UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE GEORGIA SENATE BILL 202	Master Case No.: 1:21-mi-55555-JPB

INTERVENORS' RESPONSE TO PLAINTIFFS' PRELIMINARY INJUNCTION MOTION AGAINST BALLOT ASSISTANCE AND DROP BOX PROVISIONS

Unlike some States, Georgia permits no-excuse absentee voting. Although Georgia makes it easy for all citizens to vote by absentee ballot, "voting necessarily requires some effort and compliance with some rules." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021). Those rules serve a variety of "strong and entirely legitimate state interest[s]," such as "the prevention of fraud" and the preservation of "confidence in the fairness" of elections. *Id.* at 2338, 2340.

Absentee voting poses its own set of problems. *See Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). To address those problems, Georgia continues to refine its absentee voting process. For example, Georgia generally prohibits third parties from handling voters' absentee ballots. *See* Ga. Code §§21-2-568(a)(5), 21-2-385(a). Recognizing the burden that rule could impose on disabled voters, S.B. 202 provided an exception permitting "[t]he absentee ballot of a disabled elector [to] be mailed or delivered by the caregiver of such

disabled elector, regardless of whether such caregiver resides in such disabled elector's household." *Id.* §21-2-385(a).

Georgia also provides many ways to return an absentee ballot. Over the course of several weeks, Georgians can deliver their absentee ballots in person to the county registrar or absentee ballot clerk, send their ballots in the mail, or deposit their ballots in one of the designated drop boxes. *Id.* §§21-2-380, 21-2-385. Because those drop boxes contain official absentee ballots, Georgia took steps to preserve their contents. For example, "[t]he opening slot of a drop box shall not allow ballots to be tampered with or removed and shall be designed to minimize the ability for liquid or other substances that may damage ballots to be poured into the drop box." *Id.* §21-2-382(c)(2). Each county must have at least one drop box. *Id.* Drop boxes must be located at an election office or polling place, and available only during the location's business hours. *Id.* "The drop box location shall have adequate lighting and be under constant surveillance by an election official or his or her designee, law enforcement official, or licensed security guard." *Id.*

Plaintiffs argue that these rules make it too difficult for disabled citizens to vote. Specifically, they claim that voting is not "readily accessible" to disabled voters because (1) only a disabled voter's "caregiver" can deliver the voter's absentee ballot, and (2) Georgia limits drop boxes to indoor locations during business hours. Of course, "every voting rule imposes a burden of some

sort. Voting takes time and, for almost everyone, some travel, even if only to a nearby mailbox." *Brnovich*, 141 S. Ct. at 2338. But the provisions Plaintiffs challenge make it *easier* to vote, not harder. And they certainly don't deprive anyone of access to the polls. Intervenors join the State's opposition to Plaintiffs' motion. They write separately to address why Plaintiffs' claim likely fails on the merits, why Plaintiffs' undue delay defeats their request, and why this Court should deny relief under *Purcell*.

First, Plaintiffs are not likely to succeed on the merits of their disability claims. Plaintiffs have not shown that their members were excluded from the program of voting. Even had they shown that, they provide no evidence that any exclusion was caused by their members' disabilities, since the State provides numerous accommodations for disabled voters. As Intervenors pointed out at the motion to dismiss stage, Plaintiffs' claims are really arguments that federal law preempts the challenged provisions, but Plaintiffs don't meet the proper elements for preemption. *See* Docs. 100, 103, No. 1:21-cv-1284. Finally, even if Plaintiffs met all the elements of their claim, their proposed modification of Georgia's election laws would fundamentally alter Georgia's voting process. That alone is reason to deny their motion.

Even if their claim had merit, Plaintiffs' undue delay bars preliminary relief. Plaintiffs must "show reasonable diligence" to obtain a preliminary injunction. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam). This

Court denied Plaintiffs' request for a preliminary injunction for the 2022 election cycle over eight months ago. They did not seek relief from the ballot assistance provision or the drop box regulations at that time. Instead, Plaintiffs waited until now—several months after this Court's previous preliminary injunction decision—to claim irreparable harm from those provisions. That unjustified delay forecloses relief.

