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

IN RE GEORGIA SENATE BILL 202	Master Case No. 1:21-MI-55555-JPB
SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, *et al.*, *Plaintiffs,* v. BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al., *Defendants* v. REPUBLICAN NATIONAL COMMITTEE, et al, *Intervenor Defendants*	Civil Action No. 1:21-CV-01284 JPB
GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, *et al.*, *Defendants*	Civil Action No. 1:21-CV-01259-JPB

THE CONCERNED BLACK CLERGY OF METROPOLITAN ATLANTA, INC., *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, *et al.*, *Defendants*	Civil Action No. 1:21-CV-01728-JPB

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Plaintiffs respectfully submit this Reply Memorandum in further support of their Motion for Preliminary Injunction, ECF 574-1 ("PI Br."), and in response to the opposition briefs of State Defendants (the "State"), ECF 610 ("State's Br.") and Defendant-Intervenors, ECF 608 ("Interv. Br.") (collectively, "Defendants").

I. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

A. Plaintiffs are likely to succeed on the merits.

Defendants fail to rebut Plaintiffs' evidence in support of their constitutional claims. Instead, Defendants' Opposition offers misstated legal standards, irrelevant facts, and conclusory arguments.

1. Defendants misconstrue the applicable legal standards.

Arlington Heights requires a court to consider the entire context around SB 202's enactment, including a holistic analysis of each factor. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977); *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1322 (11th Cir. 2021) ("*GBM*").

Defendants ask the Court to ignore the totality of this evidence, chiding Plaintiffs for relying substantially on *circumstantial* evidence of discrimination. Interv. Br. at 5. But it is axiomatic that "discriminatory intent need not be proved by direct evidence." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). As the Supreme

Court observed in *Arlington Heights*, 429 U.S. at 266-67, a careful analysis and weighting of available circumstantial evidence is required in cases such as this one – because, of course, "direct evidence of discrimination is seldom available," *Hawkins v. Ceco Corp*., 883 F.2d 977, 981 (11th Cir. 1989), and as such, contrary to Intervenors' suggestion, "the absence of direct evidence such as a 'let's discriminate' email cannot be and is not dispositive." *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2016).

Defendants then hang their hats on the "presumption of legislative good faith," stating that it somehow makes it "especially impossible" to divine the Legislature's intent here. State's Br. at 14. This claim is illogical; a legal presumption has no bearing on whether Plaintiffs here have established facts sufficient for an intent finding. Regardless, there is no meaningful debate here—Defendants themselves acknowledge, as Plaintiffs do, that this Court should use the binding *Arlington Heights* inquiry to determine whether the Legislature acted with discriminatory intent, and that the presumption of legislative good faith is not absolute. *See Abbott v. Perez,* 138 S. Ct. 2305, 2324-25 (2018). "When there is a proof that a discriminatory purpose has been a motivating factor in the decision, [] judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265-66.

Contrary to State Defendants and Intervenors' suggestion, neither *Abbott* nor

League of Women Voters of Fla. Inc. v. Fla. Sec'y of State, 66 F.4th 905, 923 (11th Cir. 2023) ("*LWV*"), requires a court to draw favorable inferences alone from state action. Rather, both cases stand only for the unremarkable proposition that even a history of discrimination does not single-handedly shift the burden to the defendants to disprove discrimination. *Abbott*, 138 S. Ct. at 2325; *LWV*, 66 F.4th at 923. Both parties agree that Plaintiffs have the burden to demonstrate discriminatory intent based on the totality of the circumstances under *Arlington Heights* – and Plaintiffs have met that burden here.

2. Under *Arlington Heights*, the facts and evidence here demonstrate a discriminatory purpose to minimize Black voters' voting power.

Plaintiffs have offered extensive evidence that the Runoff Restrictions bear more heavily on Black voters than on white voters, both individually and taken together. PI Br. at 14-16. Plaintiffs have established that the shorter runoff period eliminates voters' ability to register and vote in the window between a general election and a runoff; that it reduces the early voting period from three weeks to one week; that weekend voting is no longer required during the early voting period; that the shortened early voting period will result in longer lines at polling places; and that each of these restrictions disproportionately affects Black voters. *Id*.

Defendants and Intervenors do not appear to dispute this evidence. Instead, Defendants respond to Plaintiffs' evidence of discriminatory effect by citing turnout numbers of *all* voters from the 2022 U.S. Senate runoff to argue that, based on this data, there is "not evidence of any impact on Black voters." State's Br. at 6-7, 16. In the first place, Defendants' reliance on turnout is misplaced, as turnout is an inappropriate and misleading means of assessing the burden of election laws on voters. *North Carolina State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2015) (plaintiffs not required to demonstrate that challenged law prevented voters from voting at same levels they had in the past). Turnout rates and total turnout vary from election to election for a variety of reasons, as the State's own expert, Dr. Grimmer, attests. Ex. 1 (Dep. of Justin Grimmer at 54:21-25); ECF 566-47 (Fraga Sur-Rebuttal at ¶¶ 12-17); ECF 574-37 (Grimmer Report at ¶¶ 37, 43, 46). These may include demographic changes, or political factors such as particularly competitive electoral races in a given cycle, or particularly attractive or polarizing candidates. ECF 566-43 (Burden Sur-Rebuttal at 11-12); ECF 566-47 at ¶¶ 21-27.

