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

COALITION FOR GOOD GOVERNANCE, RHONDA J. MARTIN, JEANNE DUFORT, AILEEN NAKAMURA, B. JOY WASSON, AND ELIZABETH THROOP, **Plaintiffs,** **v.** **BRAD RAFFENSPERGER, in his official capacity as the SECRETARY OF STATE of the STATE OF GEORGIA, and REBECCA N. SULLIVAN, DAVID J. WORLEY, MATTHEW MASHBURN and AHN LE, in their official capacities as members of the Georgia State Election Board,** **Defendants.**	**Civil Action No. 1:20-cv- 01677 -TCB**

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The urgency of this action to provide safe and effective voting in this pandemic has become even more extreme in the 23 days since Plaintiffs initiated this litigation. Pandemic conditions have worsened, the intended safeguard alternative of absentee balloting has failed, and in the face of the deteriorating and frightening environment, the Defendants have taken no meaningful steps to fulfil their moral and legal duty to ensure the fair, legal, and orderly conduct of primaries and elections. Two new facts further confirm that the election has to be moved to June 30: first, as explained in Plaintiffs' Motion for Temporary Restraining Oder (Doc. 27), the State is mailing absentee ballots stating that Election Day is May 19, 2020. This egregious error must be corrected, and doing so requires moving the election. Second, the evidence demonstrates that the counties are so far behind in processing absentee ballot applications that tens of thousands of voters – who are depending on absentee ballots to vote because they cannot leave their home – will not receive their ballots in time to mail them back. As explained in further detail in Part III(A), below, the election must be postponed to prevent this massive disenfranchisement.

Plaintiffs will address in this Part II the many incorrect and misleading arguments that litter the Defendants' Response. In Part III, Plaintiffs will address each item of requested injunctive relief under the *Anderson/Burdick* test. In Part IV, Plaintiffs will address their equal protection claim.

II. Misleading and Incorrect Arguments in Defendants' Response

A. Plaintiffs' Supposed Motive for Bringing Suit

Despite the grave situation at hand, Defendants open their Response Brief with a petty attack on Plaintiffs' purported motivations, which although untrue, are irrelevant. Plaintiffs are proud of the resulting public benefit of their successful election litigation against defendants, and are by no means alone – many individuals and organizations have recently succeeded in litigation against the Secretary and his predecessors over a multitude of election issues.[1]

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[1] *E.g., Curling v. Raffensperger*, 397 F. Supp. 3d 1334 (N.D. Ga. 2019) (granting in part Coalition's motion to enjoin use of DRE voting machines); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1341 (N.D. Ga. 2018) (granting Martin's injunctive relief relating to processing of absentee ballots). Cases brought by other voters have also achieved success. *See Ga. State Conf. of the NAACP v. Kemp*, No. 2:16-cv-219-WCO (N.D. Ga.) (exact signature match); *Georgia Coalition for Peoples' Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (granting preliminary injunction based on citizenship for the November 2018 election); *Ga. State Conf. of NAACP v. State of Georgia*, No. 1:17-cv-1397-TCB (N.D. Ga.) (injunction ending the 90 day registration cutoff); *Ga. Coalition for the Peoples' Agenda v. Deal*, 214 F. Supp. 3d 1344 (S.D. Ga. 2016).

B. Plaintiffs' Injury is Not Fear or Emotions

On page 2 of their Response, Defendants contend that Plaintiffs injury is a result of their "emotions." Defendants mock Plaintiffs' fear of the coronavirus. "They are 'afraid' they may be compelled to vote in person." (Doc. 33 at 2). Defendants betray a complete misunderstanding of this lawsuit and the coronavirus. The future is uncertain, but today's reality is not: if the course is not immediately reversed and reasonable protective measures are not undertaken, the coronavirus will spread. Plaintiffs are indeed fearful, but no more so than Chief Judge Thrash, who concluded on March 16, 2020: "For many, this disease poses a serious risk of severe illness or death." *General Order* 20-01, at 1. As of May 12, 2020, there have been over 34,000 cases and over 1,440 deaths in Georgia.

