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

FAIR FIGHT ACTION, INC, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

Civ. Act. No. 18-cv-5391 (SCJ)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (JURISDICTION)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Defendants' unlawful voter suppression harms Georgia voters and the organizations serving them. Defendants' acts force each Plaintiff to reorient its activities toward voter protection, diverting staff and volunteer time, space, and dollars at the expense of Plaintiffs' other activities. Defendants are the cause of, and have the power to stop, these injuries—and this Court has the authority to order them to do so. Plaintiffs have standing and their claims are not moot.

I. Plaintiffs Have Standing To Bring Their Claims.

A. Plaintiffs Have Established Cognizable Injury.

Both now and when Plaintiffs filed their amended complaint, each Plaintiff has been or anticipates being forced to divert resources from its regular activities to counteract Defendants' illegal actions. Under well-established precedent, that is sufficient to demonstrate standing. An organization has standing to sue on its own behalf when it must "divert resources to counteract [a defendant's] illegal acts," thus impairing its "ability to engage in its projects." *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008). Defendants concede diversion of *financial* resources is not required; diversion of "personnel's time and energy" is sufficient. Defs.' Br. Supp. Summ. J. (Jurisdiction) 3-4, ECF No. 441 ("Defs.' Br.") (citing *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341

(11th Cir. 2014); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (NAACP "would divert resources from its regular activities to educate and assist voters in complying with" challenged statute).) An organization has standing if it has already redistributed resources *or* if it anticipates having to commit resources in the future to counter unlawful conduct. *See Browning*, 522 F.3d at 1165-66 (organizations "reasonably anticipate[d] . . . divert[ing] personnel and time" to educating volunteers and voters and assisting voters left off rolls). Injury-in-fact need not be "significant" to support standing; an "identifiable trifle" is enough. *United States v. Students Challenging Reg. Agency Procs. (SCRAP)*, 412 U.S. 669, 689-90 & n.14 (1973).[1]

[1] At least one Plaintiff has standing for each claim and form of relief requested. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). Ebenezer Baptist Church of Atlanta, Georgia, Inc. ("Ebenezer"), Care in Action, Inc., Fair Fight Action, Inc., Baconton Missionary Baptist Church, Inc. ("Baconton"), Virginia-Highland Church, Inc. ("Virginia-Highland"), and the Sixth Episcopal District, Inc. ("Sixth District") have shown injury due to voter purges and Exact Match. *See* Pls.' Statement of Additional Material Facts ¶¶ 20-33, 42-51, 79, 88, 119-23, 132-41, 148-55, 157-66, 171-88, 191-205 ("SAMF"). Ebenezer, Fair Fight Action, Baconton, Virginia-Highland, and the Sixth District have shown injury due to irregularities in the state-maintained voter rolls. *See id.* ¶¶ 20-33, 119-23, 148-55, 157-63, 171-88, 191-205. Ebenezer, Care in Action, Fair Fight Action, Virginia-Highland, and the Sixth District have shown injury due to provisional and absentee ballot issues and polling place closures. *See id.* ¶¶ 13, 15-17, 34-51, 61-88, 124-29, 132-41, 171-88, 191-205. Ebenezer, Care in Action, Fair Fight Action, and the Sixth District have shown injury due to long lines and other voting day difficulties. *See id.* ¶¶ 12, 14-16, 18, 34-51, 80, 88, 108-10, 130-41, 191-205.

Defendants ask this Court to impose legal requirements for standing that have no basis in this Circuit's law. *First*, Defendants incorrectly argue that injuries cannot be cognizable unless they are "quantified." *See, e.g.*, Defs.' Br. 8. Courts have specifically rejected this theory, and no Eleventh Circuit case requires it. *See People for the Ethical Treatment of Animals, Inc. (PETA) v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1340 (S.D. Fla. 2016) ("The showing of an actual, concrete injury is a modest requirement . . . which does not require quantification" (citing *Browning*, 522 F.3d at 1165)), *aff'd*, 879 F.3d 1142 (11th Cir. 2018); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (declining to "'demand . . . detailed descriptions' of damages" (citation omitted)). Plaintiffs have shown what is required: concrete injury resulting from Defendants' conduct.

Second, Defendants wrongly argue that Plaintiffs cannot demonstrate injury unless they had to undertake new activities that *conflict* with their organizational missions. *See, e.g.*, Defs.' Br. 13. This Court already rejected this argument. *See* MTD Order 15-19, ECF No. 68. The only relevant question is whether *Defendants'* conduct would "hinder [Plaintiffs'] abilities to carry out their missions." *Browning*, 522 F.3d at 1164. There is no additional requirement that a *plaintiff* take on activities that run counter to its mission. *See, e.g.*, *Common Cause/Ga.*, 554 F.3d at 1350; *Browning*, 522 F.3d at 1165.

