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

COALITION FOR GOOD GOVERNANCE, *et al.,* *Plaintiffs,* v. BRIAN KEMP, Governor of the State of Georgia, in his official capacity, *et al.,* *Defendants,* REPUBLICAN NATIONAL COMMITTEE, et al., *Intervenor-Defendants.*	CIVIL ACTION FILE NO. 1:21-CV-02070-JPB

STATE DEFENDANTS'[1] REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

Despite spending 50 pages in their Response to State Defendants' Motion to Dismiss, Plaintiffs cannot rescue their Amended Complaint from its shortcomings. Plaintiffs do not adequately address the constitutional standing

[1] State Defendants are Governor Brian Kemp, Secretary of State Brad Raffensperger, and State Election Board members Sara Ghazal, Anh Le, Rebecca Sullivan, and Matthew Mashburn.

arguments raised by State Defendants in their Motion because they rely on a flawed theory of direct organizational standing and advance incomplete or otherwise improper legal standards when they attempt to show their alleged future injuries are sufficient to satisfy the requirements of Article III. But even if Plaintiffs had standing, they do not even attempt to claim that their pleading is not a shotgun complaint. Their attempts to argue around their failure to state a claim do not cure the deficiencies that exist in each one of the voluminous counts they raise. This Court should grant State Defendants' Motion.

ARGUMENT AND CITATION TO AUTHORITY

I. Plaintiffs' allegations do not need to be taken as true for purposes of ruling on State Defendants' Motion.

There is no dispute that Plaintiffs are relying on information and affidavits outside the four corners of their Amended Complaint. Indeed, Plaintiffs acknowledge this many times in their Response, stating that they rely on "the Amended Complaint's allegations ***and*** [on] the preliminary injunction record … ." [Doc. 45, p. 3] (emphasis added). And they expressly acknowledge that State Defendants have lodged "a factual attack under Rule 12(b)(1)." *Id.* at n.1. But the significance of this procedural posture seems lost on Plaintiffs because they claim this Court should review their allegations

under a standard where they "must be treated as true" for purposes of ruling on State Defendants' Motion. *Id.* at 4. The standard this Court must apply is far less deferential to Plaintiffs.

As State Defendants noted in their brief in support of the Motion to Dismiss, "[i]n evaluating a 12(b)(1) motion, 'no presumptive truthfulness attaches to plaintiff's allegations.'" [Doc. 41-1, p. 9] (quoting *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 732 n.9 (11th Cir. 1982)). This means the "trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Anderson v. Raffensperger,* 497 F. Supp. 3d 1300, 1308 (N.D. Ga. 2020) (quoting *Makro Capital of Am., Inc. v. UBS AG*, 543 F.3d 1254, 1258 (11th Cir. 2008)).

And as one court in this district has already noted, "the significance of the facial/factual distinction may be limited. Even in a facial attack, courts 'are obliged to consider not only the pleadings, but to examine the record as a whole to determine whether [they] are empowered to adjudicate the matter at hand.'" *Id.* at n.4 (quoting *Elend v. Basham*, 471 F.3d 1199, 1208 (11th Cir. 2006)). *See also Corbett v. Transp. Sec. Admin.,* 930 F.3d 1225, 1235 (11th Cir. 2019) ("While we typically confine our standing analysis to the four corners of the complaint, we may look beyond it when we have before us facts in the record."). This more stringent standard of review derives from the "irreducible

constitutional minimum" embodied by Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The standing requirement, consequently, limits the quantum of deference to which Plaintiffs' allegations may be entitled even on a motion to dismiss. It is through this more searching lens that the Court must view State Defendants' Motion.

II. Plaintiffs' Amended Complaint is a shotgun pleading.

Plaintiffs apparently concede that their 484-paragraph Amended Complaint is a shotgun pleading because they do not even attempt to respond to State Defendants' arguments on this point. *Compare* [Doc. 41-1, pp. 8-9] *with* [Doc. 45]. Far from being a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), Plaintiffs' Amended Complaint has required multiple page-limit extensions to adequately brief the issues involved. And Plaintiffs continue to push beyond even those extended limits, incorporating by reference briefing from outside the motion to dismiss context. *See, e.g.*, [Doc. 45, pp. 3-4, 33, 40, 42 n.22, 51]. Their apparent attempt to achieve victory by having this Court weigh the number of pages filed by each side is not allowed by the Federal Rules; and Plaintiffs' lack of a response should be taken as an admission of their failure to abide by the pleading rules of this Court.

