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

FAIR FIGHT ACTION, INC., *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official Capacity as Secretary of State of Georgia; *et al.*, Defendants.	Civil Action File No. 1:18-cv-05391-SCJ

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFFS' CLAIMS

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INTRODUCTION

Plaintiffs' response to Defendants' Motion for Summary Judgment ("Plaintiffs' Response") largely ignores Defendants' Statement of Material Facts ("SMF") and relies on their bloated Statement of Additional Material Facts (the "SAMF"). Plaintiffs hope to overwhelm the record with irrelevant and often inadmissible documents to create a false narrative and obscure their shortcomings on the law and material facts.[1]

FACTS

Defendants adopt their entire Statement of Material Facts, Doc. No. [451], as well as their response to the Plaintiffs' SAMF ("RSAMF"), Doc. No. [532], as if fully set forth in this brief.[2] As discussed throughout the RSAMF and the Notice of Objection to the SAMF, Doc. No. [534], much of Plaintiffs' Response is based on inadmissible hearsay, legal argument, or untimely

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[1] Defendants adopt the same abbreviations from the Brief in Support of the Motion for Summary Judgment on the Merits. Doc. No. [450-1].

[2] Plaintiffs claim that some of the facts are not material because they are not specifically cited in the Brief in Support of Defendants' Motion for Summary Judgment. Doc. No. [492] at 2. Plaintiffs missed that Defendants' Brief "incorporate[d] by reference their Statement of Undisputed Material Facts." Doc. No. [450-1] at 3. See Suzhou Allpro Certified Pub. Accountants Co. v. Sure Heat Mfg., Inc., No. 1:15-CV-03436-RWS, 2019 WL 1438162, at *3 (N.D. Ga. Apr. 1, 2019) (local rules and standing order do not impose "a requirement that every fact be restated in the brief.").

declarations provided after this Court's February 14, 2020 deadline. See Fed. R. Evid. 802; Macuba v. DeBoer, 193 F.3d 1316, 1322 (11th Cir. 1999) (addressing hearsay); Doc. No. [225] (imposing deadline for declarations).

What facts remain suffer from different fatal deficiencies. After over a year of broad and open discovery; seemingly limitless resources bankrolling an army of lawyers from across the country; an outreach effort that included television advertisements, a ubiquitous social media presence, and even help from failed presidential candidates; Plaintiffs still could produce virtually no evidence of individual voters experiencing an actual incident of disenfranchisement. Nor could they find one county election official who agreed with their theory. Nor did Plaintiffs' efforts reveal widespread or systemic issues, much less any that are traceable to Defendants. [3]

[3] Even if this Court considers the declarations from the 2020 primary, they confirm what is already known: there are no statewide or systemic issues with election administration, and the declarations involve very few counties outside metro Atlanta. Specifically, out of the 59 June 2020 declarants, 35 declarants discuss Fulton County; 10 discuss Dekalb; 5 discuss Cobb; and Glynn, Haralson, Douglas, Gwinnett, Muscogee, Bryan, Clayton, Chatham, and Cherokee are mentioned in one declaration each. See SAMF Exhs. 115, 264-66, 268-69, 287-89, 294-95, 298-99, 304, 308, 312, 318, 323-24, 326, 328, 336-39, 345, 349, 351-53, 355, 357, 359, 364, 367, 372, 374, 379, 384-86, 388, 391, 394, 397, 399, 400, 405-06, 411, 413, 416, 419, 422, 424, 1038, 1041-42, 1046.

Plaintiffs are left with what can only be described as an impermissible *res ipsa loquitor* theory that contends that the Secretary and SEB are liable whenever something goes wrong in a Georgia election. This is not the law. Hernandez v. Tregea, 207CV149FTMUASPC, 2008 WL 11430028, at *10 (M.D. Fla. Dec. 1, 2008). And, Plaintiffs' evidentiary record does not overcome summary judgment.

I. HAVA-Match

On HAVA-Match, Plaintiffs wrongly claim that Defendants concede HB 316 did not change the law. Compare Doc. Nos. [450-1] at 23-34 with [490] at 30. To the contrary, Defendants conceded nothing and it did. Code Section 21-2-220.1 modified the verification process by allowing persons with mismatched information to be registered with what is known as Active-Missing ID Required ("MIDR") status. This status is terminated when the voter shows photo identification to vote like any other voter at the polls.

HAVA-MATCH GENERALLY. Much of Plaintiffs' purported HAVA-match evidence is inadmissible. It includes **(1)** hearsay, see, e.g., RSAMF ¶¶ 453, 455, 528-30, 569, 609, 613; **(2)** legal conclusions disguised as facts, see, e.g., id. ¶¶ 434-38, 451-52, 525; **(3)** proffered experts' conclusory opinions offered as fact, see, e.g., id. ¶¶ 491-92; and **(4)** multiple failures to comply with the

Local Rules, see, e.g., id. ¶¶ 462-63, 528-30, 567, 576, 585. Other "evidence" is about immaterial acts of counties. See, e.g., RSAMF ¶¶ 458-61 (county action).

What remains are a few incidents from actual voters, and many of these were from the time before the passage of HB 316. See RSAMF ¶¶452, 516-24, 557. Similarly, Plaintiffs' "evidence" of a statewide disparate impact, and notice thereof, is dated, hearsay, and does not address the current controlling law enacted by HB 316. See, e.g., RSAMF ¶¶ 610 (2018 internal analysis); 608 (Dr. Mayer's inadmissible report); ¶ 614 (Dr. McCrary's inadmissible report); ¶¶ 407-08 (hearsay letter from the Department of Justice). Curiously, Plaintiffs cite to an inadmissible Justice Department letter, acknowledge that the Department precleared the former HAVA-match process, and do not dispute the State's compliance with commitments made to the Justice Department. Doc. No. [490] at 59.

