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

THE NEW GEORGIA PROJECT, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:21-CV-01229-JPB

REPLY BRIEF IN SUPPORT OF
STATE DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

"States—not federal courts—are in charge of setting [the] rules" for the electoral process. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) (*NGP I*). Yet Plaintiffs ask this Court to interfere with the reasonable election rules that the State of Georgia established. The Court should dismiss the Amended Complaint because Plaintiffs lack standing and, moreover, have failed to state a claim.

I. Plaintiffs have failed to demonstrate standing.

Although standing is "[p]erhaps the most important of the Article III doctrines grounded in the case-or-controversy requirement[,]" Plaintiffs give it short shrift. *Woodson v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1273 (11th Cir. 2001). More is required to satisfy their burdens.

First, Plaintiffs have not sufficiently alleged "what activities they *would* divert resources away from in order to spend additional resources combatting" SB 202's supposed impact. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020) (emphasis added). Instead, they vaguely reference activities from which they *might* divert resources. *See* [Doc. 39, ¶¶ 20, 22, 24]. But bare allegations of possible diversion are insufficient; Plaintiffs must show that the diversion *will impair* their other activities. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014); [Doc. 54, at 7] (acknowledging that Plaintiffs

must identify a "change" attributable to the injury). There can be no "impairment" when Plaintiffs simply undertake new activities to carry out their existing mission. Plaintiffs' sole reliance on diversion thus fails.

Second, Plaintiffs lack standing because they rely on speculation about their claims of diverted resources. They must allege "imminent" or "certainly impending" injury. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 401 (2013). Yet they do not allege when or how their potential diversion of resources will occur, or what specific activities will be foregone. If anything, their hyperbolic allegations may increase their fundraising, thereby actually enhancing their organizational activities. In short, Plaintiffs merely rely on allegations of an "elevated risk" of a future event—an approach rejected in *Tsao v. Captiva MVP Rest. Partners*, 986 F.3d 1332, 1339 (11th Cir. 2021).

Third, the individual Plaintiffs lack standing for the same reason—they rely on speculative allegations of potential harm. Plaintiffs Solomon and Gibbs allege that they prefer to vote absentee, but neither alleges that SB 202 will prevent them from doing so. *See* [Doc. 39, ¶¶ 27–28]. Potentially disappointed "preferences" are not constitutional injury. Moreover, the allegations about possibly waiting in line to vote in person are speculative because these plaintiffs acknowledge routinely voting absentee. *See id.* Plaintiff Durbin also vaguely alleges that he prefers to vote "early in person" and speculates that

SB 202's "compressed timeline" *might* affect his ability to do so. [Doc. 39, ¶ 29]. But he does not allege how he is concretely "disadvantage[d]" by SB 202, and he also lacks standing. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Because none of the Plaintiffs identifies any concrete injury, each lacks standing.

II. Plaintiffs fail to state a claim on which relief can be granted.

A. Fundamental right to vote (Count I)

Each of Plaintiffs' claims also is insufficient on the merits. Initially, Plaintiffs ignore that only "[r]egulations imposing *severe* burdens on [the] rights" of election-statute challengers must "be narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (cleaned up, emphasis added); *see also* [Doc. 54, at 13-20]. By contrast, "[l]esser burdens . . . trigger less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions." *Timmons*, 520 U.S. at 358 (cleaned up). Plaintiffs also fail to acknowledge that everyday limitations "arising from life's vagaries" are only "lesser burdens." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197-98 (2008) (controlling opinion). Plaintiffs' speculative allegations of injury cited to support standing, even if accepted in full, are (at most) just such routine inconveniences arising from the potential vagaries of life.

