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, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants*.	Civil Action No.: 1:21-CV-01284-JPB
GEORGIA STATE CONF. OF THE NAACP, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-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*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants*.	Civil Action No.: 1:21-CV-01728-JPB

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION REGARDING RUNOFF DATES

TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

FACTUAL BACKGROUND 2

I. Georgia law on runoff elections. 2

A. Georgia runoffs before SB 202. 2

B. Changes to runoff provisions in SB 202. 3

II. Black voter participation in Georgia elections. 4

III. Voter turnout in runoff elections has increased. 6

IV. Plaintiffs' claims about the legislative process are baseless. 8

A. Dr. Anderson has no expertise in Georgia legislative processes. 8

B. Plaintiffs spin their legislative story out of context.. 9

V. Policy disagreements about length of time. 10

ARGUMENT AND CITATION OF AUTHORITIES 11

I. Plaintiffs do not have standing against State Defendants on their sole claim. 12

II. Even if Plaintiffs have standing, they are not likely to succeed on the merits of their sole claim. 14

A. There is no discriminatory impact from a four-week runoff. 16

B. The historical background of runoffs in Georgia does not support Plaintiffs' claims. 17

C. The sequence of events leading to the passage of SB 202 demonstrates a thoughtful process and engagement with interested parties..... 17

D. There were no procedural and substantive departures in the legislative process. 18

E. Plaintiffs identify no concerning contemporary statements. 19

F. The disparate impact Plaintiffs claim exists was not foreseeable, nor were legislators aware of that impact..... 19

G. What Plaintiffs claim is the availability of "less discriminatory alternatives" is actually just a showcase of alternative policy proposals..... 21

H. Even if the *Arlington Heights* factors supported Plaintiffs' claims, the facts show SB 202 would have been enacted to support the State's interests. 22

III. Plaintiffs have not adequately shown an irreparable harm. 23

IV. The equities and public interest do not favor an injunction. 25

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Aldridge v. Travelers Home & Marine Ins. Co.,
No. 1:16-CV-01247- SCJ, 2019 WL 8439150 (N.D. Ga. Feb. 21, 2019)..... 13

Biedermann v. Ehrhart,
No. 1:20-cv-01388-JPB, 2021 WL 1061794 (N.D. Ga. Mar. 19, 2021) 13

Burton v. City of Belle Glade,
178 F.3d 1175 (11th Cir. 1999)..... 15

California v. United States Dep't of Homeland Sec.,
476 F. Supp. 3d 994 (N.D. Cal. 2020) 18

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013)..... 12

Coyotl v. Kelly,
261 F. Supp. 3d 1328 (N.D. Ga. 2017) 11

Davis v. FEC,
554 U.S. 724 (2008)..... 12

FNB Bank v. Park Nat'l Corp.,
No. CIV.A. 13-0064-WS-C, 2013 WL 6842778 (S.D. Ala. Dec. 27, 2013)..... 13

Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.,
320 F.3d 1205 (11th Cir. 2003)..... 11

Greater Birmingham Ministries v. Sec'y of State of Ala.,
992 F.3d 1299 (11th Cir. 2021).....passim

Hunter v. Underwood,
471 U.S. 222 (1985)..... 15

Jacobson v. Fla. Sec'y of State,
974 F.3d 1236 (11th Cir. 2020)..... 12

Johnson v. Gov. of State of Fla.,
405 F.3d 1214 (11th Cir. 2005)..... 15

League of Women Voters of Fla., Inc. v. Fla. Sec'y of State,
32 F.4th 1363 (11th Cir. 2022) 11, 14, 16

Lee v. Va. State Bd. of Elections,
843 F.3d 592 (4th Cir. 2016) 18

Martinez v. Mathews,
544 F.2d 1233 (5th Cir. 1976) 11

N.C. State Conf. of the NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016) 16

New Georgia Project v. Raffensperger,
976 F.3d 1278 (11th Cir. 2020) 24

Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,
734 F.3d 406 (5th Cir. 2013) 25