Moreover, using turnout data from the 2022 elections fails to account for the full burden of the Runoff Restrictions on Black voters: the fact that many Black voters were able to overcome those burdens to cast their vote in the 2022 runoff elections does not negate that the Runoff Restrictions created those burdens in the

first place. ECF 566-47 at ¶¶ 21-27. Indeed, Black voters and voting rights organizations undertook considerable counter-mobilization efforts to overcome SB 202's discriminatory provisions. ECF 566-12 (Calhoun Decl. at ¶¶ 29-37) (describing statewide voter outreach efforts in response to SB 202); ECF 566-13 (Cotton Decl. at ¶¶ 26-38) (same). Defendants' expert agrees that voters who successfully turn out could still face disproportionate voting burdens compared to other voters. Ex. 1 at 336:19-338:18. Reliance on turnout alone to disprove disparate impact is therefore misplaced.

In any event, the very data from the 2022 runoff elections upon which Defendants and their expert rely demonstrates that Black turnout *decreased* in the 2022 midterm elections and runoff election relative to the 2018 midterm election and 2021 runoff election. ECF 574-37 at ¶¶ 31-35 & Tbl. 2. That Dr. Grimmer's own analysis shows decreased Black turnout even as overall turnout remained historically high – and in a midterm and runoff election in which, as Defendants note, multiple Black candidates were on the ballot including both candidates in the Senate runoff – underscores that SB 202 accomplished its discriminatory goals.

Finally, Defendants seek to downplay the impact of cumulative effects of various provisions of SB 202 on Black voters, including the Runoff Restrictions, by urging this Court to focus on the individual effects of specific provisions.

Defendants baldly assert that Plaintiffs cannot "stack all provisions as a "compounding effect" for purposes of this motion." State's Br. at 16. That proposition lacks any legal support. "A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition." *Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J., concurring in part and concurring in the judgment); *McCrory*, 831 F.3d at 231 (analyzing cumulative effect of various statutory provisions upon disenfranchisement).[1] And it lacks factual support, given that Defendants' own expert acknowledges that voters face many different costs of voting that affect their decision to participate politically. Ex. 1 at 129:13-24.

a) The discriminatory impact was foreseeable to the Legislature.

The discriminatory impact of the Runoff Restrictions was eminently foreseeable. *See* PI Br. at 5-7, 20-21; ECF 574-5 (Burden Report at 11, Tbl. 5) (showing that Black voter usage of absentee ballots had surpassed white voters in 2020 and 2021, but Black voters also experience higher rates of rejection of absentee

[1] The State attempts to distinguish *McCrory* on various grounds, alleging that the Fourth Circuit failed to presume legislative good faith, cited historical socioeconomic disparities, and cited North Carolina's history of race discrimination. State's Br. at 16 & n.4. But none of these arguments even purport to help it the State disambiguate SB 202's various discriminatory provisions and to distract from their cumulative effect.

ballots), ECF 574- 31 (Ex. A (Tr. Of Feb. 19, 2021 Hrg. Of Special Committee on Election Integrity 161:1-162:12)) (testifying about foreseeable issues with shorter runoff times in prior elections); ECF 574-33 (CDR00009771-773 (Email from Janine Eveler, Cobb County Director, to House EIC and Senate Ethics Committee, Ryan Germany and Chris Harvey, March 11, 2021)) (outlining concerns with timing of elections under proposed legislation); ECF 574-36 (Harvey Dep.at 117:2-14) (describing shorter election timeline as a "nightmare"); ECF 574-38 (CDR00526646 (Email Chain between Ryan Germany, Barry Fleming, Javier Pico Prats, and Bryan Tyson, March 10, 2021) (outlining concerns with proposed legislation); ECF 574-32 (Sterling Dep. at 185:1-187:24) (noting that election official would have preferred longer election administration time).

Defendants do not meaningfully address this plethora of evidence before the Legislature and in the public domain. Instead, they argue that imputing knowledge to legislators, notwithstanding that evidence, is speculative. State's Br. at 19-20. Yet Plaintiffs' evidence remains uncontroverted: the key architects of SB 202 were directly alerted, by public and private statements including legislative testimony about the likely effects of SB 202 on both voters and election administrators. *See* ECF 574-33 at CDR00009773 ("[A]llowing only 28 days will not work for a runoff with federal races. You are eliminating all but a few days of early voting [in runoffs]

which will mean that lines on election day will be untenable" in major urban and suburban counties with significant Black populations."); ECF 574-31 (Bailey Report, Ex. A at 162:10-162:9) (warning that four-week runoff period could result in only three days of early voting, and "even if we just did five weeks after the election, it is a very big rush for all of us to prepare for an election in three weeks or in two-and-a-half weeks depending on how quickly we get databases for the runoff."). Defendants' position is also directly controverted by the case law. *See United States v. Texas Ed. Agency (Austin Indep. Sch. Dist.)*, 564 F.2d 162, 167 (5th Cir. 1977)[2] (applying "the ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions" into the test for ascertaining discriminatory intent) (collecting cases).

