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

STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON JURISDICTION

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INTRODUCTION

In their attempt to avoid summary judgment, Plaintiffs spend buckets of virtual "ink" searching for facts that they think create some triable issue on jurisdiction. Given the number of Plaintiffs and seeming complexity of the issues, it may be tempting to surrender to this onslaught by finding that disputes of fact prevent summary judgment on jurisdictional issues.

But most of what Plaintiffs have to say is completely irrelevant. To establish standing, the individual plaintiffs have to point to evidence of some impact on their ability to vote, not just policy disagreements—but they have not done that, with many of the individual plaintiffs only able to point to generalized concerns that they *might* have problems one day, despite having had no issues voting in Georgia up to this point.

The organizational plaintiffs do no better. Despite the clear direction in this Circuit that diversions of resources alone are not enough, Plaintiffs fall back to that less-exacting standard. But an organization inflicting harm on itself or claiming a speculative harm or a generalized grievance has not provided evidence sufficient to establish an injury—and that is all that the organizational plaintiffs have provided.

Plaintiffs also fail to adequately respond to what this Court has already found about the traceability to and redressability by State Defendants for several election practices. Even if they have an injury, their failure to provide

evidence establishing a triable issue of fact on these questions is sufficient reason to dismiss those claims.

Finally, Plaintiffs take a run at avoiding the impact of the lack of a private right of action in Section 2 and the political question doctrine but their efforts again fall short. This Court is one of limited jurisdiction and those boundaries must be protected by applying the law correctly.

This Court should dismiss Plaintiffs' claims on jurisdiction alone. But at the very least, this Court should significantly narrow both the parties and the claims at issue in recognition of its limited jurisdiction to hear what are, at root, broad-based policy attacks on the election law enacted by the Georgia General Assembly.

ARGUMENT

The parties agree that Plaintiffs must satisfy the familiar three-prong test of injury, traceability, and redressability to establish standing under Article III of the United States Constitution. *Cf.* [Doc. 764-1, p. 14]; [Doc. 826, pp. 11-12]. The Court, too, has already articulated that standing inquiry in prior orders in these consolidated actions. *See, e.g.*, [Doc. 613, pp. 7-10]. But the disagreement lies in more granular applications of that broad test.

A critical aspect of the "injury" prong in the standing test is "an invasion of a legally protected interest that is *both* concrete and particularized and actual or imminent, not conjectural or hypothetical." *Trichell v. Midland*

Credit Mgmt., Inc., 964 F. 3d 990, 996 (11th Cir. 2020) (internal quotation marks omitted) (emphasis added). And whether viewed through the lens of the organizational or individual plaintiffs in these consolidated actions, neither set is able establish *both* of these critical elements needed to show a cognizable injury that this Court may appropriately address. But even if they could, many of the challenged provisions simply cannot be linked to State Defendants and thus should be dismissed as to the State for the same reasons this Court declined to enforce a preliminary injunction against them last year. [Doc. 613, p. 17].

And the so-called One Good Plaintiff Rule does not save the claims. Because Article III standing is an "irreducible constitutional minimum," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992), this Court should grant State Defendants' Motion as to any Plaintiff that does not individually establish standing. "At least one plaintiff must have standing to seek *each* form of relief requested in the complaint." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). And while courts have taken to, *as a matter of expediency,* permitting parties that haven't established standing to ride along when at least one party in the action has, that should not operate as *de facto* override of the constitutional "case" or "controversy" contained in Article III. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to

actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 37 (1976).

As shown below, all of Plaintiffs' claims must be dismissed under these settled principles, and Plaintiffs have not established the existence of any triable issue of fact on the fundamental jurisdictional questions posed here.

I. None of the Plaintiffs' purported injuries are concrete and particularized and therefore Plaintiffs do not satisfy the injury prong of Article III standing.

Beginning with injury in fact, the law is settled that, "[a]bsent a justiciable case or controversy between interested parties, [federal courts] lack the 'power to declare the law.'" *Wood v. Raffensperger,* 981 F. 3d 1307, 1313 (11th Cir. 2020) (quoting *Steel Co. v. Citizens for A Better Env't,* 523 U.S. 83, 94 (1998)). Injury-in-fact is a necessary element of the "case or controversy" requirement and, as already noted, it requires the presence of two factors: a "concrete and particularized" harm; and one that is "actual or imminent, not conjectural or hypothetical." *Trichell,* 964 F. 3d at 996.

As to the first factor, a "particularized injury is one that 'affect[s] the plaintiff in a personal and individual way." *Wood,* 981 F. 3d at 1314. "This requires more than a mere 'keen interest in the issue.'" *Wood v. Raffensperger,* 501 F. Supp. 3d 1310, 1321 (N.D. Ga. 2020). Instead, the injury must be "distinct from a generally available grievance about government." *Gill v. Whitford,* 585 U.S. 48, 54 (2018). Unlike a particularized injury, a generalized

grievance is "undifferentiated and common to all members of the public." *Lujan,* 504 U.S. at 575. "And the Supreme Court has made clear that a generalized grievance, 'no matter how sincere,'" cannot support standing. *Wood*, 981 F. 3d at 1314, (quoting *Hollingsworth v. Perry,* 570 U.S. 693, 706 (2013)).