C. Defendants' Completely Flawed Constitutional Analysis

Defendants' argument is built upon an entirely flawed understanding and application of relevant constitutional law. Defendants' theory is this: even if the state imposes an unreasonable burden on citizens' right to vote, that burden is acceptable if the citizen can overcome that burden by exercising their right to vote in other ways. For example, rather than disputing that voters who choose to vote in person at a polling place will be subjected to a substantial risk that they will be

exposed to a highly contagious disease, Defendants contend that since these voters may vote absentee, there is no constitutional violation. And, if there is a material risk that an absentee voter will be disadvantaged or completely disenfranchised because of the state's repeated administrative failures, since the absentee voter may risk his or her life and vote in person, there is no constitutional violation.

This analysis is contrary to multiple lines of constitutional authority. First, this analysis depends upon an "unconstitutional condition," "roundly condemned" by the Eleventh Circuit. *See generally Bourgeois v. Peters,* 387 F.3d 1303, 1324 (11th Cir. 2004) and discussion in Plaintiffs' Brief, Doc. 20 at 19-20. Defendants only response to the unconstitutional condition argument is to complain that it has never been employed in an election case, but fail to explain why that should make any difference.

Second, with respect to election cases specifically, the argument completely misstates the constitutional test. The issue is not whether voters might be able to overcome unreasonable burdens (such as voting absentee instead of risking their lives to vote in person), but whether, *with respect to the particular burden at issue*, the "asserted injury to the right to vote" is outweighed by "the precise interest put forward by the State as justifications for the burden imposed." *Crawford v.*

Marion County Election Bd., 553 U.S. 181, 190 (2008). Defendants claim that the burdens on Plaintiffs is slight. Even if this factual contention were supported by the evidence – and it is not – it would not relieve Defendants of justifying their actions: "However slight that burden may appear, …. it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 191. Defendants ignore this black letter constitutional law: any *unjustified* burden on the right to vote is unconstitutional.

Defendants attempt to avoid this black letter law by referencing *procedural* due process throughout their Reply Brief. (Doc. 33 at 12 – 13, 14, 17). Defendants contend that "a procedural due process claim fails if the state provides an adequate remedy to a constitutional violation." (Doc. 33 at 17). Since absentee voting is an "adequate remedy," this argument runs, the state's constitutional violations relating to in-person voting are irrelevant. This statement is wrong on the law, but also completely irrelevant: Plaintiffs make no procedural due process claim. Instead, Plaintiffs have two counts, clearly identified: one is a fundamental right to vote claim based upon substantive due process under *Anderson* and *Burdick*; the other is an equal protection claim.

Defendants claim that Plaintiffs have failed to identify any state action. But this entire lawsuit is premised on state action, whether it is conducting an election during a pandemic without legal ballots and without adequate safeguards, or forcing in-person users to vote in crowded polling places on disease-transmitting electronic touchscreens. The "state action" component of this lawsuit is no different than the state action that Judge Totenberg found actionable in *Curling v. Raffensperger,* 397 F. Supp. 3d 1334 (N.D. Ga. 2019): conducting an election that threatens to materially disenfranchise voters and burden the right to vote.

Defendants also repeatedly refer to, and purport to apply, a "rational basis" test for the Defendants' conduct. "Rational basis" analysis – appropriate for testing the validity of, for example, non-discriminatory economic regulations – has no place in testing the constitutional validity of burden on the right to vote because the right to vote, like the right to be free from invidious discrimination – is a fundamental right. *Burdick, supra,* at 433 ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'"); quoting *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979). Rationality, or the lack of it, may be relevant, but the test is whether, for each burden, whether the "asserted injury to the right to vote" is outweighed by

"the precise interest put forward by the State as justifications for the burden imposed." *Crawford v. Marion County Election Bd.,* 553 U.S. 181, 190 (2008).

Defendants also claim that Plaintiffs' case is constitutionally invalid because it challenges more than one state action or omission. (Doc. 33 at @). There is no support for Defendants' "two violation immunity" rule which would allow serial violators of plaintiffs' constitutional rights to escape liability.