Defendants emphasize that Plaintiffs have limited direct evidence regarding whether the Legislature actually considered the racial impact as applied to the Runoff Restrictions. State's Br. at 20-21. But Defendants doggedly resisted legislative discovery of just this type of evidence, relying on legislative privilege. ECF 539 (Order Granting Defs. Motion to Quash). That privilege cannot serve as both a sword and shield. *Singleton v. Merrill*, 576 F. Supp. 3d 931, 940 (N.D. Ala.

[2] This case is adopted as binding Eleventh Circuit precedent. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

2021) ("The Legislators seek to use their unique position as HB1's principal drafters as a sword to defend the law on its merits, but intermittently seek to retreat behind the shield of legislative privilege when it suits them."); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1126 (D. Neb. 2012).[3]

Intervenors allow that "[a]t most, Plaintiffs' evidence of statistical disparities shows partisan motive, not racial motive." But the Constitution forbids racial discrimination for the purpose of obtaining a partisan advantage; that race discrimination may be in service of an underlying partisan motive is irrelevant. *McCrory*, 831 F.3d at 233; *cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 427-28, 440 (2006). "To be sure…intentionally targeting a particular race's access to the franchise because its members vote for a particular party is impermissible." *LWV*, 66 F.4th at 924 (cleaned up).[4]

[3] Indeed, Defendants' argument is particularly curious given that their Opposition relies almost entirely upon the declaration of Ryan Germany, who himself is not a member of the Legislature and certainly cannot speak to the intent of any legislator, much less the entire legislature.

[4] Intervenors acknowledge the Eleventh Circuit's observation that "it might be suspicious if partisan reasons were the only consideration or justification for the law," *GBM*, 992 F.3d at 1326, but nevertheless assert that the "suspicion" may be overcome where the state "has provided valid neutral justifications (combatting voter fraud, increasing confidence in elections, and modernizing [the State's] elections procedures) for the law's passage." *Id*. at 1327. But Intervenors assert none of those justifications here, instead citing the "exhausting" effect of a nine-week runoff. Interv. Br. at 10-11.

b) The history of discrimination and sequence of events leading to the Runoff Restrictions' enactment are relevant and contextualize a racially discriminatory purpose.

Arlington Heights further instructs this Court to look to any history of discrimination and to the sequence of events leading to SB 202's enactment to place the law in appropriate context. Plaintiffs have provided a full recounting of both the historical background and the sequence of events leading to SB 202's passage to demonstrate that the Runoff Restrictions did not arrive in a vacuum but against a historical backdrop that informed both the actions of legislators and politicians and the burdens upon voters, advocates, and election officials.

Defendants misconstrue the purpose of this extensive history of discrimination and the import of the sequence of events leading to SB 202's enactment. Plaintiffs do not, contrary to Defendants' suggestion, offer this history as *proof positive* of discriminatory intent. PI Br. at 22-23. Instead, it is appropriate context for political decisions, regarding recent events, the political environment, history, and changing demographics—precisely the context required by the second and third *Arlington Heights* factors. Defendants' attempt to read this unfavorable context out of the *Arlington Heights* analysis should be rejected.

As set forth in the opening brief, that history is relevant here. State Defendants offer only a paragraph contending that Plaintiffs have identified no evidence

concerning a history of discrimination relating to *runoff elections specifically*, which is inaccurate. *See, e.g.*, ECF 574-6 (Anderson Report at 53) (outlining historical racial discrimination in runoff elections); State's Br. at 22-23.

c) Defendants ignore the substantive and procedural departures from legislative norms.

Defendants ignore the considerable evidence offered by Plaintiffs regarding the substantive and procedural deviations from normal legislative process leading to SB 202's enactment: SB 202 was passed amid an overwhelming flurry of election-related bills, in a hurried fashion and excluding Black legislators from the process. PI Br. at 20-21. Defendants contend that the lack of transparency and rushed legislative process are "part and parcel" of the legislative process – citing to *GBM*, which says nothing of the kind. 992 F.3d at 1326-27; Interv. Br. at 12-13. Moreover, Defendants ignore the extensive evidence demonstrating that SB 202's passage was anything but normal. See ECF 574-18 (Burnough Decl. at ¶¶ 29-37, 43-54); Ex. 2 (Dep. of Charles Tonnie Adams at 42:14-43:4); ECF 574-17 (Bailey Dep. at 105:9-106:6). SB 202 arrived amid an almost unprecedented flood of election-related bills, as Defendants' expert testified. *Id.* at 62:11- 63:2 ("[T]he volume of bills coming through, there were more than usual, more than I can recall in a long time, if perhaps ever.") Only three hearings were held on this sweeping legislation. ECF 574-18 at ¶ 49. And both Black legislators and others from the minority party were shut out

of the process. ECF 574-20 (Germany Dep. at 36:14-38:13); 574-18 at ¶¶ 36-38, 46, 49; ECF 574-21 (Jones Decl. at ¶¶ 19-21).[5]

State Defendants respond with a cursory, self-serving statement from SB 202 itself that it was "the product of 'hours of testimony,' finalized after 'significant modifications through the legislative process,' that were the result of weighing 'the various interests involved.'" State's Br. at 18, citing SB 202 at 6:139-143. They also cite, without elaboration, to several paragraphs of a declaration from Ryan Germany in which Mr. Germany discusses the legislative process behind SB 202 and another election-related bill from 2019, HB 316. That comparison is inapposite. There is no basis to conclude that HB 316 itself reflected a normal legislative process, nor does Mr. Germany even state that the legislative processes for the two