Additionally, Plaintiffs must show an "actual or imminent" harm rather than one that is conjectural or hypothetical. "'[T]he injury required for standing need not be actualized,' but it must be 'real, immediate, and direct.'" *Ga. Republican Party v. SEC,* 888 F. 3d 1198 (11th Cir. 2018) (quoting *Davis v. FEC,* 554 U.S. 724, 734 (2008)). And, "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly* impending." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 409 (2008) (emphasis original). Indeed, the Supreme Court has "been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 413.

For the following reasons, each of the Plaintiffs in the consolidated action has failed to establish the injury-in-fact prong of standing even with all the purported evidence cited in their Response.[1]

A. Individual Plaintiffs have not established an injury.

The Individual Plaintiffs have not provided sufficient evidence that they suffer a particularized injury because that requires the alleged injury to "affect the plaintiff in a personal and individual way." *Lujan,* 504 U.S. at 561 n. 1. In *Wood,* for example, the district court noted that a plaintiff challenging Georgia's voting practices and procedures fell "far short of demonstrating" standing even where the individual provided financial donations to candidates on the ballot of the challenged election. 501 F. Supp. 3d at 1321. Critically, the plaintiff did not "differentiate his alleged injury from any harm felt in precisely the same manner by every Georgia voter." *Id.* at 1322. The district court concluded that, in the absence of any legitimate particularity of harm to the plaintiff, the claims brought were "a textbook generalized grievance." *Id.* The same reality prevents any finding of injury to the Individual Plaintiffs in these cases.

[1] State Defendants dispute a number of purported facts relied on by Plaintiffs, even if not individually responded to in this brief, in their Response to the Statement of Additional Material Facts filed with this reply.

In addition to having only generalized grievances, the Individual Plaintiffs also claim only speculative injuries. And their conduct that stems from their unfounded speculation does not open the courthouse doors to them. Under settled, law, "[w]here a 'hypothetical future harm' is not 'certainly impending,' plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves.'" *Muransky v. Godiva Chocolatier, Inc.*, 979 F. 3d 917, 931 (11th Cir. 2020) (*en banc*) (quoting *Clapper,* 568 U.S. at 416, 422).

Nothing in the Plaintiffs' Response to Defendant's Motion for Summary Judgment demonstrates a basis for the Individual Plaintiffs to overcome this threshold standing requirement.

1. Elbert Solomon.

For example, Mr. Solomon merely "prefers voting by absentee ballot." [Doc. 826, p. 69]. He alleges that SB 202 "meant that [he] could no longer just drive up to a drop box and deposit his ballot like he did in 2020." *Id.* Of course, the ability to vote by drop box was not enshrined in Georgia law *until* SB 202 passed. It had only been temporarily approved for the first time by Emergency SEB Rule during the height of the COVID-19 pandemic in 2020. [Doc. 755, ¶ 2]. But putting that to one side, Mr. Solomon has suffered no injury even by his own definition because nothing in SB 202 prevents him from voting by absentee ballot. Indeed, he is free to do so, but he *chooses* not to because of "unreliable mail service in 2020," four years ago. *Id.*

Mr. Solomon's subjective fears about the reliability of the United States mail service, which is an independent actor not a party to this lawsuit, are insufficient to confer standing. At best, Mr. Solomon envisions a "hypothetical future harm" that might occur if something goes wrong with the mail service again. But the Eleventh Circuit has "rejected the argument that plaintiffs have standing based on their 'subjective fear of… harm…'" *City of S. Miami v. Governor of Florida*, 65 F. 4th 631, 638 (11th Cir. 2023) (quoting *Corbett v. Transp. Sec. Admin.,* 930 F. 3d 1225, 1238-39 (11th Cir. 2019)). Mr. Solomon can vote by absentee ballot. And he cannot "manufacture standing merely by inflicting harm on [himself]," by choosing to vote in some other manner. *Muransky,* 979 F. 3d at 931.

2. Fannie Marie Jackson Gibbs.

For her part, Ms. Gibbs admittedly voted both by mail and drop box at various times during 2020, 2021, and 2022. [Doc. 826, p. 70]. She claims to have had trouble finding a drop box in 2022, but there is no allegation in Plaintiff's Response to Defendant's Motion for Summary Judgment tying this difficulty to SB 202. For this reason and because Ms. Gibbs could vote by mail, as she had previously done, she has not established an injury that is actually related to her claims about SB 202. There is thus no material issue as to her standing, either.

3. Jauan Durbin.

The same is true of Mr. Durbin. Plaintiffs claim that the fact that "Mr. Durbin voted in the primary, general and runoff elections in 2022… is irrelevant as participation in those elections does not ameliorate the injuries Mr. Durbin has experienced in being silenced in their ability to express messages of solidarity and encouragement that were critical to supporting Georgians standing in long lines to vote in 2020." *Id.* at 71. Thus, the injuries Plaintiffs claim as to Mr. Durbin relate apparently exclusively to "the line relief ban in SB 202." *Id.* But Plaintiffs do not connect the prohibition of providing items of value to people in line to vote to the purported injury of "being silenced in their ability to express messages of solidarity and encouragement" to Georgia voters. Moreover, even if this somehow did constitute a cognizable injury of some kind, and Plaintiffs successfully linked the injury to SB 202, it is entirely speculative that long lines even *will* occur in any upcoming election. Indeed, Mr. Durbin's testimony related to the 2022 election shows that his own experience voting involved a line of no longer than 15 minutes. [Doc. 764-1, p. 26]. And in any event, nothing in SB 202 purports to prevent Georgians "express[ing] messages of solidarity and encouragement" to other voters. Mr. Durbin thus has not presented evidence of any injury that is certainly impending.