Third, Defendants' reliance on *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (11th Cir. 2020), is misplaced. The organizational plaintiffs in *Jacobson* failed to show what they "would divert resources away *from* in order to spend additional resources on combatting" the challenged laws. *Id.* at 1206. Plaintiffs amply satisfy this requirement. *See infra* at 3-13.

Under the proper standard, each Plaintiff has shown cognizable injury. At a minimum, genuine disputes of material fact preclude summary judgment.

1. Ebenezer Baptist Church of Atlanta, Georgia, Inc. ("Ebenezer")

Ebenezer's organizational mission includes encouraging civic participation and exercise of the franchise. SAMF ¶¶ 1-4. Ebenezer commits resources to voting rights by investing in "voter education, registration, and mobilization." *Id.* ¶¶ 5-8. In 2018, Ebenezer intended to focus its voting work on Get-Out-The-Vote efforts, *id.* ¶ 11, but instead had to counter Defendants' voter suppression tactics.[2] These activities were not one-offs; as long as Defendants' voter suppression continues,

[2] For example, Ebenezer ran a phone bank to reach potentially purged voters, created a hotline to help voters ensure they were registered, and hosted a rally to roll out an application to verify registrations. SAMF ¶¶ 19-26, 29-31. It produced "educational materials" and "flyers" and used "social media videos" and "direct text messaging . . . to educate . . . members about the ongoing purge." *Id.* ¶ 28. Ebenezer developed an extensive "vote by mail" campaign as "one more tool in [its] toolbox to respond to the voter suppression tactics." *Id.* ¶¶ 34-41. It also educated its members to assist voters who had cast provisional ballots. *Id.* ¶ 17.

Ebenezer "will continue to try to respond." *Id.* ¶ 33; *see also id.* ¶¶ 32, 50-51.

Ebenezer's responses to Defendants' actions came at a cost. Ebenezer diverted staff and volunteer time that would have been spent on a soup kitchen, on programs focused on church youth, on Ebenezer's Crisis Closet and Cutting Through Crisis projects, or on other initiatives. *Id.* ¶¶ 9-10, 42-48. Ebenezer also reallocated church space, *id.* ¶ 26, and devoted fewer resources to its Get-Out-The-Vote campaign, *see id.* ¶ 49. The Eleventh Circuit has found comparable injuries adequate to establish standing. *See, e.g.*, *Browning*, 522 F.3d at 1166, *supra* at 2.

Defendants claim Ebenezer's "engagement level" around voting has remained constant, Defs.' Br. 10, but Ebenezer was not previously required to counteract voter suppression as required in 2018. SAMF ¶¶ 12-16. Ebenezer did not previously offer a voter verification hotline or conduct phone banks to verify voter registrations. *Id.* ¶¶ 25, 31. Only in 2018 did absentee voting, by necessity, "bec[o]me much more central" to its efforts. *Id.* ¶¶ 34-36. Defendants claim several Ebenezer activities were attributable to the New Georgia Project, Defs.' Br. 12 n. 3, but Ebenezer has shown, and seeks redress for, its *own* injuries, SAMF ¶¶ 29-30, 38-41.

2. Virginia-Highland Church, Inc. ("Virginia-Highland")

Virginia-Highland has educated and registered voters since 2014. *Id.* ¶ 169.

Because of Defendants' unlawful acts, Virginia-Highland's volunteers spent, and will spend, more time with each voter to explain the "obstacle course" of Georgia's elections. *Id.* ¶¶ 171-83. Defendants concede this leads to "the net effect of contacting fewer voters . . . and less time spent in other ministries of the congregation," and that Virginia-Highland identified two members "whose voting rights work caused them to step back from another church ministry." Defs.' Br. 8.[3] If this lawsuit is unsuccessful, Virginia-Highland will be forced to "double down" on its efforts. SAMF ¶ 177. Yet Defendants complain Virginia-Highland has not shown "*quantifiable* impairment," Defs.' Br. 8 (emphasis added)—a demand without basis in circuit law. *See supra* at 3.

3. Baconton Missionary Baptist Church, Inc. ("Baconton")

Baconton has been committed to voter registration, education, and participation for over two decades, but only since 2018 has it been forced to divert resources to counter Defendants' voter suppression. SAMF ¶¶ 147-49, 160.

[3] One Virginia-Highland volunteer resigned from leadership in an L.G.B.T.Q. ministry "because she needed that time to devote to the voting rights work." SAMF ¶ 186. Another would "like to get more involved in leadership for [the church's] Lunch and Learn ministry" and personnel matters if not for her current voter protection work for the church. *Id.* ¶ 187. Virginia-Highland also explained "*every* volunteer hour that goes to voting ministry is an hour that is diverted." *Id.* ¶¶ 184-85 (emphasis added).

