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

ASIAN AMERICANS ADVANCING JUSTICE-ATLANTA, *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-01333-JPB

REPLY BRIEF IN SUPPORT
OF STATE DEFENDANTS' MOTION TO DISMISS

"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 established by the State of Georgia. The Court should dismiss the First Amended Complaint because Plaintiffs lack standing and, moreover, have failed to state a claim.

I. Plaintiffs fail 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 for Plaintiffs to satisfy their burdens.

First, Plaintiff AAAJ has not sufficiently demonstrated "what activities [it] would divert resources away *from* in order to spend additional resources on combatting" SB 202's supposed impact. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020). Instead, AAAJ vaguely references activities from which it might divert resources. *See* [Doc. 27 ¶ 20] (referencing "get out the vote" and "election protection" activities). While it may be true that AAAJ "does not have 'limitless resources,'" [Doc. 48 at 11], vague allegations of diversion are insufficient, *see Tsao v. Captiva MVP Rest. Partners*, 986 F.3d 1332, 1343 (11th Cir. 2021) (vague allegations "are not enough to confer standing").

Moreover, AAAJ cannot rely on allegations of diversion alone. Rather, it must also show that the diversion will *impair* the organization's functions. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (the diversion must "impair the organization's ability to engage in its own projects"); *Jacobson*, 974 F.3d at 1250 (same). Put simply, unless AAAJ can demonstrate that SB 202 prevents it from engaging in its "own projects," it lacks standing.

AAAJ's allegations show that it cannot do so. Rather, AAAJ confirms that it will continue spending resources on the same activities after SB 202's enactment. AAAJ states that its core mission includes "voter registration, get out the vote, and election protection activities[.]" [Doc. 27 ¶ 20]. AAAJ then claims that SB 202 will require it to spend resources to "educate voters" and to help "voters navigate" the voting process, but those activities are entirely consistent with, and obviously in furtherance of, its stated mission. *Id.* ¶¶ 21-22. By continuing to spend resources on its core activities (*e.g.*, voter education), AAAJ cannot show an "impair[ment]" of its "own projects." *Arcia*, 772 F.3d at 1341; *see also Ga. Ass'n of Latino Elected Officials v. Gwinnett Cty. Bd. of Registrations & Elections*, 499 F. Supp. 3d 1231, 1240 (N.D. Ga. 2020) (rejecting similar allegations because they do not demonstrate that the organization would "be diverting . . . resources away from the core activities it already engages in"). The Court should thus reject AAAJ's attempt to "convert

[its] ordinary program costs into an injury in fact." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). Were an organization able to claim as an injury something that enables it to continue (and increase) its mission, Article III's injury-in-fact requirement would be rendered a formality.

Second, AAAJ lacks standing because it relies solely on speculative claims of diverted resources, rather than "imminent" or "certainly impending" injury. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 401 (2013); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (the alleged injury must be "likely to occur immediately"). AAAJ does not allege when or how any potential diversion of resources will occur, or what specific activities will be foregone. If anything, AAAJ's hyperbolic allegations here may increase its fundraising capabilities, thereby enhancing its reach. In short, AAAJ relies on allegations of a mere "elevated risk" of a *future* event that the Eleventh Circuit has found insufficient to establish standing in *Tsao*, 986 F.3d at 1339.[1]

Third, the Individual Plaintiffs also lack standing because they rely on speculative allegations of potential harm. The Individual Plaintiffs allege that

[1] AAAJ contends that *Tsao* is inapplicable because "[a] diversion of resources" differs from "a mere risk of injury." [Doc. 48 at 10]. As noted above, AAAJ must still identify an "imminent" injury, which it cannot do by speculating that it may need to spend resources on certain activities at some point in the future, relying on assumptions about SB 202's implementation.

they previously used various voting methods: mail, drop box, or early in-person. *See* [Doc. 27 ¶¶ 24-30]. But they do not allege they plan to vote by the same methods again (or that they even plan to vote in the future). *See id.* Moreover, the Individual Plaintiffs fail to allege that SB 202 will prevent them from using these same voting methods in the future. *See id.* Rather, they rely exclusively on the vague allegation that "SB 202 will harm [them] in the future by further restricting their ability" to vote using these methods. *Id.* ¶ 30. Such bald assertions are insufficient. *See Oxford Asset Mgmt. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) ("conclusory allegations" and "unwarranted deductions of fact . . . will not prevent dismissal"). As the Individual Plaintiffs recognize, they must show a "concrete, particularized, non-hypothetical injury" to have standing. [Doc. 48 at 15]. They have not shown this: The vague and unsupported references to potential harm do not show how SB 202 "concretely disadvantages" them. See *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

