504 U.S. at 434, 439.

First, the State has a strong interest in enforcing its own election laws as written. *Fair Fight, Inc.*, Slip Op. at 28-29. This includes laws governing the time of presidential preference primaries and when absentee ballots must be returned. *See* O.C.G.A. §§ 21-2-191; 21-2-386(c). This interest extends to enforcing federal laws like UOCAVA, and the Justice Department agrees. *See generally* (Doc. 24)

Second, there is a real financial cost associated with Plaintiffs' proposed relief, whether buying an unquantifiable additional amount of PPE,

printing potentially millions of hand marked paper ballots, and providing additional resources like pens, cardboard, and shields. *See generally* (OPB Decl.; Sterling Decl.; Harvey Decl.) The State's realistic budget projections are dire and those fiscal concerns are "undeniably a legitimate and reasonable legislative purpose." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016); *see also Wilson v. Birnberg*, 667 F.3d 591, 601 (5th Cir. 2012).

Third, the administrative burden of retraining county election officials to accommodate Plaintiffs' policy preference for hand marked paper ballots is also significant. (Harvey Decl., ¶¶ 34–36.) These last-minute changes will also increase the possibility of human error. (*Id.*) The State has an interest in maintaining the integrity of elections and avoiding this problem. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

Fourth, the state has an interest in preventing voter confusion caused by overloading voters with alternative and new information. *See Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 793 (11th Cir.1983) (addressing voter confusion). For almost a year, voters and election officials have been learning how to use the new BMD voter system, training has taken place on the new devices, and the BMDs have been fully deployed to county election officials. (Sterling Decl., ¶ 3.) Switching to a new system now would require on-the-fly

retraining of county officials to assist voters whose understanding of the elections system would have been discarded at the eleventh-hour. More still may rely on "pop-up" or "drive-thru" polling locations that never materialize. *See Jacobson*, 2020 WL 2049076 at *11 (discussing federal courts' limitations to enforce orders against nonparties).

The best way to avoid voter confusion is to conduct this election on the set date under the set policies. Voters can vote in-person with the preventative measures that are already being planned for or they can vote by absentee ballot (and even return their ballots in-person if they fear the United States Postal Service). The pandemic is cause for enough confusion; last-minute changes imposed by the federal judiciary should not be another.

B. Plaintiffs are not likely to succeed on the merits of their Equal Protection claim.

Count II alleges Equal Protection violations based on purported discrimination against the aged and the sick. These claims also fail.

First, Plaintiffs' Equal Protection claim fails for the same reason as their Due Process claim: it presumes, without evidence or legal support, that an absentee ballot is less likely to be effective than an in-person ballot. (Doc. 20 at 30.) There is no basis in law or fact to make this presumption. As shown above, the secrecy sleeve is not a federally cognizable issue, and

generalized and unsupported concerns about postal workers are not a basis to grant a mandatory federal injunction—certainly not against Defendants who have no dominion over USPS. Moreover, government is presumed to act in good faith, which means that it is presumed that State and nonparty local officials will act in accordance with the law. *Matta*, 937 F.2d at 568.

Second, "[t]he Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring); *See also United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984). Plaintiffs have alleged no intentional conduct by the Defendants to undermine, harm, or discount the votes of those who may be more vulnerable to the COVID-19 virus. This warrants denial of the Motion based upon Plaintiffs' Equal Protection claims.