III. Plaintiffs have not rescued their shortcomings in alleging standing.

A. Plaintiffs misread the law on direct organizational standing.

Faced with the reality of their lack of standing, Plaintiffs first attempt to sidestep their constitutional obligation to allege an injury by creating a new standard out of whole cloth. Their theory rests on the flawed premise that the Coalition for Good Governance can establish Article III standing by alleging a direct injury to the organization in a manner similar to that of an individual plaintiff. [Doc. 45, pp. 3-5]. And they claim State Defendants erred because their motion "focuses its organizational standing challenge exclusively on disputing Coalition's alleged lack of diversion [of resources] and addresses none of these ***direct injuries*** to Coalition." [Doc. 45, p. 5]. But authority for this novel theory can be found nowhere in the relevant precedent, and their one fleeting reference to a case purportedly supporting their position provides them no assistance.

To the contrary, the courts in this Circuit are clear: "[a]n organization may demonstrate a concrete, imminent injury ***either*** through a 'diversion-of-resources' theory ***or*** through an associational-standing theory." *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1336 (N.D. Ga. 2018) (emphasis added). These two methods are the only ways an organization may

demonstrate an injury and, thus, any alleged "direct" injury to an organization can be found only in that organization's diversion of resources resulting from a "concrete, imminent injury" or by the organization standing in the shoes of its members. *Fla. State Conference of NAACP v. Browning*, 522 F. 3d 1153, 1160 (11th Cir. 2008); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

Plaintiffs nevertheless claim that they've alleged and provided evidence demonstrating some other kind of "direct" harm that "establish[es] Coalition's direct standing to seek injunctive relief—even *without* any diversion of resources." [Doc. 45, p. 4] (emphasis in original). They cite only *Spokeo* in support of this novel contention but that case provides no support for this new method of finding organizational standing. Instead, Plaintiffs' citation to *Spokeo* merely recites the familiar tripartite standard for establishing standing and says nothing about a direct organizational injury. 136 S. Ct. at 1547. Moreover, to the extent Plaintiffs call upon *Spokeo* to refute the clear constitutional requirements for *organizations* to establish standing, it is a poor conceptual vehicle. Indeed, *Spokeo* involved a complaint filed by an *individual* plaintiff, not an *organizational* plaintiff. It is difficult to fathom how Plaintiffs believe that a case like *Spokeo*—which does not say what Plaintiffs' claim it

says but also involves a different *type* of plaintiff altogether—would alter the jurisdictional burden required of organizations under the Constitution.

B. The Organizational Plaintiffs have not alleged enough to show a diversion of resources.

Plaintiffs rely on outdated cases and an erroneous recollection of the allegations contained in their Amended Complaint to bolster their standing allegations. It is not enough. First, the cases relied upon by Plaintiffs in their Response to claim standing in the Eleventh Circuit all pre-date *Jacobson,* in which the Eleventh Circuit carefully delineated the need for Plaintiffs to allege what they're diverting their resources *from*, in addition to what they're diverting their resources *to*. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1237, 1250 (11th Cir. 2020). As State Defendants already explained, this is the Eleventh Circuit's way of delineating the same standard articulated by multiple courts regarding organizational resource diversion. [Doc. 41-1, pp. 10-17]. That is, the diversion must go "far beyond business as usual" in order to constitute an injury to the organization. [Doc. 41-1, p. 13]. Plaintiffs make no attempt to counter this argument, opting instead to call upon earlier cases that do not even consider this requirement in *Jacobson*. But these cases cannot alter the meaning of the holding in *Jacobson* because that case is informed by the same out-of-circuit authorities Plaintiffs dismiss as irrelevant.

