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

THE NEW GEORGIA PROJECT, REAGAN JENNINGS, CANDACE WOODALL, and BEVERLY PYNE, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and the Chair of the Georgia State Election Board; et al., Defendants.	CIVIL ACTION FILE No. 1:20-CV-01986-ELR

PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE DEFENDANTS' MOTION TO STAY PENDING APPEAL

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STATUTES

I. INTRODUCTION

Not content with the Court's denial of preliminary relief on four of the five Georgia laws that The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne (collectively, "Plaintiffs") are challenging in this litigation, State Defendants embark on a quest to erase the modest relief Georgia voters received—a 72-hour extension for the return of absentee ballots. This exceedingly narrow relief—and this relief *alone*—will continue running up legal fees for Georgia taxpayers, even as the State not so long ago lamented how "COVID-19 has significantly impacted State coffers" and "Georgia's 2021 budget contains about $1.57 billion fewer in State dollars than the 2020 Budget." ECF No. 91 at 10. The cost of preventing valid votes from being counted is apparently worth the effort.

In its methodical 70-page Order, the Court carefully weighed Plaintiffs' claims and concluded that Plaintiffs met the high standard required for a preliminary injunction with respect to the Election Day Receipt Deadline. Even then, however, the Court did not grant Plaintiffs' requested relief of a five-business-day extension. Instead, the Court carefully crafted a shorter 72-hour extension "to honor the State's legitimate interest in certifying the election." ECF No. 134 at 68. In so ordering, the Court expressed deep reluctance to order any relief, but acknowledged that, under

the current pandemic circumstance, "the risk of disenfranchisement is great" and "narrowly tailored injunctive relief is appropriate." *Id.*

The Court is not wrong—the risk of disenfranchisement is very real. More than 7,000 Georgia voters were denied their right to vote in the June primary election alone because of the Election Day Receipt Deadline. *See* ECF No. 105-1 at 14. Any extension, including one as narrow as the 72 hours the Court has ordered, will allow thousands of Georgia voters to exercise their most fundamental right. As the Supreme Court has long recognized, "[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (citation and quotation omitted).

The relief that the Court granted, moreover, is entirely consistent with the relief approved of by the U.S. Supreme Court in *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207–08 (2020). As a result of that order—issued *the day before* the Wisconsin primary this past April—at least 79,054 ballots of lawful Wisconsin voters that would have otherwise been discarded due to the strict application of an election day receipt deadline were counted.[1] Defendants

[1] *See* Wis. Elections Comm'n, *April 7, 2020 Absentee Voting Report* at 7 (May 15, 2020) https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf.

provide no reason for finding that this case presents a materially different situation that would justify denying Georgia voters the same relief that the Supreme Court found appropriate for voters in Wisconsin. Defendants fall far short of the requisite showing necessary for a stay pending appeal under *any* of the requisite factors. The Court should, accordingly, deny Defendants' unfounded motion and decline to alter the status quo regarding the rules around absentee voting mere days before ballots will be mailed to voters for the November election—absentee ballots will begin being mailed out *next Tuesday*, September 15. *See* O.C.G.A. § 21-2-384(a)(2).

II. BACKGROUND

On May 8, 2020, nearly six months before the coming November general election, Plaintiffs filed a complaint for declaratory and injunctive relief against five state actors responsible for implementation of state election law and promulgation of election policy and 17 county election boards responsible for the conduct of elections. ECF No. 1. On June 3, Plaintiffs filed an amended complaint seeking relief for voters on five provisions of Georgia's election law: the Absentee Application Notification Process, the Absentee Application Age Restriction, the Election Day Receipt Deadline, the Absentee Postage Tax, and the Voter Assistance Ban. ECF No. 33. Immediately following Georgia's June primary election debacle, Plaintiffs moved for a preliminary injunction seeking to enjoin these provisions and requesting

relief to facilitate voters obtaining and effectively casting absentee ballots during the November election. ECF Nos. 57–59. Defendants filed two motions to dismiss Plaintiffs' amended complaint on standing and other grounds. ECF Nos. 82, 83. The parties fully briefed both motions. ECF Nos. 90–91, 96–97, 103–107, 112–113.