Plaintiffs further suggest that there are no cases "supporting dismissal

of a right-to-vote claim at the pleading stage." [Doc. 54, at 14] (referring to *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)). But in fact, judges nationwide *routinely* reject, including at the pleading stage, *Anderson/Burdick* claims.[1]

Plaintiffs further claim that Defendants have not asserted any compelling interests in support of the ***drop box*** and ***mobile-voting unit provisions***, *see* [Doc. 54, at 17-18], but in fact Defendants' interests are obvious and manifold: "(1) deterring and detecting voter fraud;" "(2) improv[ing] . . . election procedures;" (3) ensuring accurate information in voter registration systems; "(4) safeguarding voter confidence;" and (5) running an efficient and orderly election. *Burdick*, 504 U.S. at 433; *Greater Birmingham Min. v. Sec'y of State for Ala.*, 992 F.3d 1299, 1319 (11th Cir. 2021) (*GBM*); *NGP I*, 976 F.3d at 1282; *see also Crawford*, 553 U.S. at 191. The General Assembly also explained that its aim was to improve "elector confidence" and reduce voter confusion. SB 202 at 5:102-106; *see also NGP I*, 976 F.3d at 1284.

[1] *See, e.g.*, *Daunt v. Benson*, No. 20-1734, 2021 WL 2154769, *7-11 (6th Cir. May 27, 2021); *Balsam v. Sec'y of New Jersey*, 607 F. App'x 177, 180-83 (3rd Cir. 2015); *Lindsay v. Bowen*, 750 F.3d 1061, 1063-64 (9th Cir. 2014); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352-55 (11th Cir. 2009); *McClure v. Galvin*, 386 F.3d 36, 41-45 (1st Cir. 2004); *LaRouche v. Fowler*, 152 F.3d 974, 993-96 (D.C. Cir. 1998); *De La Fuente v. Kemp*, No. 1:16-CV-2937-MHC, 2017 WL 2289307, *3-7 (N.D. Ga. Mar. 17, 2017) (Cohen, J.).

Defendants explicitly invoke each of these interests to defend the drop box and mobile-voting unit provisions, which *expanded* Georgians' statutory ability to vote under ordinary, non-emergency, circumstances. SB 202 at 5:113-118; Ga. Comp. R. & Regs. R. 183-1-14-0.8-.14; 183-1-14-0.10-.16; 183-1-14-.08-.14; *see also* O.C.G.A. § 50-13-4(b); [Doc. 39, ¶¶ 82-84, 160]; [Doc. 45-1, at 21].[2] Contrary to Plaintiffs' conclusory allegation that the State's interests are insufficient, *see* [Doc. 54, at 18], each of these interests justifies the minimal supposed burdens claimed by Plaintiffs, *see Timmons*, 520 U.S. at 358—as controlling precedents have confirmed, *see Crawford*, 553 U.S. at 191 (controlling opinion); *GBM*, 992 F.3d at 1319; *NGP I*, 976 F.3d at 1282.

Next, Plaintiffs' challenge to SB 202's ***absentee ID requirements***, *see* [Doc. 54, at 18], misapprehends the objective nature of SB 202's solution, *see* [Doc. 45-1, at 17]. The use of an identification number for absentee-ballot applications and ballots streamlines the process. That procedure also provides safeguards for voters who lack identification, *see* SB 202 at 38:949-39:956; 51:1297-52:1305—by making it clearer and more objective than the prior signature-matching process, *see* [Doc. 45-1, at 17] (citing SB 202 at 4:73-75).

[2] Plaintiffs use a faulty comparator by looking to the conditions of the 2020 elections, which took place under COVID-19's temporary emergency rules, rather than to the pre-SB 202 statutory regime, which did not mandate or even allow outdoor drop boxes at all. *See* [Doc. 39, ¶¶ 82-84, 160]; [Doc. 45-1, at 21].

Furthermore, the State is permitted to conclude, as it has, that a "lengthy absentee ballot process . . . le[a]d[s] to elector confusion, including [by confounding] electors who were told they had already voted when they arrived to vote in person." SB 202 at 5:107-110; *see also NGP I*, 976 F.3d at 1284. To minimize this confusion, Georgia can also "[c]reat[e] a definite period of absentee voting." SB 202 at 5:107-110; *see also NGP I*, 976 F.3d at 1284.