[5] The State tries to discount the record evidence showing a flawed and non-transparent legislative process by claiming that Dr. Anderson is not qualified to opine on Georgia legislative processes. State's Br. at 8-9. The State misrepresents Dr. Anderson's report and conclusions; she is not offering an expert opinion on Georgia's procedural rules. ECF 574-6 at 169-70. Instead, she offers expertise as a trained historian who reviewed all the relevant legislative hearings. Her testimony, consistent with the *Arlington Heights* factors, sheds light on the sequence of events and legislative history, including contemporary statements made, among other evidence. ECF 574-6 at 19. This type of expert evidence is highly relevant to assess discriminatory intent, and courts frequently find it valuable in making such assessments. *See Hunter v. Underwood,* 471 U.S. 222, 229-30 (1985); *McCrory*, 831 F.3d at 220 (noting that "the key evidence" was "primarily … expert testimony"); *Veasey*, 830 F.3d at 237, 259 & n.30 (citing an expert historian's testimony on a photo ID law's discriminatory intent and effect).

bills were similar, or in what way they were similar (e.g., a similar number of hearings, similar exclusion of Black legislators, or a similar time frame for passage).

d) Defendants continue to cloak the Legislature's discriminatory intent in tenuous justifications.

Plaintiffs have also offered evidence regarding the alleged justifications of SB 202, focusing on the supposed reduction of administrative burdens with a four-week runoff. Defendants' Oppositions confirm, rather than rebut, Plaintiffs' contention that these justifications are tenuous at best.

State Defendants rely almost entirely upon the declaration of Ryan Germany, a member of the Secretary of State's front office staff, to argue that the true motivations behind SB 202 were "increasing voter confidence, reducing the burden on election officials, streamlining the process of elections, and promoting uniformity." State's Br. at 22. Mr. Germany is himself not a member of the Legislature and cannot speak for the entire Legislature or its intent. And in any event, with respect to *runoffs* specifically, neither Mr. Germany nor State Defendants identify any relationship between a shorter runoff period and voter confidence, only that more political ads during the nine-week runoff was "not popular with voters" and that SB 202's Runoff Restrictions were passed to "[s]ave Christmas." ECF 610-3 (Germany Decl. at ¶¶ 13, 30).

With respect to the "burden on election officials," the evidence indicates that a four-week runoff will *increase* the burden on election officials. PI Br. at 20-21. Moreover, Intervenors deny, at some length, that reducing administrative burdens was a goal of the legislation at all. Interv. Br. at 10-12. That Defendants cannot even agree as to whether those burdens were an animating purpose behind the enactment of SB 202 underscores its weakness as an alleged justification.

Beyond administrative burden, State Defendants and Intervenors both emphasize that voters were "exhausted" after the 2021 runoff and that the nine-week runoff was not popular with voters. That supposed justification flies in the face of actual record-breaking voter turnout in the 2021 runoff. Defendants make much of the probative value of total turnout when they think it suits them; it defies credulity that those same Defendants would look at turnout data and conclude that voters were unhappy with the arrangement.[6]

[6] Defendants argue that statements from "political opponents" are not probative to whether SB 202's disparate impact was foreseeable and known by the legislature. State's Br. at 19, Interv. Br. at 2, 8, 10-11. But as Plaintiffs' opening brief demonstrates, the evidence of tenuous justifications came not only from opponents of the bill but from legislative witnesses, including nonpartisan election officials, including supporters of the bill. PI Br. at 8-9, 17-18, 20-21; 574-32 at 152:20-152:1; 153:6-18. Although the Defendants are evidently unbothered by the concerns of their political opponents, that is not evidence that those concerns were invalid, as the evidence supplied by Plaintiffs makes clear. Br. at 17-18.

In the absence of non-pretextual justifications for SB 202's Runoff Restrictions, State Defendants point to voting laws in *other* states, which are not at issue in this litigation, and sarcastically remark that "it is curious why Plaintiffs have not sued those states." State's Br. at 21. Plaintiffs and the individuals they represent do not live or vote in *other* states, and have not been burdened in their exercise of the franchise by other states' laws: they live and vote in Georgia, and it is SB 202's Runoff Restrictions and not some other law that abridged their right to vote. State Defendants' Opposition not only fails to address Plaintiffs' evidence, it speaks volumes regarding the State of Georgia's cavalier attitude toward the rights of Black voters within its borders.

> e) Even assuming Defendants had some reasonable interests, they could have still achieved those with less discriminatory alternatives.

Finally, even if the State identified some reasonable interests behind the Runoff Restrictions, those interests could have been achieved with less discriminatory alternatives, including a five-, six-, or seven-week runoff. *See* PI Br. at 20-21. For example, the goal of "harmonizing" state and federal runoffs, ECF 610-3 at ¶¶ 29-30, could have been achieved just as easily by standardizing both runoffs at a period longer than four weeks. Similarly, a five- to seven-week runoff would both have had a lesser discriminatory impact on Black voters, and would have

enabled the election cycle to conclude in advance of the Christmas holiday. Finally, a runoff period between four and nine weeks would have enabled federal officials elected in the runoff to take office upon the swearing-in of a new Congress on January 3. *Cf.* ECF 610-3 at ¶ 70. And as Plaintiffs have emphasized, a longer runoff period of even a few weeks would have reduced the administrative burden on election officials. PI Br. at 20-21.