Purcell v. Gonzalez,
549 U.S. 1 (2006) 11

Siegel v. LePore,
234 F.3d 1163 (11th Cir. 2000) 11, 24

Town of Chester v. Laroe Estates, Inc.,
581 U.S. 433 (2017) 12

United States v. Georgia,
952 F. Supp. 2d 1318 (N.D. Ga. 2013) 2, 3

Washington v. Davis,
426 U.S. 229 (1976) 20

Wreal, LLC v. Amazon.com,
840 F.3d 1244 (11th Cir. 2016) 23, 24

Statutes

52 U.S.C. § 20302(a)(9) 4

Ala. Code § 17-13-3(a) 10

Ala. Code § 17-13-8.1 4

Ark. Code Ann. § 7-5-106(a)(1) 10

La. Rev. Stat. Ann. § 18:402 10

Military and Overseas Voting Empowerment Act 2, 4

Miss. Code Ann. § 23-15-191 10

N.C. Gen. Stat. § 163-111(e) 10

O.C.G.A. § 21-2-384(e)(5), (6) 4

O.C.G.A. § 21-2-501(a) (2012) 2

O.C.G.A. § 21-2-501(a) (2017) 3

Okla. Stat. § 26-1-103 10

S. D. Codified Laws § 12-6-51.1 10

S.C. Code Ann. § 7-13-50 10

S.C. Code Ann. § 7-15-650 4

Tex. Elec. Code § 41.007 10

Uniformed Overseas Citizens Absentee Voting Act 2

INTRODUCTION

Plaintiffs' latest motion for a preliminary injunction seeks to alter Georgia's election schedule dramatically—by extending all runoffs for federal races back to nine weeks. In so doing, Plaintiffs continue their outlandish narrative that SB 202 was the result of the General Assembly viewing "growing Black political participation as a threat." [Doc. 574-1, p. 8]. The relevant facts do not support this narrative or Plaintiffs' fanciful assertion that the Georgia General Assembly enacted the changes to the federal runoff schedule with "a purpose to discriminate against Black voters."

Initially, Plaintiffs lack standing to assert their claims because they have not provided any evidence regarding their alleged injuries. Specifically, these organizations have not submitted sufficient evidence to support associational or diversion-of-resources claims about the runoff schedule.

But even if Plaintiffs have standing, they are not likely to prevail on the merits of their intent-only claim. The runoff provisions of SB 202 aligned the runoff schedule for *federal* offices to the *already-existing* four-week runoff schedule for state offices after adding ranked-choice voting for overseas voters. And the unified four-week runoff schedule was only adopted after the *first-ever* nine-week general-election federal runoff that the legislature determined was "exhausting" for all involved. Moreover, data show that voter participation in

the four-week general-election runoff in 2022 was improved from voter participation in the nine-week runoff in 2021, undermining Plaintiffs' primary claim. But Plaintiffs refuse to acknowledge those data or data from states that run shorter runoff elections.

The remaining factors for a preliminary injunction are not met because every Georgia voter is still able to vote in four-week federal runoffs—just as they always have for state runoffs. There is no irreparable harm, and the equities do not favor Plaintiffs because of the significant changes that are required to implement their proposed injunction.

This Court should deny Plaintiffs' requested injunction and allow Georgia to continue operating four-week runoffs for all elections.

FACTUAL BACKGROUND

I. Georgia law on runoff elections.

A. Georgia runoffs before SB 202.

Before 2013, Georgia held runoffs for all elected offices three weeks after a primary or four weeks after a general election when no candidate received a majority of the vote. O.C.G.A. § 21-2-501(a) (2012); *United States v. Georgia*, 952 F. Supp. 2d 1318, 1322 (N.D. Ga. 2013). Following 2013 litigation involving the Uniformed Overseas Citizens Absentee Voting Act (UOCAVA) and the Military and Overseas Voting Empowerment Act (MOVE Act), Georgia was

ordered to hold *federal* runoff elections at least 45 days after a primary or general election to allow time for military and overseas ballots under the MOVE Act. *Id.* at 1333–34. To comply, the legislature amended the statute in 2014 to use two different runoff schedules for general elections—a four-week schedule for non-federal runoffs and a nine-week schedule for federal runoffs. *See* O.C.G.A. § 21-2-501(a) (2017); *United States v. Georgia*, 778 F.3d 1202, 1204 (11th Cir. 2015) (discussing HB 310); 2014 Ga. Laws 343.