Plaintiffs seek to appoint themselves policymakers by asserting that the "unsolicited distribution of absentee ballot applications" will not really confuse voters. [Doc. 54, at 18]. But that decision belongs to the *elected* policy makers of the State, who believe that voters might mistake such unsolicited applications as government-sent or assume their earlier requests had been unsuccessful or not reached the election officials. *See NGP I*, 976 F.3d at 1284.

Plaintiffs also object to ***restrictions on approaching voters in line*** on the ground that so-called "relief activities [need not] be banned to prevent fraud and intimidation." [Doc. 54, at 18-19]. But in enacting this provision, the General Assembly recounted that "many groups" approached voters in line during the 2020 elections; and concluded that "[p]rotecting electors from improper interference, political pressure, or intimidation while waiting in line to vote," SB 202 at 6:126-129, in the manner SB 202 has chosen was critical to maintaining election integrity. States may restrict even campaign speech near

polling locations and precincts, *see Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1879, 1886 (2018); *Burson v. Freeman,* 504 U.S. 191, 208-09 (1992), because those interests are of the highest order. Usually, the *preventative* means pursued by SB 202 are the only practical solution: Not only might handing objects over to voters standing in line be a pretext to defraud, intimidate, or pressure them, *see* SB 202 at 6:126-129, but enforcing those interests once the elector has already voted under dubious conditions would be very difficult.

Plaintiffs also facially attack SB 202's ***voter-challenge provision*** because they worry that "inviting mass challenges and requiring the corresponding hearings to be rushed" would increase the risk of erroneously removing eligible voters. [Doc. 54, at 19]. But because this provision "has a plainly legitimate sweep," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008), Plaintiffs' speculative allegations cannot succeed as a facial challenge, *see United States v. Williams*, 553 U.S. 285, 303 (2008). Those kinds of allegations are reserved for as-applied challenges. *See id*. And by expediting the challenge process, the State aims for a speedy resolution *ahead of* elections to maximize accuracy and thus avert diminution in voter confidence. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006) (*per curiam*). In any event, Georgia law already proscribes abusive and harassing conduct. Therefore, Plaintiffs' concern is without merit.

Plaintiffs also suggest that the State's asserted interests in SB 202's ***changes to runoff election timelines***—reducing burdens on election officials and voters, *see* [Doc. 54, at 19] (citing SB 202 at 5:119-6:122)—will be ill-served if all runoffs occur during the four-week period, *see* [Doc. 54, at 19]. But the State may reasonably conclude that the overhead costs of "conducting . . . efficient election[s]" and the attendant burdens on election officials and voters alike are reduced by this arrangement. *NGP I*, 976 F.3d at 1282. Accordingly, all of Plaintiffs' fundamental-right-to-vote claims fall short due to their failure to provide plausible allegations showing either that these governmental interests are not "important" or that the challenged provisions are not rationally related to any of them.

B. Section 2 of the Voting Rights Act (VRA) (Count II)

(1) SB 202 was not a product of discriminatory intent.

None of the circumstantial evidence Plaintiffs offer to show that SB 202 was motivated by racism holds water. [Doc. 54, at 20-21]. First, they allege that SB 202 is racist because it "was introduced after the historic registration of Black voters and the breakthrough success of candidates that Black voters supported." *Id*. at 20. But that is a classic case of *post hoc ergo propter hoc*—after this, therefore because of this—a logical fallacy that "is not enough to support a finding of [discriminatory intent.]" *Gibson v. Old Town Trolley Tours*

of Wash., D.C., Inc., 160 F.3d 177, 182 (4th Cir. 1998) (cleaned up). On its face, this line of allegations is meritless.

Next, Plaintiffs allege that SB 202 was enacted in a "rushed" manner with "limited" opportunity for public comment and that "the stated rationales for [SB 202] were unfounded pretext." [Doc. 54, at 21]. Even if these allegations were true—and they are not—not only do they fail to give rise to any inkling of a discriminatory intent, but they also fail to satisfy the Supreme Court's plausible-pleading requirement. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 570 (2007).