Moreover, the vast majority of the Coalition's numerous allegations of resource diversion are, by Plaintiffs' own admission, done for the purpose of funding this lawsuit. This purported diversion is entirely irrelevant to the organizational standing inquiry and will not be sufficient to establish injury. The payment of legal fees related to a lawsuit cannot qualify as an injury for Article III purposes. *See, e.g.*, *La Asociacion De Trabajadores De Lake v. City of Lake Forest, Calif.*, 624 F.3d 1083, 1088 (9th Cir. 2010). And to the extent the Coalition claims to have diverted resources in response to fears of SB 202, that diversion is not sufficient for the purposes of establishing injury. "[S]tanding based on diverting resources to avoid the risk of hypothetical future harm is not a sufficient injury." *Greater Birmingham Ministries v. Alabama*, 161 F. Supp. 3d 1104, 1114 (N.D. Ala. 2016) (*GBM*). Further, while claiming that the same arguments support standing for all of the Organizational Plaintiffs, Plaintiffs place all of their arguments solely in support of the Coalition alleging an injury. [Doc. 45, p. 7 n.3].

C. Plaintiffs do not satisfy the imminence requirement of Article III standing.

1. The imminence prong requires more than a "realistic probability" of harm.

Apparently not content with inventing one new theory of constitutional standing within the space of a single brief, Plaintiffs next invent a second. The

Supreme Court has made clear that the standard for adequately alleging a future injury requires either a substantial risk of injury or the alleged injury is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

Plaintiffs seek to brush this standard aside in favor of one that requires *only* that there is a "realistic probability" the purported future injury will occur. *See, e.g.* [Doc. 45, pp. 8-9, 20, 45-46]. But this standard, which Plaintiffs support only by citing *Arcia v. Fla. Sec'y of State,* 772 F. 3d 1335 (11th Cir. 2014), does not square with the more emphatic language in *Clapper*. And, of course, *Arcia* cannot alter a decision by the Supreme Court, so it must be viewed *in conjunction with*—rather than lieu of—*Clapper*. "[W]e have repeatedly reiterated that 'threatened injury ***must be certainly impending*** to constitute injury in fact.'" *Clapper,* 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added)). Plaintiffs attempt to argue that *Tsao* and *Muransky* are consistent with their position, [Doc. 45, p. 46], but the fact that Plaintiffs can dream up a situation that might be problematic for them does not rise to the level of alleging "a material risk, or significant risk, or substantial risk, or anything approaching a realistic danger." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 933 (11th Cir. 2020) (en banc); *see also Tsao v. Captiva MVP Rest. Partnres, LLC*, 986 F.3d

1332, 1344 (11th Cir. 2021) ("[P]laintiff's burden to plausibly plead factual allegations sufficient to show that the threatened harm of future identity theft was 'certainly impending'—or that there was a 'substantial risk' of such harm" was difficult without specific evidence).

Thus, even to the extent Plaintiffs have alleged a "realistic probability" of injury, [Doc. 45, pp. 8-9, 20, 45-46], that does not end the inquiry. They still must show that the probability of injury is *also* certainly impending.[2] At most, they can only point to a fear of Board Member Plaintiffs later being suspended if they engage in misconduct and complete a long process outlined in SB 202. Or to voters imagining situations where someone may steal their vote. Neither of those scenarios are enough for the injury to be "certainly impending." *Tsao*, 986 F.3d at 1344 (cleaned up). And Plaintiffs' attempt to lower their burden demonstrates they do not sufficiently allege an injury in their Amended Complaint.

[2] This deficiency likewise dooms Plaintiffs' claims about the absentee-ballot timeline challenges in Counts XII, XIII, and XIV. If Plaintiffs are injured by complying with the law, every voter will always have standing to challenge every election law with which they have to comply. Far from Plaintiffs' claim that State Defendants do not dispute standing for these counts, [Doc. 45, p. 48], Plaintiffs are still asserting only generalized grievances about election administration that are not certainly impending because Plaintiffs must comply with the law.

2. Wollschlaeger *does not save Plaintiffs' claims about criminal statutes.*

In the remainder of their brief, Plaintiffs intertwine their broader standing argument as to all their claims with the specific standard set out for pre-enforcement challenges to the criminal provisions in the Amended Complaint. While these standards largely overlap, there are some differences, none of which can save Plaintiffs' claims from dismissal.

The main distinction between the two standards is that a party engaging in a pre-enforcement challenge to a criminal statute has an injury where "he has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Wollschlaeger v. Gov. of Fla.,* 848 F. 3d 1293, 1304 (11th Cir. 2017). The key points for this case are that the conduct that is "arguably affected with a constitutional interest [be] … proscribed by a statute …" *Id.* Plaintiffs' alleged course of conduct for almost all of their challenges is not affected with a constitutional interest or proscribed by a statute because it is only proscribed by Plaintiffs' *misreading* of the statute. Further, *Wollschlaeger* involved a defined group of individuals who would be affected—medical doctors—but here, Plaintiffs claim that every voter in the state could bring the same claims. *Id.* at 1302. That makes their claims a generalized

grievance[3] and then they run headlong into *Wood*—and *Wollschlaeger* does not save them. *Wood v. Raffensperger*, 981 F. 3d 1307 (2020).

