UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE CONCERNED BLACK CLERGY OF METROPOLITAN ATLANTA, INC., *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, *Defendants*.	CIVIL ACTION NO. 1:21-CV-01728-JPB

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

It is not surprising to see those involved in the implementation of SB202—a rushed omnibus election bill designed to disenfranchise Black, Latinx, and other voters of color—now ask this Court to rush through these legal proceedings by applying erroneous legal tests, misapplying legal standards and precedent, and ignoring the voices of the Plaintiffs in this action.

In their motion to dismiss [Doc. 46], Defendants improperly dispute Plaintiffs' organizational standing and contest the merits of the underlying facts alleged in the Complaint. But Plaintiffs have plausibly alleged each of the violations identified in the Complaint. Plaintiffs have standing to bring their claims because SB 202 forces them to expend resources to counteract the negative effects of SB 202 on their members'—and all Georgians'—right to vote, resources that would otherwise be used to support Plaintiffs' other longstanding activities. Plaintiffs' claims are all supported with factual allegations that are more than sufficient to support a reasonable inference that Defendants are liable for the alleged violations. Defendants' motion to dismiss is therefore unfounded and should be denied.[1]

[1] Nothing in this Opposition is intended to waive Plaintiffs' right to seek consent or leave to amend their Complaint.

LEGAL STANDARD

On both a 12(b)(1) motion to dismiss for lack of standing and a 12(b)(6) motion to dismiss for failure to state a claim, plaintiffs' allegations are entitled to an equivalent presumption of truthfulness. *See Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1237 (11th Cir. 2002); *see also Speaker v. U.S. Dep't of Health & Hum. Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010) ("In ruling on a 12(b)(6) motion, the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff."). In order for a plaintiff's claims to survive a motion to dismiss, the facts alleged by the plaintiff must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). That standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

It is especially important for the Court to have the benefit of a developed factual record in voting rights cases. They raise complex factual issues and require sensitive balancing of competing interests, which weighs heavily against dismissal at this stage of litigation. *See, e.g.*, *Nipper v. Smith*, 39 F.3d 1494, 1498 (11th Cir.

1994) ("Voting rights cases are inherently fact-intensive […] In such cases, courts must conduct a searching practical evaluation of the past and present reality of the electoral system's operation.") (internal citations omitted).

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

Article III of the U.S. Constitution requires a plaintiff to demonstrate "that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *See Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1316 (11th Cir. 2021) ("GBM") (citing *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003)).

The standing of one plaintiff is sufficient to establish standing for the whole group. *See Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999) (finding that if one plaintiff establishes standing "the standing question is moot" as to the others); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (finding that one plaintiff has standing and therefore the court need not consider the standing of other plaintiffs).

Each Plaintiff here has plausibly alleged sufficient facts to establish standing under both a theory of organizational standing and a theory of associational standing.

But even if one or more of Plaintiff organizations are deemed to fall short, at least one has alleged standing sufficient for this Court to have jurisdiction.

A. Organizational Standing

"[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008). When a plaintiff organization is "actively involved in voting activities and would divert resources from its regular activities to educate and assist voters in complying with" a new voting law, that plaintiff organization has "established an injury sufficient to confer standing to challenge the statute." *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009). Every named Plaintiff alleges a diversion of resources sufficient to establish standing under this standard. *See* Complaint ¶¶ 18-65.

The Eleventh Circuit has held that diversion from "regular activities" regarding voting is sufficient to establish diversion of resources in a voting rights case. *See Common Cause/Georgia*, 554 F.3d at 1350 (finding that plaintiff organizations established standing by alleging it "would divert resources from its regular activities to educate and assist voters in complying with" a new voting law). Defendants' contentions that Plaintiffs have not sufficiently established standing

under a diversion of resources theory run counter to Eleventh Circuit precedent. Defendants first argue that Plaintiffs have alleged diversion of resources only from "day-to-day" activities, claiming that activities such as "GOTV programs, educational forums on voting, digital advertising and graphics for educational purposes, phone and text banking, poll monitoring, and efforts to assist voters to cure their ballots" do not qualify. *See* Brief in Support of Defendants' Motion to Dismiss ("Defendants' Brief") at 3-4; *Cf.* Complaint at ¶ 37. However, one of Defendants' own citations plainly supports a finding that Plaintiffs have established organizational standing. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) ("[O]rganizations can establish standing to challenge election laws by showing that they will have to divert personnel and time to educating potential voters on compliance with the laws and assisting voters who might be [affected by those laws].").[2]

Defendants then argue that Plaintiffs' allegations "are too speculative." *See* Defendants' Brief at 5. They base this argument entirely on the logic of two cases in which plaintiffs alleged a perceived threat of future actions to be taken by government officials or data thieves. *See Clapper v. Amnesty Int'l USA*, 568 U.S.