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

Nor have Plaintiffs properly pleaded any claim on which relief may be granted. Plaintiffs have not disputed Georgia's compelling interests in enacting SB 202: "(1) deterring and detecting voter fraud;" "(2) improv[ing] . . . election procedures;" (3) managing voter rolls; "(4) safeguarding voter confidence;" and (5) running an efficient and orderly election. *Brnovich v. DNC*,

No. 19-1257, 2021 WL 2690267, *13, *20 (U.S. July 1, 2021); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Greater Birmingham Ministries 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 v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling opinion); SB 202 at 5:102-106 [Doc. 41-2]. These compelling state interests must underlie any analysis of SB 202's lawfulness. And "a State may take action to prevent [any election-related problem] without waiting for it to occur and be detected within its own borders." *Brnovich*, 2021 WL 2690267, *20. Further, facial challenges to election practices face a high bar because they "must fail where [a] statute has a plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Given these settled standards, none of Plaintiffs' claims should be allowed to proceed.

A. Intentional Discrimination Claims under the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act (VRA) (Counts I and II)

Plaintiffs make the unsupported claim that, under the *Arlington Heights* factors, SB 202 "intentionally discriminate[s] against voters of color, and particularly [Asian American and Pacific Islander (AAPI)] voters" in violation of the Fourteenth and Fourteenth Amendments and Section 2 of the Voting Rights Act (VRA). [Doc. 48 at 19]; *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977). But establishing a violation of

either amendment or Section 2's intent prong "require[s] proof of *both* an intent to discriminate and actual discriminatory effect." *GBM,* 992 F.3d at 1321; *see also Johnson v. DeSoto Cty. Bd. of Comm'rs*, 72 F.3d 1556, 1561-64 (11th Cir. 1996). And Plaintiffs have not adequately alleged a basis for either conclusion.

The first *Arlington Heights* factor is the impact of the challenged law. But Plaintiffs have not adequately alleged that SB 202 has an impact or "pattern" that is "*unexplainable* on grounds other than race." 429 U.S. at 266 (emphasis added). They ignore, for example, that SB 202 was enacted to advance the State's compelling interests, *see* Part II – Preamble, in minimizing fraud and optimizing election security, voter confidence, orderliness, and the effectiveness of election procedures, *see Brnovich*, 2021 WL 2690267, *13, *20.

As to the second factor—historical background and statements/actions by key legislators: Nothing in the legislative record indicates a discriminatory intent. And Georgia's distant past does not render SB 202 racist. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *GBM,* 992 F.3d at 1328. Indeed, unless a legislator has spoken or acted in a discriminatory manner "during the same [legislative] session" as the allegedly discriminatory bill—and none did here—no such intent may plausibly be inferred. *GBM*, 922 F.3d at 1323; *see also Brnovich*, 2021 WL 2690267, *22 (noting that "partisan motives are not the same as racial motives").

As to the third *Arlington Heights* factor—the procedure leading up to the law's passage: Plaintiffs have not plausibly pleaded the requisite amount of irregularity that would raise concerns about SB 202. They baldly state that SB 202's enactment soon after the 2020 elections and the 2021 Senate runoffs shows discriminatory intent, and they just as perfunctorily allege that SB 202's enactment was a "substantive departure[] from the normal legislative process." [Doc. 27 ¶¶ 2-3, 73-81, 130]. But even if true (and it is not, *see GBM,* 992 F.3d at 1326-27), that does not mean SB 202 was motivated by racial animus. Plaintiffs' argument is also 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).

As to the fourth factor—foreseeability and knowledge of disparate impact: Plaintiffs have pleaded nothing to indicate the legislature could reasonably have predicted or that it knew of a such an impact. Nor do Plaintiffs plausibly allege that any impact of SB 202 has been racially disparate.

The final factor—availability of less discriminatory alternatives—also does not help Plaintiffs. The State reasonably believed that its compelling interests could only be achieved by enacting SB 202. *See* Part II – Preamble. A State is entitled to deference when deciding whether to tackle a problem

incrementally or in "one fell swoop." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015). "Policymakers may focus on their most pressing concerns." *Id.*

And as an overarching matter, the potent combination of compelling interests supporting SB 202 indicates "a strong state policy in favor of [SB 202], *for reasons other than race*," and thus demonstrates "that [SB 202] does not have a discriminatory intent." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984) (emphasis added); *see also GBM,* 992 F.3d at 1326-27. Further, Plaintiffs have failed to plead a sufficiently plausible causal connection between SB 202 and any race-based "denial or abridgement of the right to vote." *GBM*, 992 F.3d at 1330. Finally, because SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, Plaintiff's intentional discrimination claims cannot succeed as a facial attack on SB 202's lawfulness, *see United States v. Williams*, 553 U.S. 285, 303 (2008). For all these reasons, these claims should be dismissed.