On August 31, after extensive briefing on both the motion for preliminary injunction and the motions to dismiss, and a three-hour hearing that was delayed until August 19 at Defendants' request, *see* ECF Nos. 109 and 120, the Court issued its Order denying the motions to dismiss and granting in part and denying in part the motion for preliminary injunction. ECF No. 134. Finding that Plaintiffs satisfied the heavy burden for a preliminary injunction and demonstrated irreparable harm if the Election Day Receipt Deadline were not extended, the Court granted a modest three-day reprieve for voters. ECF No. 134 at 67–69. State Defendants waited four days to file a notice of appeal, ECF No. 136, and with just 53 days before the November election are now seeking a stay pending that appeal, ECF No. 137. Notably, the County Defendants have not filed a notice of appeal and only today indicated they merely do not oppose State Defendants' stay request.[2] ECF No. 143.

[2] There is also an open question as to whether Defendant State Election Board Member David Worley authorized State Defendants' appeal in light of contrary public statements he made the day before Defendants filed their notice of appeal. *See* Ex. A, Sept. 3, 2020 Email from David Worley to Plaintiffs' Counsel, et al.

III. LEGAL STANDARD

A stay pending appeal is an "exceptional response," *United States v. Hamilton*, 963 F.2d 322, 322 (11th Cir. 1992), and represents "an intrusion into the ordinary process of administration and judicial review," *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotations omitted). In deciding whether to grant a stay, the Court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id*. at 434. Courts consider these factors to "ensure that courts do not grant stays pending appeal improvidently." *Chafin v. Chafin*, 742 F.3d 934, 937 n.7 (11th Cir. 2013).

IV. ANALYSIS

A. Plaintiffs are likely to succeed on the merits of State Defendants' appeal.

1. Plaintiffs are likely to prevail on their *Anderson-Burdick* claim.

In its thorough Order based on the substantial record before it, the Court reasoned that the Election Day Receipt Deadline imposes a severe burden on Georgia voters that no State interest, no matter how "strong," can justify. ECF No. 134 at 59–61. Notably, the Court rejected Plaintiffs' request for a longer extension of time for receipt of absentee ballots and instead ordered the receipt deadline extended by just 72 hours. In tailoring this relief, the Court explicitly considered the

"State's legitimate interest in certifying the election." *Id.* at 68. Before this Court, Defendants fail to make the required "strong showing" that they are likely to succeed on appeal. *Nken*, 556 U.S. at 427. Instead, they resort to familiar arguments the Court rejected in its Order, while misstating the applicable legal standards.

First, Defendants' argument that a large percentage of voters can comply with the Deadline has no place in the *Anderson-Burdick* analysis. The Supreme Court has emphasized that when assessing the severity of the burden, courts must consider the effects of the restriction on those voters who the law *actually impacts*. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 201 (2008) (controlling op.) (explaining "[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a [photo ID]," not the burdens on all voters); *see also Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (finding courts should consider "not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"); *League of Women Voters of Fla. v. Detzner*, 354 F. Supp. 3d 1280, 1286 n.6 (N.D. Fla. 2018) (explaining how courts analyzing *Anderson-Burdick* claims "look to the *burdens* on the right to vote" rather than categorical "demonstrations of *disenfranchisement*").

Here, the Deadline disenfranchised 7,281 voters in the June primary election. ECF No. 105-1 at 14. Each one of those thousands of voters were fully entitled to vote. Each one was stripped of that right by the application of the Deadline. The Court recognized how this represents severe burdens on voting rights for those thousands of voters, even if a larger percentage of voters did not have their votes rejected by the Deadline's operation. ECF No. 134 at 60–61. In acknowledging how "voters were disenfranchised for no error of their own," *id.* at 60, the Court comfortably positioned itself in a long line of cases recognizing that disenfranchisement, even for a comparatively small number of voters, imposes severe burdens on voting rights. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("[T]he basic truth that even one disenfranchised voter—let along several thousand—is too many."), *cert. denied*, 135 S. Ct. 1735 (2015); *Anderson v. Celebreeze*, 460 U.S. 780, 784–86 (1983) (holding unconstitutional a filing deadline that affected candidates who received less than 6% of statewide vote); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (observing that poll taxes, even if it not burdensome for the average voter, violate Fourteenth Amendment of U.S. Constitution because of burdens they impose on poor voters); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593 (6th Cir.