MIDR STATUS. The alleged harm arising from these purported HAVA-match issues is being placed in MIDR status, which is actually no harm at all. Doc. No. [490] at 14. After HB 316, voters in MIDR status may vote after showing proper identification, just like any other voter. O.C.G.A. §§ 21-2-

220.1(c), 21-2-216(g). Plaintiffs ignore this dispositive change in law and cite little evidence that recognizes this. See RSAMF ¶¶ 387-429.

CITIZENSHIP STATUS. Plaintiffs also argue that the citizenship matching protocol burdens voters of color. Doc. No. [490] at 14. Here too, much of Plaintiffs' "evidence" constitutes **(1)** legal conclusions disguised as fact, see, e.g., RSAMF ¶¶ 430-33, 435, 439, 450 498-99, 490-507, 510; **(2)** hearsay, see, e.g., id. ¶¶ 490, 500-07, 509, 511, 607; **(3)** miscited evidence, see, e.g., id. ¶ 495 (citing to a portion of a deposition that does not support the "fact" described); **(4)** acts of counties with no link to State actors; see, e.g., id. ¶¶ 500, 502-07, 510-12, 514-7, 519-20; or **(5)** claims of disenfranchisement that are unsupported. See, e.g., id. ¶¶ 522 (2013), 523-24 (2016).

The remaining testimony from voters shows no disenfranchisement. See, e.g., RSAMF ¶¶ 500 (voter received notice and did not respond); 524 (voter refused a provisional ballot). Plaintiffs agree that counties can take action to override erroneous identification, which further cuts against their claim of injury and causation. See RSAMF ¶ 449-50.

II. The Voter Registration Database

Plaintiffs' description of the voter registration database is similarly flawed. First, Plaintiffs criticize Defendants for not doing enough

maintenance and then wrongly describe routine maintenance and beneficial trouble-shooting efforts as evidence of errors (none of those efforts burdened voters). RSAMF ¶¶ 12-29. Plaintiffs' remaining claims are that the 2018 election resulted in hundreds of provisional ballots being wrongly rejected. Doc. No. [490] at 15; RSAMF ¶¶ 703-05. This too is unsupported. Paragraph 703 refers to a preliminary injunction order that fell short of concluding that voters' provisional ballots were wrongly not counted. Paragraph 704 presumes, without an admissible foundation, that voters' affirmations were correct and contains inadmissible hearsay. Paragraph 705 is also hearsay and unspecific. Collectively, the exhibits fail to identify how many voters appeared at which polls for the November 2018 general election.

Even if these various emails were admissible—which they are not—the small handful that Plaintiffs cite is woefully insufficient to demonstrate a systemic issue in a system maintaining almost 7 million registered voters. See, e.g., RSAMF ¶¶ 705, 735, 743, 745-47. Instead, the (inadmissible) evidence portrays a few isolated and concentrated incidents: Four declarants assert they were incorrectly told they were not registered to vote; two claim they were told that they are not US citizens; one says someone told her that she was a felon; and 12 state they were told they appeared at the wrong

polling location. RSAMF ¶¶ 741-747. Of these 19 voters only three claim that they could not vote. RSAMF ¶ 746.[4] When viewed in the context of over 4 million votes cast in the November 2018 election, Doc. No. [41] ¶ 43, this evidence is insufficient to support Plaintiffs' claims of systemic and widespread disenfranchisement.

III. Voter List Maintenance Efforts

HB 316 made significant changes to Georgia's list maintenance efforts. O.C.G.A. §§ 21-2-232, 21-2-234, 21-2-235. These changes clarify the process of moving voters among the applicable statuses (active, inactive, cancelled); provide more opportunities for notice to the voter; increase the types of conduct that will be considered "contact" for list maintenance purposes; and extend the time a voter can have no contact before a status change. Plaintiffs basically ignore each of these material changes.

This Court has seen Plaintiffs' arguments before, and Plaintiffs' new evidence does not change the outcome. Doc. No. [188]; Doc. No. [490] at 33-34 (citing SAMF ¶¶ 712-13). For example, Plaintiffs wrongly contend that the

[4] Even this number is inflated, however, as one of the individuals cited—Sarah Clark (Ex. 294)—claims that she *did* vote, and her declaration does not discuss any registration issues, but rather a line she experienced during the June 2020 primary. Doc. No. [225].

State's use of a no-contact ("NGE") component for voter list maintenance is based only on "the **assumption** [that the individuals] moved." Doc. No. [490] at 16 (emphasis added). The cited deposition testimony, however, is about the importance of accurate voter list maintenance generally. See also Doc. No. [490] at 16 n.2; RSAMF ¶ 712. The citation to a website providing, in part, a link describing state legislation and notice requirements is irrelevant. Id.

Plaintiffs cite no evidence for their claims that a "majority of voters purged for 'No Contact' . . . had not moved," or that list maintenance efforts result "in widespread and unjustified disenfranchisement." See Doc. No. [490] at 16. This is likely because such evidence does not exist. For example, citing their proffered expert, Dr. McDonald, Plaintiffs claim that the Secretary cancelled the registrations of "at least 14,732 additional voters on the premise they filed [NCOA] forms when they had not." Doc. No. [490] at 16 (citing SAMF ¶ 672). Not true. Dr. McDonald actually testified, however, that he "do[es] not have sufficient information to determine the reasons for" voters' appearance on a cancellation list. See RSAMF ¶ 672. Dr. Mayer's testimony provides no way out: he did not examine data after the implementation of HB 316, and he wrongly believes it did not affect this process. Doc. No. [471-1] at 79-80.

Finally, Plaintiffs claim that, during the 2018 election, "hundreds of ballots [were] rejected because they were cast by voters who did not realize they had been purged." See Doc. No. [490] at 16-17. This too is unsupported by competent evidence. Some of Plaintiffs' offering is inadmissible hearsay. See RSAMF ¶ 704 (citing Exs. 576, 630, 885). Moreover, none of the exhibits identify how many people, if any, "affirmed in writing that they continued to meet all requirements to vote in that election," and none indicate that the list maintenance efforts were improper. Id. Indeed, some of the entries support the State's decision. Id. (citing Ex. 886). Here again, no evidence shows widespread and systemic burdens.