Plaintiffs' attempt to analogize to *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014), likewise falls short because Plaintiffs have to rely on an attenuated chain of possibilities before they are injured. In *Driehaus*, enforcement was one step away—the plaintiffs said they were going to engage in the prohibited speech, and the entity they sued could immediately move against them. *Id*. Even if Plaintiffs are right about the interpretation of the statutes they challenge here, the only way they could ever be prosecuted is if they engage in conduct where the provisions they worry about are in effect, some third party sees it, that third party reports the conduct to the State Election Board (SEB), the SEB investigates,[4] the SEB then refers the complaint to the Attorney General or a district attorney, who then has to make an independent decision about prosecution. O.C.G.A. § 21-2-33.1(5) even requires *further* investigation by the appropriate district attorney or Attorney

[3] Plaintiffs' claims about individual voters being affected by the removal provisions, [Doc. 45, pp. 19-21, 23-24], are likewise generalized grievances, because every voter could bring those claims.

[4] Plaintiffs' reliance on the allegations against Ms. Dufort fall short because the letter they attach indicates that the investigation led to a conclusion that her case would *not* be handed over to any potential law-enforcement agency for a decision about prosecution. [Doc. 45, p. 61] (letter indicates recommendation of "close the case with no violation.").

General before making that decision. This chain of possibilities could only result in an injury based on "'the result of the independent action of some third party not before the court.'" *Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 148 F.3d 1231, 1247 (11th Cir. 1998) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). That is not enough to demonstrate any injury by Plaintiffs.

IV. Plaintiffs fail to state any claim for relief.

Plaintiffs spend more than 40 pages discussing the individual counts in their Amended Complaint, but this discussion does not alter the conclusion that they have failed to state a claim on any of the provisions.

A. Plaintiffs' procedural due process claims fail. (Count I).

Plaintiffs begin with their attack on the takeover provisions by claiming that the process provided in the statute is not adequate. [Doc. 45, pp. 12-16]. Faced with the reality of the Georgia Supreme Court upholding similar provisions allowing state officials to remove and replace members of school boards, *DeKalb Cty. Sch. Dist. v. Ga. State Bd. of Educ.*, 294 Ga. 349, 369 (2013), Plaintiffs resort to what they accuse State Defendants of doing—revising the law to create an injury.

Confronted with limited options in reining in poorly performing counties, SB 202 created a process so that "[c]ounties with long-term problems of lines,

problems with processing of absentee ballots, and other challenges in administration [can have] accountability," with the goal of "promot[ing] voter confidence and meet[ing] the goal of uniformity." SB 202 at 6:96-101. Those provisions apply to a variety of local election officials, depending on the jurisdiction, and require (for actions not initiated directly by the SEB[5]): (1) a request for a performance review of local election officials, (2) a performance review conducted by an SEB-appointed board, (3) a written report back to the SEB with any recommendations, (4) a petition to the SEB based on the performance review, (5) a preliminary investigation by the SEB, (6) a hearing held at least 30 days after the petition is received. SB 202 at 12:285-14:302, 20:484-22:541.[6] Only after this entire process is complete can the SEB suspend a superintendent after making specific factual findings. SB 202 at 14:303-312. The suspended superintendent can then petition for reinstatement or wait for nine months and then seek reappointment from the county or other entity. SB 202 at 15:327-342.

Plaintiffs look at this entire process and conclude that the process is inadequate, drawing distinctions about who can make initial reports and the

[5] The SEB is empowered to begin the process at step five, which still requires investigation and a hearing before any suspension. SB 202 at 12:289-294.
[6] The SEB has not yet promulgated additional rules regarding this process.

appointment process for the performance review board. [Doc. 45, pp. 14-15]. But quibbling about minor differences obscures the primary issue—the removal provisions cannot be invoked cavalierly. Plaintiffs also ignore the SEB's existing statutory responsibility to "obtain uniformity" in election administration—the very goal the legislature said it was seeking in enacting these provisions. *Compare* O.C.G.A. § 21-2-31(1) *with* SB 202 at 6:96-101.