2012) (law likely unconstitutional even though it affected only 0.248% of total ballots cast).

Burdens on voting rights are especially serious when voters are harmed through no fault of their own. *See id*. at 597. Defendants mistakenly ignore these voters in favor of the voters whose ballots were received on time. Defendants also erroneously conflate these thousands of examples of disenfranchisement as "mere inconveniences," ECF No. 137 at 14, but the Court correctly recognized that these rejected ballots represent the Deadline's severe burden on Georgia voters, ECF No. 134 at 60.

Second, the Court considered the State's interests in "conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud" and crafted limited relief in light of those "strong" interests. *Id*. at 60–61; *see also id*. at 68–69. Thus, the Court's narrow remedy is the result of careful, methodical balancing required under *Anderson-Burdick*. *Id*. at 60–61. Defendants' argument that these interests outweigh the Deadline's burden misses the mark because, as outlined above, the Deadline inflicts severe burdens on voters in the form of disenfranchisement, not mere minimal burdens.

In light of the modest 72-hour extension the Court granted, other administrative issues that Defendants identify in their motion for a stay pending

appeal ring hollow. First, the post-election, pre-certification audits must be completed "prior to final certification of the contest." O.C.G.A. § 21-2-498(c)(1). This certification occurs on November 20, a full 17 days after Election Day and a full two weeks after the deadline for return of absentee ballots. *See* O.C.G.A. § 21-2-499(b). Notably, there is no requirement that all ballots must be received for the audit to occur. *See generally* O.C.G.A. § 21-2-498. Nor can it, since ballots from UOCAVA voters and ballots from voters seeking to cure their ballots are also still being processed after Election Day. *See* O.C.G.A. §§ 21-2-386(a)(1)(C), 419-2-419 (providing voters three days after Election Day to cure absentee ballot deficiencies); *see also* O.C.G.A. § 21-2-386(a)(1)(G) (setting deadline for overseas and military voters' absentee ballots as three days after Election Day).

Further, the Secretary of State does not need to complete the canvass until 17 days after Election Day. O.C.G.A. § 21-2-499(b). The Court's ordered relief impacts that timeline only to the extent a complete tabulation and canvass cannot be completed after the Friday after Election Day—*still* two full weeks before the Secretary's statutory deadline. *Id*. Again, absentee ballots requiring cures from voters, as well as overseas and military ballots, will *still* be received and tabulated during this time period. Additionally, the 72-hour extension's impact on runoff

elections is minimal because the runoff elections are not held until December 1, 2020, or January 5, 2021. O.C.G.A. § 21-2-501(a)(3), (4).

Finally, Defendants emphasize how the surge of absentee ballots in the June primary election was the cause of the "nearly doub[ling of] the number of absentee ballots" rejected during that election. ECF No. 137 at 12. But this fact *underscores* the need to maintain the Court's narrowly tailored relief for the November election—not suspend it. It is undisputed the number of absentee ballots will skyrocket in November, along with the number of voters the Deadline threatens to disenfranche. As many as 4 million voters are expected to cast absentee ballots in Georgia this November. More than 62,000 of those are expected to arrive after Election Day, even when voters promptly mailed them before Election Day. But for the Court's Order, many of these ballots would be rejected, resulting in mass disenfranchisement of lawful voters. *See* ECF No. 59-1 at 32. Anything other than implementing the Court's narrow relief will continue the disenfranchisement the Deadline has inflicted on Georgia voters for election after election and of which Plaintiffs provided ample evidence. *See, e.g.*, ECF Nos. 59-1 at 17–32; 105-1 at 15–17.[3]

[3] The evidence established that in the 2018 general election, 2,427 ballots out of the total 3,581 late ballots arrived within three days after Election Day—representing approximately 68% of all late ballots. ECF No. 59-1 at 19. Using this ratio, it is not unreasonable to expect approximately 40,000 out of the expected 62,000 late ballots,