IV. **Interactions with County Officials**

A. Provision of Resources

It is unclear what Plaintiffs still allege about resources. Doc. No. [490] at 19. What is clear is that they ignore (1) that HB 316 requires a minimum number of machines per voters, O.C.G.A. § 21-2-367; and (2) that the DRE machines were de-certified and cannot be used. SMF ¶ 33. Instead, Plaintiffs continue to rely largely on inadmissible hearsay, RSAMF ¶¶ 1061, 1064-70, or their own legal conclusions. Id. ¶¶ 221-61, 1071-79. Their proffered evidence also fails to link any of the issues described to the action or inaction

of the State. RSAMF ¶¶ 1061, 1063-67. Some simply misstate deposition testimony. See, e.g., RSAMF ¶¶ 1062 (claiming inaction and citing testimony where Elections Division Director frequently spoke with county election officials), 1081-82 (wrongly expanding discussion of BMD to other aspects of voting).

B. Training Efforts

Plaintiffs claim the Secretary fails to train poll workers, but Plaintiffs' Response does not articulate any relief for this claim, and it is hard to imagine what an appropriate and justiciable remedy looks like.[5] Doc. No. [490] at 59. Their understandable inability to articulate any prospective injunctive relief for this claim speaks volumes. Plaintiffs' "evidence" suggests only that the Secretary (and SEB) respect their statutory boundaries to train county election officials, and it shows their efforts to improve training. RSAMF ¶¶ 328-40, 345-46.

POLLING LOCATIONS. Plaintiffs allege that State actors encouraged counties to close polling locations, but they do not argue or provide evidence

[5] Plaintiffs still fail to cite any authority for the claim that the SEB has an obligation to train anyone, which is dispositive on all training counts such that summary judgment should be granted in favor of the SEB on all training counts. See Doc. No. [450-1] at 11.

that (1) anyone with the State knew that polling location changes resulted in reduced votes or had a disparate impact on minority voters; or (2) polling locations were closed to disenfranchise voters of color. Doc. No. [490] at 18-19. Plaintiffs also concede there is no evidence that a county closed any polling location for an improper purpose. Doc. No. [490] at 39.[6] This is dispositive.

In the light of these shortcomings, Plaintiffs make two arguments. First, they contend that persons who received new polling places between 2016 and 2018 voted less. See RSAMF ¶¶ 1022-28. But, neither Plaintiffs nor their proffered expert(s) provide any admissible evidence that changing polling locations causes the decrease. RSAMF ¶¶ 1012-21, 1023-27, 1029. Instead, they offered hearsay, RSAMF ¶¶ 1023-25, 1027, and testimony from voters who actually voted in new polling locations. Id. ¶¶ 1026, 1028.

Plaintiffs next claim that the Secretary "promoted" polling place changes. Doc. No. [490] at 19. Evidence does not support this either. It shows, instead, the Secretary providing training on how polling locations are to be

[6] Plaintiffs wrongly argue they do not have to show intent or Defendants' knowledge of a disparate impact. Precedent is clear on this issue: under an Anderson-Burdick analysis, the burden of proof never shifts to the State. Common Cause/Georgia v. Billups, 554 F.3d 1340, 1353 (11th Cir. 2009); see also, Doc. No. [277] at 5, 8-10; SMF ¶ 242 (showing proper reasons).

closed and warning that counties should carefully consider "all factors in making these decisions." RSAMF ¶ 998. Another document (a job description) simply states a preference that a potential hire have some background on polling closures. Id. ¶ 999. Other documents address the general procedures counties should follow if they choose to close polling locations, hearsay, and inquiries and statements from counties. Id. ¶¶ 1000-02. None of these documents include any words of encouragement or promotion, and none show that any polling locations closed **because** of State action.[7]

PROVISIONAL BALLOTS. Plaintiffs do not address HB 316's changes to the administration of provisional ballots, including: requiring counties to make good faith efforts to check voters' identification from a broad range of sources, notifying an elector as soon as possible about the status of their provisional ballot, and empowering the Secretary to extend certification deadlines to conduct audits of provisional ballots. O.C.G.A. §§ 21-2-419, 21-2-493.

Despite this, Plaintiffs wrongly claim that county election officials "routinely" denied eligible voters provisional ballots, and that the State did

[7] Further, Plaintiffs' proposed relief—requiring the SEB to set forth a minimum number of polling locations—has no basis in law, flatly contradicts current statutes, and is not mandated by the Constitution. O.C.G.A. § 21-2-265.

not take any "steps to standardize" counties' processing of provisional ballots. Doc. No. [490] at 40, 42. In support, Plaintiffs offer untested evidence that impermissibly requires the Court to accept their legal conclusion. See, e.g., RSAMF ¶¶ 909, 914 (listing voters who Plaintiffs only allege were wrongly denied a provisional ballot). Or, they claim that the State "routinely" receives notice of counties improperly utilizing provisional ballots, yet cite to only a few incidents going back to 2013. Id. ¶ 911.

As usual, Plaintiffs also rely extensively on hearsay. See, e.g., Id.¶¶ 909-10, 914, 917-18, 922-25, 932, 936, 941-45, 947, 949, 956. Some is speculative hearsay, which they brazenly misconstrue as fact. Id.¶ 940 (hearsay declarants surmising that poll workers lacked training). Plaintiffs also rely on declarations that were provided after this Court's deadline. Id. ¶¶ 936, 956. Plaintiffs continue to impermissibly transform their legal arguments into facts. Id.¶¶ 907-09, 914, 921-22. Or, Plaintiffs cite to a lack of documents as implied evidence of inaction. Id.¶¶ 948, 950. In some cases, they wrongly cite to court decisions—decided on a preliminary injunction standard—as fact. Id.¶ 969.