Baconton's pastor has discussed voter verification during sermons and other church gatherings, diverting time in which he "could have talked about feeding the hungry," healthcare, homelessness, opioid addictions, and other topics. *Id.* ¶¶ 149-55, 164, 166. On multiple Sundays in the fall of 2018, Baconton volunteers helped parishioners check their voter status, when those volunteers instead would have been "inviting [listeners] to come be a member of the church, or [discussing] their relationship with the Lord," or "[a] myriad of things." *Id.* ¶¶ 57-59, 165. Baconton also devoted operational resources to hosting two prayer meetings where the pastor encouraged individuals to check their registrations. *Id.* ¶¶ 150-56. The church will need to continue with similar initiatives "[u]nless this suit changes all that." *Id.* ¶¶ 161-63. *See, e.g.*, *Ga. Latino All. for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1326 (N.D. Ga. 2011) (organization that "traditionally encourage[d] people to apply for food stamps and housing" diverted resources "to educate its volunteers and residents about the [challenged] law" (internal quotation marks omitted)), *rev'd in part on other grounds*, 691 F.3d 1250, 1259-60 (11th Cir. 2012).

Defendants respond that "much of [Baconton's] interest in voting issues stemmed from its interest in seeing Stacey Abrams elected." Defs.' Br. 9. This response would be irrelevant if true. But Baconton's efforts to combat Defendants' voter suppression were distinct from any support for Ms. Abrams. *See* SAMF

¶¶ 142-46 (Pastor Scott: "[W]hether they voted for Stacey Abrams or not, I wanted to make sure . . . they voted and that vote counted.").

4. The Sixth Episcopal District, Inc. ("Sixth District")

Defendants insist the Sixth District lacks standing because it has not diverted resources to counteract Defendants' actions. It has.[4] In any event, the Sixth District can establish standing "by showing [it] *will* have to divert personnel and time" to respond to challenged practices. *Arcia*, 772 F.3d at 1341 (emphasis added).

To further its social justice mission, the Sixth District traditionally works to register voters and transport voters to the polls. SAMF ¶¶ 189-90. Because of Defendants' voter suppression in 2018, however, as of the filing of the amended complaint the church anticipated diverting resources in 2020 to two new activities. *Id.* ¶¶ 193, 195. *First*, because of widespread mistrust caused by the 2018 election, it would take on the new activity of "re-motivat[ing]" discouraged voters to return to the polls. *Id.* ¶¶ 195-99. It has already begun discussing how to contact voters registered in 2018 to make sure they vote in 2020. *Id.* ¶¶ 200-01. *Second*, the church will work to ensure each cast vote *counts*. *Id.* ¶¶ 202-03. These new activities will demand "extra effort," "extra time," and "divided attention" from

[4] The Sixth District has "diverted resources from other endeavors and programs to address voting rights" both during and since the 2018 election and expects it "will have to continue diverting resources." SAMF ¶¶ 194, 204.

church leaders. *Id.* ¶ 205. The church thus "reasonably anticipate[s]" diverting resources to respond to Defendants' acts. *See Browning*, 522 F.3d at 1165-66.

5. Care in Action, Inc. ("Care in Action")

Care in Action's mission is "to support the fairness and dignity of domestic workers to help them exercise their rights," of which "[t]heir right to vote is the most important." SAMF ¶¶ 52-54. Care in Action originally envisioned 2018 election-related work in Georgia as Get-Out-The-Vote activities ending on Election Day. *Id.* ¶¶ 55-56, 60. But because Defendants' misconduct caused far more provisional ballots to be cast than usual, Care in Action mounted an extensive and unanticipated *post*-election campaign to ensure provisional ballots were counted, including through making phone calls and sending text messages, recruiting volunteers, and using digital ads and posts. *Id.* ¶¶ 56-58, 61-72. Care in Action expects to need to continue these activities in the future. *Id.* ¶¶ 73-80, 88.

Care in Action's unanticipated activities in 2018 diverted resources from other projects. *Id.* ¶¶ 81-87. One staff member who remained in Georgia post-election could not perform the staffer's "regular[,] full-time job" in immigration work. *Id.* ¶ 83. Care in Action was unable to advocate as planned in the 2019 legislative session for a state domestic worker bill of rights and delayed its work on a federal domestic worker bill of rights. *Id.* ¶¶ 86-87. Care in Action also could not

complete its 2019 strategic planning process in the post-election period. *Id.* ¶ 85.

Defendants contend Care in Action "did not quantify" how diverting a staff member impacted its activities. Defs.' Br. 15. That is both irrelevant, *see supra* at 3, and wrong. Care in Action explained the staffer who normally worked on immigration matters could not travel to Mexico to open a refugee camp. SAMF ¶ 83. As for Defendants' other factual challenges, Care in Action produced documentation of its provisional ballot-related expenses, including travel expenditures, and testified that *all* listed expenses post-dating the election related to the unanticipated provisional ballot campaign. *Id.* ¶ 67.[5]

Defendants argue Care in Action's post-election activities do not constitute an injury because they are "not contrary to its mission or in response to any allegedly illegal activity." Defs.' Br. 13. The first proposition is irrelevant. *See supra* at 3. The second is incorrect. Defendants claim Care in Action's activities are "part and parcel of" its support for Ms. Abrams. Defs.' Br. 14. To the contrary, Care in Action took these steps "because of the large amount of provisional ballots