III. Violation of Fundamental Right to Vote

Under *Anderson* and *Burdick,* issue is whether state officials have the constitutional duty to lessen the burden on in-person voting by taking reasonable measures to reduce the risk that people who want to vote in-person will not be exposed to a life-threatening disease *and* to take reasonable measure to reduce the risk that their own multiple administrative failures disenfranchise absentee voters. Of course they do. It is true that state officials should not have to be told by a federal court to undertake these duties. But if they refuse to take reasonable measures without justification, as Defendants have here, then relief is warranted.

Before addressing each measure, it should be noted that Defendants have agreed to take certain actions that, Defendants claim, renders the particular

requested relief moot. This is not correct. On April 27, 2020, this Court entered an order (Doc. 13) directing the Defendants as follows:

> Defendants shall inform the Court and the Plaintiffs, by April 28, 2020, as to which of the remedies or changes to elections procedures described in the Motion (Doc. 11), including moving the date of the June 9 election, Defendants (a) intend to make, in whole or in part, prior to a Court order requiring them to do so, or (b) do not oppose.

In response, Defendants identified only a single change that it did not oppose or action that it would take absent a court order, and that was to mail absentee ballots applications to the correct addresses. (Doc. 19 at 2). In their Response, Defendants suggest that may voluntarily comply with five more changes: to count March ballots correctly (Doc. 33 at 27); to provide counties with PPE (*id.* at 22); to allow early scanning of ballots before Election Day (*id.* at 25 ¶ 5, item 1)[2]; to permit post-election day acceptance of timely-mailed ballots (*id.,* item 3.); and to

[2] Defendants state that "[t]hese issues have either already been addressed or will be addressed by the time of the hearing on Plaintiffs' Motion." (Doc. 33 at 25-26). Plaintiffs read this statement as an indication that Defendants intend to make these changes. Defendants, however, contradict themselves with respect to the extension of due dates for absentee ballots. Immediately after suggesting that they will agree to the change, Defendants state that the State "has a strong interest in enforcing its own laws," including the laws detailing when absentee ballots are due. (Doc. 33 at 28). This is a bootstrap argument that runs counter to the Supremacy Clause and the Bill of Rights. The state's interest in enforcing its own laws is never sufficient if doing so violates a citizen's constitutional rights. Other than saying "the law is the law," Defendants offer no justification of the deadlines.

permit acceptance of delayed UOCAVA ballots. (*Id.,* item 4). This does not render these claims moot or eliminate the need for injunctive relief because there is no guarantee that, absent injunctive relief, the State will not "return to [it's] old ways." *United States v. W. T. Grant Co.,* 345 U.S. 629, 632 (1953). Indeed, because the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot," *id.,* Plaintiffs are entitled to an injunctive relief as to the each of these claims for relief.

In the discussion that follows, Plaintiffs will address Defendants' Response to key measures Plaintiffs contend must be taken to make in-person voting reasonably safer and ensure that absentee mail voting does not result in voter disenfranchisement.

A. Postponing Election Day

On Election Day, June 9, voters who are over 65 or have certain medical conditions will not be permitted to come to polling places under Georgia law. All these people will be subject to being charged with a misdemeanor if they leave home to vote. (*See* Ex. U). This stay-at-home order expires on June 12. Thus, the State has determined that it will be too dangerous for hundreds of thousands of

voters to come to the polls on June 9, but not on June 30. This fact alone compels a postponement of the election.

In addition, the need to move election day to June 30 is now imperative because the State has failed in its effort to provide an effective altenative mail voting plan to offset the health dangers of in-person voting. As Plaintiffs explain in their Motion for Temporary Restraining Order (Doc. 27), the absentee ballots that the Secretary is in the process of sending to 1.3 million Georgia states that the election date is May 19, 2020. This mistake has to be cured immediately because voters receiving the ballot will reasonably believe that it is too late to cast a vote. Separately, as established in the numerous declarations filed in support of this Reply, the State has fallen even further behind in the mailing out of absentee ballots and has no hope of catching up, much less correcting the egregious error, in time for a June 9 election. Normally, state administrative problems should not be cause for moving an election. Here, however, the massive and unanticipated increase in mail voting – directly caused by the unprecedented pandemic – has rendered the counties unable to process absentee ballot applications in time and in an orderly and accurate way. Thousands – even hundreds of thousands – of

Georgia voters who are depending on absentee ballots to vote *will not receive their ballots in time to cast them timely.*

Evidence showing examples of how far the state is behind is contained in the Declarations filed in support of this Reply. In summary:

* Voters are waiting multiple weeks to receive ballots. (Doc. 36 at 6, 23, 30, 43, 46, 50, 52, 54-46, 57, 59, 62, 64-65);

* Voters cannot get answers on the ballot request status.(Doc. 36 at 46, 64-65);

*County Boards of Elections meetings, such as Henry County's Election Director, discussing that the vendor was taking 2 to 3 weeks to mail ballots. (To be filed with Marks Declaration).