4. Steven Paik.

There is also no triable issue as to Mr. Paik's standing. He claims "SB 202's shortened window to request an absentee ballot makes voting difficult for him, because he needs assistance to translate the materials into his native language of Korean." [Doc. 826, p. 71]. But this does not address or satisfactorily resolve the point made by State Defendants in their Motion that Mr. Paik flatly stated in his deposition that he was "not personally" impacted by the provisions of SB 202. [Doc. 755, ¶131]. At best, Mr. Paik "heard it was going to get difficult" to vote following passage of the challenged law. *Id.* But that doesn't square with his actual experience and, in any event, is entirely speculative.

5. Angelina Thuy Uddullah.

Nor is there any trial issue as to Ms. Uddullah's standing. In her deposition, she stated, with some equivocation, in her deposition that "I *believe* I missed the deadline for applying for an absentee ballot [in 2022]." [Doc. 807-1, ¶¶ 722-23 (Uddullah Dep. 38:1-2)] (emphasis added). But she has not presented evidence sufficient to establish that assertion. And she has not properly shown the existence of any injury *caused by* SB 202—because nothing in her testimony suggests she would have been able to meet another deadline that was different from that imposed by SB 202. Her only action that affected her vote was her own choice to wait to apply. She does note that "I could no

longer do it [request an absentee ballot], like a few days before," *id.* at 38:2-5, but that doesn't mean the SB 202 deadline was the *cause* of her inability to request the ballot. In other words, her injury is based on speculation that she might have been able to meet a deadline occurring closer to election day, but there is no evidence in the record to suggest in any concrete way that Ms. Uddullah would have been able to make that hypothetical deadline either. Without a concrete injury, Ms. Uddullah is left with only speculation, which is not an injury.

6. Anjali Enjeti-Sydow.

By contrast, Ms. Enjeti-Sydow has voted successfully in every Georgia election since passage of SB 202 and has not alleged any cognizable injury except to claim that dropping off ballots in a drop box in the 2022 election "was an onerous and physically painful process for her." [Doc. 826, p. 73]. But Georgia offers multiple avenues to vote, including absentee by mail voting, which does not entail leaving the house to cast a ballot. It is unclear what injury Ms. Enjeti-Sydow claims to have suffered as a result of SB 202, especially because no drop boxes existed prior to the pandemic emergency rules in 2020. And in any event, her experience in selecting from one of Georgia's many different avenues to cast a ballot is common to all Georgia voters and thus not sufficiently particularized to afford her standing.

7. Nora Aquino

As to Ms. Aquino: State Defendants mistakenly believed in preparing their initial motion that Ms. Aquino had been voluntarily dismissed from the case. [Doc. 764-1 at 45 n. 8]. Plaintiffs are correct that the Order from this Court does not mention Ms. Aquino, and Plaintiffs state that "she remains a plaintiff in this case to this day." [Doc. 826, p. 73].

But that being the case, Plaintiffs are incorrect to suggest that State Defendants' standing argument is waived by this oversight, and the cases cited by Plaintiffs in support of that position are inapposite because Article III standing is not an argument that can be waived. Indeed, courts "are required to examine [their] jurisdiction *sua sponte…" Wood,* 981 F. 3d at 1313. Viewed in that light, it is clear Ms. Aquino, like the other individual plaintiffs, lacks standing.

As Plaintiffs concede, Ms. Aquino's "method in which she can vote in any given election… is dependent on the availability of her daughter." [Doc. 826, p. 74]. And, at this stage, it is entirely speculative to suggest that Ms. Aquino's daughter—who is a third party and not part of this lawsuit—might be unavailable during Georgia's extensive time allotted for voting such that Ms. Aquino might be unable to vote using her preferred method. Accordingly, the evidence does not indicate Ms. Aquino has suffered any injury beyond a speculative one that depends largely on "the action of an absent third party."

Lewis v. Governor of Ala., 944 F. 3d 1287, 1296 (11th Cir. 2019) (en banc). So she too has failed to establish a triable issue of fact as to her standing.

B. The Organizational Plaintiffs have not established injury because, like the Individual Plaintiffs, their claim to standing is based on speculative harms and generalized grievances.

In response to the Defendants' Motion for Summary Judgment as against all Organizational Plaintiffs, Plaintiffs simply provided more examples of what they claim to be resource diversion, but those examples do not add to what this Court must decide because State Defendants already explained how those various diversions fell short of that standard in their principal brief.[2]

To be sure, this Court has previously held that the types of activities asserted by Plaintiffs was sufficient to state an injury. *See, e.g.*, [Doc. 613, pp. 8-10]. While State Defendants maintain that the evidence presented is insufficient evidence of a diversion, the key point for this Court is that, even if these are legitimate diversions, they are not sufficient to show standing.