Plaintiffs' request also fails under *Purcell*, which instructs "that a court should ordinarily decline to issue an injunction—especially one that changes existing election rules—when an election is imminent." *Coal. for Good Governance v. Kemp*, 2021 WL 2826094, at 3 (N.D. Ga. July 7). This Court previously looked to the four conditions that a plaintiff must "at least" satisfy under Justice Kavanaugh's opinion in *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring). It denied relief to Plaintiffs because they could not satisfy two of these requirements: the merits were not clearcut in their favor, and the changes they requested would have significant cost and confusion. The same is true here, but Plaintiffs also fail a third factor—undue delay. So *Purcell* bars relief.

The easiest path to dispose of Plaintiffs' motion is to adopt the same reasoning the Northern District of Florida employed in *League of Women Voters of Florida, Inc. v. Lee*, 595 F. Supp. 3d 1042 (N.D. Fla. 2022), *aff'd in part, vacated in part, rev'd in part sub nom. League of Women Voters of Fla.*

Inc. v. Fla. Sec'y of State, 66 F.4th 905 (11th Cir. 2023). In that case, Florida required voters to provide some form of identification to register to vote by mail. *Id.* at 1158. After a bench trial, the court assumed for the sake of argument that Plaintiffs had established a prima facie case under the Americans with Disabilities Act. *Id.* at 1157-58. But the court denied relief because the plaintiffs had asked the court to "enjoin the entire … provision for all voters in the whole state," which would not be a "reasonable modification" under the ADA because it would "fundamentally alter[] the law." *Id.* at 1158. The Eleventh Circuit did not disturb that ruling, though it reversed much else in the district court's order. Plaintiffs here request even more expansive relief—a preliminary injunction of *two* provisions for all voters in the State. It should be rejected for the same reason. "Plaintiffs are entitled to no relief." *Id.* at 1159.

ARGUMENT

A preliminary injunction is an "extraordinary and drastic remedy that should not be granted unless the movant clearly carries its burden." *Georgiacarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015). That burden requires Plaintiffs to show a "substantial likelihood" of success on the merits, irreparable injury absent an injunction, that the balance of the equities favors them, and that an injunction favors the public interest. *Id.* But that alone is not enough in cases like this one. Courts must

also look to "considerations specific to election cases." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022). Those considerations instruct courts not to issue injunctions that could cause disruption and voter confusion close to an election. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Plaintiffs cannot meet their burden on the merits or on the equities.

Plaintiffs cannot succeed on the merits for three reasons. First, the ballot-assistance and drop-box regulations do not exclude disabled voters from voting. Second, Plaintiffs' poorly disguised preemption argument fails, because neither the ADA nor the Rehabilitation Act preempt Georgia's absentee voting procedures. Third, Plaintiffs' requested relief would result in an untimely and unreasonable change to Georgia's already-established election protocols.

I. Plaintiffs are not likely to succeed on their claims that Georgia's election regulations violate federal law.

A. S.B. 202 does not disenfranchise disabled voters.

S.B. 202's third-party assistance provision and drop box regulations do not "exclude[]" disabled persons from the "activity[]" of voting "by reason of [their] disability." 42 U.S.C. §12132. A plaintiff alleging an ADA or Rehabilitation Act violation must show "(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, activities, or otherwise

discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability." *Karantsalis v. City of Miami Springs*, 17 F.4th 1316, 1322 (11th Cir. 2021) (citation omitted). Plaintiffs have not shown (1) that they were excluded from voting, or (2) that any exclusion was caused by their disability.

1. The challenged provisions do not exclude anyone from the activity of voting.

Absentee voting is an accommodation that "make[s] voting more available to some groups who cannot easily get to the polls." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969). The ADA does not mandate the use of any particular technology or any specific accommodation, so long as every individual has "an opportunity to participate in or benefit from the aid, benefit, or service … equal to that afforded others." 28 C.F.R. §35.130(b)(1)(ii)-(iii); *see also* 45 C.F.R. §84.4(b)(1)(ii)-(iii). Courts thus evaluate a jurisdiction's "entire program of voting," which includes "all of its polling locations … as well as its alternative and absentee ballot programs." *Kerrigan v. Phil. Bd. of Election*, No. 2:7-cv-687, 2008 WL 3562521, at *11-13 (E.D. Pa. Aug. 14) (citing 28 C.F.R. §35.150 and cases); *accord Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107 (11th Cir. 2011) (voting machines and polling facilities are part of a county's "voting program").