[2] Note also that *Arcia* was decided with the benefit of a factual record and testimony from representatives of organizational plaintiffs. *See Arcia*, 772 F.3d at 1341.

398, 414 (2013) (finding a plaintiff did not sufficiently allege injury based on "speculation about the decisions of independent actors"); *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1344 (11th Cir. 2021) (finding a plaintiff did not sufficiently allege injury "based on 'an increased risk'" of identity theft, in the very fact-specific context of data breaches).

Voting rights cases are not particularly similar to identity theft cases; the facts alleged in this Complaint present a far more concrete injury. Here, SB 202 is already law. Plaintiffs are already expending resources to inform and educate voters on the law's impact and assist those voters in navigating their newly narrowed paths to exercising their fundamental right to vote. Besides, it is hardly speculative to say that elections will be held in Georgia under the requirements of SB 202. *See Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1268 (N.D. Ga. 2019) (finding that plaintiffs demonstrated an imminent injury when that injury would arise predictably before the next scheduled election, in direct contrast to the plaintiffs' claimed injury in *Clapper*).

B. Associational Standing

Plaintiffs also meet the requirements of associational standing, which is established where an organization shows: "[1] its members would otherwise have standing to sue in their own right; [2] the interests it seeks to protect are germane to

the organization's purpose; and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *GBM*, 992 F.3d at 1316 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). *See also Am. Iron & Steel Inst.*, 182 F.3d at 1274 n.10 (discussing associational standing); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1249 (11th Cir. 2020).

The Complaint contains numerous references to Plaintiff members whose right to vote will be burdened or denied as a result of SB 202. See Complaint ¶¶ 21, 24-26, 32, 34, 40-41, 49, 52, 62, 63-65. Moreover, the voting rights injuries created by SB 202 are relevant to every Plaintiff organization's mission. Despite Defendants' unfounded claim that Plaintiffs' identification of members who will be burdened by SB 202 is insufficient, Plaintiff organizations will be able to "submit affidavits showing through specific facts that one or more of its members would be directly affected," thereby satisfying the "requirement of naming the affected members" as articulated in *Summers,* which is not required at this stage of the proceedings. *See Summers v. Earth Island Institute,* 555 U.S. 488, 498 (2009) (internal citation omitted). Plaintiffs' Complaint clearly establishes associational standing.

II. PLAINTIFFS HAVE SUCCESSFULLY STATED CLAIMS ON WHICH RELIEF CAN BE GRANTED.

Plaintiffs' Complaint alleges facts for each count sufficient to create a plausible inference that Defendants are liable for the claimed violations. To dismiss the Complaint at this early stage would contradict established Eleventh Circuit and Supreme Court precedent recognizing that voting rights claims demand a searching factual inquiry, given "the fact-driven nature of the legal tests required by the Supreme Court and our precedent." *See Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1348-49 (11th Cir. 2015) (observing that "courts are required to consider all relevant evidence, conduct a searching practical evaluation of the past and present reality of the challenged electoral system, and gradually draw together a picture of the challenged electoral scheme and the political process in which it operates by accumulating pieces of circumstantial evidence.") (internal citation omitted); *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("The task of assessing a jurisdiction's motivation . . . is an inherently complex endeavor, one requiring the trial court to perform a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.") (internal citation omitted).

A. Section 2 of the Voting Rights Act (VRA)—Discriminatory Results

The Eleventh Circuit's test for Section 2 discriminatory results, or "vote denial," claims requires that plaintiffs allege that the challenged law "'result[s] in' the denial or abridgement of the right to vote," and that said denial or abridgement is "on account of race or color." *See GBM*, 992 F.3d at 1330.[3] Applying this results test requires "an inquiry into the totality of the circumstances." *Id.*, at 1329. The "totality of the circumstances" approach was reaffirmed by the Supreme Court in *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021). Under *Brnovich,* "*any* circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered," *id.* (emphasis added), which reinforces the need to develop a full factual record in this case.