That is because even if the non-financial resources that Organizational Plaintiffs claim to have allocated *could* constitute resource diversion for purposes of standing under Article III, they cannot in this case because the purported harms they were made to counter are speculative and thus not

[2] State Defendants maintain that the evidence Plaintiffs presented is insufficient regarding the diversion of resources.

actionable in federal court. One case that is particularly instructive in this regard is *City of S. Miami*, 65 F. 4th at 631, which State Defendants cited in their opening brief. As applied to the facts here, it forecloses standing for each Organizational Plaintiff.

The Eleventh Circuit in *City of S. Miami* considered "whether several organizations may sue the governor and attorney general of Florida in federal court to challenge a state law that requires local law enforcement to cooperate with federal immigration officials." *Id.* at 634. The court concluded that "[t]he organizations have not established a cognizable injury and cannot spend their way into standing without an impending threat that the provisions *will cause actual harm*." *Id.* (emphasis added).

The history of *City of S. Miami* is instructive. When the plaintiffs in that case initially moved for a preliminary injunction, the trial court found the plaintiffs had both organizational and associational standing to bring their claims. For organizational standing purposes, the district court concluded they had sufficiently demonstrated a diversion of resources "to address member concerns about the law and its implications," because they "operated a toll-free hotline to address member concerns, hosted community meetings, and conducted 'Know Your Rights' presentations." *Id.* And the court concluded that undertaking these activities "divert[ed] resources 'away from core activities '" of the organization. *Id.* at 636. These, of course, are the same categories of

purported diversions to which Plaintiffs point to in their Response here. The district court in that case also found the organizations had associational standing because the challenged law would injure their individual members by promoting or permitting "racial and ethnic profiling, and unlawfully prolonged stops, arrests and detentions," and that these harms would be disproportionately borne by their members. *Id* at 635. And the district court reaffirmed these conclusions following a bench trial. *Id.* at 636. But on appeal, the Eleventh Circuit reversed.

First considering the question of associational standing, the Eleventh Circuit found that the organizations' alleged harm rested on "highly speculative fear[s]…" *Id.* at 637. And these fears required "that: the federal government will target their members for deportation; the federal government will enlist the help of local authorities, even though street-level cooperation with federal officials is exceedingly rare; local officials will invoke their authority under [the challenged law] to justify cooperation; local authorities will successfully target the organizations' members; and local authorities, following federal directives, will racially profile the organizations' members…" *Id*. at 637. This is the kind of "highly attenuated chain of possibilities" that rests "on speculation about the about the decisions of independent actors" that the Supreme Court has previously found insufficient for purposes of Article III injury. *Id.* (citing *Clapper*, 568 U.S. at 413).

The Eleventh Circuit also rejected the plaintiffs' associational standing theory because the organizations were essentially attempting to stand in the shoes of their members on the basis of an uncertain harm that would not otherwise be actionable. And the Eleventh Circuit held that, "[w]here a hypothetical future harm is not certainly impending, plaintiffs cannot manufacture standing merely by inflicting harm on themselves." *Id.* at 638 (internal quotations omitted) (quoting *Muransky,* 979 F. 3d at 931). This Circuit has similarly "rejected the argument that plaintiffs have standing based on their 'subjective fear of… harm' and its 'chilling effect.'" *Id.* (quoting *Corbett v. Transp. Sec. Admin.,* 930 F. 3d 1225, 1238-39 (11th Cir. 2019)).

With respect to organizational standing, the Eleventh Circuit quoted the commonplace standard that injury can be shown "if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counter those illegal acts." *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008). But to establish this, the Court held, "the organizational plaintiff[s] must prove *both* that it has diverted its resources *and* that the injury to the identifiable community that the organization seeks to protect is itself legally cognizable Article III injury that is closely connected to the diversion." *City of S. Miami,* 65 F. 4th at 638-39 (emphasis original). As the Court summarized, "an organization can no more spend its way into standing based on speculative fears of future harm than an

individual can." *Id.* at 639 (quoting *Shelby Advocs. for Elections v. Hargett,* 947 F. 3d 977 (6th Cir. 2020)).

Further, the Eleventh Circuit found that "[i]n each of the cases in which this Court has found standing based on a resource-diversion theory, the organizations pointed to a concrete harm to an identifiable community, not speculative fears of future harm." *Id.* Thus, while the resource diversion itself may be concrete in the sense that quantifiable hours of labor were expended, it must be done *in response* to a concrete, cognizable harm. In other words, "the organization must present concrete evidence to substantiate its fears, not commit resources based on mere conjecture about possible government actions." *Id.* (quoting *Clapper,* 568 U.S. at 420 (cleaned up)). Plaintiffs have failed to do so here.

The Eleventh Circuit also approvingly cited a sister circuit for the proposition that "diversion of resources, standing alone, does not suffice to establish standing." *Id.* at 639. In *Fair Housing Council v. Montgomery Newspapers,* 141 F. 3d 71 (3d Cir. 1998), the plaintiff was concerned about a discriminatory housing advertisement in the newspaper and claimed, "it would need to divert resources to counteract the discriminatory impact of the advertisement through an education program." 65 F. 4th at 639. But, as the Eleventh Circuit explained, the Third Circuit correctly found that argument unpersuasive. Indeed, even though resources were diverted by the plaintiff, "it

failed to prove any member of the public was denied housing or deterred from seeking housing because of the advertisement." *Id.* In other words, the organization failed to prove the education program it undertook "was necessary to address an actual, non-speculative harm caused by the advertisement." *Id.*

Applying these principles to each of the alleged resource diversions asserted by Plaintiffs demonstrates that they lack a cognizable injury. As outlined in the Response to Plaintiffs' Statement of Additional Material Facts, many of the facts cited by Plaintiffs are also inadmissible for other reasons and cannot be relied on at summary judgment.