2. Plaintiffs are likely to prevail on their procedural due process claim.

Defendants' attempt to stay the Court's determination that Plaintiffs are likely to succeed on the merits of their due process claim should similarly be rejected. The Court correctly applied the *Mathews v. Eldridge* balancing test in holding that the Deadline violates procedural due process. The *Mathews* factors are: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of those interests and the probable value of any additional or substitute safeguards; and (3) the government's interest, including the safeguards' burdens. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

First, the Court, in accordance with binding judicial authority, recognized that the interest at stake here is "an individual's right to vote" and that this right is "entitled to substantial weight." ECF No. 134 at 62; *see also United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966), *aff'd* 384 U.S. 155 (1966) ("[I]t cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.").

Second, the Court acknowledged that the risk of erroneous deprivation is "high due to massive delays and exigent circumstances caused by COVID-19." ECF

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around 68%, to arrive within the three-day extension period the Court ordered. Put simply, the voting rights of *at least 40,000* Georgians is on the line with this motion.

No. 134 at 62. Defendants argue that no erroneous deprivation of absentee voting can *ever* occur because "voters do not have the right to cast a ballot at any time they wish." ECF No. 137 at 18. But this argument overlooks well-established case law—including from the Court—that once "the State has provided voters with the opportunity to vote by absentee ballot, the State must now recognize that the privilege of absentee voting is certainly deserving of due process." *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (quotations omitted); *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018).[4] Moreover, additional safeguards to prevent this erroneous deprivation through a reasonable Deadline extension "would be a valuable measure to address the risk of absentee voter disenfranchisement." ECF No. 134 at 62. In other words, the probable value of these safeguards is significant, as they will thwart disenfranchisement. Defendants recast these safeguards as a "policy" that will "impose a heavy burden on Defendants." ECF No. 137 at 19. But they fail to detail how a mere extension is a policy *and* how

[4] Defendants invoke the specter of an "early riser who wishes to vote in-person before 7:00 A.M. on Election Day" as supporting "generally applicable regulations regarding timing of elections." ECF No. 137 at 18. A more apt analogy is the voter who can continue waiting in line after a polling place closes if, through no fault of his own, he has not yet voted and was in line at the time the polling place closed. In Georgia, he is permitted to cast a ballot even after the poll's closing. *See Georgia Voter Information Guide*, https://sos.ga.gov/admin/uploads/Voting_3_panel_for_website1.pdf (last visited Sept. 10, 2020).

these burdens outweigh the valuable, modest procedural safeguards that minimize the risk of erroneous deprivation of a foundational liberty interest.[5]

Third, the Court considered the State's interests, but correctly concluded the "additional procedures impose a minimal burden on Defendants, because they already have an extended deadline" for overseas and military voters. ECF No. 134 at 63. The Court's *Mathews* balancing—which considered the evidence, the State's burdens, and the fundamental right at stake—is likely to be sustained on appeal.

B. *Purcell* does not bar relief.

The Court should decline Defendants' invitation to transform *Purcell v. Gonzalez*, 549 U.S. 1 (2006), into a shield for unconstitutional voting restrictions in election years. *First*, *Purcell* concerns itself with *last-minute* election changes that threaten to sow widespread voter confusion that could result in voter disenfranchisement. *See id.* at 4. The Court's Order, which was issued *more than two months* before the November election—long before the ordered Deadline extension would even take effect—is simply not comparable.

[5] Recasting these safeguards as a "policy" is also contrary to multiple court decisions. *See Republican Nat'l Comm.*, 140 S. Ct. at 1208; *see also Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (extending deadline in elections context); *Ga. Coal. for the Peoples' Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (same); *Doe v. Walker*, 746 F. Supp. 2d 667, 681–83 (D. Md. 2010) (same).