What remains is very little evidence about provisional ballots other than disagreement with Georgia's law that counties request supplies

(including provisional ballots) from the Secretary.[8] See, e.g., RSAMF ¶ 951, 953. While they frequently misconstrue voter complaints as conclusive evidence, see, e.g., RSAMF ¶¶ 926, Plaintiffs cite to only a single incident of a substantiated complaint. RSAMF ¶ 927. Further, and striking a fatal blow to their inaction and deliberate indifference theories, Plaintiffs acknowledge that the SEB changed the policy on provisional ballots. RSAMF ¶¶ 933-34, 955.

ABSENTEE BALLOTS. HB 316 made it much easier to obtain an absentee ballot, more difficult to reject them, and significantly enhanced cure provisions. O.C.G.A. §§ 21-2-381, 21-2-384 through 21-2-386. Plaintiffs ignore these changes and cite very little incidents after its adoption. More curiously, they acknowledge that counties administer absentee ballots and advance a *res ipsa loquitor* theory that blames the State for untimely delivered and returned absentee ballots. Doc. No. [490] at 17; RSAMF ¶¶ 753-54, 756, 758.

First, much of the evidence upon which Plaintiffs rely is inadmissible hearsay or from declarants that were not timely disclosed to Defendants. Doc.

[8] Plaintiffs cite to a statement about municipal elections to attempt to create some inconsistency, but many facets of municipal elections are different. RSAMF ¶ 942.

No. [225] See, e.g., RSAMF ¶¶ 764-65, 768, 783. Second, the information—both admissible and inadmissible—does not demonstrate a statewide issue. Identified issues were concentrated in a handful of metro-Atlanta counties. See, e.g., RSAMF ¶¶ 764 (Gwinnett), 765 (Fulton), 768 (Dekalb, Fulton), and 783 (mostly metro-Atlanta counties).

Third, Plaintiffs' documents do not show that State action caused anything. All that is cited is acts at the county level, which make sense, given that counties process absentee ballots. See, e.g., RSAMF ¶¶ 764-68, 787, 794-99. No evidence links any issues arising from these efforts to State action, inaction, or training efforts.

Plaintiffs' contention that the State does not "do enough" is refuted by the very evidence they cite. See Doc. No. [490] at 37. For example, Plaintiffs cite one incident where a voter experienced a problem cancelling their absentee ballot after the enactment of HB 316. RSAMF ¶ 889. The Secretary's office contacted the county to clarify the correct procedure and even opened an investigation into the matter. RSAMF ¶ 890-91. This is consistent with training materials. Exh. 44 at STATE-DEFENDANTS-00096214. Plaintiffs' other arguments raise trivial and outdated issues where no causation is shown. See, e.g., RSAMF ¶¶ 788 (addressing official U.S.P.S.

Elections Logo); 824 (forwarding emails containing complaints but "with no instructions on how to improve"); 826 ("sometimes" opening responsive investigations). Little to none of this evidence comes after HB 316.

LINES. Plaintiffs offer only argument to establish any causal link between wait times experienced by voters and Defendants. They also ignore their own cited evidence. See SAMF ¶ 1074. The poll worker manual (while not required by Georgia law) includes several suggestions on how to prevent long lines and wait times including: having a line manager, distributing sample ballots, and distributing voter certificates. Id.

Plaintiffs also claim that the Secretary "did not ensure polling places had adequate … poll worker training." Doc. No. [490] at 20. Putting aside that the Secretary cannot ensure there will never be lines, the portions of Chris Harvey's deposition Plaintiffs cite show that the Secretary discussed training issues with county representatives. RSAMF ¶ 1062. The record contains other false discussions of evidence too. See also, RSAMF ¶¶ 1072 (citing to Kennedy report that does not address lines); 1074 (claiming the poll worker manuals do not address lines). Beyond these problems, Plaintiffs

again rely on hearsay, RSAMF ¶¶ 1066-67; 1068-70; 1085; 1088; 1090; 1096; 1110; and 1118; and untimely declarations.[9] RSAMF ¶¶ 1104-17, 1126-30.

The remaining evidence—admissible or otherwise—fails to show widespread or systemic issues with lines. For 2018, Plaintiffs cite to (1) Dr. Graves's inadmissible testimony about a small subset of polling locations in Fulton County; and (2) the declarations of 29 voters and six poll watchers. See SAMF ¶¶ 1083-84; 1091; 1111. Only one declarant is from outside of metro Atlanta. Id. About 30% are from Fulton County, and 80% are from Fulton, Cobb, or Gwinnett. Id. Only four voters said they were unable to vote because of a line: one failed to appear for her deposition, two voted at the same location in Chatham County, and the remaining two were in the same Fulton County location. Id.[10] Four voters in two polling locations hardly

[9] Even if this evidence were admissible, however, it is similarly reflective of the isolated nature of the issue: of the eleven voters identified in SAMF ¶ 1084, four are from Fulton, four are from Chatham, and the remaining three are from different metro Atlanta counties. The untimely declarations also focused on three metro Atlanta counties.

[10] Plaintiffs also attempt to rely on the inadmissible speculations of voters, poll watchers, and unverified complainants to support their claims, SAMF ¶¶ 1104-1110. Fed. R. Civ. P. 56(c)(4); see also Riley v. Univ. of Alabama Health Servs. Found., P.C., 990 F. Supp. 2d 1177, 1187 (N.D. Ala. 2014). For the complainants, and to the extent the others rely on what was said or told to them by voters, such is also inadmissible as hearsay evidence. Fed. R. Evid. 802; Macuba v. DeBoer, 193 F.3d 1316, 1322 (11th Cir. 1999).

represents evidence of widespread or systemic issues. Moreover, Plaintiffs provided no evidence showing that lines were caused by the Secretary, and very little evidence that lines "disenfranchised." RSAMF ¶¶ 1061, 1063-67.