C. The NGP Plaintiffs lack standing.

1. New Georgia Project.

Plaintiffs claim that, "[i]n direct response to SB 202 in 2021, NGP was forced to shift funds, three staffers, and nearly all of the organization's volunteers from its Party at the Polls program, which focused on cultivating a positive atmosphere around polling locations to encourage voting, to its Rides to the Polls program, which saw demands for rides double during early voting and election day voting for the 2022 general election. *See* SAMF ¶ 913 (NGP Dep. 61:4–22, 63:25–64:20, 66:2–6, 120:16–23, 121:9–13, 122:17–20). As a result of these changes, they claim that Party at the Polls has been "whittled

down almost entirely" and now operates in only a small number of precinct locations." [Doc. 826, pp. 20-21].

But NGP fails to adequately link, through record evidence, the increase in rides needed to the polls to SB 202. Indeed, it is just as likely that more people went to the polls in 2022 as compared to 2020 because the pandemic that raged during the 2020 election cycle had largely abated. *See, e.g., Wood,* 501 F. Supp. 3d at 1316 ("Due in large part to the threat posed by COVID-19, an overwhelming number of Georgia voters – over 1 million of 5 million votes cast by November 3 – participated in the [2020] General Election through the use of absentee ballots"). Thus, it is entirely plausible that the increase in ride requests NGP saw was wholly *unrelated* to the challenged law. But the key here is that the purported harm is entirely speculative. And Plaintiffs cannot spend their way into standing based on such speculation without providing more evidence at this stage in the litigation. *City of S. Miami,* 65 F. 4th at 639.

NGP also claims the establishment of the "VoPro" program constitutes injury in fact. But this program, like the hotline or the "Know Your Rights" presentations of the organizational plaintiffs in *City of S. Miami*, was created in response to speculative and unfounded fears about SB 202, not any actual harm occasioned by the law. The resources utilized by NGP in carrying out those programs thus are therefore insufficient to afford the organization standing.

2. Black Voters Matter Fund.

Black Voters Matter Fund (BVMF) likewise has not established a triable issue of fact as to its standing. It lists several purported research diversions, including "increas[ing] spending on printing and larger operational costs associated with more frequent literature drops, phone banking, canvassing, and texting…" as well as "educat[ing] voters and volunteers" on the provisions of SB 202. [Doc. 826, p. 27]. BVMF also claims to have "abandon[ed] its practice of handing food and water to voters in line and instead spend additional personnel time and money setting up large" aid stations away from the line. *Id.* None of these suffices to establish standing.

First, the spending incurred by BVMF to educate voters and provide literature does not rise to an injury when the harm the organization is looking to address through this spending is entirely speculative, as it is here. BVMF has not pointed to a single person who has been prevented from voting that this work helped mitigate. It does not establish standing to merely engage in this activity.

With respect to the line relief work BVMF does, it is unclear that merely moving efforts from approaching people who are standing in line to the same activity in a slightly different location at or near the polling place is an injury at all. This is especially true when Georgia law already limited electioneering as to voters in line prior to the passage of SB 202.

Finally, the fact that BVMF has "wound down its operations in South Carolina and Tennessee" to redirect those resources to Georgia does not, in and of itself, establish standing when the harm this resource allocation purports to address is speculative. [Doc. 826, p. 28]. Without more, BVMF has not established any injury that is not based on speculative harms.

3. Rise, Inc.

For the same reasons NGP's and BVMF's purported resource diversion is speculative, so too are the diversions made by Rise, Inc. Ultimately, Rise's spending allocations related to SB 202 are what it considers the law's "restrictions and the resulting barriers to voting." However, these restrictions and barriers are entirely speculative, and Rise has not pointed to any concrete injury the law has caused the organization or its members to suffer. They accordingly do not have standing under a resource-diversion theory, and they have not even established a triable issue of fact as to their standing.

D. The Ga. NAACP Plaintiffs do not have standing.

1. Georgia NAACP.

Much of what Georgia NAACP alleges as resource diversion has been done for the same speculative reasons as the NGP Plaintiffs. *See, e.g.*, [Doc. 826, pp. 30-33]. In a footnote, Georgia NAACP also claims organizational injury because SB 202 forced it "to cease proactively mailing ballot applications and providing free food, water, and PPE to voters standing in line." *Id.* at p. 31

n. 7. But this does not constitute a proper showing of resource diversion for purposes of Article III standing, because Plaintiffs need to show both where they are diverting resources "from" as well as what they are diverting resources "to." *Jacobson v. Fla. Sec'y of State,* 974 F. 3d 1236, 1250 (11th Cir. 2020). In this footnote, Plaintiffs have not established where these resources were diverted to—which is necessary to establish standing. But even if it did so, it could demonstrate standing only with respect to claims related to the providing things of value to persons standing in line.

In short, Georgia NAACP has failed to establish a triable issue of fact as to its standing.