Second, *Purcell* clearly does not impose a black letter rule that federal courts may never issue orders that protect against disenfranchisement even right on top of an election. Indeed, the Supreme Court's decision in *RNC v. DNC*, a case upon which Defendants themselves heavily rely, proves as much. There, in an order issued the day before the April 7, 2020 Wisconsin primary, the Supreme Court endorsed the revision of Wisconsin's election day receipt deadline to impose a postmark deadline even more expansive than the one ordered by the Court here. *See Republican Nat'l Comm.*, 140 S. Ct. at 1208. While the Court's Order will ensure that Georgia voters who mail their ballots by Election Day and whose ballots are received within three days after Election Day are counted, the order in the *RNC* case required Wisconsin to count ballots mailed by Election Day but received up to *six days* after. *Id*. Thus, the Supreme Court's order in that case is a reason to *deny* Defendants' request for a stay, not to grant it.[6]

[6] Defendants' remarkable assertion that the Court "afford[ed] relief that the plaintiffs themselves did not ask for," *id*., flatly mischaracterizes what occurred in this case and ignores that the Court has broad power to enter equitable relief as it deems it appropriate. Plaintiffs clearly and indisputably asked for an extension of the Receipt Deadline. The Court granted a shorter extension than that requested by Plaintiffs *because the Court considered the State's interests*, as required when a court, acting in equity, fashions injunctive relief. *See* ECF No. 134 at 68; *see also*, *e.g*., *Kansas v. Nebraska*, 135 S. Ct. 1042, 1058 (2015) ("flexibility [is] inherent in equitable remedies"); *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982) ("The essence of equity jurisdiction has been the power of the [court] to do equity and to

RNC is far from unique in this regard. Defendants similarly ignore that federal courts regularly hear and grant motions for temporary injunctions to protect voting rights in the weeks and months before an election and issue relief much closer to a pending election than the Court's Order here. *See, e.g.*, *Ga. State Conf. NAACP v. Georgia*, No. 1:17-cv-1397-TCB, 2017 WL 9435558, at *6 (N.D. Ga. May 4, 2017) (enjoining voter registration requirements and extending voter registration deadline approximately six weeks before the election); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 966 (D. Nev. 2016) (granting preliminary relief and ordering counties to open additional in-person voter registration and early voting locations approximately four weeks before 2016 general election); *Fla. Democratic Party v. Detzner*, No. 16-CV-607, 2016 WL 6090943, at *9 (N.D. Fla. Oct. 16, 2016) (requiring cure period for ballots with signature mismatches approximately three weeks before 2016 general election); *League of Women Voters of N.C.*, 769 F.3d at 248–49 (enjoining in part an omnibus election law approximately five weeks before 2014 general election); *Bryanton v. Johnson*, 902 F. Supp. 2d 983, 1006 (E.D. Mich. 2012) (preliminarily enjoining inclusion of a citizenship verification question on absentee ballot and voter

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mould each decree to the necessities of the particular case."); *N.C. State Conference Conf. of NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016) (describing federal courts' "broad and flexible equitable powers to fashion a remedy" to address injuries).

registration applications approximately four weeks before 2012 general election); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1377 (N.D. Ga. 2005) (preliminarily enjoining state's voter ID requirement approximately three weeks before election).

Moreover, the Court granted the 72-hour extension only after considering extensive briefing, reviewing expert reports, and holding a hearing on the issues where Plaintiffs and Defendants presented arguments on the merits. This was not the case decided on the eve of an election with "inadequate time to resolve the factual disputes," as the U.S. Supreme Court cautioned against in *Purcell*. 549 U.S. at 5–6. Contrary to Defendants' assertions, *Purcell* urged courts to take careful account of considerations unique to the election context before intervening, such as whether the change is likely to broadly confuse voters, undermine confidence in the election, or create insurmountable administrative burdens on election officials. *See id.* at 4. None of these apply here.

C. Laches does not bar relief.

Defendants' last-ditch laches arguments are not any more persuasive. As a threshold matter, laches cannot bar this action because Plaintiffs seek *prospective* relief to take effect in *future* elections. "[L]aches serves as a bar only to the recovery of retrospective damages, not to prospective relief." *Peter Letterese & Assocs., Inc.*

v. World Inst. of Scientology Enters., 533 F.3d 1287, 1321 (11th Cir. 2008); *see also Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981) (finding "laches may not be used as a shield for future, independent violations of the law" because "[t]he concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective"). This includes when prospective relief is sought "in close temporal proximity to an election." *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1026 (N.D. Fla. 2018) *aff'd* 915 F.3d 1312 (11th Cir. 2019) (collecting cases).