Georgia provides ample opportunity for its citizens (disabled or not) to vote. Georgians can vote in person on election day from at least 7:00 AM to 7:00 PM, and later if the poll hours are extended. Ga. Code §21-2-403. They can vote early in person for at least a month before election day. *See id.* §21-2-385(d)(1). All Georgians can vote early by absentee ballot with no excuse, and they can submit that ballot by mailing it, delivering it to the county registrar or absentee ballot clerk, or dropping it in one of the designated drop boxes. *Id.* §§21-2-380, 21-2-385. S.B. 202 now *requires* counties to have those drop boxes. *Id.* §21-2-382(c)(1). "[W]hen viewed in [their] entirety," these options make voting "readily accessible" to disabled voters, who can vote at a time and in a manner that is most convenient to them. *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001).

Plaintiffs' evidence does not show otherwise. For example, voters who have trouble getting to the polls can vote absentee by mail. Plaintiffs complain that "10.5% of voters with disabilities required assistance" in voting by mail. Doc. 546-1 at 4. Even if that were a statistically significant number, Georgia permits "[a] physically disabled or illiterate elector [to] receive assistance in preparing his or her ballot from any person of the elector's choice," other than the elector's employer, union, or agents of either. Ga. Code §21-2-385(b). Plaintiffs' only response is that some voters prefer not to vote by mail. Doc.

546-1 at 4-5. But that preference does not mean voting is not "readily accessible" to those voters. *See Shotz*, 256 F.3d at 1080.

Given the many voting options Georgia provides, Plaintiffs try to reframe the question in their favor by arguing that *absentee* voting is the relevant "service, program, or activity" that the Court must analyze for accessibility. Doc. 546-1, at 13. Even if that were true, Plaintiffs fail to show that S.B. 202 "excludes" disabled voters from voting absentee. 42 U.S.C. §12132. Georgia allows disabled voters to use others to help them register, apply for a mail ballot, assemble the necessary documents, prepare their ballot, and mail or drop off their ballot. Ga. Code §§21-2-220(f), 21-2-381(a)(1), 21-2-385(a)-(b). Plaintiffs' members are not prohibited from voting absentee. They are not even prohibited from asking for or receiving help from others to vote absentee. One of Plaintiffs' members says he is "unsure whether facility staff will be willing to assist him in mailing his ballot." Doc. 546-1 at 6. But each voter can receive "assistance in preparing his or her ballot from any person of the elector's choice." *Id.* §21-2-385(b). And the "absentee ballot of a disabled elector may be mailed or delivered by the caregiver of such disabled elector, regardless of whether such caregiver resides in such disabled elector's household." *Id.* Plaintiffs point to no voter who was unable to take advantage of the many options Georgia offers to vote absentee.

The two district court cases Plaintiffs rely on do not support their claims. In *Democracy North Carolina v. North Carolina State Board of Elections*, the court enjoined a state law that prohibited disabled voters from seeking assistance from any employees of their nursing home, forcing them to rely on their fellow residents for help. 476 F. Supp. 3d 158, 232 (M.D.N.C. 2020). And because of the specific COVID-era social distancing restrictions in place at nursing homes, the court found that one blind resident whose wife was *prevented* from visiting him was deprived "of 'meaningful access' to voting because of his disability." *Id.* at 233. Plaintiffs' evidence that some of their members are "unsure" whether they will receive help falls far short of the deprivation in *Democracy North Carolina*. Likewise, the law at issue in *American Council of Blind of Indiana v. Indiana Election Commission* imposed significant burdens on *only* disabled voters by "subject[ing disabled voters] to a shorter window for absentee voting (19 days versus 45 days)," and requiring them to "vote at a time that is based on the schedule of the Traveling Board," and "submit to the intrusion of two strangers into their home and into the voting process." No. 1:20-cv-3118, 2022 WL 702257, at *8 (S.D. Ind. Mar. 9, 2022). Unlike Indiana's law in that case, S.B. 202 does not subject disabled voters "to additional restrictions on absentee voting by mail that do not apply to others." *Id.* Plaintiffs don't even argue that it does.