B. **Defendants fail to meet their burden to prove that the challenged Runoff Restrictions would have passed absent a racially discriminatory purpose.**

Once Plaintiffs have made an initial showing that race was a substantial or motivating factor behind the enactment of a law, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. at 228. As set forth above and in Plaintiffs' opening brief, Plaintiffs have made such a showing. *See* supra Sec. 2A; PI Br. at 14-23; Defendants fail to meet their burden in response. Defendants devote just two paragraphs to potential justifications for SB 202, including "increasing voter confidence, reducing the burden on election officials, streamlining the process of elections, and promoting uniformity." State's Br. at 22.[7] But the relevant question

[7] Again, this rationale is in tension with Intervenor Defendants' contention that Plaintiffs were mistaken in assuming administrative burden as the justification for SB 202.

for this Court is not whether any plausible legitimate justification for the law existed; rather, "courts must scrutinize the legislature's *actual* nonracial motivations to determine whether they *alone* can justify the legislature's choices." *McCrory*, 831 F.3d at 221 (emphasis added). As set forth in Section 2Ad, *supra*, the Defendants' alleged justifications are *post hoc*, tenuous, and pretextual.

C. **Plaintiffs have suffered and will continue to suffer irreparable harm.**

Remarkably, after repeatedly moving to extend discovery, Defendants now contend that Plaintiffs unreasonably delayed in filing this motion. Interv. Br. at 14-17; State's Br. at 23-24. These arguments are baseless.

Defendants' arguments on delay are essentially identical to the ones this Court rejected in a recent decision in this case. *See* ECF 613 at 32-34 ("Had Plaintiffs filed their motions earlier, their prospective harms would not have been imminent, but had they filed any later, their relief may have been barred by *Purcell*."). There is no reason for the Court to depart from that analysis, which applies with equal force here.

The facts demonstrate that Plaintiffs timely filed this Motion shortly after the end of discovery to preclude injuries in the 2024 election cycle, with the knowledge that a 2023 trial would be unlikely. *See* ECF 400 (Order Granting in Part Motion for Extension of Time to Complete Discovery and Motion for Status Conference).

Given the likelihood that trial will take place in 2024 or beyond, preliminary injunctive relief is the only way Plaintiffs could plausibly obtain relief before the 2024 general election and any resulting runoff elections. *Cf. Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). Notably, this Court has recently considered and granted other motions for preliminary injunctive relief in this litigation. *See, e.g.*, ECF 613, 614.

Plaintiffs filed following extensive discovery necessary to establish a full factual record on a key issue of legislative intent. Defendants repeatedly sought to prolong discovery, seeking extensions of the discovery schedule until spring 2023, *see, e.g.*, ECF 453 (Def's. Motion to Extend Discovery), and declining to make key witnesses available for deposition until spring of 2023. Plaintiffs could not have reasonably obtained the information and data necessary for this motion more quickly, particularly given Defendants' own dilatory tactics. *See Georgia Coalition for the People's Agenda v. Kemp*, 347 F. Supp. 3d 1251, 1268 (N.D. Ga. 2018); *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 560-61 (6th Cir. 2014).

Defendants' contention that Plaintiffs will not suffer irreparable harm if relief is denied is equally spurious. As elections occur at regular intervals, so too do injuries arising out of denial of equal access to the franchise; they are repeated and recurring injuries occurring with every election. *See League of Women Voters of*

Fla., Inc., v. Detzner, 314 F. Supp. 3d 1205, 1223 (N.D. Fla. 2018); *League of Woman Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). State Defendants and Intervenors' reliance on a trademark case, *Wreal, LLC v. Amazon.com*, 840 F.3d 1244, 1248 (11th Cir. 2016), is therefore inapposite—not only because the denial of the fundamental right to vote is not comparable to trademark infringement, but also because injuries from misuse or appropriation of intellectual property are generally not recurring but continuous. Plaintiffs' filing of this Motion within weeks of the close of discovery is consistent with precedent in similar voting rights cases. *See LWV of N.C.*, 769 F.3d at 230, 232 (PI filed after discovery was conducted). Similarly, Defendants' argument that the harm wrought by SB 202 cannot be "irreparable" because an election cycle and runoff have come and gone in 2022 is absurd. The harm Plaintiffs will suffer absent an injunction will be repeated every election cycle until relief is granted. *See* ECF 613, 614.

D. **The balance of equities weigh in Plaintiffs' favor.**

The balance of equities also weigh in favor of granting an injunction. The burden on Plaintiffs if an injunction is not granted would be an unconstitutional impingement on Black voters' access to the franchise, far outweighing any limited administrative burden the State may face in extending the runoff period or reverting to the nine-week period. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d

1349, 1355 (11th Cir. 2005); ECF 566-1 (Plaintiffs' Motion in Support of Preliminary Injunction at 61-62). There is more than a year until the 2024 general election and any subsequent runoffs, giving the State ample time to adhere seamlessly to an injunction from this Court. *See* PI Br. at 24-25. As the State's witnesses have testified, Georgia election officials have conducted recent elections effectively notwithstanding the impact of new laws such as HB 316 and SB 202, the impact of a global pandemic, and the promulgation of emergency rules in response. *See* ECF 566-1 at 7-9.[8] There is no reason that they could not do so now.