From 2014 through 2019, the only general-election runoffs that took place were in 2018 for the state offices of Secretary of State and Public Service Commissioner, so they were held four weeks after election day. Declaration of Ryan Germany, attached as Ex. A ("Germany Decl.") ¶¶ 57–58. But in 2020, three statewide general-election races required runoffs: both U.S. Senate seats and a Public Service Commission seat. *Id.* at ¶ 59. After this first-ever nine-week general-election runoff, the legislature determined that the timeline that prolonged the election process through Thanksgiving, Chanukah, and Christmas was "exhausting for candidates, donors, and electors." SB 202, Section 2, Paragraph 11.

B. Changes to runoff provisions in SB 202.

In SB 202, the legislature undertook a comprehensive overhaul of the runoff process. SB 202 created the ranked-choice system for military and

overseas voters in Section 27.[1] O.C.G.A. § 21-2-384(e)(5), (6); SB 202, Section 2, Paragraph 11. By allowing military and overseas voters to vote in runoffs without requiring another round trip for an absentee ballot, the 45-day requirement of the MOVE Act no longer applied. *Id.*, *see also* 52 U.S.C. § 20302(a)(9) (written plan for runoff elections); Germany Decl. ¶ 62.

SB 202 created the ranked-choice system for overseas voters in Section 27 and established the process for the "special absentee run-off ballot." O.C.G.A. § 21-2-384(e)(5), (6). It then updated the election timeline for advance voting in runoffs in Section 28, updated absentee-ballot processing rules (including early scanning) in Section 29, then revised the timeline to move all runoffs, both federal and non-federal, to match the non-federal runoff schedule in Section 42, returning to the pre-2014 runoff length in Georgia. Section 42 also made changes to requirements for municipal election runoffs, voter registration related to runoffs, and alignment of municipal special elections with runoffs.

II. Black voter participation in Georgia elections.

In service of their racialized narrative surrounding the adoption of SB

[1] Ranked-choice or instant runoff voting is also used by several other states to hold shorter runoffs when federal candidates are involved. *See, e.g.*, Ala. Code § 17-13-8.1; S.C. Code Ann. § 7-15-650; Germany Decl. ¶ 62.

202, Plaintiffs devote several pages of their brief to their one-sided version of Black voter participation in Georgia elections. [Doc. 574-1, pp. 10–11]. But almost all the facts they cite about increasing voter participation are not supported by their attached declarations. *See* [Doc. 574-7, ¶ 2] (Kelly Dec. only noting she has voted in elections since 1990s); [Doc. 574-8, ¶ 2] (Robinson Dec. only noting that she never misses an election); [Doc. 574-9, ¶ 5] (Dennis Dec. only noting that Common Cause "encourages voter participation in Georgia, including among Black voters"); [Doc. 574-10, ¶ 4] (Kinard Dec. only noting that she handed out food and water in 2014). And while Plaintiffs rely on Dr. Clark's report for facts about the election of Sen. Warnock, they fail to note that the proportion of Georgia's Black House members of Congress has exceeded the proportion of its Black population since 2019. [Doc. 574-11, p. 41 table 11].

Plaintiffs also spin a story that is not supported by the record. Plaintiffs insist that "Souls to the Polls" is of great importance to Black communities and churches, but the depositions they cite do not support the broad statements in the brief. *Compare* [Doc. 574-1, p. 13] ("weekend voting is of particular importance for Black communities") *with* [Doc. 574-14 at 75:11–76:3] and [Doc. 574-15 at 101:9–102:5] (both just describing Souls to the Polls).