It is grossly inadequate and cruel to answer that the voters who do not timely receive accurate absentee ballots may vote in person: many of these voters are 65 and over or suffer from medical conditions. These voters *must* vote absentee because the law requires them to stay at home through June 12. Moreover, even if there were no such law, it would obviously be constitutionally unacceptable for the state to permit them to exercise their right to vote only in-person in pandemic conditions. .

Defendants have asserted two interests in not moving the election, neither persuasive. First, Defendants contend that moving the election will render the state unable to comply with the deadline for delivering UOCAVA ballots for the run-off. To the contrary, as Plaintiffs' will explain in a separate brief in response to the Statement of Interest of the United States, the state can still comply with UOCAVA if it moves the election. Moreover, conducting the election on June 9 causes massive disenfranchisement of domestic voters who also have a statutory right to absentee ballots 45 days before the election -- a right that is being flagrantly violated for hundreds of thousands of voters.

Second, Defendants contend that moving the election will result in voter confusion. The opposite is the case. By now, because of another error by the printer (or the Secretary) a 1.3 million Georgia voters have been sent a formal absentee ballot for the "May 19, 2020" election with no correcting instructions. *See generally* Plaintiffs' Motion for Temporary Restraining Order (Doc. 27). State and county officials need to take the time now to do this election in a legal manner with legally compliant ballots, issued to voters with the correct date or possibly clarifying instructions with plenty of time of these voters to mail them back.

Defendants also contend that Plaintiffs have not proven that pandemic conditions will be worse in the voting period leading up to June 5 and the voting period leading up to June 30. To the contrary: Plaintiffs have pointed to the best evidence available, projections from IHME, and Defendants have offered no contrary evidence. In addition, the official position of the State of Georgia, in the form of the Governor's Executive Order, is that pandemic conditions will extend to June 12, but not thereafter. (Doc. 38 at 98).

B. Replacing BMDs

In their Brief, Plaintiffs explained with exhaustive citations to evidence that using BMDs during a pandemic exposes voters to an unreasonable risk because there is no practical means of cleaning the touchscreens between voters. Defendants' Response is significant for what Defendants do not say and do not deny. Defendants make no attempt to refute the CDC's conclusion that the coronavirus can be transmitted by touching surfaces like the touchscreen voting machines and numerous related components. This fact is undisputed.

Defendants now concede that "the general instructions for Dominion voting equipment requires the units to be powered down between cleanings." (Doc. 33-1 at 9). However, Elections Director Chris Harvey in his Declaration states that

"[o]ur office has consulted with Dominion" and Dominion now "has advised us that the machines may be safely wiped down without being powered off." (*Id.*) This triple hearsay, which contradicts Dominion's written instructions, is not admissible or persuasive. More to the point, Defendants do not represent to the Court, either in their Response Brief (Doc. 33 at 19) or Mr. Harvey's Declaration (Doc. 33-1 at 10) that the counties will be required to clean off the screens between each voter, and there is no evidence that all counties will do so or with what disinfecting protocols. This is not surprising, since doing so is completely impractical and would lead to intolerable delays.

Moreover, even without the cleaning, voting using BMDs is extremely slow because of the multiple steps in the process that are unnecessary with hand marked paper ballots: the generation of the virus-transmitting smart card, the voting on the screen, the printing out of the ballot summary, the time-consuming voters' review of the long ballot summary (as required by Board rule). (Doc. 36 at 4-8).