[5] Defendants quibble that Care in Action "was unable to describe the content" of its ad buys. Defs.' Br. 13-14. Care in Action produced an invoice describing its purchase as "Care in Action *Ballot Chase* Ad Buys." SAMF ¶ 69 (emphasis added). Defendants' argument at best shows the existence of a disputed fact.

that had been cast and the need to make sure that every vote was counted"—that is, because of Defendants' unlawful conduct. SAMF ¶¶ 57-59, 72.[6]

6. Fair Fight Action, Inc. ("Fair Fight Action")

Fair Fight Action's core mission is to engage the Georgia electorate and get out the vote. *Id.* ¶ 89. Because of Defendants' "tremendous wrongdoing" in the 2018 election, Fair Fight Action has diverted resources to voter protection activities. *Id.* ¶¶ 98, 101-41. Defendants' actions have forced Fair Fight Action to hire an organizing department and fund two new programs—"Democracy Warriors" and "Fair Fight U"—to mitigate harms of voter suppression. *Id.* ¶¶ 102-06.[7] This work comes at a cost to Fair Fight Action's core voter engagement activities. When known as the Voter Access Institute (VAI), Defs.' Statement of Material Facts ("Merits SMF") ¶ 3, ECF No. 451, Fair Fight Action conducted a broad-scale voter engagement campaign, SAMF ¶¶ 90-94. Although Fair Fight

[6] Defendants also contend Care in Action has not shown "significant[] impair[ment]" of its operations because it has not produced its "entire budget." Defs.' Br. 14. Although the impairment of Care in Action's operations *was* significant, *see* SAMF ¶¶ 81-88, it need not be. *Common Cause/Ga.*, 554 F.3d at 1351 ("[A] small injury . . . is sufficient to confer standing.").

[7] Because Fair Fight Action is not claiming an injury-in-fact due to any costs associated with this lawsuit, Defendants' arguments about this litigation are irrelevant. *See PETA*, 189 F. Supp. 3d at 1340 ("[U]tilizing litigation to achieve organizational goals does not negate Article III standing.").

Action has been able to continue with some similar activities, those efforts have necessarily been limited. *Id.* ¶¶ 112-14.[8] Absent Defendants' voter suppression, the organization could return to its "fundamental core mission." *Id.* ¶ 133.

Defendants claim Fair Fight Action diverted no resources because it and VAI have consistently advocated against voter suppression. Not so. Defendants concede Fair Fight Action's purpose "was not altered following the name change from VAI to Fair Fight Action." Merits SMF ¶ 4. VAI did not focus on countering voter suppression; to the contrary, VAI's 2014 plan stated VAI would educate voters "on the importance *and ease of voting*." SAMF ¶ 95 (emphasis added). Defendants stress Ms. Groh-Wargo's statement in her personal capacity deposition that fighting voter suppression is a part of Fair Fight Action's work, Defs.' Br. 17, but Ms. Groh-Wargo later clarified that Fair Fight Action's "core work" is "voter engagement and the work to turn out [the] vote." SAMF ¶ 136; *see also id.* ¶¶ 96-97, 99. While Fair Fight Action has been forced to counteract voter suppression, this does not prove *lack* of injury—diversion of resources from Fair Fight Action's voter engagement activities is precisely the injury for which it seeks redress. *See*

[8] Defendants' unlawful activities have also detracted from Fair Fight Action's advocacy on issues such as reproductive rights. SAMF ¶¶ 100, 135, 139-41.

id. ¶ 137 ("The mission of the lawsuit is to get a set of relief so that . . . [Fair Fight Action] can get back to more typical voter engagement activities.").[9]

Defendants also contend Fair Fight Action could not have diverted resources to combat Defendants' wrongdoing because it had no active programs when it filed this suit. Defs.' Br. 19. But when Fair Fight Action filed the complaint, it planned to engage in traditional voter engagement work and "reasonably anticipate[d]" diverting resources away from those activities. *See Browning*, 522 F.3d at 1165-66. Defendants concede that Fair Fight Action and VAI are the same organization, Defs.' Statement of Material Facts (Jurisdiction) ¶ 76, ECF No. 441-2, that VAI previously engaged in voter turn-out, *id.* ¶ 77, and that Fair Fight Action's leaders have testified that if voter suppression were eliminated, Fair Fight Action would return to "very typical 'get out the vote' activities" like those VAI conducted, *id.* ¶ 91; SAMF ¶¶ 132-38.

* * *

Each Plaintiff has amply demonstrated concrete injury sufficient to support

[9] Defendants claim Fair Fight Action suffers no harm from its diversion of staff resources because staff members would otherwise work for the Fair Fight PAC. Defs.' Br. 20. This mischaracterizes Fair Fight Action's testimony, which was that *one* staff member would likely work for the PAC if this litigation were successful. *See* Pls.' Resp. to Defs.' Statement of Material Facts (Jurisdiction) ¶ 96.

its standing. At a minimum, genuinely disputed issues of material fact preclude summary judgment on this issue.