III. Voter turnout in runoff elections has increased.

A review of the facts shows that voter participation in Georgia runoffs has been increasing, not decreasing, since SB 202. In the 2018 general election, 61.4% of registered voters voted (approximately 3.9 million votes). Germany Decl. ¶ 72. But in the 2018 runoff election, only 22.9% of voters voted (almost 1.5 million votes). *Id*. at ¶ 73. That changed in 2020, with 69.6% of active voters voting, or nearly 5 million votes cast, in the 2020 general election, and then 61% of active voter voting, or approximately 4.4 million votes cast, in the January 2021 runoff election. *Id*. at ¶ 74. The 2022 runoff showed a similar pattern, when 57.02% of voters voted, or 3.9 million votes cast, in the 2022 general election, and 50.58% of voters voted, or 3.5 million votes cast, in the December 2022 runoff election—even when control of the U.S. Senate was not on the line as it was in 2020. Germany Decl. ¶ 75. In other words, the December 2022 runoff resulted in a smaller decrease in turnout rate when compared with the general election than the January 2021 runoff even with the shorter timeline. Report of Justin Grimmer, attached as Ex. B ("Grimmer Report") ¶ 30. In addition, more voters used weekend voting in the December 2022 runoff than in the January 2021 runoff, with a 58.6% increase in weekend voting in the four-week runoff over the nine-week runoff. *Id*. at ¶¶ 18, 184–185.

In fact, voter turnout in Georgia has been increasing for years, even in

midterm elections that usually have lower turnout than Presidential election years. *Id*. at ¶¶ 27–28. Turnout in both the 2022 general election and 2022 general runoff election was very high, with the turnout rate for the 2022 midterm approximately 81% higher than the turnout rate for the 2014 midterm, which is larger than the increase of the 2020 general election turnout rate over the 2016 general election turnout rate. *Id*. Further, Georgia voter turnout in mid-term elections remains higher than other comparable states after SB 202. *Id*. at ¶¶ 41–42, 44–45. And the decreases in Black voter turnout in Georgia from 2018 to 2022 that Plaintiffs point to are smaller than in other states that track similar data. *Id*. at ¶¶ 48–50.

In 2022, four-week runoffs were held in June for the May primary, then again in December after the November general election. Germany Decl. ¶ 63. Black candidates regularly were successful in those four-week runoffs in 2022, with Black candidates winning the Democratic nominations for Insurance Commissioner and Labor Commissioner in June and a Black candidate winning the U.S. Senate race in December 2022.[2] *Id*. at ¶ 64.

[2] Regardless of the outcome of the December 2022 runoff, a Black candidate would represent Georgia in the U.S. Senate because both Republicans and Democrats had nominated Black candidates in their primary elections and those candidates progressed to the runoff election. Germany Decl. ¶ 65.

IV. Plaintiffs' claims about the legislative process are baseless.

A. Dr. Anderson has no expertise in Georgia legislative processes.

Plaintiffs rely on Dr. Anderson's report to assert that the legislative process was unusual or otherwise irregular. [Doc. 574-1, p. 14]. But Dr. Anderson has never studied the process of how a bill becomes a law in Georgia and does not consider herself an expert on the Georgia legislative process. Excerpts from the Deposition of Carol Anderson, attached as Ex. C ("Anderson Dep.") 203:20–204:1. While she relied on her review of hearings on SB 202 for her conclusion there was "chaos" in the process, she has never reviewed hearings of any other election legislation in any other years as a comparison. Anderson Dep. 204:18–205:1. In fact, Dr. Anderson relied solely on the public comments and the meeting notices for her conclusions. Anderson Dep. 247:14–248:16. Further, her conclusion that the process was rushed was based solely on individuals (many of whom were connected with organizations that later sued the State over SB 202) saying the process was rushed during the hearings, not as compared to any other bills considered by the General Assembly under normal processes. Anderson Dep. 248:17–249:5. Further, Ms. Bailey's deposition does not support Plaintiffs' statement that legislators and the public "struggled to keep up with the sheer volume of such [election] bills." *Compare*

[Doc. 574-1, p. 14] *with* [Doc. 574-17 at 62:11–63:2] (simply noting there were a lot of election-related bills).

Dr. Anderson agreed that the legislative process resulted in several changes she supported. For example, after Rev. Woodall testified about the impact of the photo ID requirements on pretrial detainees in jails, the legislation was amended to provide detainees with access to their photo IDs. Anderson Dep. 222:12–223:2. And Dr. Anderson agreed that the legislature maintained weekend voting in SB 202 and also maintained no-excuse absentee voting. Anderson Dep. 212:4–15, 225:16–20.