Finally, Intervenors assert that *Purcell* forecloses relief. This Court recently rejected the application of the *Purcell* principle here, with the earliest elections in Georgia more than six months away. *See* ECF 614 at 36-39. The same *Purcell* analysis applies with equal force here.

II. PLAINTIFFS HAVE STANDING

The State's claim that Plaintiffs "provide no evidence whatsoever of any organizational injury or associational activities related to the runoff provisions they challenge" is wrong and contradicted by record evidence. State's Br. at 14.

[8] Contrary to State Defendants' suggestion, the Local Rules for the Northern District of Georgia and this Court have no limitation on incorporation by reference. Plaintiffs cited to the (65-page) Joint Brief, ECF 566, to avoid unnecessary duplication of arguments, and to avoid a request for additional excess pages (to which all parties have repeatedly stipulated), not to "evade" page limits.

Organizational Standing: Plaintiffs have organizational standing because they have diverted resources to respond to the Runoff Restrictions. As set forth in the opening brief, enactment of the Runoff Restrictions erected barriers that have impaired Black voters' access to the ballot box. Plaintiffs have been forced to divert resources to counteract such barriers. *See* PI Br. at 14-18; *Florida State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (noting division of resources as grounds for organizational standing). It is false that Common Cause "says nothing about runoffs," State's Br. at 13; Common Cause testified about its voter participation efforts in both the "2020 Primary and *Runoff* election cycles." Doc. 574-9, (Dennis Decl. at ¶ 6) (emphasis added). It is likewise false that Delta Sigma Theta Sorority's testimony related to the runoff election had "no relationship" to organizational activity. State's Br. at 13-14. 30(b)(6) designee Ms. Briggins testified about how the Deltas have diverted resources to combat the fear that SB 202 engendered and to encourage voter engagement in time for the runoff election. ECF 574-14 (Briggins Dep. at 114:21-115:3) ("[T]here was a lot of fear invoked in the organization and outside the organization. So we really had to push … to increase the amount of engagement that we had. Eventually people came around, especially when we moved into the runoff …").

Similarly, the Georgia Muslim Voter Project ("GAMVP") 30(b)(6) designee testified that the Runoff Restrictions required the organization to divert resources to respond and, as a result, GAMVP fell behind on its planning and goals for the following year. Ex. 3 (Dep. of Shafina Khabani at 100:16-22) ("with…the runoff election and just all the work we had to put in towards GOTV with the limited early voting and limited time for the runoffs and really having to rally and put together events and things for our community to get them prepared for the elections and runoffs, we got behind on our planning in 2023."); *see Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) ("organizations 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").

Moreover, SB 202's shortened early voting period for runoffs has severely reduced the number of senior voters Metropolitan Atlanta Baptist Ministers Union (MABMU)—one of the plaintiffs in the Concerned Black Clergy case—can transport to the polls. Ex. 4 (Decl. of Rev. Stanley Smith at ¶¶ 3-4, 9).[9] The Runoff Restrictions therefore injure MABMU—which has long provided transportation to seniors so they can vote early in-person, including during runoff elections—because

[9] Note that the substance of Rev. Smith's declaration is derived entirely from his February 27, 2023, deposition taken by State Defendants.

it undermines MABMU's mission of empowering members of the Black community through voter engagement. *Id.* ¶ 9. MABMU also has had to divert resources to help educate its membership and their constituent congregations on the numerous obstacles to voting imposed by SB 202. *Id.* ¶ 6. Because of this diversion, MABMU has had less time to dedicate to some of its core activities, including Christian education and Bible study. *Id*. Plaintiffs' past diversion of resources show a substantial likelihood of future harm absent injunctive relief, particularly given the frequency of runoff elections in Georgia. Likewise, the Georgia Coalition for the People's Agenda (GCPA) 30(b)(6) designee testified that the compression of time for the runoff creates burdens for voters and GCPA has had to dedicate time and resources to educate its members and the public about this and the other new restrictions of SB 202. Ex. 5 (Dep. of Helen Butler at 122:5-125:6). And, the Georgia NAACP has presented evidence, which this Court has accepted, that it has had to divert attention and resources away from other programming toward educating members and the public about the changes to the voting laws ushered in by SB 202. *See* ECF 548-12 (Griggs Decl. at ¶¶ 7-11); ECF 613 at 8-10.

Associational standing: Plaintiffs also have associational standing because the Runoff Restrictions harm their members. Indeed, the State's own evidence supports Plaintiffs' associational standing. The State's expert and fact witnesses

confirm that the Runoff Restrictions disproportionately burden Black voters and worsen the long voting lines members of Plaintiffs' organizations already face. *See, e.g.*, ECF 574-36 at 117:2-14; ECF 574-31 at ¶¶ 58-60; PI Br. at 23-24 (discussing likelihood of irreparable harm to Plaintiffs absent relief from Runoff Restrictions). As GAMVP's Rule 30(b)(6) designee, Shafina Khabani, testified:

> I know [a GAMVP member] personally…with having only one week of early voting for the runoffs as a result of SB 202, tried to vote during her lunch break because that's the only time she could go vote. She has kids and had to go take care of them after. She had to go three times. She almost didn't go the third time to go vote because… she had an hour for lunch. The lines were really long. And it was really discouraging to her to have to go through that.