Because S.B. 202 does not exclude or deny the opportunity for voters with disabilities to participate equally in voting, deny voters the benefits of public voting services, or discriminate against voters because of their disability, Plaintiffs cannot prevail on their disability claims.

2. Plaintiffs have not shown that any exclusion was caused by their members' disability.

Even if this Court rules that Plaintiffs' members have been excluded from the process of voting, Plaintiffs have not shown that they were denied the access "by reason of [their] disability." 42 U.S.C. §12132. A State does not exclude someone "by reason of" their disability if the State supplies reasonable accommodations. *See League of Women Voters of Fla.*, 595 F. Supp. 3d at 1157. Although "[c]laims for discrimination under the Rehabilitation Act 'are governed by the same standards' as the ADA," the burden of proof to establish causation differs between the acts. *Karantsalis*, 17 F.4th at 1321. The Rehabilitation Act requires proof that the individual was discriminated against "*solely* by reason of [their] disability," 29 U.S.C. §794(a) (emphasis added), while the ADA requires only the lesser "but for" standard of causation, *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008). Plaintiffs satisfy neither standard.

Georgia already provides a variety of accommodations to *include* disabled voters in the activity of voting. *See* Ga. Code §21-2-409.1 (allowing

disabled voter to skip the line); §21-2-385.1 (same); §21-2-409 (allowing disabled voters to receive assistance in the voting booth); §21-2-379.21 (requiring electronic ballot markers be accessible to disabled voters); §21-2-452 (requiring paper ballots and privacy accommodations for disabled voters who cannot vote electronically); §21-2-451(b) (requiring accommodations for disabled voters who cannot sign their name); §21-2-431(b) (same).

Given these numerous accommodations, it is unsurprising that Plaintiffs have not found even a single person who was unable to vote because of the provisions they seek to enjoin. Instead, Plaintiffs point to several disabled voters who faced some difficulty while voting. But "mere difficulty in accessing a benefit is not, by itself, a violation of the ADA." *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1155 (N.D. Ala. 2020) (citing *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1088 (11th Cir. 2007)). For example, one voter who voted via drop box "was exhaust[ed]" from voting and "had to stop to take multiple breaks to rest." Doc. 546-1 at 8. Another voter became "frustrated" when voting because "he could not see where the drop box was located, and believed that the distance to enter the building and locate the drop box would be too great." Doc. 546-7 at 7. A final voter "endur[ed] the difficulty of standing in line for approximately 20 minutes because poll workers did not offer that she skip the line." Doc. 546-1 at 8. But Georgia allows disabled voters to skip the line "upon request to a poll officer." Ga. Code §21-2-409.1; §21-2-385.1. The voter made no

such request. *See* Doc. 546-5 at 4-5. At most, Plaintiffs' evidence points to nothing more than the "usual burdens of voting," *Brnovich*, 141 S. Ct. at 2338, which do not establish an ADA violation, *see Bircoll*, 480 F.3d at 1088.

In an attempt to waive off these accommodations, Plaintiffs argue that some voters want to avoid "the uncertainties and expense of U.S. mail" and "the burden and risk of in-person voting." Doc. 546-1 at 5. But the ADA does not demand compliance with any "preferred mode" of accommodation. *D'Onofrio v. Costco Wholesale Corp.*, 964 F.3d 1014, 1026 (11th Cir. 2020). The statute requires only a "reasonable accommodation," not "the maximum accommodation or every conceivable accommodation possible." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997). Plaintiffs have not carried their burden to show that Georgia's many accommodations for disabled voters are unreasonable.

B. Federal law does not preempt the challenged provisions.

Plaintiffs argue that Section 208 of the Voting Rights Act "supersedes" S.B. 202's ballot assistance provision. Plaintiffs disguise this preemption claim as an "equal access" argument because they failed to raise it in their complaint. *See* Doc. 83 at 119-31, No. 1:21-cv-1284. But courts "cannot grant preliminary relief on claims not pleaded in the complaint." *Steele v. United States*, No. 1:14-

cv-1523, 2020 WL 7123100, at *7 (D.D.C. Dec. 4, 2020) (collecting cases). The Court should dismiss Plaintiffs' Section 208 claim on that ground.