Third, neither the aged nor those that may be more susceptible to the COVID-19 virus are protected classes. *Gary v. City of Warner Robins, Ga.*, 311 F.3d 1334, 1337 (11th Cir. 2002) (age); *cf. Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001) (reaffirming that the disabled are not a suspect class). Accordingly, the rational basis test will uphold the government's policies. *Id.* As discussed above, there are numerous rational

and important issues to maintain the current election system, especially as it has been already modified to address the COVID-19 virus.[21]

II. Plaintiffs will not suffer an irreparable injury absent issuance of a preliminary injunction.

Even in election cases, Plaintiffs must still show a substantial likelihood of an "actual and imminent" injury to their right to vote. *Siegel,* 234 F.3d at 1176; *NE Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Plaintiffs here failed to do so. Voters concerned about COVID-19 can vote absentee, and the Eleventh Amendment precludes consideration of Plaintiffs' secret ballot concerns. *See, supra* Section I, A, ii. In addition, Plaintiffs speculate that the pandemic will be in full swing in June, August, and November, but acknowledge they really cannot predict this, thus their requested relief does not avoid the alleged harm. (Doc. 1, ¶ 40.)

[21] Plaintiffs' attempt to weave back in the "unconstitutional conditions doctrine" to the Equal Protection claim fails for the same reasons as it does under the Due Process analysis. *See supra*, n. 13.

III. The public interest and balance of the equities weigh against granting Plaintiffs' relief.[22]

In the light of the ongoing pandemic and the State's other election obligations, the balance of the equities and the public interests involved clearly favor Defendants. The (at worst) minimal burdens Plaintiffs articulate pale in comparison to the financial and administrative burdens their relief would impose upon the State (much less 159 nonparty county election officials), and the voter confusion imposed upon the public.

This is particularly true given the temporal proximity of the June Primary, potential August runoffs, and November elections. The United States Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (April 6, 2020) (per curiam) (citations omitted). In cases like this one, courts must consider "imminence of the election," *id.,* as there is "a public interest in the Court promoting certainty with elections and not entering orders that create 'voter confusion and consequent incentive to remain away from the polls.'" *Gwinnett Cty. NAACP,* 2020 WL 1031897 at *9 (quoting *Purcell*, 549

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[22] Courts in this district have considered the remaining two factors—balancing the equities and public interest—together in election cases. *See Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018).

U.S. at 5). The risk of voter confusion from court orders affecting elections increases as the election draws closer. *Purcell*, 549 U.S. at 4-5.

The effects of COVID-19 on elections are unknown, but the relief Plaintiffs seek would fundamentally change the upcoming election and recognized voting procedures for all Georgia voters. The June election is already underway, and over 1 million absentee ballot applications have been accepted. (Sterling Decl. at ¶ 16.) Official absentee ballots have been mailed to many voters already and, as of May 11, 2020, 180,215 absentee ballots have been returned, processed, and accepted. (*Id.*) Early in-person voting will begin in less than a week—on May 18, 2020. (Harvey Decl. at ¶ 17.)

In addition to the obvious public interest in not disturbing an election process already underway, "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Eu,* 489 U.S. at 231. The functioning of our democracy demands that voters have confidence in the integrity of the electoral processes. *Purcell*, 549 U.S. at 4. *See also Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Moreover, Plaintiffs' proposed relief would burden the franchise of military and disabled voters. Plaintiffs' relief would sacrifice the franchise of military voters to allay their speculative fears and concerns. *See* (Doc. 24). Similarly, in their unrelenting march to override a policy choice of the state,

Plaintiffs' relief would require Georgia's disabled voters utilize a system that (under the logic of their own theory) is constitutionally insufficient for the general public, but permissible for those relegated to a position of "political powerlessness in our society." *Tennessee v. Lane*, 541 U.S. 509, 516 (2004); *see also National Federation of the Blind v. Lamon*, 813 F.3d 494, 506 (4th Cir. 2016).

CONCLUSION

Plaintiffs (once again) request this Court accomplish what their state-level advocacy could not. Plaintiffs' Complaint and Motion are largely the same failed arguments they have pushed for years, repackaged with a COVID-19 wrapper. Whatever the merits of Plaintiffs' preferred method of voting, their claims in this case do not provide a constitutional basis for supplanting a reasonable policy decision of the State at the eleventh-hour. Accordingly, this Court should deny Plaintiffs' Motion.

Respectfully submitted, this 11th day of May 2020.

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