B. Plaintiffs spin their legislative story out of context.

Plaintiffs rely on hearsay statements regarding the legislative process [Doc. 574-1, pp. 8–9], from legislators who opposed SB 202 and who freely recognized that they were the minority party. [Doc. 574-18, ¶¶ 29–30] (Rep. Burnough acknowledging Democrats lacked the "votes" needed); [Doc. 574-18, ¶¶ 15–16] (Sen. Harrell quoting other legislators); [Doc. 574-21, ¶ 4] (Sen. H. Jones is "convinced that the underlying purpose for Senate Bill 202 . . . was to make voting more difficult for those that had supported Democratic candidates" and that supporters "failed to advance convincing purposes for the bill's provisions"). Other legislative-process facts are spun out of context to tell a terrible tale—for example, Plaintiffs reference that "Black legislators

received the new version only one hour before the hearing" [Doc. 574-1, p. 15], but fail to note that March 17 was the first hearing of the substitute to SB 202, and there were two additional hearings before the bill passed out of committee on March 22.[3] Germany Decl. ¶ 45.

The General Assembly engaged in a deliberative process to update the election code in response to the 2018 and 2020 elections, and nothing about the process for adopting SB 202 was unusual, rushed, or irregular. *Id.* at ¶¶ 3–56.

V. Policy disagreements about length of time.

Plaintiffs cite several individuals who testified about varying runoff lengths. [Doc. 574-1, pp. 16–17]. But states use a variety of timelines for runoffs. Those dates range from two weeks (S.C. Code Ann. § 7-13-50) to three weeks (Miss. Code Ann. § 23-15-191), four weeks (Ala. Code § 17-13-3(a); Ark. Code Ann. § 7-5-106(a)(1); La. Rev. Stat. Ann. § 18:402 (jungle primary system)), or more than six weeks (Tex. Elec. Code § 41.007; N.C. Gen. Stat. § 163-111(e); S. D. Codified Laws § 12-6-51.1). After the experiences of runoffs in 2020 and 2021, the Georgia legislature decided nine weeks was too long and chose the four weeks used for state runoffs—and for federal runoffs until 2014.

[3] Plaintiffs also do not rely on evidence for various statements in their brief, instead citing only to vote sheets that do not list partisan affiliation or race for the legislators. [Doc. 574-28] (no voting information); [Doc. 574-29] (no racial or partisan information); [Doc. 574-30] (no racial or partisan information).

ARGUMENT AND CITATION OF AUTHORITIES

For a preliminary injunction, Plaintiffs must clearly establish: "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that granting the relief would not be adverse to the public interest." *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). "The purpose of a preliminary injunction is to maintain the status quo until the court can enter a final decision on the merits of the case." *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1341 (N.D. Ga. 2017). A mandatory injunction, which Plaintiffs seek here, "goes well beyond simply maintaining the status quo" and "is particularly disfavored." *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976). Despite Plaintiffs' invective against the General Assembly, they fail to satisfy each requirement for obtaining relief, especially when this Court reviews the "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) (*LWV*) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006)).

I. Plaintiffs do not have standing against State Defendants on their sole claim.

"To have a case or controversy," within the subject-matter jurisdiction of this Court, "a litigant must establish that he has standing." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). To show standing sufficient to obtain a preliminary injunction, Plaintiffs must show "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Id.* And a "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). An injury cannot be speculative but must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Here, Plaintiffs have presented no evidence of any injury or resource diversion related to the return to using four-week runoffs for federal as well as non-federal elections. While noting that Plaintiffs from three different cases join the motion, [Doc. 574-1, p. 8 n.1], Plaintiffs do not identify which of those Plaintiffs are claiming an injury. And in claiming irreparable harm, Plaintiffs cite only to the "Joint Brief" in support of the DOJ's motion for any potential injury. [Doc. 574-1, pp. 29–30].