7. Associational Standing

Because Plaintiffs' organizational standing is well established under Eleventh Circuit law, Plaintiffs need not rely on associational standing, although the facts support that alternative approach. Associational standing requires an organization's "members would otherwise have standing to sue," the interests the organization seeks to protect "are germane to the organization's purpose," and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Conn. State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1354 (11th Cir. 2009).

Defendants' voter suppression has harmed members of the Sixth District and Virginia-Highland. Virginia-Highland members have been burdened by Defendants' practices with respect to absentee ballots and polling place changes. SAMF ¶¶ 218-20. A Sixth District member has been affected by voter roll irregularities. *Id.* ¶¶ 206-10, 217. And members of both churches have suffered lengthy waits while attempting to vote. *Id.* ¶¶ 212-16. Plaintiffs' interests in their members' voting rights are germane to both churches' purposes, *id.* ¶¶ 167-70, 190, 211, and neither the claims Plaintiffs assert nor the relief they request requires

these members' participation in this suit. *Conn. State Dental Ass'n*, 591 F.3d at 1354. This is but another basis for standing.

B. Plaintiffs' Injuries Are Traceable to, and Redressable by, Defendants.

Defendants cannot absolve themselves of their responsibilities to implement and enforce Georgia's election code and supervise county election officials.

Causation, in the context of Article III standing, requires that a plaintiff's injury be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (quotation marks and alterations omitted). The traceability requirement is less stringent than proximate cause: "[e]ven a showing that a plaintiff's injury is indirectly caused by a defendant's actions satisfies the fairly traceable requirement." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1271 (11th Cir. 2019) (quotation marks omitted). Similarly, an injury is redressable when "a decision in a plaintiff's favor would significantly increase the likelihood that she would obtain relief." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc) (internal quotation marks and alterations omitted). An injury is redressable when the effect of the court's judgment remedies the plaintiff's injury, "whether directly or indirectly." *Id*. (quotation marks omitted). Plaintiffs' injuries are both traceable *to* Defendants and redressable *by* Defendants.

This Court has already found the injuries Plaintiffs allege both traceable to Defendants and redressable through appropriate injunctive relief. MTD Order 19-22. Courts routinely reaffirm the extensive scope of the Secretary of State's ("SOS") authority over Georgia's election system. *See, e.g., Grizzle v. Kemp,* 634 F.3d 1314, 1319 (11th Cir. 2011); *Curling v. Raffensperger*, 397 F. Supp. 3d 1334, 1345 (N.D. Ga. 2019); *Smith v. DeKalb Cnty.*, 654 S.E.2d 469, 471 (Ga. Ct. App. 2007).[10] The SOS and State Election Board ("SEB") collectively have broad statutory authority over county election officials, including the authority to make rules, ensure elections occur in a "fair, legal, and orderly" manner, train local election officials, and investigate and sanction local election officials' failure to comply with Georgia and federal election law. *See* O.C.G.A. §§ 21-2-31, 21-2-

[10] The State shares this interpretation of the SOS's significant supervisory authority over county election officials. *See* Ga. Op. Att'y Gen. No. 2005-3, 2005 WL 897337, at *3 (Apr. 15, 2005) (recognizing "it is clear that under both the Constitution and the laws of the State the Secretary is *the* state official with the power, duty, and authority to manage the state's electoral system" (emphasis in original)). The SOS's own website states the Elections Division "organizes and oversees all election activity, including voter registration, municipal, state, county, and federal elections . . .[,] [is] responsible for certification of election results [and] qualification of candidates and preparation of ballots and election forms and materials . . .[,] maintains the Statewide Voter Registration Database . . .[,] [and is] accountable for investigating election fraud and enforcing state election laws." *Elections*, Ga. Sec'y of State, https://sos.ga.gov/index.php/elections.

50(a).[11] Plaintiffs' injuries, caused by deficiencies in this system, are thus traceable to Defendants.

Likewise, Plaintiffs' injuries are redressable by an order from this Court directing Defendants to remedy the harms Plaintiffs have identified. And, to the extent Defendants dispute the scope of their authority, that question requires a legal *and* factual analysis rendering it inappropriate for summary judgment.[12]

The Eleventh Circuit's decision in *Jacobson*, 957 F.3d 1193, does not change this conclusion. The *Jacobson* plaintiffs challenged Florida's ballot-order statute, which required county elections supervisors to print candidates' names on the ballot in a certain order. Fla. Stat. § 99.121. County supervisors had no discretion over the order, and the Secretary of State had no role in candidates' placement on the ballot other than to certify the candidates' names. *Id*. Here, by contrast, Plaintiffs challenge practices Defendants directly implement or wield

[11] The SEB's duties also include investigating counties' administration of elections and referring violations for prosecution, defining "uniform and nondiscriminatory standards concerning what constitutes a vote and what will be counted as a vote for each category of voting system used in this state," and taking any "other action, consistent with law, as the board may determine to be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. §§ 21-2-31(5), (7), (10), 21-2-32, 21-2-33.1; *see also* SAMF ¶¶ 235-40, 250-54.