Thus, since counties are not required to clean the screens, and are suffering from a serious shortage of poll workers (Doc. 36 at 13, 16). and there is no evidence that they will do so, Defendants will be forcing voters to expose themselves to the coronavirus just to cast a vote. Almost worse, using the BMDs is

so slow that using them will expose voters to other voters crammed into polling locations.[3]

These are burdens on the right to vote: what is the justification? Only one argument is advanced. Defendants' contend, without evidence, that voting on paper ballots is just as likely to transmit the disease. To the contrary: a paper ballot can be handed to the voter in a clean envelope and then marked by the voter with a disposable marker. Only the voter will touch the paper ballot or the marker. That is why this is the solution that experts recommend, *see* Doc. 1 at 101, and there is no contrary evidence or argument. The same is true for the choice between Pollpads, which the voters must touch, and laptops or paper pollbooks, which are only touched by pollworkers. Plaintiffs' recommendations are so sensible that Defendants spend far more ink questioning Plaintiffs' motives (Doc. 33 at 2, 20, 35), than attempting to articulate any sensible justification for not replacing the BMDs with clean hand marked paper ballots (*id.,* one sentence at page 19).

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[3] Defendants also state: "And *no* Declarants testifies that the use of hand-marked paper ballots or PollPad alternatives would allay their in-person voting concerns." This is not correct. See Declaration of E. Throop, Doc. 20 at 115-166 ("I would, however, prefer to vote in person on a paper ballot that I marked with my own clean pen. . . . At this point, I face a tradeoff between the uncertainties and lack of privacy involved in absentee voting, and the disease risks and other types of privacy involved in voting on a touchscreen. As a voter, I don't feel I should be forced to make these tradeoffs in exercising my right to vote.").

Defendants weakly contend that replacing BMDs with hand marked paper ballots is not in the public interest because county election officials will have to be "retrained" on hand marked paper ballots. (Doc. 33 at 29). This is absolutely incorrect, for three reasons. First, county election officials already process hundreds of thousands of hand marked ballots each election – absentee ballots, emergency ballots, and provisional ballots are all hand marked paper ballots processed by the poll workers. Second, county officials are required by Board rule[4] to use hand-marked paper ballots if election lines run longer than thirty minutes, meaning that they are already trained. (Marks Decl. ¶ 43) (to be filed). Third, Defendants are required by Judge Totenberg's Order in *Curling* to be prepared to use hand marked paper ballots in the event BMDs effectively rolled out—which is the case currently. Despite the prominence of the discussion of Judge Totenberg's opinion in the Complaint (Doc. 1 at 40), and Plaintiffs' Brief (Doc. 20 at 15-16), Defendants do not address it once. By not addressing *Curling*, they concede the point: they are already prepared to use hand marked paper ballots and using them is entirely feasible.

[4] @@ cite to board rule

Balancing the burden of using BMDs and the justification is straightforward and completely one-sided: the burden is the increased risk of contracting a deadly virus; the justification, non-existent.

C. Reducing Congestion and Interaction at Polling Locations

Defendants do not dispute the obvious proposition that all reasonable measures need to be taken to reduce human interaction at polling places to protect the health of in-person voters and pollworkers. Some polling places are extremely small, as shown in the photographs attached to the Complaint. (Doc. 1 at 128, 130 and 132). This is exactly the kind of environment that health care professionals are warning the public about and State Defendants have done little to address. After the lessons learned from Wisconsin's highly publicized health safety and election scheme failure, Plaintiffs demanded that State Defendants adopt at least minimal standards of the type adopted too late and incompletely by Wisconsin. (Doc. 36 at 17-86), Marks Decl. ¶ 44).

By making voters endure this disease-transmitting congestion to cast a vote, Defendants are unreasonably burdening the right to vote. It is unreasonable because the Defendants can reduce the congestion, and the threat, by taking five reasonable steps, discussed below:

1.Permit Reduction in Number of Voting Stations

Plaintiffs frankly do not understrand the Defendants' position on this issue. State law requires each precinct to have one "voting booth" for every 250 electors, regardless of actual turnout. As Plaintiffs established with unrebutted evidence, adhering to this requirement will make it impossible to keep voting stations at least six feet apart if the cumbersome BMDs are used. (Doc. 20 at 133-134). Plaintiffs understand that counties in fact will not be following this rule and Defendants should give the counties this disretion. Plaintiffs propose a simple solution: allow county superintendents to determine the number of voting booths in their discretion "after evaluating the anticipated turnout." (Doc. 11 ¶ 3).