In any event, the laws do not conflict. Section 208 permits "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. §10508. Georgia permits the same thing: "A physically disabled or illiterate elector may receive assistance in preparing his or her ballot from any person of the elector's choice other than such elector's employer or the agent of such employer or an officer or agent of such elector's union…." Ga. Code §21-2-385(b). Plaintiffs don't even try to explain how these provisions conflict.

Presumably, Plaintiffs believe that preventing third parties from returning ballots conflicts with the VRA's permission to obtain "assistance by a person of the voter's choice." 52 U.S.C. §10508. But courts have rejected that argument. "Section 208 allows certain voters who need help voting to select '*a* person of the voter's choice'—not '*any* person,' not '*the* person.'" *Priorities USA v. Nessel*, 628 F. Supp. 3d 716 (E.D. Mich. 2022) (quoting 52 U.S.C. §10508). "Congress agreed to use an indefinite article, meaning that the persons identified in Section 208 do not constitute an exhaustive or exclusionary list." *Id.* Section 208 thus "allow[s] the voter to choose *a* person whom the voter

trusts to provide assistance. It does not preclude all efforts by the State to regulate elections by limiting the available choices to certain individuals." *Ray v. Texas*, No. 2:6-cv-385, 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008). "[A] State law that limits a voter's choice does not automatically flout Section 208." *Priorities USA*, 628 F. Supp. 3d at 716. And Plaintiffs agree that "caregivers" can return disabled voters' ballots for them under Georgia law. Doc. 546-1 at 16. "Thus, the two laws are harmonious and the VRA does not preempt the absentee-ballot law." *Priorities USA*, 628 F. Supp. 3d at 716.

Likewise, neither the ADA nor the Rehabilitation Act preempt Georgia laws governing the conduct of elections. Even if Plaintiffs were correct that the "provisions at issue threaten Plaintiffs' members' and constituents' rights," Doc. 546-1 at 21, Plaintiffs' arguments justify relief only for their members who have provided evidence that the provisions, as applied, will threaten their rights. But in requesting an injunction against *all applications* of the challenged provisions, Plaintiffs must show that there is "no set of circumstances" under which the provisions would be valid. *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 951 (E.D. Wis. 1998). They have not even tried to make that showing.

In reality, Plaintiffs' claims under the ADA and Rehabilitation Act are preemption claims. Plaintiffs seek to enjoin S.B. 202's ballot assistance measures and drop box regulations as being inconsistent with federal

discrimination law. Their proposed order would mean that the ADA and the Rehabilitation Act *require* States to provide outdoor drop boxes with no security protections accessible at all hours. Federal law requires no such thing.

To prevail on that claim, Plaintiffs would have to overcome the presumption against preemption, which counsels courts to presume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13 (2013) (citation omitted). Although the presumption does not apply to Elections Clause legislation, *id.* at 13-14, neither the ADA nor the Rehabilitation Act were enacted under Congress's power to regulate elections, *see* 42 U.S.C. §12101(b)(4) (the ADA invokes the Commerce Clause); *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1568-70 (2022) (the Rehabilitation Act invokes the Spending Clause). Plaintiffs neither explain nor overcome the presumption that the ADA and Rehabilitation Act do not preempt Georgia's regulation of elections.

C. Plaintiffs' proposed changes are unreasonable.

Plaintiffs accept their burden to propose "reasonable modifications" that address their claims. Doc. 546-1 at 18. A modification is unreasonable if it would "cause an undue burden or a fundamental alteration of its policy or program." *Schaw v. Habitat for Human. of Citrus Cnty., Inc.*, 938 F.3d 1259, 1267 (11th Cir. 2019). Plaintiffs request "that the Court return Georgia's

absentee voting program to the pre-S.B. 202 status quo for these two challenged provisions." Doc. 546-1 at 2. Plaintiffs argue at length that their proposal is logistically feasible, but they ignore that their proposal would be a "fundamental alteration of [Georgia's] policy or program." *Schaw*, 938 F.3d at 1267.