ARGUMENT AND CITATION TO AUTHORITY

Plaintiffs' evidence does not show a question of material fact. Recognizing this, Plaintiffs misstate the law to achieve a more forgiving standard. For example, Plaintiffs misplace significant reliance on a motions panel decision from the Eleventh Circuit, Democratic Executive Committee of Florida v. Lee, 915 F.3d 1312 (11th Cir. 2019) ("Lee I"). See Doc. No. [490] at iii. A binding panel of the Eleventh Circuit held that Lee I contains no precedential value; it "*cannot* spawn binding legal consequences regarding the merits of the case." Democratic Executive Comm. of Florida v. Nat'l Republican Senatorial Comm., 950 F.3d 790, 795 (11th Cir. 2020) ("Lee II") (emphasis in original). Moreover, much of the burdens about which Plaintiffs complain (e.g., further travel or re-registering) are "nominal;" they are not unconstitutional burdens. Clingman v. Beaver, 544 U.S. 581, 591 (2005).

V. **Plaintiffs' Fundamental Right to Vote Claim (Count I).**

HAVA-MATCH. As shown, Plaintiffs have no real evidence of a constitutional burden, and certainly not one that exists after the enactment

of HB 316, nor is any purported burden widespread, systemic, or traceable to the State. See supra Section I. Consequently, Plaintiffs have relied on a *res ipsa loquitor* theory, which does not apply in this context. Hernandez, 2008 WL 11430018 at *10. The only law they cite is a preliminary injunction order in Georgia Coalition for People's Agenda, Inc. v. Kemp, 347 F. Supp. 3d 1251, 1263 (N.D. Ga. 2018). But beyond the differences in evidentiary records, as another court put it: "the defendants in that case did not respond to the plaintiffs' arguments on disparate impact, and Kemp does not cite any authority applying strict scrutiny." People First of Alabama v. Merrill, 2:20-CV-00619-AKK, 2020 WL 3207824, at *18 (N.D. Ala. June 15, 2020).

Plaintiffs also argue that the Defendants did not raise the State interest in the HAVA-match program, but this is inaccurate. See Doc. No. [450-1] at 38-39. Defendants' Daubert motions also argue that the prevention of voter fraud is a recognized important state interest. See Doc. No. [392] at 10. These interests, and the agreed-upon interest in maintaining an accurate voter list, far outweigh the phantom injuries Plaintiffs articulate.

VOTER REGISTRATION DATABASE. Here too, the Plaintiffs failed to show any injury that is systemic or caused by the State. At best, the evidence shows the inevitable consequences of human involvement in elections.

Precedent cautions that courts must distinguish between actionable conduct and "episodic events" of human error. Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir. 1980). Given this, Plaintiffs also articulate no enforceable remedy to address their purported harm. So viewed, Plaintiffs' record falls short on providing admissible evidence, and summary judgment is warranted.

THE VOTER LIST MAINTENANCE EFFORTS. The same is true of voter list maintenance efforts, which have already been addressed by this Court. Doc. No. [188]. Plaintiffs now craft a strawman argument based on a misconstruction of the NGE component of voter-list maintenance. O.C.G.A. § 21-2-234(a)(1) (defining "no contact"). But even then, Plaintiffs have not shown that the alleged burdens are systemic and widespread throughout Georgia. Plaintiffs also claim that the record now shows the "burden is disenfranchisement." Doc. No. [490] at 33.[11] Not so. Plaintiffs have **no evidence** that the consequence of an improper move from inactive to cancelled status (re-registering to vote) imposes an unconstitutional burden. Id. And, their persuasive authority involves photo ID, where, unlike list

[11] This relies on Lee I, where disenfranchisement was presumed. 915 F.3d at 1231. See Lee II, 950 F.3d at 795 (describing Lee I as having no precedential value).

maintenance efforts, voters are not provided written notice of an issue. See Fish v. Schwab, 957 F.3d 1105, 1129 (10th Cir. 2020). Further, Plaintiffs ignore how HB 316 makes it more difficult to be placed on the inactive or cancelled lists, which renders their evidence materially stale and insufficient.

Beyond that the NVRA requires list maintenance, 52 U.S.C. § 20507(a)(4), this Court has already recognized other important State interests that warrant the current list maintenance policies. Doc. No. [188]. That remains true today. Plaintiffs' authority to the contrary involved a challenge to a statute, which Plaintiffs have not brought here. See KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1272 (11th Cir. 2006) (addressing statute deemed unconstitutional).

C. Plaintiffs' Remaining Claims Involve County Actors.

Plaintiffs' remaining claims involve matters administered by local election officials and allegations of insufficient training. Facial errors preclude the claims from ever making it out of the gate.

i. *The Role of the Secretary of State and the Eleventh Amendment.*

Plaintiffs try to transform the legal question of the Secretary's duties into a factual one. See RSAMF ¶¶ 221-46. They also take unwarranted cheap shots at State officials that are wholly unsupported by the record they cite.

See Doc. No. [490] at 23 (wrongly alleging the Elections Division Director does not understand the VRA). But it is apparently easier for Plaintiffs to attack State officials than address State law. Plaintiffs do not cite the statute that imposes on county election superintendents the **exclusive** duty to train poll workers. O.C.G.A. § 21-2-99(a). Nor do they challenge that Georgia courts would likely agree with the Secretary's interpretation of Georgia law.[12] Doc. No. [450-1] at 31. Their reliance on federal law is equally unpersuasive. Compare Jacobson v. Florida Sec'y of State, 957 F.3d 1193, 1199 (11th Cir. 2020) with Grizzle v. Kemp, 634 F.3d 1314 (11th Cir. 2011). In Jacobson, the court explained that a designation as the "Chief Election Officer" does not make a single official responsible for every act or omission in an election. 957 F.3d at 1199 (11th Cir. 2020).[13] See Doc. No. [490] at 36.