Even if laches could apply, Defendants cannot satisfy its requirements. The Eleventh Circuit has recognized laches is an "extraordinary" remedy that only applies when the party invoking the defense can prove (1) the plaintiff unreasonably and inexcusably delayed, and (2) that delay has resulted in material prejudice to the defendant. *Letterese*, 533 F.3d at 1321. Defendants cannot meet either requirement.

First, Defendants cannot show that Plaintiffs inexcusably delayed in filing this action. There is no requirement that voting rights plaintiffs bring suit as soon as they are aware of a constitutional violation. *Cf. Democratic Exec. Comm. of Fla.*, 915 F.3d at 1326 (holding plaintiff need not "search and destroy every conceivable potential unconstitutional deprivation, but could catch its breath, take stock of its resources, and study the result of its efforts").

Second, and more fundamentally, Defendants have failed to establish that any delay has caused them undue prejudice. Put simply, none of the potential prejudices they identify, *see* ECF No. 137 at 8–11, are a result of Plaintiffs bringing this suit later than Defendants preferred.

D. State Defendants will not suffer irreparable harm absent a stay.

State Defendants also fall woefully short of the required "strong showing" in establishing how a stay pending appeal will prevent irreparable harm. *Nken*, 556 U.S. at 427. The Court should reject all of Defendants' arguments on this factor. *First*, Defendants contend that the relief granted by the Court will "create voter confusion." ECF No. 137 at 20. But it is COVID-19 and not the Court's Order that has already caused extensive voter confusion. The Court's injunction, on the other hand, provides limited relief allowing more voters to cast ballots with assurance that their ballots will be counted. This new status quo established by the Court has already received substantial public attention.[7] As a result, Georgia voters are relying on the extended Deadline in deciding whether to request and cast an absentee ballot

[7] *See, e.g.*, Mark Niesse, *Judge rules Georgia ballots mailed by Election Day must be counted*, Atlanta Journal Constitution (Aug. 31, 2020), https://www.ajc.com/politics/judge-extends-georgia-deadline-to-return-absentee-ballots/OEETBUYMWJASHCW3YMVCKTPPYI/; Mike Stewart, *Judge Orders Georgia to Extend Deadline for Absentee Ballots*, WABE (Aug. 31, 2020), https://www.wabe.org/judge-orders-georgia-to-extend-deadline-for-absentee-ballots/.

and should not be left in a lurch not knowing what deadline applies during Defendants' appeal. *Cf. Purcell*, 549 U.S. at 4–5 ("Court orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion and consequent incentive to remain away from the polls." (emphasis added)).

Next, Defendants rehash their claim that the 72-hour extension will delay the cure period for rejected absentee ballots, which will in turn "threaten delaying certification of the results, which will impact the ability of voters to cast ballots in runoff elections and possibly voting by Georgia's Presidential Electors." ECF No. 137 at 20. This argument does not explain why a stay is necessary while Defendants' appeal is pending and is not only baseless, *see supra* at 9–10, but a parade of horribles chockful of speculation and conclusory statements insufficient to support the exceptional relief of a stay pending appeal, *see, e.g.*, *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 953 (S.D. Miss. 2014) (rejecting argument that State will be irreparably harmed absent a stay because allegations of "confusion and practical difficulties" of implementing the injunctive relief were "speculative").

Finally, Defendants reprint their *Purcell* argument, ECF No. 137 at 20–21, but it fares no stronger in its second rendition for the simple reason that *Purcell* has nothing to do with irreparable harm. *See supra* at 13–16. Because Defendants fail to show harm—let alone *irreparable* harm—their motion for a stay should be denied.