[12] Defendants' statements and actions are highly relevant in showing the scope of Defendants' authority and duties. *See supra* at 16 n.10; SAMF ¶¶ 221-40, 242-45, 247-51, 253-54, 257-61, 277-78, 300-05, 308, 322-26.

significant authority over. *See* Am. Compl. ¶¶ 45-71, 83-85, 108-11, 132, ECF No. 41; *supra* at 16-17. Unlike in *Jacobson*, Defendants have *legal responsibility* for, and exercise authority over, the aspects of Georgia's election system Plaintiffs challenge.

Moreover, the injunction sought in *Jacobson* would have ordered the Secretary to instruct counties to disregard a state law that specifically required them to take action. 957 F.3d at 1211. Plaintiffs here do not seek to require Defendants to stop county personnel from carrying out a state law directive. Rather, to the extent Plaintiffs' relief implicates county officials at all, Plaintiffs seek only to require Defendants to direct county personnel to conform to their state-law obligations in ways that do not violate federal law. *See, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1341-42 (N.D. Ga. 2018) (ordering relief via SOS directions to county personnel); *Ga. Coal. for the People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1270 (N.D. Ga. 2018) (same); *Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1299-300 (N.D. Ga. 2018) (same).[13]

II. Plaintiffs' Claims Are Not Moot.

Government actors enjoy a "rebuttable presumption" they will not resume

[13] Of course, some of the relief sought—such as relief related to Exact Match and the voter purge—would not require county involvement at all. *See, e.g.*, Am. Compl. at 87.

illegal activities, but must ultimately show "it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014) (emphasis added). That standard is not met here.

Defendants have previously argued the passage of House Bill 316 ("H.B. 316") and House Bill 392 ("H.B. 392") mooted significant parts of Plaintiffs' claims. This Court appropriately rejected those arguments, observing that the changes enacted by H.B. 316 and H.B. 392 did not "address[] Plaintiffs' claims that Defendants inadequately oversee and train election officials," MTD Order at 40, 42, or that specific practices "disproportionately affect[] low-income and minority voters," *id.* at 38. Defendants now argue that limited aspects of Plaintiffs' claims are moot. Defs.' Br. 24-28.

With respect to voter list accuracy and security, Defendants have not come close to showing that "Plaintiffs' remaining claims about inaccurate voter rolls are moot." *Id*. at 28. Defendants have, at most, suggested they have taken additional measures to protect their voter rolls from *external* hacking or intervention and can now share voter registration information with out-of-state government entities through the Electronic Registration Information Center. *Id.* at 26-27. These measures do nothing to address voter roll inaccuracies caused by problems internal to Defendants' voter registration database, which persistently cancels voters

erroneously, marks eligible voters as ineligible, and lists voters as registered in incorrect precincts or even incorrect counties. SAMF ¶¶ 723-51.

Plaintiffs' claims with respect to absentee voting are similarly not moot. A streamlined oath envelope and faster absentee ballot rejection notifications do not address in any way Defendants' failures to distribute absentee ballots in a timely fashion, to provide accurate information about the status of voters' ballots, or to resolve problems voters experience when attempting to cancel their absentee ballots at the polls. All of these issues resulted in pervasive disenfranchisement in Georgia's June 9, 2020 primary election. Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. (Merits) 8-9. Further, even after H.B. 316 changed the absentee oath envelope to no longer request a voter's date of birth, the SOS approved of local officials using envelopes that continued to ask for a voter's date of birth. SAMF ¶ 857.

With respect to voting machines, Defendants have not shown "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Doe*, 747 F.3d at 1322 (internal quotation marks omitted). But the effectiveness and security of Georgia's voting machines are the subject of the *Curling* litigation in this district (Dkt. No. 17-cv-2989-AT) and, in the interest of judicial economy, Plaintiffs will not reiterate those claims here.

III. The Political-Question Doctrine Is Not Relevant.

Plaintiffs' claims are brought under well-established constitutional and statutory frameworks and involve issues federal courts have adjudicated for decades. "[T]he mere fact that [a] suit seeks protection of a political right does not mean it presents a political question." *Baker v. Carr*, 369 U.S. 186, 209 (1962). Yet, Defendants argue Plaintiffs' claims present a nonjusticiable political question, claiming: (1) Plaintiffs' claims are textually committed for resolution by the states under the Elections Clause, and (2) "there are no 'judicially discoverable and manageable standards' that this Court can apply to Plaintiffs' claims." Defs.' Br. 33. These arguments fail.