B. Undue Burden on the Right to Vote (Count III) Under the First and Fourteenth Amendments and Voting Rights Act (VRA)-Based Discriminatory Results (Count I) Claims

Undue Burden on the Right to Vote (Count III). Plaintiffs also contend that the challenged provisions of SB 202 unduly burden Georgia voters' right to the franchise. *See* [Doc. 48 at 21-30]. As an initial matter, Plaintiffs ignore that it is only "[r]egulations imposing *severe* burdens on [the]

rights" of challengers that "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. 48 at 21-22]. Plaintiffs also neglect to mention that "[l]esser burdens . . . trigger less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions." *Id.* (cleaned up). In addition, Plaintiffs fail to acknowledge that everyday limitations "arising from life's vagaries" are such lesser burdens. *Crawford*, 553 U.S. at 197-98 (controlling opinion); *see also Timmons*, 520 U.S. at 358. Finally, Plaintiffs overlook that the State's interest in "maintain[ing] the integrity of the democratic system"—the interest that SB 202 strives to vindicate—is paramount. *Burdick*, 504 U.S. at 441 (collecting cases); *see also Brnovich*, 2021 WL 2690267, *19.

Moreover, 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, of course, is voting uniquely associative. Thus, as to both points, either the First Amendment is inapplicable or, at most, the restrictions must be upheld as reasonable and nondiscriminatory.

In short, the challenged provisions advance compelling governmental interests, *see* Part II – Preamble, and are, at most, merely routine

inconveniences arising from life's potential vagaries. *See Crawford*, 553 U.S. at 197-98 (controlling opinion). For instance, the ***drop box provision***, the ***prohibition on gratuitous mailing of absentee ballot applications***, and the ***ID requirements for absentee ballots*** help the State administer elections in an orderly and organized fashion, avert and deter fraud, instill greater voter confidence, ensure the integrity of the election process, reduce voter confusion, and more. *See Brnovich*, 2021 WL 2690267, *13, *18, *19, *20; *Crawford*, 553 U.S. at 191, 204 (controlling opinion); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); *Burdick*, 504 U.S. at 441; *Storer v. Brown*, 415 U.S. 724, 730 (1974); *GBM*, 992 F.3d at 1320, 1334; *Green v. Mortham*, 155 F.3d 1332, 1335 (11th Cir. 1998). And the Supreme Court in *Brnovich* flatly rejected Plaintiffs' premise that there is no risk of fraud accompanying mail-in voting, thus confirming that laws like SB 202 are essential to election integrity. *Compare* [Doc. 27 ¶ 59 ("voting by mail is a safe and secure form of voting")], *with Brnovich*, 2021 WL 2690267, *20 ("Fraud is a real risk that accompanies mail-in voting").

Likewise, the ***restrictions on handling absentee ballot applications*** engender voter confidence, avert fraud, minimize confusion, and protect the integrity of the ballot by streamlining the chain of custody. *See Brnovich*, 2021 WL 2690267, *13, *18, *19-20; *Crawford*, 553 U.S. at 191, 204

(controlling opinion); *Purcell*, 549 U.S. at 4; *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *GBM*, 992 F.3d at 1320, 1334. And just last week, the Supreme Court noted that "[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence." *Brnovich*, 2021 WL 2690267, *19.

Finally, the ***absentee ballot request timeline provision*** helps the State run efficient and orderly elections, expeditiously certify election results, avert fraud and foul play, avoid voter confusion, and structure the electoral apparatus efficaciously. *See Brnovich*, 2021 WL 2690267, *13, *18, *20; *Crawford*, 553 U.S. at 191 (controlling opinion); *Storer*, 415 U.S. at 730; *GBM*, 992 F.3d at 1320, 1334; *NGP I*, 976 F.3d at 1282; SB 202 at 5:107-110.

Finally, as SB 202 has a "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, this claim cannot succeed as a facial challenge. Plaintiffs' 1st and 14th Amendment claim of undue burden should thus be dismissed.

VRA Discriminatory Results (Count I). Nor have Plaintiffs adequately pleaded a claim for discriminatory results under the VRA. As an initial matter, it is an open question whether "the [VRA] furnishes an implied cause of action under § 2" at all. *Brnovich*, 2021 WL 2690267, *22 (Gorsuch, J., concurring). Not too long ago, the Supreme Court reinforced that "[i]f the statute *itself* does not display an intent to create a private remedy, then a cause

of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855-56 (2017) (cleaned up). And here, there is no support in Section 2's text or, for that matter, legislative history for Plaintiffs' cause of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286-91 (2001). Without that statutory authorization, Plaintiffs have no VRA-based cause of action—and one may "not be created [for them] through judicial mandate." *Ziglar*, 137 S. Ct. at 1856. Accordingly, this Court should dismiss Plaintiffs' VRA claim for want of jurisdiction.