The Northern District of Florida declined a far more modest request to enjoin a single vote-by-mail provision because doing so would have fundamentally altered the State's policy. *See League of Women Voters of Fla.*, 595 F. Supp. 3d at 1158. The court observed that "[p]laintiffs are not seeking a limited injunction for a subset of disabled voters. Rather, Plaintiffs' counsel goes for broke and seeks to enjoin enforcement of the law as to all voters." *Id.* But enjoining an entire provision for the whole State "would eliminate an 'essential aspect' of the defendant's policy or program." *Schaw*, 938 F.3d at 1267. Courts have entertained modifications that expand exceptions to cover disabled voters. *See People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1213 (N.D. Ala. 2020). "But a proposed modification which seeks to enjoin an entire provision necessarily eliminates an 'essential aspect' of it." *League of Women Voters of Fla.*, 595 F. Supp. 3d at 1158. That is doubly true of Plaintiffs' request, which seeks to enjoin *two* entire provisions in a preliminary posture, rolling back Georgia's absentee voting process to an old system. Whether that would

be "easy" to implement is irrelevant, as Plaintiffs' proposed modification by definition "undermines the basic purpose of the law." *Id.*

II. Plaintiffs' undue delay defeats their request for a preliminary injunction.

"[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam). The "balance of the equities … tilt[s] against" a party who cannot show reasonable diligence. *Id*; *see also Adventist Health Sys./Sunbelt, Inc. v. HHS*, 17 F.4th 793, 806 (8th Cir. 2021) (Delay "means that the balance of the equities favors the denial of a preliminary injunction."). This principle "is as true in election law cases as elsewhere." *Benisek*, 138 S. Ct. at 1944. Delay also "militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2021); *see also Adventist Health Sys.*, 17 F.4th at 806 (Delay "refuted … allegations of irreparable harm.").

Plaintiffs failed to act with reasonable diligence in moving for a preliminary injunction. Plaintiffs moved to preliminarily enjoin the line-warming provisions for the 2022 election, claiming those provisions would cause irreparable harm. *See* AME and Georgia NAACP PI Motion (Doc. 171) (May 25, 2022). But they did not ask the Court to enjoin the ballot assistance provisions or the drop box regulations for the November 2022 election. Plaintiffs' failure to request for the *last* election the relief they want for *this*

election shows "that the harm would not be serious enough to justify a preliminary injunction." *Adventist Health Sys.*, 17 F.4th at 805 (quoting Wright & Miller, 11A Fed. Prac. & Proc., §2948.1 & n.13 (3d ed. 2013)). Plaintiffs have been free to move for a preliminary injunction for the 2024 election cycle since filing their lawsuit. At the very least, they should have sought relief after the November 2022 elections. Instead, they waited six months to file their motion as discovery closes and the parties prepare for summary judgment briefing.

Far more modest delays have defeated requests for a preliminary injunction. *Wreal* found that a "five-month delay" supported denial of a preliminary injunction. *Wreal, LLC*, 840 F.3d at 1248. A delay "even of only a few months," the Eleventh Circuit explained, "militates against" a preliminary injunction. *Id.* This Court should reach the same conclusion based on Plaintiffs' unexplained six-month delay.

Ongoing discovery does not excuse a party for delay in seeking for a preliminary injunction. *Benisek* confirmed that privilege disputes that "delayed the completion or discovery … d[id] not change the fact that plaintiffs could have sought a preliminary injunction much earlier." 138 S. Ct. at 1944. And delay is especially unjustified when "the preliminary-injunction motion relied exclusively on evidence that was available" earlier. *Wreal*, 840 F.3d at 1248-49 (rejecting preliminary-injunction motion based on evidence "available" to the moving party "at the time it filed its complaint").

Plaintiffs' delay cannot be excused because the 2024 election was not impending six months ago. At most, the time until the 2024 election might support an argument that Plaintiffs are only now facing irreparable injury. But courts have "reject[ed] [the] implausible assertion of law" that "delay bears on irreparable harm only where the plaintiff delays despite suffering the harm." *Adventist Health Sys.*, 17 F.4th at 806 (cleaned up). More importantly, "the balance of the equities" would still "tilt[]" against Plaintiffs because of their delay. *Benisek*, 138 S. Ct. at 1944. In fact, the Supreme Court rejected a delayed request for preliminary relief looking on to the balance of the equities and public interest, not irreparable harm, in *Benisek*. *See id*. The same is true here; Plaintiffs' "unreasonable delay … means that the balance of the equities favors the denial of a preliminary injunction." *Adventist Health Sys.*, 17 F.4th at 806.