A. The Elections Clause

The political-question doctrine is not triggered just because the Constitution—here the Elections Clause—authorizes states to regulate within an area. As Defendants recognize, the political-question doctrine "is rooted in the separation of powers." *Id.* at 31. "[I]t is the relationship between the judiciary and the coordinate branches of the *Federal* Government, *and not the federal judiciary's relationship to the States*, which gives rise to the 'political question'" under the "textual commitment" prong of the doctrine. *Carr*, 369 U.S. at 210 (emphasis added). Because Defendants fail to identify any textual commitment of Plaintiffs'

claims for resolution by a different *federal* "coordinate political department," they cannot invoke the first prong of the political-question doctrine.

To overcome this fatal defect, Defendants argue the political-question doctrine applies because "the Elections Clause commits the administration of elections to other government departments—Congress and state legislatures." Defs.' Br. 32. As the Supreme Court recognized just last year, that the Elections Clause authorizes Congress to overturn state regulations of federal elections *does not* mean federal courts are barred from doing so. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019) ("Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree." (internal citation omitted)).

While the Constitution grants states broad power to determine the means and manner of elections, there is no question the judiciary can, and must, intervene when a state exercises that power to violate voters' fundamental rights to vote or contravene federal statutory mandates. *See, e.g., Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 191-92 (1999); *Smith v. Cobb Cnty. Bd. of Elections & Registrations*, 314 F. Supp. 2d 1274, 1286 (N.D. Ga. 2002).

B. Judicially Discoverable and Manageable Standards

Defendants' claim that there exist no judicially manageable standards for

adjudicating Plaintiffs' claims fares no better. Each of Plaintiffs' claims can be adjudicated under well-established legal frameworks. Four are constitutional claims properly assessed under standards announced by the Supreme Court, specifically the *Anderson-Burdick* undue-burden test, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); the Fifteenth Amendment race discrimination test, *Rice v. Cayetano*, 528 U.S. 495, 512 (2000); the uniformity-doctrine standard, *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 234 (6th Cir. 2011); and the *Mathews* procedural-due-process test, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Plaintiffs' Voting Rights Act claim also operates under a clear adjudicatory framework. *See Thornburg v. Gingles*, 478 U.S. 30, 35-37 (1986).[14] Unlike in *Rucho*, upon which Defendants rely, Plaintiffs are not bringing novel claims presenting unique challenges or "ask[ing] the courts to make their own political judgment[s]." *Rucho*, 139 S. Ct. at 2499.[15] This Court need not "discover" the relevant standards—they are clearly articulated in binding precedent.

Defendants are really using the political-question doctrine to raise the

[14] Plaintiffs acknowledge their claims under the Help America Vote Act are foreclosed by *Bellitto v. Snipes*, 935 F.3d 1192, 1202 (11th Cir. 2019).

[15] Other courts have rejected similar attempts to extend *Rucho* beyond its clear boundaries. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 398 n.15 (5th Cir. 2020) (*Rucho* was "of no help" to Defendants arguing that an as-applied challenge to vote-by-mail restrictions was nonjusticiable).

specter of judicial overreach, repeating the assertion that "Plaintiffs' claims require this Court to effectively become an election administrator and micromanage tasks that have been delegated . . . to state and local election officials." Defs.' Br. 33. Beyond the invalidity of this as a jurisdictional argument, Defendants' suggestion of impropriety is unfounded. Courts across the country have adjudicated claims similar to those Plaintiffs bring today.[16] Courts have also found constitutional violations by looking at the cumulative effect of a state's discrete election administration decisions. *See League of Women Voters*, 548 F.3d at 478 (taken

[16] Those challenges include those to voter purges, *see Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 314 (S.D.N.Y. 2020) (finding an equal-protection violation); "Exact Match" policies, *see Fish v. Kobach*, 309 F. Supp. 3d 1048, 1113 (D. Kan. 2018), *aff'd sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020) (finding Fourteenth Amendment violation); polling place closures, *see Florida v. United States*, 885 F. Supp. 2d 299, 322 (D.D.C. 2012) (finding changes in early voting procedures disproportionately affected minority voters); inaccurate voter registration rolls, *see Common Cause Indiana v. Lawson*, 937 F.3d 944, 962-63 (7th Cir. 2019) (affirming grant of preliminary injunction of state voter cleanse law); inadequate election official oversight and training, *see League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008) (finding allegations of inadequate training sufficient to state equal protection and substantive due process claims); and inadequate oversight of the absentee ballot rejection process, *see Democratic Executive Committee of Florida v. Detzner*, 347 F. Supp. 3d 1017, 1030-31 (N.D. Fla. 2018) (finding unconstitutional a law allowing county election officials to reject vote-by-mail and provisional ballots for mismatched signatures); *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) (denying motion for stay of preliminary injunction allowing cure period for improperly rejected mail-in ballots).

together, failures in election process created a "picture of a system so devoid of standards and procedures as to violate substantive due process" and equal protection guarantees). Binding precedent recognizes not only that judicial intervention in a state's administration of elections may be warranted, but "'a drastic, if not staggering' remedy" will be appropriate if "designed to match the enormity of the deprivations involved." *Hubbard v. Ammerman*, 465 F.2d 1169, 1176–77 (5th Cir. 1972) (citation omitted).[17] Plaintiffs ask for far less here.