2. Georgia Coalition for the People's Agenda (GCPA) and the League of Women Voters of Georgia (LWV).

The same is true of GCPA and LWV, both of which claim to have diverted resources as a result of SB 202 due to educational activities. But because these educational activities are based on speculative harms SB 202 might cause, the resources related to them are not sufficient to establish standing. Additionally, Plaintiffs claim that "GCPA staff requested and analyzed thousands of pages of records about rejected out-of-precinct provisional ballots to assist voters." [Doc. 826, p. 35]. But it is unclear how this is related to or caused by SB 202, or how it helps to assist voters, particularly when Plaintiffs have put forth no evidence that the sole reason these ballots were rejected was

for being out of precinct *due to the provisions of SB 202*. It is therefore not clear that SB 202 "caused" any harm related to these actions.

Similarly, the "unanticipated voter outreach and education activities" undertaken by both GCPA and LWV are based on speculation about the potential harms of SB 202. They do not establish standing and without more, both GCPA and LWV have not identified a material, triable issue of fact as to their injury. *Id.* at 35-37.

3. GALEO Latino Community Development Fund (GALEO) and Common Cause.

So too with GALEO and Common Cause, which rely on educational activities related to SB 202 as their sole basis for establishing organizational standing. *Id.* 37-40. But these are on par with the "toll-free hotline to address member concerns, [hosting of] community meetings, and … Know Your Rights presentations" put on by the organizational plaintiffs in *City of S. Miami,* 65 F. 4th at 635. As with that organization, the underlying hypothetical nature of the harm allegedly suffered necessarily means the resources dedicated to counteracting that purported harm are not actionable in federal court. To the extent the organizations claim resource diversion as to other discrete aspects of SB 202, those diversions are insufficient for the reasons outlined in State Defendants' principal brief. But even if this Court disagrees, Plaintiffs cannot rely on standing as to those separate provisions to achieve standing for the

other claims challenged in this action. "At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester,* 581 U.S. at 439.

In short, these organizations have likewise failed to establish a triable issue of fact as to their injury flowing from SB 202—and hence their standing.

4. Lower Muskogee Creek Tribe (LMCT).

The same is true of LMCT. Its representative testified that the organization never did any voter education efforts until the enactment of SB 202. [Doc. 826, p. 40]. Once SB 202 passed, however, the tribe's Chief indicated that "approximately 25% of her time" involved voter education. [Doc. 826, p. 40]. But this does not establish standing for the same reasons discussed with respect to GALEO and Common Cause because the underlying hypothetical nature of the harm allegedly suffered necessarily means the resources dedicated to counteracting that purported harm are not actionable in federal court. And here again, there is no triable issue.

E. The Sixth District AME Plaintiffs lack standing.

1. The ARC of the United States.

So too with the Arc of the United States (ARC), which claims to have spent "significant time and resources studying the implications of SB 202 to ensure its activities comply with the changes in the law…" *Id.* at 42. But this "does not sufficiently differentiate [the organization's] alleged injury from that

which *any* voter might have suffered…" *Wood,* 501 F. Supp. 3d at 1322 (emphasis original). Similarly, the "costly training materials, educational programs, and a documentary" mentioned by ARC's representative are the same kind of "Know Your Rights" presentations and educational material found insufficiently imminent in *City of S. Miami* to afford standing. 65 F. 4th at 637. The remaining Plaintiffs (Sixth District AME, Women Watch Afrika, and Latino Community Development Fund, Ga. Muslim Voter Project, and Delta Sigman Theta, Georgia ADAPT, and the Georgia Advocacy Office) offer only slight variations on what ARC alleges, and they are similarly unavailing.[3] The time organizations spend in "understanding" or "learning" the ins and outs of SB 202 are textbook generalized grievances common to all voters and are not particularized to the various Plaintiffs. Resources diverted or expended to this end accordingly do not establish standing. Similarly, resources expended in training or educating the public on SB 202 for purely speculative harms cannot be actionable by organizations when they are not actionable by individuals. "Speculative harms are no more cognizable dressed up as organizational injury than as an associational one." *City of S. Miami,* 65 F. 4th at 640. And for that reason, there is no triable issue here.

[3] The associational standing claims for several of these organizations are dealt with in a subsequent section because this section focuses only on organizational standing.

2. The GAO does not have the ability to sue as the P&A system in Georgia.

This same reason dooms Plaintiffs' claim that GAO has associational standing as a protection and advocacy system ("P&A") because it "has the authority to prosecute actions in its own name and on behalf of its constituents." [Doc. 826, p. 55]. They rely on *Doe v. Stincer,* which admittedly held that certain P&As "may sue on behalf of its constituents like a more traditional association may sue on behalf of its members." 175 F.3d 879, 886 (11th Cir. 1999). But that does not end the inquiry.

Indeed, the mere fact that membership is not required before a P&A can establish standing does not give the organization *carte blanche* to sue in federal court on any issue on which it takes an interest. To the contrary, the right to sue on behalf of its constituents still requires the organization to show "that one of its constituents otherwise had standing to sue to support the district court's grant of summary judgment and injunctive relief." *Id.* Plaintiffs apparently hope to satisfy this requirement by noting the sheer volume of Georgians they claim to represent: "GAO's constituents are the approximately 1.3 million Georgia voters with disabilities." [Doc. 826, p. 55]. But for the same reason Ga. NAACP Plaintiffs cannot rely on their many members throughout Georgia for a probabilistic source of associational harm, neither can GAO. And that is why GAO has failed to establish a triable issue as to its standing.