Superintendents in danger of suspension are likewise given rights to continue a hearing if they need more time and the distinctions Plaintiffs draw between the standards of full and preliminary hearings ignore the SEB's established process for conducting investigations. *See* O.C.G.A. § 21-2-33. And the distinction Plaintiffs attempt to draw between individual members petitioning for reinstatement labors under the impression that all counties administer elections by board, which they do not—demonstrating the law cannot be unconstitutional in all its applications *even if* Plaintiffs' premise were correct. Finally, unlike the school-board suspension provisions which allowed for permanent removal, SB 202 provides for only temporary replacement of up to nine months. The process it provides is more than adequate to meet the requirements of due process; and Plaintiffs have failed to state a claim.

B. Plaintiffs' state-law claims fail. (Count II).

Plaintiffs next attempt to get around this Court's limited jurisdiction by arguing that violations of state statutes "implicating the very integrity of the electoral process constitute a denial of substantive due process under the Fourteenth Amendment to the U.S. Constitution." [Doc. 45, p. 21]. But this passing reference to federal law is not sufficient to satisfy the *Ex parte Young* standard and avoid application of the Eleventh Amendment. [Doc. 41-1, p. 30]. The Court is not required to take this legal conclusion as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-89 (2009).

Plaintiffs' reliance on the decisions in the case involving the District Attorney in Georgia's Western Judicial Circuit does not save them. *Gonzalez v. Kemp*, 470 F. Supp. 3d 1343 (N.D. Ga. 2020). There, the defendants did not argue that the district court should not consider the state-law challenges and only decided against abstaining because it found the answers "clear." *Id.* at 1346 n.5. Further, the Eleventh Circuit did not make an independent finding, but instead certified the question of state law to the Georgia Supreme Court and then ruled for the plaintiffs after that court found a conflict in state law. *Gonzalez v. Gov. of Ga.*, 978 F.3d 1266, 1270 (11th Cir. 2020). Because Plaintiffs have failed to adequately allege an ongoing violation of *federal law*

in this Count, this Court should dismiss Count II. *Verizon Md. Inc. v. PSC,* 535 U.S. 635, 645 (2002).

C. Plaintiffs' fundamental right to vote claims on the Takeover Provisions do not state a claim. (Count III).

Plaintiffs' response on Count III encapsulates the hypothetical nature of Plaintiffs' Amended Complaint while also highlighting Plaintiffs' refusal to account for the doctrine of constitutional avoidance, as discussed in Section D below. Plaintiffs advance the ominous—yet wholly unsupported—warning that "SB202 allows the SEB to remove but not replace a board of registrars on the eve of an election and thereby eliminate absentee voting in the entire county and curtail county-level registrations activities." [Doc. 45, p. 25]. They proffer this extreme hypothetical with precisely zero evidence nor even an *allegation* suggesting it would actually occur. Then they suggest that the "deliberative process" of appointing a registrar will be an insufficient remedy in such an extreme event. Again, Plaintiffs provide no rationale as to why this remedy would not be effective. They simply invent hypothetical scenarios that may, at some point, occur, in some place, and fail to be remedied. Conjecture abounds. But as this Court is aware, "[f]ederal courts are not 'constituted as free-wheeling enforcers of the Constitution and laws.'" *Wood v. Raffensperger,* 981 F. 3d 1307, 1313 (11th Cir. 2020) (quoting *Initiative & Referendum Inst. v.*

Walker, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc)). This is the type of conjectural and hypothetical injury that federal courts are constitutionally mandated to steadfastly avoid. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

D. Plaintiffs cannot proceed on their hypothetical "worst-case scenarios" involving the observation provisions because of the doctrine of constitutional avoidance. (Counts IV and V).

Plaintiffs chose to bring their claims as facial, pre-enforcement challenges. Because of this, they must demonstrate that the provisions of SB 202 that they challenge are "unconstitutional in all of its applications." *City of L.A., Calif. v. Patel*, 576 U.S. 409, 418 (2015) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U. S. 442, 449 (2008)). But Plaintiffs' claims are too hypothetical and too speculative to invoke the jurisdiction of this Court. And, as already discussed above, most of their claims rely on an uncertain chain of hypothetical events through which Plaintiffs were never injured.