CONCLUSION

Plaintiffs respectfully request that this Court deny Defendants' motion for summary judgment.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing has been prepared with a font size and point selection (Times New Roman, 14 pt.) which is approved by the Court pursuant to Local Rules 5.1(C) and 7.1(D).

This 29th day of July, 2020. Respectfully submitted,

/s/ Allegra J. Lawrence
Allegra J. Lawrence (GA Bar No. 439797)
Leslie J. Bryan (GA Bar No. 091175)
Maia Cogen (GA Bar No. 832438)
Suzanne Smith Williams (GA Bar No. 526105)

[17] *Hubbard* is "binding as precedent in the Eleventh Circuit." *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

LAWRENCE & BUNDY LLC
1180 West Peachtree Street
Suite 1650
Atlanta, GA 30309
Telephone: (404) 400-3350
Fax: (404) 609-2504
allegra.lawrence-hardy@lawrencebundy.com
leslie.bryan@lawrencebundy.com
maia.cogen@lawrencebundy.com
suzanne.williams@lawrencebundy.com

Thomas R. Bundy (Admitted *pro hac vice*)
LAWRENCE & BUNDY LLC
8115 Maple Lawn Boulevard
Suite 350
Fulton, MD 20789
Telephone: (240) 786-4998
Fax: (240) 786-4501
thomas.bundy@lawrencebundy.com

Dara Lindenbaum (Admitted *pro hac vice*)
SANDLER REIFF LAMB ROSENSTEIN & BIRKENSTOCK, P.C.
1090 Vermont Avenue, NW
Suite 750
Washington, DC 20005
Telephone: (202) 479-1111
Fax: (202) 479-1115
lindenbaum@sandlerreiff.com

Elizabeth Tanis (GA Bar No. 697415)
John Chandler (GA Bar No. 120600)
957 Springdale Road, NE
Atlanta, GA 30306
Telephone: (404) 771-2275
beth.tanis@gmail.com
jachandler@gmail.com

Kurt G. Kastorf (GA Bar No. 315315)
KASTORF LAW, LLC
1387 Iverson Street
Suite 100
Atlanta, GA 30307
Telephone: (404) 900-0330
kurt@kastorflaw.com

Matthew G. Kaiser (Admitted *pro hac vice*)
Sarah R. Fink (Admitted *pro hac vice*)
Scott S. Bernstein (Admitted *pro hac vice*)
Norman G. Anderson (Admitted *pro hac vice*)
KAISERDILLON PLLC
1099 Fourteenth Street, NW
Eighth Floor West
Washington, DC 20005
Telephone: (202) 640-2850
Fax: (202) 280-1034
mkaiser@kaiserdillon.com
sfink@kaiserdillon.com
sbernstein@kaiserdillon.com
nanderson@kaiserdillion.com

Andrew D. Herman (Admitted *pro hac vice*)
Nina C. Gupta (Admitted *pro hac vice*)
MILLER & CHEVALIER CHARTERED
900 Sixteenth Street, NW
Washington, DC 20006
Telephone: (202) 626-5800
Fax: (202) 626-5801
aherman@milchev.com
ngupta@milchev.com

Kali N. Bracey (Admitted *pro hac vice*)
Ishan K. Bhabha (Admitted *pro hac vice*)
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900

Washington, DC 20001
Telephone: (202) 639-6000
Fax: (202) 639-6066
kbracey@jenner.com
ibhabha@jenner.com

Jeremy M. Creelan (Admitted *pro hac vice*)
Elizabeth A. Edmondson (Admitted *pro hac vice*)
JENNER & BLOCK LLP
919 Third Avenue
New York, New York 10022
Telephone: (212) 891-1600
Fax: (212) 891-1699
jcreelan@jenner.com
eedmondson@jenner.com

Von A. DuBose
DUBOSE MILLER LLC
75 Fourteenth Street NE
Suite 2110
Atlanta, GA 30309
Telephone: (404) 720-8111
Fax: (404) 921-9557
dubose@dubosemiller.com

Jonathan Diaz (Admitted *pro hac vice*)
Paul M. Smith (Admitted *pro hac vice*)
CAMPAIGN LEGAL CENTER
1101 Fourteenth Street NW
Suite 400
Washington, DC 20005
Telephone: (202) 736-2200
psmith@campaignlegal.org
jdiaz@campaignlegal.org

Counsel for Fair Fight Action, Inc.; Care in Action, Inc.; Ebenezer Baptist Church of Atlanta,

Georgia, Inc.; Baconton Missionary Baptist Church, Inc.; Virginia-Highland Church, Inc.; and The Sixth Episcopal District, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the within and foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (JURISDICTION)** with the Clerk of Court using the CM/ECF electronic filing system which will automatically send counsel of record e-mail notification of such filing.

This the 29th day of July, 2020.

/s/ Allegra J. Lawrence
Allegra J. Lawrence