F. Asian Americans Advancing Justice-Atlanta (AAAJ) lacks standing.

The same is true of Asian Americans Advancing Justice – Atlanta (AAAJ). It claims that "SB 202's sweeping limitations on absentee voting forced [AAAJ] to pivot away from other organizational activities in order to assist community members in understanding the impacts of the law." [Doc. 826, p. 59]. But, as has already been explained, *supra,* training and educating the public (even when accompanied by the expenditure of significant resources) is not enough to establish standing in the face of a speculative or otherwise generalized injury. AAAJ has no other organizations and only has individuals who, as discussed above, do not have concrete and particularized injuries. And AAAJ has likewise failed to establish a triable issue as to its own standing.

G. Concerned Black Clergy of Metropolitan Atlanta, Inc. (CBC) Plaintiffs lack standing.

So too with the Concerned Black Clergy (CBC) plaintiffs. All five organizational plaintiffs in CBC's case offer some combination of purported injuries and resource diversion discussed at length in the other consolidated cases. [Doc. 826, pp. 61-68]. For reasons already discussed and for those outlined in Defendants' principal brief, the purported resource diversion related to training and educating the public is not actionable. Nor is any diversion stemming from a speculative harm or a generalized grievance. None of the CBC Plaintiffs allege any kind of diversion beyond that which has been

alleged by organizational plaintiffs in the other actions. And for the same reasons outlined above, the CBC Plaintiffs here have not established a triable issue as to standing, either.

H. Plaintiffs cannot establish Associational Standing because they have not demonstrated their members face anything other than speculative harms.

A handful of Plaintiffs allege they have associational standing through their members in addition to organizational standing. Part of this theory relies on now-outdated caselaw suggesting the possibility of "probabilistic injuries" to members of sufficiently large organizations. *Fla. State Conf. of the NAACP v. Browning,* 522 F. 3d 1153, 1162-64 (11th Cir. 2008). Plaintiffs, for example, argue that organizations like "[t]he Ga. NAACP ha[ve] around 10,000 members statewide, and evidence shows… it is highly unlikely that not a single member will have" been injured as a result of SB 202. Doc. 826, p. 18. But, as the Eleventh Circuit has noted:

> [S]ince *Browning*, the Supreme Court has rejected probabilistic analysis as a basis for conferring standing. In *Summers*, the majority rejected the dissent's theory that an organization could establish standing if "there is a statistical probability that some of [its] members are threatened with concrete injury." 555 U.S. at 497. The Supreme Court reasoned that probabilistic standing ignores the requirement that organizations must "make specific allegations establishing that at least one identified member had suffered or would suffer harm."

Ga. Republican Party, 888 F. 3d at 1204. And, to the extent Plaintiffs rely on individual members for their standing, the problems that plague the

Individual Plaintiffs in this action are no less applicable to the individual members of the Organizational Plaintiffs. So, for the reasons discussed above with respect to the Individual Plaintiffs, the Organizational Plaintiffs have not established a triable issue of fact as to their standing on an associational theory.

I. Plaintiffs have not established standing through the third-party doctrine.

In their response brief, some Plaintiffs also attempt to shoehorn in standing through the third-party doctrine, arguing (for example) that "NGP thus has a sufficiently close relationship with their constituents voters and are consequently well-suited to represent their interests in challenging SB 202." [Doc. 826, p. 24]. But the problem is that the injuries alleged by NGP are only either generalized grievances or speculative and hypothetical harms. Thus, even if NGP were "well-suited" to represent individual voters in this action, those voters themselves do not have the underlying standing NGP seeks to acquire through them.

Indeed, the theory of third party standing, which is "disfavored," requires three elements, the first of which is "an injury-in-fact that gives [the plaintiff] a sufficiently concrete interest in the dispute…" *Wood,* 501 F. Supp. 3d at 1322 n.26. Even presuming NGP or any other organizational plaintiff had a "close relationship" with the third party they seek to represent in this action, they

still have not established the third element: that "there is a hindrance to the third party's ability to protect its own interests." *Id.* (citing *Aaron Private Clinic Mgmt. LLC v. Berry,* 912 F. 3d 1330, 1339 (11th Cir. 2019)). And the presence of voter-Plaintiffs in this action indicates that there is no inability to protect any interests that might be involved. Thus, Plaintiffs cannot rely on third-party standing to gain access to this Court.

II. There is no traceability or redressability as to State Defendants.

But lack of injury is not Plaintiffs' only barrier to establishing a triable issue on standing. In its order [Doc. 613] on one of Plaintiffs' motions for preliminary injunction this Court correctly noted a lack of *traceability* to the State Defendants with respect to "the processing and verification of absentee ballots" because discretion is committed "solely to county officials…" *Id.* at 15. The same logic applies with equal force to *all* Plaintiffs insofar as their alleged injuries can be traced—or more appropriately, *cannot* be traced—to State Defendants. Accordingly, State Defendants are entitled to summary judgment on the claims outlined in Section III(B) of their principal brief. *See, e.g.*, [Doc. 764-1, pp. 56-58].