Plaintiffs have plausibly alleged that SB 202 makes voting less equally open and deprives Plaintiffs' members of an equal opportunity to vote. *See* Complaint ¶¶ 173-78. Contrary to Defendants' assertion that the Complaint does not allege why

[3] Defendants ignore clear Eleventh Circuit precedent when they imply there is no private right of action under Section 2. That the VRA furnishes a private cause of action has been recognized repeatedly. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 557, 89 S. Ct. 817, 827, 22 L. Ed. 2d 1 (1969) (finding that the protection of the VRA "might well prove an empty promise unless" citizens had a private right of action under the statute); *see also Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1227 (11th Cir. 2005) (finding it "well-settled that a plaintiff can challenge voting qualifications under a 'results' test.").

"minority voters are less likely than white voters to be able to vote due to" the challenged provisions of SB 202, *see* Defendants' Brief at 9, Plaintiffs repeatedly allege racially caused disparity in access to voting because of SB 202. Although Defendants casually discount the credibility of Plaintiffs' allegations, this Court must accept them as true and construe them in a light most favorable to Plaintiffs. *See Speaker*, 623 F.3d at 1379.

Some of the alleged racially caused disparities in access to voting include:

- The challenged mobile voting unit limitation, which unduly burdens voters of color who used the mobile voting units to cast their votes in Fulton County, where the majority of the population is nonwhite. *See* Complaint ¶¶ 133-137.
- The challenged drop box limitation, which will disproportionately affect historically disenfranchised communities in Georgia who have relied on drop boxes to cast their vote. *See* Complaint ¶¶ 122-132.
- The challenged ID requirements for absentee voting, a provision that disparately impacts voters of color. Black voters account for almost 42% of absentee ballot requests, but 25% of Black voters do not have a current and valid form of government-issued photo ID. *See* Complaint ¶¶ 112-121.

- The challenged limitations on early voting during runoff elections, a limitation that is obviously targeted to Black voters and Plaintiff churches and faith-based organizations, whose members often vote after Sunday services. *See* Complaint ¶¶ 138-142.
- The challenged line warming prohibition, which will be experienced disproportionately by Black voters and other voters of color. These voters experience longer lines at the polling place and benefit from non-partisan offerings of water, snacks, chairs, and other assistance while waiting in line. *See* Complaint ¶¶ 143-155.
- The challenged limitation on out-of-precinct voting, which will disproportionately affect Black voters and historically disenfranchised communities, who experience a higher rate of in-county moves and are thus more likely to cast an out-of-precinct ballot. *See* Complaint ¶¶ 156-162.

All of these allegations are relevant to Plaintiffs' claims under Section 2, which "applies to a broad range of voting rules, practices, and procedures," and under which valid claims of abridgement of the right to vote do[] not require outright denial of the right … do[] not demand proof of

discriminatory purpose," and may be rightly brought against "'facially neutral' law[s] or practice[s]." *See Brnovich*, 141 S. Ct. at 2341.

Defendants' counterargument that SB 202 "expand[s]" Georgians' ability to vote, *see* Defendants' Brief at 9, is fundamentally flawed. SB 202 establishes hard *limits* on the use of drop boxes and mobile-voting units. These new limitations will be felt acutely by Plaintiffs' members, who benefit disproportionately from these now-limited methods. *See, e.g.*, Complaint ¶¶ 118 ("data from recent years demonstrates that while Black voters comprise 30% of Georgia's voting population, they account for almost 42% of the requests for absentee ballots."), 130 ("SB 202's restrictions on the location, availability, and operating hours of ballot drop boxes will disproportionately burden Black, Asian, and Latinx voters, and voters with disabilities."), 134 ("In the 2020 election, two Fulton County mobile voting units made stops at twenty-four locations, including several Black churches."), 149 ("the more voters in a precinct who are non-white, the longer the wait times"). This is yet another area where only after the benefit of evidentiary development and fact-finding at trial will this Court be able to fully balance the burdens and interests alleged by either side of this dispute—that is, taking into account the totality of the circumstances.

Furthermore—contrary to Defendants' claims, *see* Defendants' Brief at 6—Plaintiffs repeatedly dispute the legitimacy of the interests asserted in support of SB 202. *See, e.g.*, Complaint ¶¶ 137 ("There is no credible evidence that mobile voting facilities have been used fraudulently in Georgia or that prohibiting their use is necessary to ensure the integrity of future elections."), 184 (challenging "the tenuousness of the stated justifications for SB 202[.]"), 189 ("SB 202 embodies unjustifiable, irrelevant and illegitimate state interests."), 194 ("None of the burdens imposed by the challenged provisions of S.B. 202 are necessary to achieve, or reasonably related to, any sufficiently weighty legitimate state interest."), 196 ("These provisions . . . are not supported by any sufficient nor compelling, government purpose.").