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[12] Indeed, Plaintiffs double down on ignoring Georgia law by claiming that the SEB should simply make rules that exceed their statutory authority. Doc. No. [490] at 21 (citing SAMF ¶¶ 256-61). Georgia courts have said the opposite. N. Fulton Med. Ctr. v. Stephenson, 269 Ga. 540, 543, 501 S.E.2d 798, 801 (1998) (limiting executive branch rulemaking to statutory authority).

[13] Grizzle was also decided in the context of whether the Secretary was a proper party. Id. at 1318-19. All that needs to be shown under those circumstances is "some connection," which is a far looser standard than causation. Doc No. [68] at 72. (citing Luckey v. Harris, 860 F.2d 102, 1016-16 (11th Cir. 1988).

Plaintiffs' other authority is easily distinguished. See Walker v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987); Democratic Party of Ga., Inc. v. Crittenden, 347 F. Supp. 3d 1324, 1338 n.2 (N.D. Ga. 2018); Ga. Op. Att'y Gen. No. 2005-3, 2005 WL 897337, at *3, *7 (Apr. 15, 2015). Decided before Jacobson, Crittenden applied the relaxed burdens of standing. 347 F. Supp. 3d at 1338 n.2. Walker concerned the State's unique custodial role with foster children. 818 F.2d at 795. The 2005 Attorney General's opinion addressed the **division** of power between the Secretary and the SEB, not the **delegation** of power between the State and counties. 2005 WL 897337, at *3, *7.

If any question about the Secretary's authority remains, this Court could follow the guidance of a recent election decision from the Eleventh Circuit and certify the question. Gonzalez v. Governor of State of Georgia, 20-12649, 2020 WL 4611992, at *1 (11th Cir. Aug. 11, 2020). In Gonzalez, the court decided that even though

> the Georgia state-wide general election is fast approaching . . . this case requires us to resolve a question at the core of the state's authority: whether a Georgia statute concerning elections of local officials violates the Georgia Constitution. And neither the Georgia Supreme Court nor the Georgia Court of Appeals has addressed the question before us.

Id. A certified question also avoids the issue of the Eleventh Amendment, which Plaintiffs' Response misses altogether. Absent clarity from a Georgia court, Plaintiffs' theory requires this Court to establish liability by deciding that the Secretary's interpretation of his own jurisdiction is incorrect. This is a classic Eleventh Amendment issue, and this Court has already rejected Plaintiffs' argument that raising constitutional claims avoids the jurisdictional bar. Doc. No. [450-1] at 30-31; Prelim. Inj. Hr'g at 98 (Dec. 19, 2019), Doc. No. [188] at 13 (order denying preliminary injunction).[14]

ii. *Alleged Lack of Resources.*

In addition to the lack of a cognizable injury, Plaintiffs' Response highlights that there is no evidence that the Secretary's or SEB's acts or omissions **caused** the alleged constitutional burden. For example, there is zero evidence of a county requesting resources and being denied. Nor is there

[14] Plaintiffs' authority demonstrates this fundamental misunderstanding. Jacobson, 957 F.3d at 1207-12 (applying state law to determine if standing existed); Teagan v. City of McDonough, 949 F.3d 670, 675 (11th Cir. 2020) (addressing whether a defendant was a state actor); United States v. City of Yonkers, 96 F.3d 600, 618 (2d Cir. 1996) (applying well-settled New York law); Alberti v. Sheriff of Harris Cty., 937 F.2d 984, 995 (5th Cir. 1991) (addressing prisoners and wards of the state); Weaver v. Tillman, No. CIV A. 05-0449-WS-B, 2006 WL 1889565, at *10 (S.D. Ala. July 10, 2006) (addressing official capacity claims).

one declaration or statement from a county election official claiming they received insufficient resources. Plaintiffs' implied r*es ipsa loquitor* theory is simply misplaced. Hernandez, 2008 WL 11430028, at *10.

iii. *Alleged Failure to Train.*

The Supreme Court has said that plaintiffs alleging a failure to train must show, inter alia, deliberate indifference to the need to train poll workers. City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989). Doc. No. [490] at 27 n.6. Plaintiffs rely exclusively on Lee I to argue the contrary. 915 F.3d at 1319-20. But see, Lee II, 950 F.3d at 795.[15]

As discussed, Defendants have no obligation to train poll workers, and without a duty, there can be no liability. See Russell by Russell v. Fannin Cty. Sch. Dist., 784 F. Supp. 1576, 1580 (N.D. Ga. 1992). As held by the Seventh Circuit, a "state officer named in a suit brought under 42 U.S.C. § 1983 must be in some manner responsible for the alleged deprivation of rights." Dommer v. Crawford, 653 F.2d 289, 291 (7th Cir. 1981).

Plaintiffs' new argument is that Defendants must (1) mandate that county election officials train poll workers using state materials; and (2)

[15] Lee I is also factually distinguishable. There, the plaintiffs provided evidence that Florida's local poll workers received no training, and deliberate indifference appears not to have been raised. Lee I, 915 F.3d at 1319.

improve the State materials. The first is a legal theory, espoused only by Mr. Kennedy based on what he did in Wisconsin, and not based on a national standard, judicial opinion, or federal law. RSAMF ¶ 336. The only evidence on the second, a qualitative criticism, comes from Mr. Kennedy as well. RSAMF ¶¶ 357-60, 373-74, 984. Mr. Kennedy acknowledges, however, that elections will always include human error (and says nothing about lines). Doc. No. [411-1] at 92:22-101:14. But more important than Mr. Kennedy's testimony, the Supreme Court has held that governments are not liable on a theory that they could just do more or do better. Harris, 489 U.S. at 391 (deciding a "do better" theory is not cognizable); see also Connick 563 U.S. at 67 (same). In addition, Plaintiffs failed to provide one document from a county election official who claims the training was insufficient, and little to no evidence from an actual poll worker on training. Neither provides a basis to overcome summary judgment, and, as importantly, Plaintiffs articulate no basis for this Court to fashion a judicial remedy. Which is why Plaintiffs remain stuck seeking an impermissible "obey the law" injunction on training.