Nowhere is this shortcoming more apparent in Plaintiffs' challenges to the criminal provisions in SB 202. As State Defendants explained in their opening brief, Plaintiffs completely ignore the constitutional-avoidance canon. For example, by claiming that the word "intentionally" does not apply to the entire scope of conduct prohibited in SB 202 in the observation provisions,

Plaintiffs invite this Court to interpret the statute in a way they claim raises constitutional questions. But "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney Gen. v. Del. & Hudson Co.,* 213 U.S. 366, 408 (1909); *see also Corwell v. Benson*, 285 U.S. 22, 62 (1932) (same).

Even if this Court finds that Plaintiffs' proposed interpretation of "intentionally" applies only to the provisions about observing someone voting is plausible, the Court should give this statute the alternative and more reasonable construction that would avoid the constitutional question. The actual language of the statute applies "intentionally" to the entire course of prohibited conduct. A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247-251 (2012). And as noted above, the standard for pre-enforcement challenges articulated in *Wollschlaeger* is not sufficient to pull Plaintiffs across the jurisdictional goal line. As a result, Plaintiffs have failed to state a claim for Counts IV and V of the Amended Complaint.

E. Plaintiffs' Voting Rights Act (VRA) claim on the observation provisions also fails. (Count VI).

Plaintiffs attempt to dismiss the clear rule that private rights of action "must be created by Congress," *Alexander v. Sandoval*, 532 U.S. 275, 286

(2001), by claiming that the cases cited by State Defendants were not VRA cases. [Doc. 45, pp. 36-37]. But this misses the point. Plaintiffs cannot point to the text of any congressional enactment and cannot point to any case that finds a private right of action under Section 11 of the VRA, even if they found a district court case that assumed such a right.[7] Because the VRA recognizes no private right of action, Plaintiffs' suit is unavailing.

Plaintiffs' remaining allegations under Count VI are either shared by all voters and thus a generalized grievance or fail for the same reasons outlined in Section C above because of the attenuated chain of possibilities required before any enforcement action could be brought. Count VI fails to state a claim.

F. Plaintiffs' First Amendment claims fail. (Count VII).

Plaintiffs next claim a First Amendment right to disclose sensitive election information at times when such disclosure may adversely affect the capacity of the state to safely and securely run its election. While disclaiming that this is their purpose, Plaintiffs ignore the connection to the prior sequestration of those engaged in early scanning on Election Day itself. [Doc. 41-1, pp. 4-7]. Those sequestered individuals were prohibited from sharing any

[7] *Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 476 (S.D.N.Y. 2020), relied primarily on non-Section 11 cases to find a private right of action and did not discuss the Supreme Court's hesitancy to find such a right when interpreting other sections of the VRA.

information, just as all observers are prohibited from doing by SB 202. Plaintiffs are free to share information with election officials, including the Secretary of State, but cannot share that information with the public at large, which, as activists, they apparently wish to do. Even if the disclosure provisions regulate protected expressive activity in some way, it should be evaluated as a regulation of elections under *Anderson/Burdick*. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Far from being "nonsensical," as Plaintiffs claim, this is exactly how the Eleventh Circuit said a district court should evaluate election regulations. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *see also Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 777 (M.D. Tenn. 2020) (discussing various standards and relying on *Anderson/Burdick* in the First Amendment context).[8]

[8] As previously noted, here and elsewhere in their Response, Plaintiffs cite to their preliminary-injunction briefing. [Doc. 45, p. 40]. This incorporation by reference of arguments from separate briefs violates the page limits imposed on the parties by this Court. Any argument purportedly contained in these papers has not been properly put to this Court, and the Court should decline to consider it, or in the alternative, the Court should consider *all* of the briefing and arguments from the preliminary injunction portion of this proceeding, including those made by State Defendants.

G. Plaintiffs' vagueness challenges fail because of the constitutional avoidance doctrine. (Counts VIII and X).

Plaintiffs continue to present their vagueness claims about disclosing the tallying of votes and of photographing ballots. The fact that Plaintiffs can dream up the appearance of an unconstitutionally burdensome statutory provision does not make an otherwise-clear statute unconstitutional. As discussed above in Section D and in Defendants' principal brief, the doctrine of constitutional avoidance compels the opposite result, especially in a facial challenge. Plaintiffs' claims with respect to these counts are too hypothetical and speculative for this Court's consideration as a facial attack. Therefore, both Counts VIII and X should be dismissed.