Finally, "Georgia's racial past" is relevant to the alleged violations, contrary to Defendants' argument that it is "insufficient." *See* Defendants' Brief at 11. The totality of the circumstances test comprehends "any circumstance" that bears on the question of equal opportunity, and "Georgia's racial past" is absolutely relevant to understanding SB 202 as a direct response to the growing voting power of minority voters in Georgia. *See GBM*, 992 F.3d at 1330 (explaining that a Section 2 claim may be made by "showing that racial bias in the relevant community *caused* the alleged vote-denial or abridgement.") (emphasis in original). Indeed, the Complaint

begins as early as ¶ 2 to explain the connections between historical growth in Black, Latinx, and Asian Georgians' exercise of the franchise and the General Assembly's attempts to restrict that growth via SB 202. *See, e.g.*, Complaint ¶¶ 2-10 ("The historic turnout, combined with the changing demographics of Georgia voters, produced historic results."), 68-87 ("Georgia's history of implementing election laws that suppress nonwhite voters began shortly after Black men first gained the right to vote in 1868 through the ratification of the Fifteenth Amendment.").

B. Intentional Racial Discrimination Under the Fourteenth Amendment and Fifteenth Amendment

To successfully challenge a law as intentionally discriminatory, a plaintiff "must establish that the challenged decision was at least motivated in part by a discriminatory purpose." *Jean v. Nelson*, 711 F.2d 1455, 1485 (11th Cir. 1983), *on reh'g,* 727 F.2d 957 (11th Cir. 1984), *aff'd,* 472 U.S. 846 (1985). That purpose need not be the "dominant" or "primary" reason for the legislation's passage—a plaintiff need only show that "*a* discriminatory purpose has been *a* motivating factor in the decision." *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (emphasis added). The governing test originated in *Arlington Heights*, in which the Supreme Court determined discriminatory purpose according to five factors: "(1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive

departures; and (5) the contemporary statements and actions of key legislators." *GBM*, 992 F.3d at 1322 (citing *Arlington Heights*, 429 U.S. at 266-68). Building on this analysis, the Eleventh Circuit has also considered: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives." *Id.* This approach was reaffirmed by the Supreme Court in *Brnovich*. *See Brnovich*, 141 S. Ct. at 2349 (discussing the district court's application of *Arlington Heights* to the record developed at trial.).[4]

Plaintiffs have plausibly alleged Fourteenth and Fifteenth Amendment claims of intentional racial discrimination. *See* Complaint ¶¶ 179-89. Examining the original *Arlington Heights* factors, the first inquiry is into the impact of the challenged law, encompassing "such circumstantial and direct evidence of intent as may be available." This factor reflects the need to conduct an examination of the discriminatory effects of the challenged law, which are discussed in detail above. *See supra* Sec. II.A. Further, the facts alleged need not be limited to express discrimination, but can instead support "an inference of invidious purpose," especially when legislators' or officials' motivation is at issue. *See Arlington*

[4] The district court decision upheld in *Brnovich*, *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 832 (D. Ariz. 2018) (subsequent history omitted), was decided on a well-developed record and with the benefit of a ten-day bench trial.

Heights, 429 U.S. at 270 & n.20. Defendants categorically disregard the facts in the Complaint alleging that racial discrimination was a motivating factor in the enactment of SB 202. *See* Defendants' Brief at 12-13.

Plaintiffs also sufficiently allege facts necessary to support each additional *Arlington Heights* factor, as well as the additional factors articulated by the Eleventh Circuit. Among other allegations, Plaintiffs detail the historical background of voting rights in Georgia, *see, e.g.*, Complaint ¶¶ 68-87, specify the sequence of events leading up to the passage of SB 202, *see, e.g.*, Complaint ¶¶ 88-109, recount procedural and substantive departures, *see id.*, and contemporary statements and actions of key legislators, *see id.* Plaintiffs allege that the disparate impact was known and foreseeable to the legislators, *see, e.g.*, Complaint ¶¶ 89, 92, 95, 106-07, 111, and make clear that less discriminatory alternatives were available, *see, e.g.*, Complaint ¶¶ 112-14, 122-25, 133-35.

What is more, the justifications for SB 202 offered by Defendants are not relevant enough, not legitimate enough, and not weighty enough to justify SB 202's limitations on the right to vote. *See Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 191 (2008) ("However slight [a] burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.")