Beyond these threshold errors, Plaintiffs have not shown causation in three ways. First, no evidence establishes deliberate indifference, which requires Plaintiffs to show that Defendants either (1) made a "deliberate and

conscious choice," Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990), or (2) "disregarded a known or obvious consequence of [their] action." Connick v. Thompson, 563 U.S. 51, 61 (2011). A consequence becomes known only if the underlying conditions are "obvious, flagrant, [and] rampant." Brown, 906 F.2d at 671. Rather than apathy, the evidence shows frequently evolving training to meet new standards and requirements and, ultimately, the enactment of HB 316 to address criticisms of election administration. Moreover, the State cannot be on notice of insufficient training about legislation enacted only last year.

Second, no evidence provides proximate cause on training. Mr. Kennedy impermissibly speculates on this issue, but cites to no specific evidence establishing a connection to training. See Doc. No. [411-1] at 98:22-100:4. Third, by any measure, Plaintiffs' evidence is insufficient to show a statewide or systemic problem, which demonstrates the sporadic and localized nature of Plaintiffs' claims.

VI. Plaintiffs' Fifteenth Amendment and Equal Protection Claims (Counts II and III).

Plaintiffs' Equal Protection and Fifteenth Amendment claims fail for the same reasons as Count I, and the additional reason that there is no

evidence of intentional discrimination.[16] Plaintiffs' Response does not argue that the individual Plaintiffs have knowledge of intentional discrimination by Defendants. See Doc. No. [450-1] at 9-11. Ultimately, Plaintiffs have not shown the requisite "*present* intent to discriminate[,] which implies that the decisionmaker ... selected ... a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325, 1349 (11th Cir. 2005) (emphasis in original) (citations omitted). Under such circumstances, the Eleventh Circuit considers seven factors on intent and not just disparate impact. Greater Birmingham Ministries v. Sec'y of State for Alabama, 966 F.3d 1202, 1225 (11th Cir. 2020) (citing Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977)).[17]

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[16] Count II and III now appear to focus only on absentee ballots, the HAVA-match process, polling closures, and line length at some Fulton County precincts. Doc. No. [490] at 57-62. Thus, summary judgment can be granted as to Plaintiffs' claims under Counts II and III that relate to allegations regarding (1) "sufficient tools for voting," including voting machines; (2) failure to train on election laws; (3) the voter registration list allegations; and (4) voting machine issues. See Doc. No. [41] ¶¶ 175-76.

[17] Plaintiffs' other authority helps Defendants. In I.L. v. Alabama, 793 F.3d 1273, 1278 (11th Cir. 2014), the district court found a clear disparate impact but still found no discriminatory intent. Id. at 1287.

To satisfy this burden, Plaintiffs rely heavily on two campaign statements by then-Secretary Kemp. Doc. No. [490] 59-62. However, Plaintiffs ignore authority indicating Governor Kemp's campaign statements are not evidence of intent. Doc. No. [450-1] at 37 (citing Trump v. Hawaii, 138 S. Ct. 2392, 2418-20 (2018); Washington v. Trump, 858 F.3d 1168, 1173-74 (9th Cir. 2017) (Kozinski, J., dissenting)). They also fail to point out that the Governor addressed only voter registration efforts, which Plaintiffs do not address. Doc. No. [490] at 60. More telling is Plaintiffs' lack of showing that any person—at the State or local level—implemented this purported systemic discriminatory effort. This, along with HB 316, precludes a question of material fact on a "*present* intent to discriminate." Holton, 425 F.3d at 1349 (emphasis in original). While the record may attempt to settle some political scores, it fails to overcome summary judgment.

VII. **Plaintiffs' Equal Protection Claim (Geography) (Count III).**

Count III also alleges that Georgia voters are subject to geographic variations in voting administration rising to a constitutional violation. Doc No. [41] ¶¶ 196-200. As set forth above, Plaintiffs have not provided any evidence of **how** an alleged geography variance itself causes an injury, or that Defendants have **caused** any variance that purportedly leads to an

injury. Doc. No. [450-1] at 38. Indeed, Plaintiffs' evidence does not go much beyond election administration in two or three counties.

Under these facts, Bush v. Gore, 531 U.S. 98, 109 (2000) is inapplicable. That case was expressly "limited to the present circumstances" where a state court order established no uniform standards to count votes. Id.; see also Curling v. Kemp, 334 F. Supp. 3d 1303, 1324 (N.D. Ga. 2018) ("cautious" preliminary injunction order). Plaintiffs' other authority supports Defendants: the court found "differences in the local application of provisions" of state election law but no Equal Protection violation.[18] See Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 636 (6th Cir. 2016).

VIII. Plaintiffs' Procedural Due Process Claim (Count IV).

Count IV of Plaintiffs' complaint addresses only list-maintenance efforts. Contrary to Plaintiffs' representation, Defendants challenge Plaintiffs' assertion of constitutional deprivation and State action. See Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003). In December, Plaintiffs identified only three voters that were moved to the cancelled voter list pursuant to State law. SMF ¶¶ 128-29. Now, Plaintiffs cite even less

[18] Plaintiffs' remaining authority, League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 466 (6th Cir. 2008), reviewed an order on a motion to dismiss. The cited provision presumed facts that are not in this record.

compelling evidence: very few affected voters and a proffered expert that did not consider the correct data or HB 316. See supra Section III. This ends the inquiry.

On the third element, which focuses on the procedure to remedy a deprivation, Matthews v. Eldridge, 424 U.S. 319, 335 (1976), Plaintiffs' identified private affected interest—receiving precinct cards and being counted in supply requirements—is minimal at best. Doc. No. [490] at 46 n.17 (addressing voters on the inactive voter roll). For those who are on the cancelled status, the burden of registering to vote is, as this Court has previously held when considering Plaintiffs' preliminary injunction motion, quite low. Doc. No. [188]. No new evidence offered by Plaintiffs changes that.