E. Plaintiffs will suffer irreparable harm if the Court grants a stay.

If the Court grants Defendants' motion, on the other hand, Plaintiffs will be irreparably harmed. Defendants posit that the 72-hour extension *may* cause a litany of speculative problems, ignoring that *staying* it *will absolutely* result in the disenfranchisement of (at a minimum) tens of thousands of lawful Georgia voters. That disenfranchisement is the textbook example of irreparable harm. And the Court properly recognized as much in its Order when it found, after carefully examining Plaintiffs' declarations and evidence, that "the balance of the harms weighs in Plaintiffs' favor [because] Plaintiffs will be forever harmed if they are unconstitutionally deprived of their right to vote." ECF No. 134 at 65. By issuing a stay, the Court would re-impose this harm. *See, e.g.*, *Brady v. Nat'l Football League*, 779 F. Supp. 2d 1043, 1050 (D. Minn. 2011) ("A stay would re-impose on the Players precisely the irreparable harm that the Court found the NFL's lockout to be likely inflicting on them since March 12."). This strongly counsels against a stay while Defendants appeal the Court's Order.

Moreover, if voters are not confident their absentee ballots will arrive in time to be counted, more will be driven to forego requesting an absentee ballot and instead vote in person. This increases the risks of community spread of COVID-19 and adds to the length of lines at polling places that are already dwindling in number and

staffed by too few poll workers. This itself poses an independent and serious risk of irreparable harm that far outweighs any of the purported injuries that State Defendants claim they may suffer if a stay is not granted.

F. A stay will harm the public's interest in voting rights.

The last factor weighs heavily against issuing the requested stay. The Court has already explained that "the public will be served by this injunction" because "Georgia voters have an interest in ensuring their votes are counted." ECF No. 134 at 66. Defendants argue that the public interest favors a stay because the Court's Order will "undermine public confidence" through "[a]dding new, *ad hoc* processes." ECF No. 137 at 23. On the contrary, "[t]he public interest . . . favors permitting as many qualified voters to vote as possible." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). Here, of course, "the risk of disenfranchisement is great." ECF No. 134 at 68. Nothing is confusing about this concept—one the Court has acknowledged on more than one occasion. *Id*. at 66; *see also Ga. Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1268 (N.D. Ga. 2018).

What *would* confuse Georgia voters—and what would erode confidence in the November election—is for the Court to stay the injunction it granted just days after it found the Deadline to impose severe burdens on their voting rights. *Cf. Purcell*, 549 U.S. at 4–5. Doing so would harm voters who are relying on the Court's Order.

G. Plaintiffs have standing against State Defendants.

The Court correctly concluded that Plaintiffs have standing. ECF No. 134 at 15–23. State Defendants' continual contention that Plaintiffs lack standing because their claims are neither traceable to nor redressable by them is, as the Court stated, "misguided." *Id.* at 19. Although State Defendants do not receive voters' absentee ballots like County Defendants do, the Secretary of State is Georgia's chief election official, O.C.G.A. § 21-2-50(b), and the State Election Board is the body responsible for uniform election practice in Georgia, O.C.G.A. § 21-2-31. As the Court found, State Defendants also "have significant statutory authority to train local election officials and set election standards." ECF No. 134 at 19–20. State Defendants are bound by the Court's Order and have the authority to enforce it statewide. Defendants offer no new or compelling arguments on this issue. ECF No. 137 at 23.

Moreover, even if Plaintiffs' injuries were not traceable to or redressable by State Defendants, that would not be a basis for issuing a stay pending State Defendants' appeal because *none* of the 17 County Defendants in this action have filed a notice of appeal of the Court's Order. In fact, this makes the State Defendants' position even more tenuous because they simultaneously claim they have "no authority" to order the county boards to count ballots pursuant to the Court's Order while appealing for statewide relief. *Id*. In other words, they claim to have expansive

power to appeal, but no power at all to implement the relief (despite contrary Georgia law on the powers and duties of the Secretary of State, as the Court concluded)—a logically inconsistent position that undermines their standing argument.

Additionally, the Court should reject State Defendants' belated adoption of the County Defendants' argument that Plaintiffs should have sued all 159 counties in Georgia. ECF No. 137 at 23–24. As the Court properly concluded, the *Jacobson* decision is distinguishable given the difference between Georgia and Florida law with respect to the broad powers granted to Georgia's Secretary of State and State Election Board in the administration of election laws. *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1208 (11th Cir. 2020). Georgia's Secretary and State Election Board have the power and authority to enforce the Court's Order and prohibit *all* county election officials—not only those who are parties to this action—from rejecting ballots that are not postmarked by and received within three days after Election Day. Because the Court's Order is directed at *all* Defendants, *see* ECF No. 134 at 69–70, including the Secretary of State, Plaintiffs' injuries are redressable. Put simply, Plaintiffs' standing is beyond question.