Specifically, Plaintiffs ignore that, under *Iqbal*, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the *reasonable* inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678 (emphasis added). But the most that can be said is that Plaintiffs are speculating about *racial* motivations based solely on someone's *political* desire to win elections. *See*, *e.g.*, [Doc. 39, at ¶ 58]. As Justice Ginsburg noted, "[t]hat political officials would have politics in mind is hardly extraordinary, and there are many ways in which a politician can attempt to win over a constituency . . . without . . . unlawful discrimination." *Ricci v. DeStefano*, 557 U.S. 557, 642 (2009) (Ginsburg, J., dissenting). Moreover, Plaintiffs inappropriately present *some Republicans'* election-fraud

claims as evidence of the *racially* discriminatory intent of the *legislators* enacting SB 202. *See* [Doc. 39, at ¶¶ 59-60]; *but see* [Doc. 39, at ¶¶ 61-65].

For similar reasons, Plaintiffs' allegation that the State "surgically removed processes relied on by Black voters at every step of voting," also fall short. [Doc. 54, at 21]. Plaintiffs plead no facts showing that SB 202 affords any group "less opportunity than *other members of the electorate* to participate in the political process and to elect representatives of their choice." *Chisom v. Roemer*, 501 U.S. 380, 388 (1991) (cleaned up and emphasis added); *see also GBM,* 992 F.3d at 1329-31. In contravention of *Twombly* and *Iqbal*, Plaintiffs fail to factually back up their conclusory assertion that SB 202 targets African American voters. Therefore, Plaintiffs have not sufficiently pleaded their discriminatory-intent claims.

(2) SB 202 does not produce racially discriminatory results.

Plaintiffs assert the following arguments to establish an "effects" claim under Section 2: (1) they point to the already-mentioned displeasure of just *one* local Republican official at her party's electoral loss, *see* [Doc. 39, at ¶ 58]; (2) they ascribe "falsehoods" about the 2020 election's results to "Republican Party leaders" (as a whole), *id.* at ¶ 59; (3) going all the way back to 1868, they bring up Georgia's history of racism, *see id.* at ¶¶ 128-37; (4) they present a list of

instances they regard as bigotry on the part of modern Republican figures nationwide, *see id*. at ¶¶ 138-46; and (5) mostly without attribution, they recite racial statistical disparities in health, unemployment, real estate, education, and incarceration, *see id*. at ¶¶ 147-54—but *not* voting. None of these allegations could establish a valid vote-denial claim.[3]

To make out a valid vote-denial claim, the Eleventh Circuit requires: (1) proof of disparate impact (a denial or abridgement); *and* (2) that the disparate impact is *caused* by racial bias. *See GBM,* 992 F.3d at 1328-29. To begin, a single official's displeasure at losing and some Republicans' alleged angst about the 2020 Presidential election results have nothing to do with any racially disparate outcomes in voting that might be actionable under Section 2. Next, Georgia's history in this overall space in the distant past does not render SB 202's results racist. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *GBM,* 992 F.3d at 1328. And the supposedly bigoted statements made by modern political leaders have nothing to do with SB 202's enactment, and thus are immaterial. *See id*. at 1322-23, 1333. In *GBM*, for example, biased statements by legislators were deemed irrelevant for purposes of finding discrimination

[3] If what Plaintiffs offer suffices to establish a valid vote-denial claim, almost any law, including ones *improving* on the existing access to voting while not going far enough, would violate Section 2.

because those statements were either not made for purposes of the bill in question or because they did not rise to the necessary level. *See id*. at 1322-23.

Finally, any statistical disparities in the general life circumstances of African Americans in Georgia are unrelated to voting—and thus immaterial. If Plaintiffs' point is that African American voters' living conditions keep them from going to the polls, they have numerous other options to vote. *See* SB 202 at 31:774-778; *GBM,* 992 F.3d at 1333. As for voting disparities in Georgia, "[v]oter turnout and registration rates now approach parity" across races. *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 200 (2009). Thus, Plaintiffs have not sufficiently pleaded any Section 2 vote-denial claims.