(internal citation omitted). Plaintiffs repeatedly challenge the interests asserted in support of SB 202. *See supra*, Section II.A.

C. Undue Burden on the Right to Vote (Under the First and Fourteenth Amendments)

A law imposes an undue burden on the right to vote if the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" outweigh "the precise interests put forward by the State as justifications for the burden imposed by its rule" while also considering "the extent to which those interests make it necessary to burden the plaintiff's rights." *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The scrutiny that a reviewing court applies to a challenged law increases with the severity of the burden. *See Democratic Exec. Comm. of Fla. v. Lee,* 915 F.3d 1312, 1319 (11th Cir. 2019) ("The more a challenged law burdens the right to vote, the stricter the scrutiny to which we subject that law.").

As with discriminatory effects and discriminatory intent claims, claims as to undue burden on the right to vote demand a searching factual inquiry, given the interest balancing required under the Supreme Court's test and how "[t]he existence of a state interest . . . is a matter of proof." *See Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993) ("declin[ing] … to assess the importance of these alleged interests absent a factual determination by the district court below.").

Plaintiffs have plausibly alleged that SB 202 imposes an undue burden on the right to vote. *See* Complaint ¶¶ 110-11, 190-94. Among these allegations, Plaintiffs note in their Complaint that the State Election Board takeover provision of SB 202 will permit arbitrary and unpredictable changes in county election administration, which will destabilize elections and disproportionately burden voters in the counties in which the takeover provision is deployed. *See* Complaint ¶¶ 166-69, 176. Counties that have a history of long lines at the polls and ballot processing delays are already disproportionately and unjustifiably burdened by other provisions of SB 202. *See, e.g.*, Complaint ¶ 136.

Plaintiffs have also sufficiently contested the legitimacy of the state interests asserted during the consideration of SB 202 and following its passage, and the justifications offered for the challenged provisions of SB 202 in Defendants' Brief are too vague to necessitate the many new burdens imposed by the law. *See supra* Section II.A.

D. Freedom of Speech and Expression—Limitations on Approaching Voters in Line

Plaintiffs have alleged sufficient facts to raise a plausible inference that SB 202 imposes a facial restriction on political speech by Plaintiffs in a traditional public forum. *See, e.g.*, Complaint ¶¶ 19, 25, 61, 63, 143-55, 195-96. Because SB 202 imposes content-based restrictions on expressive conduct such as line warming

activities, it must face strict scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 197 (2002) ("[T]he First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic."). In such cases, "a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest." *Id.* at 199.

Plaintiffs have sufficiently challenged the purported state interests underlying the line warming prohibition, and have demonstrated the line warming prohibition is unnecessary to serve the asserted interests, in contrast to the law considered in *Burson*. *See, e.g.*, Complaint ¶¶ 143-55. Indeed, even if SB 202 were only subject to the intermediate scrutiny applied to content-neutral time, place, and manner restrictions of expressive activity in a traditional public forum, Defendants have still not demonstrated SB 202's line warming prohibition is narrowly tailored to serve a significant governmental interest. SB 202 imposes burdens above and beyond those already in place regarding electioneering around polling places in Georgia. *See* Complaint ¶ 143 (noting previous enforcement of existing electioneering restrictions in the Georgia Code). The motivations behind the law's passage are deeply suspect. Plaintiffs allege that SB 202 intentionally targets the expressive voting advocacy and voter support activities such as line warming, which eased the burdens of voting in

Georgia in the 2020 elections and encouraged voters to remain in line, surely not a permissible reason to restrict core political speech. *See* Complaint ¶¶ 19, 25, 61, 63, 143-55. The erosion of "Souls to the Polls" efforts by way of SB 202's allowance of limitations on Sunday voting, viewed in the context of the legislative process, is evidence that SB 202 not only burdens but actively *targets* specific religious political associations—an especially pernicious attack on First Amendment rights. *See* Complaint ¶¶ 6, 48, 141. And nowhere do Defendants state that SB 202 leaves open ample alternatives for the expressive conduct in question.

Finally, regardless of the scrutiny applied, Georgia has no legitimate interest in proscribing Plaintiffs' expressive activities encouraging voters to stay in line at the polls, which are non-partisan, unlike the electioneering often prohibited, and do not pose the risks that Defendants claim justify the provision. *See* Defendants' Brief at 22. State legislators' claims to be "[p]rotecting electors from improper interference, political pressure, or intimidation," via the line warming prohibition cannot be simply accepted at face value. *See id.* at 21. As stated by the Secretary of State's office, "many of these bills are reactionary to a three-month disinformation campaign." Complaint ¶ 92. SB 202 restricts Plaintiffs' ability to engage in educational political speech and thereby restricts the flow of information to Georgia voters. For that reason, the challenged law "must be viewed with some skepticism."