H. Plaintiffs' First Amendment claims on photographing ballots fails (Count IX).

Plaintiffs next claim that photographing ballots is "commonplace and an essential part of transparent elections." [Doc. 45, p. 44]. But Plaintiffs continue to run into the constitutional avoidance doctrine, see Section D above, and fail to account for what the statute actually prohibits. Plaintiffs also do not explain how any conflict exists with Georgia's Open Records Act or why the disclosure by the government of scanned ballot images (not the ballots themselves) *after* an election relates to an individual voter's ability to photograph their ballot during an election. Plaintiffs' claim that the photography provisions are not

time-limited also ignores the reality that an individual voter could only take a picture of his or her ballot before casting it, because after the election, all ballots remain under seal with the clerk of superior court and cannot be released without a court order. *See* O.C.G.A. § 21-2-500.

I. Plaintiffs' claims about identification on absentee ballots fails because it imposes no burden on the right to vote. (Count XI).

Plaintiffs claim that State Defendants never addressed the merits of Count XI of the Amended Complaint. [Doc. 45, pp. 47-48]. But that count challenges "the new identification requirements and relaxed security processes." [Doc. 14, pp. 13; 151-152]. State Defendants explained that moving from signature-matching to identification numbers does not impose a burden on the right to vote and further that Plaintiffs lack standing because this count relates only to an alleged elevated risk based on data breaches. *See* Section C above; [Doc. 45, pp. 38-39]. Plaintiffs cannot demonstrate any burden on the right to vote that is not justified by the State's interests in conducting its elections and avoiding voter fraud. *See, e.g., Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021).

J. Plaintiffs' remaining claims on the absentee-ballot timeline are contested and impose no burden on voters. (Counts XII, XIII, XIV).

Plaintiffs' remaining claims about the absentee-ballot timeline are likewise unavailing. Not only do Plaintiffs continue to claim Georgia has no emergency process for absentee ballots when it does—voters who are hospitalized can obtain an absentee ballot within the 11-day period under O.C.G.A. § 21-2-385(a)—it refuses to meaningfully engage with the Eleventh Circuit's analysis in *New Georgia Project*. Deadlines relating to absentee ballots "do[] not implicate the right to vote at all." *New Ga. Project*, 976 F.3d at 1281. The mere fact that Georgia adjusted several provisions in SB 202, [Doc. 45, p. 51], does not transform timelines that are well in the mainstream of other states' laws into severe burdens on the right to vote—especially when Georgia law after SB 202 still provides the option to return absentee ballots through "the mail, hand-delivery, or a drop box." *New Ga. Project*, 976 F.3d at 1281. And the mere fact that Georgia has runoffs, aside from improperly narrowing what Plaintiffs actually allege in their Amended Complaint, ignores both the statutory language and the record before this Court, neither of which deprives voters of the ability to request absentee ballots until after certification. None of these counts state any claim for relief.

CONCLUSION

Plaintiffs disagree with Georgia's decisions about how to structure its elections. The Amended Complaint is a shotgun complaint—a policy document masquerading as an attempt to invoke this Court's jurisdiction. Plaintiffs have not corrected their lack of alleging any injury for purposes of standing. But even if they have, Plaintiffs have not stated a claim because they have not alleged any burden on the right to vote that is not justified by the State's interests.

While Plaintiffs imagine a variety of extreme scenarios, they have not shown that the provisions of SB 202 are unconstitutional in all their applications. Plaintiffs have provided this Court with no basis "to second-guess[] and interfer[e] with a State's reasonable, nondiscriminatory election rules." *New Ga. Project*, 976 F.3d at 1284. This Court should dismiss this case and direct Plaintiffs to the proper venue for their policy advocacy—the Georgia General Assembly.

Respectfully submitted this 16th day of August, 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/ Bryan P. Tyson
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, GA 30339
Telephone: (770) 434-6868

Gene C. Schaerr*
H. Christopher Bartolomucci*
Riddhi Dasgupta*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
Fax: (202) 776-0136
gschaerr@schaerr-jaffe.com

* Admitted *pro hac vice*

Counsel for State Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR 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/Bryan P. Tyson
Bryan P. Tyson