III. *Purcell* forecloses relief.

The *Purcell* principle is a "bedrock tenet of election law." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of stay applications). This principle instructs that the "traditional test" for injunctive relief "does not apply" when a plaintiff asks for "an injunction of a state's election in the period close to an election." *Id*. Instead, "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Id*. at 880-81.

Purcell is an equitable principle that protects against disruption of elections. Preliminary injunctions barring the enforcement of election laws cause "voter confusion" that encourages voters to stay "away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). They also cause confusion for election administrators who may have to "grapple with a different set of rules." *Coal. for Good Governance v. Kemp*, 2020 WL 2829064, at *3 (N.D. Ga. July 7).

Plaintiffs make no effort to justify a preliminary injunction under *Purcell*. *See* Doc. 535-1 at 12-14. Nor could they. To "overcome" *Purcell*, they must show "at least … (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Milligan*, 142 S. Ct. 881 (Kavanaugh, J., concurring). This Court found that Plaintiffs "failed to show at least two" of these factors on their line-warming motion: the merits are not clearcut in their favor, and a change would not be feasible without significant cost, confusion, or hardship. Doc. 241 at 741-42. The same analysis applies to Plaintiffs' motion this time. And now, Plaintiffs cannot satisfy the third factor either. By waiting over six months to move for a preliminary injunction, Plaintiffs unduly delayed. Thus, *Purcell* provides sufficient basis to deny Plaintiffs renewed motion. *League of Women Voters*, 32 F.4th at 1371.

Since they cannot justify an injunction under *Purcell*, Plaintiffs ignore it. But *Purcell* applies to Plaintiffs' request. Even an election several months away is close enough for *Purcell*. The Supreme Court applied *Purcell* to an election that was "about four months" away in *Milligan*. 142 S. Ct. at 88 (Kagan, J., dissenting). And the Eleventh Circuit found that four months "easily falls within" *Purcell*'s reach. *League of Women Voters of Fla. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022). Other courts have applied *Purcell* six months before an election. *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020). In each of these cases, the Courts measured from the time when the State would have to implement a disruptive change. *See Milligan*, 142 S. Ct. at 88 (Kagan, J., dissenting) (Election is "four months from now."); *League of Women Voters*, 32 F.4th at 1371 ("[D]istrict court … issued its injunction" when the next election was "set to begin in *less* than four months); *Thompson*, 959 F.3d at 813 ("[M]oving or changing a deadline or procedure now will have inevitable, further consequences."). While Georgia's presidential primary—planned for March 2024—may be further, these decisions confirm that *Purcell* is not categorically inapplicable because a plaintiff sought relief several months before an election.

The costs of an injunction reinforce *Purcell's* applicability. In *Milligan*, Justice Kavanaugh noted that "'[h]ow close to an election is too close may depending in part on … how easily the State could make the change without

undue collateral effects." The collateral effects of a change here would be great. This Court has a noted that "S.B. 202 is already the law, and an injunction … would not merely preserve the status quo." Doc. 241 at 69. Since voters have already voted with the birthdate requirement in place, a change would cause voter confusion. *See id.* at 69-70. It would also require retraining election officials who have been trained to follow the mandatory birthdate requirement. *See id*. These unavoidable costs confirm that *Purcell* applies to Plaintiff's request.

CONCLUSION

This Court should deny Plaintiffs' motion for preliminary injunction.

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Respectfully submitted,

/s/ William Bradley Carver

Cameron T. Norris*
Gilbert C. Dickey*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
(703) 243-9423

Tyler R. Green*
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423

*admitted pro hac vice

John E. Hall, Jr.
Georgia Bar No. 319090
William Bradley Carver, Sr.
Georgia Bar No. 115529
Baxter D. Drennon
Georgia Bar No. 241446
Jake Evans
Georgia Bar No. 797018
HALL BOOTH SMITH, P.C.
191 Peachtree Street NE, Suite 2900
Atlanta, Georgia 30303
(404) 954-5000
(404) 954-5020 (Fax)

Counsel for Intervenors

CERTIFICATE OF COMPLIANCE

This document complies with Local Rule 5.1(B) because it uses 13-point Century Schoolbook.

/s/ *Gilbert C. Dickey*

CERTIFICATE OF SERVICE

On June 29, 2023, I e-filed this document on ECF, which will email everyone requiring service.

/s/ *Gilbert C. Dickey*