On the merits: When a law is based on valid interests but imposes "modest burdens" and its "disparate impact" is "small [in] size," that law does not violate Section 2. *Brnovich*, 2021 WL 2690267, *18. Moreover, governmental interests such as those mentioned in Part II – Preamble are given strong deference by the courts. *See id.*, *13, *20. "[T]he mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote." *Id.*, *13. As *Brnovich* held, any "voting system . . . must tolerate the usual burdens of voting." *Id.*, *12 (cleaned up). And the Supreme Court has also reminded us that "[m]ere inconvenience cannot be enough to demonstrate a

violation of § 2." *Id*. Under settled VRA principles, therefore, SB 202 is consistent with Section 2.

With respect to the ***drop box provision***, the ***prohibition on gratuitous mailing of absentee ballot applications***, and the ***ID requirements for absentees***, Plaintiffs do not plausibly allege any racially disparate impact traceable to SB 202. Nor do they allege any comparable datapoints that would sufficiently plead SB 202-generated racial disparity, as Section 2 requires. *See GBM,* 992 F.3d at 1329-31.

The most Plaintiffs allege are some unattributed drops of data suggesting AAPI voters' reliance during the 2020 elections and 2021 Senate runoffs on absentee voting—without saying a word about *how*, or even *if*, these SB 202 provisions make voting more difficult for AAPI voters. *See*, *e.g.*, [Doc. 27 ¶ 57].[2] Plaintiffs want the Court to strike down the Georgia General Assembly's duly enacted law based on their attribution-free assertions concerning those two back-to-back elections. *See* [Doc. 48 ¶¶ 21-30]. But that is improper.

[2] Plaintiffs also bring up "an alarming surge in anti-Asian American violence" and the health conditions and economic status of Asian Americans in Georgia—none of which has anything to do with SB 202. [Doc. 27 ¶¶ 53-54].

Therefore, Plaintiffs cannot even "clear the [statistical] hurdle of demonstrating that minority voters are less likely than white voters" to be able to vote due to these provisions. *GBM,* 992 F.3d at 1329. In any event, because the burden imposed by these SB 202 provisions is at most a "modest" one—a "[m]ere inconvenience," if you will—they comply with Section 2. *Brnovich*, 2021 WL 2690267, *12; *see also* Part II(B) – *Undue Burden* Analysis.

As for ***restrictions on handling absentee ballot applications***, Plaintiffs have pleaded no allegations that these provisions "*caused* the denial or abridgement of the right to vote" *on account of race*. *GBM*, 992 F.3d at 1330; *see also* [Doc. 48 at 30; Doc. 27 ¶¶ 88, 115]. They speculate, by making "mere[ly] conclusory statements," that this provision will impede AAPI voters. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiffs first assume that AAPI voters "are unfamiliar with or may be intimidated by voting protocols" and have limited English proficiency. [Doc. 27 ¶ 115]. Then Plaintiffs assume that AAPI voters will turn to community organizations—*not* their own authorized relatives—to help with their absentee ballot applications. *See id.* ¶ 114. In addition, Plaintiffs presuppose that SB 202 will prevent AAPI voters from voting or place substantial obstacles in their path. Such pleading is insufficient because it is heavy on conclusory speculations and low on factual allegations. *See Iqbal*, 556 U.S. at 678-79.

Finally, Georgia already gives voters numerous voting options, including by requesting absentee ballots. *See NGP I*, 976 F.3d at 1281. Accordingly, Plaintiffs have not adequately pleaded that this provision deprives anyone of "an equal opportunity to participate in the electoral process *and* to elect representatives of their choice." *GBM*, 992 F.3d at 1329.

Plaintiffs' challenge to SB 202's ***absentee ballot request timeline provision*** similarly fails. Plaintiffs have not alleged any causal connection between race and the impediments to voting, if any, created by this provision. *See GBM,* 992 F.3d at 1329-31. They also have not pleaded any causal connection between this provision and any impediments to voting. *See id*. At any rate, because the burden imposed by this provision is at most a "modest" one, *Brnovich*, 2021 WL 2690267, *18 (cleaned up), it conforms to Section 2. Thus, Plaintiffs have not adequately pleaded their Section 2 claims.

CONCLUSION

Plaintiffs lack standing to pursue this action and have failed to plead legally cognizable claims. SB 202 is respectful of both the franchise and of the need to maintain its integrity. *See Burdick*, 504 U.S. at 441. Accordingly, the Court should dismiss this case in its entirety—and with prejudice.

Respectfully submitted this 9th day of July, 2021.

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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
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