The same is true of Section III(C) of the principal brief. As stated there, the speculative fear expressed by Plaintiffs have related to the potential for long lines. But whether such lines materialize depends on a number of third-

party actors, most of whom are not parties to this action. Courts should be "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper,* 568 U.S. at 413. Therefore, State Defendants are entitled to summary judgment on these claims.

Plaintiffs attempt to revive traceability to State Defendants by pointing out that the SEB "has the power to compel compliance with its rules or to restrain 'other illegal conduct in connection therewith' for any election or primary." [Doc. 826, p. 85] (citing O.C.G.A. § 21-2-32(a)). But this does not bolster Plaintiffs' traceability argument in the slightest because that provision of Georgia law only empowers the SEB to seek relief *through the courts*. And the Eleventh Circuit has repeatedly rejected this theory of traceability: "As we explained [in *Jacobson*], '[t]hat the Secretary must resort to judicial process if the Supervisors fail to perform their duties underscores the lack of authority over them.'" *City of S. Miami,* 65 F. 4th at 642 (quoting *Jacobson,* 974 F. 3d at 1254). Nor can Plaintiffs rely on the Secretary's general responsibilities related to elections,[4] because the law it clear that his office does not process absentee

[4] Plaintiffs rely on pre-*Jacobson* cases like *Martin v. Crittenden*, 347 F. Supp. 2d 1302 (N.D. Ga. 2018) and *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324 (N.D. Ga. 2018). It is clear that these cases would be decided differently if the courts deciding them would have had the benefit of the *Jacobson* decision.

ballots and is not responsible for lines. *See Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 U.S. App. LEXIS 39969, at *6 (11th Cir. Dec. 20, 2020); *Anderson v. Raffensperger*, 497 F. Supp. 3d 1300, 1329 (N.D. Ga. 2020) (lines). Plaintiffs do not mention or even attempt to distinguish these cases.

III. Nothing in Plaintiffs' Response suggests Plaintiffs are entitled to a private right of action under Section 2 of the Voting Rights Act.

Plaintiffs further ask this Court to entertain Plaintiffs' private claims to enforce Section 2 of the Voting Rights Act notwithstanding the lack of any express statutory language authorizing such a suit. In the Eighth Circuit, the courts have finally considered the propriety of private actions under Section 2 and declined to allow them. *Arkansas State Conf. NAACP v. Arkansas Bd. Of Apportionment,* 86 F. 4th 1204 (8th Cir. 2023). Plaintiffs direct this Court to other district courts in this circuit, but none of those decisions are binding on this Court. This Court should squarely consider whether Section 2 affords Plaintiffs a private right of action and engage with the text and precedent as the courts in the Eighth Circuit have. And for the reasons outlined in State Defendants' principal brief, the text demands the Court grant summary judgment in favor of State Defendants on the Plaintiffs' Section 2 claims.

IV. The political question doctrine applies to several of Plaintiffs' claims.

As shown in State Defendants' motion, some of Plaintiffs' claims must also be dismissed under the political question doctrine. Plaintiffs dismiss their policy disagreements with the Georgia General Assembly by arguing that the political question doctrine cannot apply to timing, opening hours, and mobile voting facilities. [Doc. 826, pp. 105-109]. Federal courts clearly have a role to play in reviewing election laws. But, because this Court is one of limited jurisdiction, it "must resist the temptation to step into the role of elected representatives, weighing the costs and benefits of various procedures." *Curling v. Raffensperger*, 50 F.4th 1114, 1126 (11th Cir. 2022). One of those limitations is the political question doctrine.

In their attempt to avoid the application of the doctrine, Plaintiffs propose a too-simple solution: that merely because they are claiming a violation of particular individuals' right to vote, the political question doctrine cannot apply. [Doc. 826, p. 107]. But this approach would eliminate the doctrine in the election law space and render meaningless the Constitution's commitment of election administration to the states and Congress. Further, state decisions about hours of voting, length of time of runoffs, and whether to use mobile voting units are the types of state administration of elections that do not burden the right to vote but simply ensure that an election is

administered according to rules. These types of policy decisions are reserved for the political branches. *Jacobson*, 974 F.3d at 1260, 1265; *Coal. for Good Governance v. Raffensperger*, Case No. 1:20-cv-1677-TCB, 2020 WL 2509092 (N.D. Ga. May 14, 2020).

Like the claims of partisan advantage, Plaintiffs here seek "fairness" in the guise of preferred policy decisions for the length of runoff elections, early voting hours, and mobile voting units. How long is a sufficiently long runoff? How many mobile voting units are allowable or required? There are "no discernable and manageable standards" to allow this Court to conclude what the best election-administration option is for these questions. *Jacobson*, 974 F.3d at 1263. And for that reason, too, Plaintiffs' challenges to the provisions of SB 202 at issue must be dismissed under the political question doctrine.

CONCLUSION

Plaintiffs cannot establish that this Court has jurisdiction over their claims. Not only have they failed to point to evidence that they will suffer a concrete and particularized, non-speculative injury, they also have not shown how several of their claims are even traceable to or redressable by State Defendants. Plaintiffs' Section 2 claims should also be dismissed for lack of a private right of action and under the political question doctrine. In short, the Court should grant summary judgment to State Defendants on all of Plaintiffs' claims.

Respectfully submitted this 14th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing brief was prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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