C. Political association and expression (Count III)

Plaintiffs further claim that "SB 202 was passed to restrict Black, young, and Democratic voters' ability to associate in elections and express broadly shared viewpoints"—but they do not say *how*, *why*, or *which part* of SB 202 violates these voters' free speech, expression, or association rights. [Doc. 54, at 23; Doc. 39, ¶¶ 178-84]. Such skimpy pleading falls short of the pleading standard of *Twombly*, 550 U.S. at 555-56, 570, and *Iqbal*, 556 U.S. at 678.

But even if it did not, Plaintiffs' First Amendment claim would still be implausible. Casting a *secret* ballot by nature cannot be expressive, *see Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as

forums for political expression."). Nor is voting uniquely associative. Thus, as to both points, either the First Amendment is inapplicable or, at most, the *Anderson/Burdick* framework is appropriate. Accordingly, Plaintiffs have not sufficiently pleaded a distinct First Amendment claim.

D. Civil Rights Act (Count V)

Plaintiffs further assert that SB 202's requirement that a voter provide his or her date of birth on an absentee-ballot envelope violates the Civil Rights Act (CRA), 52 U.S.C. § 10101(a)(2)(B). *See* [Doc. 54, at 24-25; Doc. 39, ¶¶ 191-96]. Specifically, they contend that a date of birth is immaterial for an absentee voter, *see* [Doc. 54, at 24-25; Doc. 39, ¶¶ 191-96]; that such a requirement "would increase the number of errors or omissions on the application forms," [Doc. 54, at 24] (cleaned up); and that it is not intrinsically a "unique identifier," which SB 202 already requires absentee voters to provide, *id*. at 25. None of these arguments has merit.

Indeed, sometimes a date of birth *is* material—for instance, when two voters share the same name and address—and Georgia law affords voters notice and an opportunity to cure the defect if the election official is unable to identify the individual. Ex. A at 63:1599-1612. Moreover, date of birth, which is required by practically every official form, goes to the age and identity of the person concerned. Contrary to Plaintiffs' fear, it would not realistically

"increase the number of errors or omissions," [Doc. 54, at 24], since no one forgets their own date of birth. Furthermore, even if a person's date of birth is not intrinsically a "unique identifier," *id.* at 25, when taken together with other identifiers it can significantly narrow the possibilities to a limited number of persons; avert and catch fraud; and deter mischief. All in all, this provision protects election integrity. *See NGP I*, 976 F.3d at 1282. Thus, a facial challenge to this requirement is without merit. *See Williams*, 553 U.S. at 303. Plaintiffs have not adequately pleaded their CRA claim either.

CONCLUSION

Plaintiffs want this Court to micromanage Georgia's elections on their behalf. But Plaintiffs ignore that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick*, 504 U.S. at 441. The principal responsibility for that "structur[ing]" belongs to the States. *Id.* The Court, accordingly, should dismiss this case in its entirety, and with prejudice.

Respectfully submitted this 29th day of June, 2021.

Christopher M. Carr
Attorney General
Georgia Bar No. 112505
Bryan K. Webb
Deputy Attorney General
Georgia Bar No. 743580

Russell D. Willard
Senior Assistant Attorney General
Georgia Bar No. 760280
Charlene McGowan
Assistant Attorney General
Georgia Bar No. 697316
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334

/s/ Gene C. Schaerr
Gene C. Schaerr*
Special Assistant Attorney General
gschaerr@schaerr-jaffe.com
Erik Jaffe*
ejaffe@schaerr-jaffe.com
Riddhi Dasgupta**
sdasgupta@schaerr-jaffe.com
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
Fax: (202) 776-0136
**Admitted pro hac vice*
***Pro hac vice admission pending*

Bryan P. Tyson
Special Assistant Attorney General
Georgia Bar No. 515411
btyson@taylorenglish.com
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@taylorenglish.com
Loree Anne Paradise
Georgia Bar No. 382202
lparadise@taylorenglish.com

Taylor English Duma LLP
1600 Parkwood Circle
Suite 200
Atlanta, Georgia 30339
Telephone: (678) 336-7249

Counsel for State Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Reply Brief in Support of State Defendants' Motion to Dismiss has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Gene C. Schaerr
Gene C. Schaerr