See Eu v. San Francisco Cty. Democratic Cent. Comm., 489 U.S. 214, 228 (1989) (citing *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 221(1986) (quoting *Anderson,* 460 U.S. at 798)).

E. ADA Claims

A violation of Title II of the ADA is established if a qualified plaintiff proves that he or she was not provided equal access to or benefits of Defendants' programs, including through eligibility criteria or administration methods that disfavor or filter out people with disabilities or Defendants disallowing reasonable modifications to policies, practices, and procedures. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b).

Plaintiffs have alleged a plausible claim that the challenged provisions of SB 202 "individually and collectively fail to provide Georgia voters with disabilities, including members and/or constituents of Plaintiffs, equal access and ability to vote as Georgia voters without disabilities." Complaint ¶¶ 197-207. Plaintiffs have members with disabilities who will face discrimination under SB 202 as they seek to exercise their fundamental right to vote. *See* Complaint ¶¶ 31, 40, 52, 63. SB 202's challenged provisions, including reductions in drop box availability, categorically disqualifying most out-of-precinct provisional ballots, imposing additional burdensome ID requirements on absentee ballot requests, and banning support or line warming for voters with disabilities at the polling place will have predictably

discriminatory impacts on the ability of voters with disabilities to enjoy equal access to Defendant's programs. *See* Complaint ¶¶ 119, 130, 204-07.

In a misguided argument, Defendants point to an ADA implementing regulation providing some protections for "existing facilities" such that a public entity's program must be assessed "in its entirety" in relation to the ADA's requirement that the program be "readily accessible to and usable by" people with disabilities. 28 C.F.R. § 35.150. But "[t]his regulation is targeted principally at physical accessibility and allows a public entity to provide accessibility alternatives that would not require large-scale architectural modifications of existing facilities," and Plaintiffs' claims pertain to the above-referenced, not exclusively architectural, aspects of SB 202's discriminatory obstacles to voting by Georgians with disabilities. *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 504 (4th Cir. 2016).

Once again, these claims are fact-intensive and merit factual development beyond Defendants' cavalier and unsupported allegations about voters with disabilities, such as their claims that "SB 202's position on out-of-precinct provisional ballots does not inconvenience disabled voters either because such voters are most likely to be near their own homes" or that the newly required supporting ID materials are "documents that the disabled may obtain without difficulty." Defendants' Brief at 24-25; *cf.* Complaint ¶¶ 52, 63, 130 (referencing voters with

disabilities facing difficulties such as transportation challenges and night shift work hours). It would be premature to dismiss these claims before developing a factual record to assess the burdens facing Georgia's voters with disabilities. *See, e.g.*, *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020), *appeal dismissed sub nom. People First of Alabama v. Sec'y of State for Alabama*, No. 20-13695-GG, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), and *appeal dismissed sub nom. People First of Alabama v. Sec'y of State for State of Alabama*, No. 20-13695-GG, 2020 WL 7028611 (11th Cir. Nov. 16, 2020) (reaching decision on ADA voting claim on basis of record of agreed facts); *Schaw v. Habitat for Human. of Citrus Cty., Inc.*, 938 F.3d 1259, 1266 (11th Cir. 2019) ("Whether a particular aspect of an activity is 'essential' will turn on the facts of each case").

Additionally, Plaintiffs' ADA claim is properly brought against Defendants, as they are public entities that facilitate, implement, and regulate the service, program, or activity in question—here, voting and elections. Defendant Raffensperger is Georgia's statewide chief election official; he is responsible for implementing Georgia election law and routinely issues guidance to county election supervisors statewide. O.C.G.A. § 21-2-210. SEB and its members are tasked with implementing uniform, nondiscriminatory statewide standards, including distributing their rules and regulations to every county election supervisor. O.C.G.A.

§ 21-2-31. Defendants Raffensperger and SEB members are the public officials charged with supervising and directing the operations of these public entities.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied in its entirety.

Respectfully submitted,

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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 the Times New Roman font at a point size of 14.

Dated: July 26, 2021

/s/ Kurt Kastorf
Kurt Kastorf

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2021, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Dated: July 26, 2021

/s/ Kurt Kastorf
Kurt Kastorf

Counsel for Plaintiffs