2. Expand Early Voting

Plaintiffs have moved that the Defendants give the counties the option to extend early voting through the weekend and Monday before Election Day to reduce pressure on the expected crowds at the polling places. Defendants only response to this simple but important measure is that counties are not parties to this action and therefore cannot be bound by the Court's Order. But Plaintiffs do not seek any relief against the counties. Instead, the relief sought is directed at Defendants, for them *to allow counties, at their option*, to expand early voting.

Defendants also argue that "Georgia election law also provides signicant discretion to local government officials." (Doc. 33 at 21). Plaintiffs' motion, if granted, would give counties *more* discretion. If Defendants mean what they say – that this is something that the counties should decide – then Plaintiffs' motion is, for all practical purposes unopposed. However, since Defendants are known to take offensive action against counties that attempt to protect voters' constitutional rights but stray from the Defendants' positions, the injunction is necessary.[5]

3. Curbside Voting.

Defendants do not address curbside voting, the benefits of which are discussed by Plaintiffs in their Brief. (Doc. 20 at 18).

4. Temporary Mobile Voting Centers

Defendants do not dispute that counties are violating Georgia law by closing polling locations without the required 60 days advance public notice. (Doc. 20 at 18). Plaintiffs are not challenging these closures, but do seek measured relief that, where polling locations are closed (many times for good reasons due to the

[5] For example, earlier this year, Athens Clark County Board of Elections made the decision that using BMDs was "impracticable" because they violated voters' right of privacy and resolved to use hand-marked paper ballots. The Board convened a punitive hearing and reversed the County's decision. (Doc. 38 at 88).

pandemic, but still in violation of Georgia law), counties be directed to offer temporary mobile voting centers. Defendants articulate no reason for not taking this action, except to say that counties are not parties. (Doc. 20 at 22). Again, the motion is directed at the Defendants, not the counties, and Defendants do not contend that they lack the power to direct the counties to take this action, particularly in light of the counties' inability to comply with Georgia law.

5. Streamline Voter Check-In

Defendants does not explain why voter check-in should not be streamlined and conducted in a manner that minimizes personal contact, as addressed in Plaintiffs' Brief (Doc. 20 at 19).

6. Physical Distancing and Personal Protective Equipment

Initially, Defendants state that they are providing counties with PPE, rendering Plaintiffs' requested relief moot. (Doc. 20 at 22). This is incorrect for two reasons. First, the Defendants' actions are insufficient because they have not committed to supply counties with face masks for voters. (Marks Decl. ¶ 46). In addition, under *W.R. Grace,* quoted above, Plaintiffs are entitled to an injunction even if Plaintiffs had voluntarily agreed to all the relief sought.

As for the requirement that county officials be instructed to require voter physical distancing, the Defendants' only response is that is that Plaintiffs are free to wash their hands and wear a mask, which is protection enough. To the contrary: physical distancing is a universally accepted requirement to stop the spread of the pandemic and Defendants' failure to require it is unacceptable, irresponsible, and increases the risk that voters will be exposed to the coronavirus.

D. Changes to Absentee Mail Voting

As discussed above in relating to moving the election to June 30, the the counties, left to deal with the mess created by the Secretary's mismanaged ballot printing and distribution, hopelessly behind in processing absentee ballot applications and issuing absentee ballots. Defendants simply will not be able to print and issue legal ballots and clarifying instructions unless the election is moved.

In this section, Plaintiffs will address additional changes that can be made to absentee voting to prevent voter disenfranchisement, regardless of the actual date of the election. Significantly, as noted above, Defendants apparently have agreed to take many of these actions, but Plaintiffs are still entitled to injunctive relief.

1.Change Deadlines for Absentee Mail Balloting (Doc. 20 at 18-19).

Defendants have apparently agreed to make these important changes. *See* Doc. 33 at 25. The laws requiring the rejection of absentee ballots that are postmarked by election day, or received by the day after election day without a postmark, or timely mailed by Election Day and received from UOCAVA voters before the final day of certification, have absolutely no justification. These are simple but very important changes, particularly given the delays that have already been experienced in the processing of absentee ballot applications and absentee ballots.