Plaintiffs' attempt to incorporate the Joint Brief by reference there—and multiple other places, *see* [Doc. 574-1, pp. 14 (incorporating four pages), 22 (incorporating four pages), 25 (incorporating three pages), 27 (incorporating same four pages as p. 14), 29–30 (incorporating two pages)], would provide Plaintiffs an unpermitted additional 13 pages beyond their brief's 25-page limit. But this Court does not permit incorporation by reference. *See Biedermann v. Ehrhart,* No. 1:20-cv-01388-JPB, 2021 WL 1061794, at *1 (N.D. Ga. Mar. 19, 2021); *Aldridge v. Travelers Home & Marine Ins. Co*., No. 1:16-CV-01247- SCJ, 2019 WL 8439150, at *1 (N.D. Ga. Feb. 21, 2019) (noting that "incorporation by reference is impermissible"); *FNB Bank v. Park Nat'l Corp*., No. CIV.A. 13-0064-WS-C, 2013 WL 6842778, at *1, n.1 (S.D. Ala. Dec. 27, 2013). Thus, this Court should exclude not only the standing arguments, but also all arguments made by reference.

But the cited portions of the Joint Brief do not even purport to demonstrate injury to the Plaintiff organizations related to the return to a four-week period for federal runoff elections. Even digging through the exhibits accompanying Plaintiffs' motion does not produce any evidence of an injury related to runoff elections. Common Cause claims it diverts resources related to engaging in handing out items to voters in line, but says nothing about runoffs. [Doc. 574-10, ¶ 4]. The Delta Sigma Theta Sorority 30(b)(6) designee

references runoffs only once, with no relationship to organizational or associational activity. [Doc. 574-14 at 115:3]. The Justice Initiative 30(b)(6) designee's only reference to runoffs is to how the "Souls to the Polls" program worked versus the organization's activities. [Doc. 574-15 at 101:9–102:5]. Plaintiffs thus provide no evidence whatsoever of any organizational injury or associational activities related to the runoff provisions they challenge. Without any evidence of any injury, this Court must deny Plaintiffs' motion because they have not provided evidence of this Court's jurisdiction.

II. Even if Plaintiffs have standing, they are not likely to succeed on the merits of their sole claim.

Even if Plaintiffs have standing, this Court still must deny their proposed mandatory injunction. Plaintiffs challenge to the runoff provisions of SB 202 only on the ground that they were adopted with a racially discriminatory purpose. But "determining the intent of the legislature is a problematic and near-impossible challenge." *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1324 (11th Cir. 2021) (*GBM*). This is especially impossible for Plaintiffs here because this Court must presume that the legislature acted in good faith. *LWV*, 32 F.4th at 1373.

To overcome the presumption of good faith, Plaintiffs must "show that the State's 'decision or act had a discriminatory purpose and effect,'" *GBM,* 992

F.3d at 1321 (quoting *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188-89 (11th Cir. 1999)). Only if Plaintiff make that showing does "'the burden shift[] to the law's defenders to demonstrate that the law would have been enacted without this [racial discrimination] factor.'" *Id.* (quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1223 (11th Cir. 2005)). To assess purpose and effect, courts use the *Arlington Heights* analysis, which the Eleventh Circuit summarized as "(1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators. And, because these factors are not exhaustive, the list has been supplemented: (6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives." *GBM*, 992 F.3d at 1322. Plaintiffs' burden for a preliminary injunction tracks their burden at trial. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). None of those factors support Plaintiffs' claims about Georgia's discriminatory intent, so this Court need not reach the second prong of the analysis.

A. There is no discriminatory impact from a four-week runoff.

Plaintiffs claim that four-week runoffs create a heavier burden for Black voters than nine-week runoffs, arguing that a shorter runoff period lessens the time available for early voting and gets rid of the option of registering to vote in the runoff after the general election. [Doc. 574-1, p. 20–21].

But the actual evidence of four-week runoffs shows no disparate impact. The December 2022 runoff resulted in *a smaller decrease* in turnout rate when compared with the general election than the January 2021 runoff even with the shorter timeline. Grimmer Report ¶ 30. And more voters—a 58.6% increase—used weekend voting in the December 2022 runoff than in the January 2021 runoff. Grimmer Report ¶¶ 18, 184–185. This is not evidence of any impact on Black voters, nor can Plaintiffs stack all provisions as a "compounding effect" for purposes of this motion.[4] [Doc. 574-1, p. 22]. Nor can

[4] There are significant differences between the out-of-circuit case of *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), and binding precedent. *McCrory* did not apply the presumption of good faith of the legislature that is required here. *Compare* 831 F.3d at 228 *with GBM*, 992 F.3d at 1326. *McCrory* relied on North Carolina's history of race discrimination in ways not allowed in this Circuit. *Compare* 831 F.3d at 223–25 *with GBM*, 992 F.3d at 1325. And *McCrory* relied on socioeconomic disparities imported through historical accounts, which likewise is not permitted in this Circuit. *Compare* 831 F.3d at 232–33 *with LWV*, 66 F.4th at 923.

they show that four weeks is discriminatory while five or six weeks is not. [Doc. 574-1, pp. 26–27].