Ex. 3 at 132:20-133:12. Ms. Khabani further testified that this member's injury is representative of that of many other members who faced barriers in exercising their right to vote during the 2022 runoff. *See id.* at 179:20-180:2 (in response to question regarding harm to GAMVP members specifically, stating "…we heard from many community members who said they had struggled during the runoffs to vote early, that the lines were long and some people…walked away or didn't want to stay in those long lines"); *see also* Ex. 5 at 124:10-18) (GCPA designee testifying that "a lot of people [] were not able to vote early because of [the compressed time for runoffs]"). The Court previously found that Plaintiffs had established associational standing as to the Georgia NAACP because it has about 10,000 members in the state, making it extremely unlikely that a single member would not be impacted by SB

202's birthdate requirement. ECF 613 at 10-14. Plaintiffs have shown that the same is true as to the Runoff Restrictions.

The State flippantly dismisses the testimony of the Justice Initiative 30(b)(6) designee, Reverend Malone, as only concerning "how the 'Souls to the Polls' program worked." State Op. at 14. But Reverend Malone explained that before the Runoff Restrictions were enacted, members would vote on Saturdays and Sundays (days congregants had off from work) because this would "relieve[] them of the intimidation because [they were] doing it together as a congregation." *See* ECF 574-15 (Malone Sr. Dep. at 101:9-102:5). The Runoff Restrictions "reduced that drastically," injuring members by stripping them of the protection weekend voting had afforded them. *See id.* at 101:13-101:18; *see also* Ex. 3 at 132:20-133:12; 179:20-180:2 (describing difficulty voters faced in having only one week to vote early in the 2022 runoff, including attempting to vote multiple times due to long lines). As with organizational harm, future harm to Plaintiff members is likely to continue if the Runoff Restrictions remain in place.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

Date: August 24, 2023

Respectfully submitted,

/s/ Pichaya Poy Winichakul
Bradley E. Heard (Bar No. 342209)
bradley.heard@splcenter.org
Pichaya Poy Winichakul (Bar 246858)
poy.winichakul@splcenter.org
Matletha N. Bennette*
matletha.bennette@splcenter.org
SOUTHERN POVERTY
LAW CENTER
150 E. Ponce de Leon Ave., Suite 340
Decatur, Georgia 30031-1287
Telephone: (404) 521-6700
Facsimile: (404) 221-5857

Jess Unger*
jess.unger@splcenter.org
Sabrina S. Khan*
sabrina.khan@splcenter.org
SOUTHERN POVERTY
LAW CENTER
1101 17th Street NW, Suite 705
Washington, DC 20036
Telephone: (202) 728-9557

/s/ *Adam S. Sieff*
Adam S. Sieff*
adamsieff@dwt.com
Daniel Leigh**
danielleigh@dwt.com
Brittni A. Hamilton*
brittnihamilton@dwt.com
DAVIS WRIGHT TREMAINE LLP

/s/ Leah C. Aden
Leah C. Aden*
laden@naacpldf.org
Alaizah Koorji*
akoorji@naacpldf.org
John S. Cusick*
jcusick@naacpldf.org
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, New York 10006
Telephone: (212) 965-2200
Facsimile: (212) 226-7592

Anuja Thatte*
athatte@naacpldf.org
NAACP LEGAL DEFENSE AND
EDUCATION FUND, INC.
700 14th Street, NW
Washington, DC 20005
Telephone: (202) 682-1300

/s/ Tania C. Faransso
Tania C. Faransso*
tania.faransso@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, D.C. 20037
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

865 South Figueroa Street, 24th Floor
Los Angeles, California 90017-2566
Telephone: (213) 633-6800
Facsimile: (213) 633-6899

Matthew R. Jedreski*
mjedreski@dwt.com
Grace Thompson*
gracethompson@dwt.com
Danielle E. Kim*
daniellekim@dwt.com
Kate Kennedy*
katekennedy@dwt.com
Shontee Pant*
ShonteePant@dwt.com
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, Washington 98104-1610
Telephone: (206) 622-3150
Facsimile: (206) 757-7700

David M. Gossett*
davidgossett@dwt.com
Courtney DeThomas*
courtneydethomas@dwt.com
DAVIS WRIGHT TREMAINE LLP
1301 K Street NW, Suite 500
Washington, D.C. 20005-7048
Telephone: (202) 973-4288
Facsimile: (202) 973-4499

Attorneys for Plaintiffs Georgia Muslim Voter Project, Women Watch Afrika, Latino Community Fund Georgia, and The Arc of the United States

Debo P. Adegbile*
debo.adegbile@wilmerhale.com
Alexandra Hiatt*
alexandra.hiatt@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, New York 10007
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

George P. Varghese*
george.varghese@wilmerhale.com
Stephanie Lin*
stephanie.lin@wilmerhale.com
Arjun K. Jaikumar*
arjun.jaikumar@wilmerhale.com
Mikayla C. Foster*
mikayla.foster@wilmerhale.com
Sofia C. Brooks*
sofie.brooks@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
Telephone: (617) 526-6000
Facsimile: (617) 526-5000