2.Facilitate Distribution and Acceptance of Absentee Ballots (Doc. 20 at 20).

With the outrageous delays the state is experiencing processing absentee voting applications and ballots, it is absolutely essential that superintendents be directed to appoint absentee ballot clerks at polling locations to provide absentee ballot applications and absentee ballots to eligible voters and to accepted completed mail ballots. Counties recognize the timely requests from eligible voters for ballots in the week before the election will be pointless without this change. (Doc. 38 at 159). In Response, Defendants complain that Plaintiffs have not proven that the U.S. Mail is delayed because of coronavirus. This may be true, but it misses the point entirely. Even with instantaneous mail, it is almost certain that

many absentee voters will be disenfranchised because they do not get their absentee ballot in the mail in time to mail it back to the counties for arrival prior to election day. Defendants offer no justification for not allowing voters to pick up and drop off absentee ballots and missing secrecy sleeves at polling locations.

3.Speed Processing of Absentee Mail Ballots (Doc. 20 at 20).

Defendants have agreed to this change. (Doc. 33 at 25).

4.Count Eligible March Ballots

The Complaint explains in detail how the Secretary threatened to disenfranchise many voters who obtained March Ballots (as defined therein). (Doc. 1 ¶¶ 116-17). After being ordered by this Court to state whether they would comply with the Motion without Court action, Defendants in their "Notice of Actions" discussed the March Ballots problem, *id.,* but merely reiterated its intent to cancel eligible ballots at issue and did nothing to solve it, as explained in Plaintiffs' Brief. (Doc. 20 at 19-20). Apparently recognizing the egregious unconstitutional plan, Defendants have now reversed themselves, and Defendants' current position is unclear. Counties have not received any instruction from the Secretary other than to proceed to cancel such eligible ballots as they continue to

do. (Marks Decl. ¶ 47). Nevertheless, under *W.R. Grace,* this issue is not moot and Plaintiffs are entitled to an injunction.

IV. Equal Protection

How the equal protection clause is to be applied when a pandemic has a vastly disproportionate impact upon a discrete class of voters may be an issue of first impression, but Plaintiffs' equal protection claims is rooted in the core values of the equal protection clause.

Without doubt, the Defendants' failure to protect voters against the impact of the coronavirus will have a much greater impact upon voters who are over 65 or suffer from medical conditions making them far more vulnerable to the disease. To ensure that these voters are equally protected from the disease when they vote – that they are literally granted "equal protection under the law" – the state must take extraordinary measures to ensure in-person voting is as safe as possible and that absentee voting is administered in a manner that ensures that this vulnerable group of voters is not disenfranchised. The state's failure to ensure that every voter has an equal opportunity to cast their vote is subject to exactly scrutiny.

In this case, the state is not being asked to take extraordinary measures to accommodate the right to vote. It is not being asked to hand-deliver ballots to the

elderly or, as done in South Korea, test everyone's temperature before allowing them to enter a polling place. Instead, the state is simply being asked to take reasonable measures to make voting more safe for all voters because, among other reasons, there is a subset of voters that is extremely vulnerable to the disease.

There is an additional, and new, argument supporting Plaintiffs' equal protection claim. Voters over 65 are now prohibited by law from leaving their homes to travel to polling locations until June 12. (Doc. 38 at 98). Healthy voters under 65 are not so prohibited. If the election is held on June 9, it will be a crime for the elderly to vote in-person. Though poll workers over 65 are exempted because they work for "critical infrastructure," this exemption does not apply to the ordinary voter. This existence of this law is important to the equal protection claim for three reasons. First, it reflects the state's sensible conclusion that this pandemic is far more dangerous for the elderly and those with medical conditions. Second, it underscores the important of making sure the state has enough time before Election Day to mail absentee ballots to everyone who has applied for one in time for them to mail it back and be counted. Third, though the law could be extended further, at least at this time it reflects the state's judgment that severe pandemic conditions will last at least until mid-June, but not thereafter.

Respectfully submitted this 12th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2020, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send notification of such filing to all attorneys of record.

/s/ Bruce P. Brown
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