H. The political question doctrine has no relevance here.

Defendants' efforts to re-plant Plaintiffs' claim into the narrow confines of the non-justiciable political thicket are misplaced. Otherwise, the Court would have

dismissed Plaintiffs' suit months ago and not entered a partial preliminary injunction in their favor. Defendants' insistent reliance on *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), ignores how that case's holding was expressly limited to partisan gerrymandering. *See id*. at 2506–07 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of federal courts."). Had *Rucho* extended beyond partisan gerrymandering, the Supreme Court would have informed the parties and the public. *Cf. Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (the Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*"). Defendants' unsupported assertion that the Deadline is a "policy choice" and therefore creates a non-justiciable question flies in the face of courts extending similar deadlines, perhaps most significantly including the Supreme Court's endorsement of a postmark deadline. *Republican Nat'l Comm.*, 140 S. Ct. at 1208; *see also supra* at 13 n.5. And, while Defendants do not rely on it, a recent Eleventh Circuit opinion on the political question doctrine deals with the narrow issue of ballot order and the "impermissible partisan advantage" the statutorily-mandated ballot order benefits one political party over another. *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377, at *17 (11th Cir. Sept. 3, 2020). *Jacobson* has no application here because neither Plaintiffs' claims nor the Court's relief have anything to do with partisan interests and partisan advantages.

Similarly, the modest, practicable nature of the Court's Order undercuts Defendants' efforts to recast Plaintiffs' requested relief as policy decisions unmoored from judicially manageable standards. Plaintiffs sought—and the Court granted—a failsafe for tens of thousands of Georgians whose ballots will arrive just after the Deadline through no fault of the voters. By ordering a postmark deadline rather than a receipt deadline—the same remedy the Supreme Court approved, *see* 140 S. Ct. at 1208—the Court crafted relief with judicially manageable standards. ECF No. 134 at 68. Plaintiffs did not ask the Court to impose its own policy preferences or even make any policy judgments at all. Rather, it requested the Court enjoin specific laws to prevent unconstitutional disenfranchisement based on actual instances of ballots not being counted through no fault of the voter. *See* ECF No. 105-1 at 14 (outlining how 7,281 ballots were rejected in June primary election). Preventing disenfranchisement during unprecedented circumstances is the judicially manageable standard for the Court to consider Plaintiffs' claims.

V. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny State Defendants' motion for a stay pending appeal.

Dated: September 11, 2020

/s/ Kevin J. Hamilton

Halsey G. Knapp, Jr.
Georgia Bar No. 425320
Joyce Gist Lewis
Georgia Bar No. 296261
Adam M. Sparks
Georgia Bar No. 341578
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW, Ste. 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
hknapp@khlawfirm.com
jlewis@khlawfirm.com
sparks@khlawfirm.com

Marc E. Elias*
Amanda R. Callais*
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
ACallais@perkinscoie.com

Kevin J. Hamilton*
Stephanie R. Holstein*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
KHamilton@perkinscoie.com
SHolstein@perkinscoie.com

Lilian Timmermann*
PERKINS COIE LLP
1900 Sixteenth Street, Suite 1400
Denver, CO 80202-5222
Telephone: (303) 291-2354
Facsimile: (303) 291-2454
LTimmermann@perkinscoie.com

Christian R. Ruiz
Georgia Bar No. 548611
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
Facsimile: (602) 648-7000
cruiz@perkinscoie.com

Counsel for Plaintiffs
**Admitted Pro Hac Vice*

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

THE NEW GEORGIA PROJECT, REAGAN JENNINGS, CANDACE WOODALL, and BEVERLY PYNE, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and the Chair of the Georgia State Election Board, et al. Defendants.	Civil Action File No. 1:20-CV-01986-ELR

CERTIFICATE OF COMPLIANCE

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

Dated: September 11, 2020

/s/ Kevin J. Hamilton
Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 11, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: September 11, 2020

/s/ Kevin J. Hamilton
Counsel for Plaintiffs