Nana Wilberforce*
nana.wilberforce@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue, Suite 2400
Los Angeles, California 90071
Telephone: (213) 443-5300
Facsimile: (213) 443-5400

**Admitted pro hac vice*

***Application to be admitted pro hac vice forthcoming*

/s/ *Sophia Lin Lakin*
Sophia Lin Lakin*
slakin@aclu.org
Davin M. Rosborough*
drosborough@aclu.org
Jonathan Topaz*
jtopaz@aclu.org
Dayton Campbell-Harris*
dcampbell-harris@aclu.org
ACLU FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 519-7836
Facsimile: (212) 549-2539

Susan P. Mizner*
smizner@aclu.org
ACLU FOUNDATION, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0781

Brian Dimmick*
bdimmick@aclu.org
ACLU FOUNDATION, INC.
915 15th Street NW
Washington, D.C. 20005
Telephone: (202) 731-2395

/s/ *Rahul Garabadu*
Rahul Garabadu (Bar 553777)
rgarabadu@acluga.org
Caitlin May (Bar 602081)
cmay@acluga.org

Cory Isaacson (Bar 983797)
cisaacson@acluga.org
ACLU FOUNDATION OF
GEORGIA, INC.
P.O. Box 570738
Atlanta, Georgia 30357
Telephone: (678) 981-5295
Facsimile: (770) 303-0060

Attorneys for Plaintiffs
Sixth District of the African Methodist Episcopal Church, Delta Sigma Theta Sorority, Georgia ADAPT, Georgia Advocacy Office, and Southern Christian Leadership Conference

/s/ *Bryan L. Sells*
Bryan L. Sells
Georgia Bar No. 635562
The Law Office of Bryan Sells, LLC
PO Box 5493
Atlanta, Georgia 31107
Tel: (404) 480-4212
Email: bryan@bryansellslaw.com

Jon Greenbaum (pro hac vice)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (pro hac vice)
erosenberg@lawyerscommittee.org
Julie M. Houk (pro hac vice)
jhouk@lawyerscommittee.org
Jennifer Nwachukwu (pro hac vice)
jnwachukwu@lawyerscommittee.org
Heather Szilagyi (pro hac vice)
hszilagyi@lawyerscommittee.org
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900

Washington, D.C. 20005
Telephone: (202) 662-8600
Facsimile: (202) 783-0857

Vilia Hayes (pro hac vice)
Neil Oxford (pro hac vice)
Gregory Farrell (pro hac vice)
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, New York 10004-1482
Telephone: (212) 837-6000
Facsimile: (212) 422-4726

Laurence F. Pulgram (pro hac vice)
lpulgram@fenwick.com
Molly Melcher (pro hac vice)
mmelcher@fenwick.com
Armen Nercessian (pro hac vice)
Anercessian@fenwick.com
Ethan Thomas (pro hac vice)
EThomas@fenwick.com
FENWICK & WEST LLP
555 California Street
San Francisco, CA 94104
Telephone: 415.875.2300

Joseph S. Belichick (pro hac vice)
jbelichick@fenwick.com
FENWICK & WEST LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041-2008
Telephone: 650-988-8500

Catherine McCord (pro hac vice)
cmccord@fenwick.com
FENWICK & WEST LLP
902 Broadway, Suite 14

New York, NY 10010
Telephone: (212) 430-2690

Attorneys for Plaintiffs Georgia State Conference of the NAACP, Georgia Coalition for the People's Agenda, Inc., League of Women Voters of Georgia, Inc., GALEO Latino Community Development Fund, Inc., Common Cause, and Lower Muskogee Creek Tribe

/s/ *Kurt Kastorf*
Kurt Kastorf (GA Bar No. 315315)
KASTORF LAW, LLC
1387 Iverson Street, N.E., Suite 100
Atlanta, GA 30307
Telephone: 404-900-0330
kurt@kastorflaw.com

Judith Browne Dianis*
Matthew A. Fogelson*
Angela Groves*
ADVANCEMENT PROJECT
1220 L Street, N.W., Suite 850
Washington, DC 20005
Telephone: (202) 728-9557
JBrowne@advancementproject.org
MFogelson@advancementproject.org
AGroves@advancementproject.org

Clifford J. Zatz*
Justin D. Kingsolver*
William Tucker*
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Telephone: (202) 624-2500
CZatz@crowell.com
JKingsolver@crowell.com
WTucker@crowell.com

Jordan Ludwig*
CROWELL & MORING LLP
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
Telephone: (213) 443-5524
JLudwig@crowell.com

*Admitted *pro hac vice*

Attorneys for Plaintiffs The Concerned Black Clergy of Metropolitan Atlanta, Inc., The Justice Initiative, Inc., Metropolitan Atlanta Baptist Ministers Union, Inc., First Congregational Church, United Church of Christ Incorporated, Georgia Latino Alliance for Human Rights, Inc.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(D)

Pursuant to Local Rule 7.1(D), I certify that the foregoing document was prepared in Times New Roman 14-point font in compliance with Local Rule 5.1(C).

/s/ Tania Faransso

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2023, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

/s/ Tania Faransso