On the substitute procedural safeguards, Plaintiffs' Amended Complaint mentions only same-day voter registration. Doc. No. [490] at 47. Only now (after discovery) do Plaintiffs raise phone and email notice **and** counting ballots of voters who have supposedly not moved as alternatives to same day registration. Doc. No. [490] at 48. But, Plaintiffs have no evidence showing that phone numbers and email addresses would be any more effective, nor do they have any statement from any county election official that their new proposal would be workable. Doc. No. [490] at 48. These

eleventh-hour ideas provide this Court with no reason to reverse itself, and should not be considered given their late revealing.

IX. **Plaintiffs' VRA Section 2 Claim (Count V).**

Plaintiffs are correct that no showing of intent is necessary to prove a violation of Section 2 of the VRA. Chisom v. Roemer, 501 U.S. 380, 403-404 (1991). But, Plaintiffs ignore recent precedent that requires them to point to evidence that the laws and practices they challenge "caused the denial or abridgement of the right to vote on account of race." Greater Birmingham Ministries, 966 F.3d at 1233. This warrants granting summary judgment.[19]

For the remaining three practices—HAVA-match, absentee ballots, and polling closures—about which Plaintiffs claim they have offered some evidence of disparate impact, their arguments fail to cross the causal bridge required by the Eleventh Circuit. Plaintiffs first claim that issues of material fact exist as to polling-place changes, pointing to Dr. Herron's report about closure rates. Doc. No. [490], p. 51-52. But, the Eleventh Circuit had similar data on Alabama's photo identification requirement for voting in Greater

[19] Plaintiffs do not contest the lack of evidence of any disparate impact about voting technology, training, provisional ballots, or voter-list maintenance. Compare Doc. No. [450-1], p. 46 with Doc. No. [490], pp. 51-54. This ends the inquiry for these issues. Greater Birmingham Ministries, 966 F.3d 1231-35.

Birmingham Ministries and found no violation of Section 2. In that case, they explained that a similar difference of one percentage point "barely clear[ed] the hurdle of demonstrating" any racial disparity. Id. at *63-64; RSAMF ¶¶ 1039, 1042. Even if they crossed that hurdle, like the plaintiffs in Alabama, Plaintiffs here point to no facts that demonstrate the extremely small disparity "caused the denial or abridgement of the right to vote on account of race," id. at *65—only that such a disparity exists. This ends the analysis as to polling-place changes for purposes of Section 2.

Likewise, Plaintiffs take a 1.4-percentage point difference in rejection rates for absentee ballots and, like the Alabama plaintiffs in Greater Birmingham Ministries, cast it as "150%" rejection rate to make it seem large. Doc. No. [490] at 52; SMF ¶ 186, SAMF ¶ 900. Plaintiffs again do not (and cannot) identify any fact that supports any causal connection for the rejection rate, which is fatal to their claim. See generally Greater Birmingham Ministries, 966 F.3d at 1202.

Finally, Plaintiffs address database matching, claiming that they do not need to show any causal analysis—an approach specifically rejected by the Eleventh Circuit. Compare Doc. No. [490] at 54 with Greater Birmingham Ministries, 2020 U.S. App. LEXIS 22672 at *65. Because

Plaintiffs have no evidence of causation, Defendants are entitled to summary judgment on the Section 2 claim about database matching as well.

Plaintiffs then proceed to summarize their views of the "Senate factors," which is unusual because (1) they did not move for summary judgment; and (2) their failure to cross the threshold showings precludes the need to analyze any further circumstances. But their summary also does not make sense in light of what is required in a vote-denial case, to the extent that the Senate factors are even still at issue. On the first factor, Plaintiffs claim that Georgia's history is relevant to particular election practices—but this is directly contrary to Greater Birmingham Ministries, which cautioned against "allowing old, outdated intentions of previous generations to taint [a state's] ability to enact voting legislation." Id. at 1229. Plaintiffs have offered no "concrete evidence of current racially polarized voting," id. (emphasis added), such as the 2018 election, instead relying on Dr. McCrary's collection of evidence in other cases. RSAMF ¶¶ 1138-40. Plaintiffs' statements about Senate factor five are to inadmissible reports that were not part of discovery in this case and Dr. McCrary's review of Census data. Id. ¶¶ 1141-46. Senate factor six cites to a collection of random incidents, some old, most involving unsuccessful candidates, and some involving connections as attenuated as

tweets from the spouses of candidates, supported primarily by inadmissible evidence. Id. ¶¶ 1147-56.

Ultimately, Plaintiffs have pointed to no evidence, let alone a single material fact, that "would permit a reasonable factfinder to conclude that minority voters, pursuant to Section 2(b), had 'less opportunity than other members of the electorate to participate in the political process.'" Greater Birmingham Ministries, 966 F.3d at 1232 (quoting 52 U.S.C. § 10301(b)). This is dispositive as to their Section 2 claim.

CONCLUSION

Plaintiffs filed this litigation claiming that hundreds of thousands of voters were disenfranchised by the intentionally discriminatory acts of State officials. The claims were inflammatory. They caused some Georgians to question the integrity of our elections. Discovery has shown the claims were wrong. State officials conducted elections—before and during a pandemic—tirelessly, earnestly, and often thanklessly. They have responded to legitimate concerns through legislation and regulation and have proven, time and again, that the Plaintiffs' claims have no merit. For all of these reasons, Defendants request this Court grant Defendants' Motion for Summary Judgment.

Respectfully submitted, this 31st day of August 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFFS' CLAIMS was prepared double-spaced in 13-point Century Schoolbook font, approved by the Court in Local Rule 5.1(C).

/s/ Josh Belinfante
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