B. The historical background of runoffs in Georgia does not support Plaintiffs' claims.

Plaintiffs do not discuss the history of *runoffs*, but rather discuss generally the history of voting discrimination in Georgia. [Doc. 574-1, pp. 28-29]. That approach is invalid for two reasons: (1) it is inconsistent with the required factor in *GBM*, 992 F.3d at 1322, which looks at the historical background *of the challenged practice*, *i.e.*, four-week runoffs; and (2) *GBM* also does not allow Plaintiffs attempt to import all of the long-past discrimination unrelated to runoffs into a new context. *GBM*, 992 F.3d at 1325.

C. The sequence of events leading to the passage of SB 202 demonstrates a thoughtful process and engagement with interested parties.

In reviewing the sequence of events that led to the passage of SB 202, Plaintiffs draw sweeping conclusions based solely on the bill's passage in a session following record Black voter turnout. [Doc. 574-1, pp. 24-26]. In so doing, they ignore the thorough process the legislature engaged in while considering these provisions. *See* Section IV, above. And any Georgia voter—and any county election official—who was present in 2020 will understand the reference to the four-week runoff provisions as the "Save Christmas" portion

of the bill. Germany Decl. ¶ 30. Further, the fact that no Black legislators voted for SB 202 [Doc. 574-1, p. 28], cannot imply racial discrimination, especially because the vote was along party lines. *GBM*, 992 F.3d at 1326.

D. There were no procedural and substantive departures in the legislative process.

Comparing the 2019 and 2021 processes for adopting comprehensive election-law changes is instructive—they involved bills of similar length, similar time, similar issues, and similar thorough consideration. Germany Decl. ¶¶ 3–56. The evidence demonstrates the enactment of SB 202 followed the normal legislative process, including "full and open debate," contrary to Plaintiffs' claims. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 604 (4th Cir. 2016). SB 202 was the product of the "hours of testimony," finalized after "significant modifications through the legislative process," that were the result of weighing "the various interests involved." SB 202 at 6:139-143.

While Plaintiffs make much of receiving copies of bills at or near committee meetings, they ignore the detailed explanations of changes and question-and-answer sessions in those meetings. Germany Decl. ¶¶ 29, 44, 52. And the weekslong process was not "frantic," as Plaintiffs claim—rather, it took place within the 40 legislative days of the session that required attention

to other priorities.[5] And even if the passage was relatively fast, quick implementation of a policy does not create an inference of discriminatory intent. *GBM*, 992 F.3d at 1326; *see also California v. United States Dep't of Homeland Sec.*, 476 F. Supp. 3d 994, 1026 (N.D. Cal. 2020) ("allegations that the [challenged] Rule was fast tracked do not raise an inference of discriminatory intent" under *Arlington Heights*).

E. Plaintiffs identify no concerning contemporary statements.

Plaintiffs have identified no concerning contemporary statements or purportedly discriminatory statements or actions of key legislators. But even if they had, any such statements or actions would be of limited relevance given the number of legislators who voted on the bill. *GBM*, 992 F.3d at 1324–25.

F. The disparate impact Plaintiffs claim exists was not foreseeable, nor were legislators aware of that impact.

Plaintiffs' primary argument about the foreseeability of a racial impact on changing runoff dates is that legislators knew that shorter runoff periods

[5] Plaintiffs criticize the legislature for seeking legal advice by darkly noting that "sponsoring legislators coordinated closely with counsel," [Doc. 574-1, p. 28]. Failing to do so would have been irresponsible; lawsuits were inevitable given that Georgia has been repeatedly sued about election administration over the past five years, often by these same Plaintiffs.

might result in counties choosing to have fewer early-voting sites for a runoff,[6] which *might* increase lines on Election Day and that those lines *might* happen in counties with significant Black populations. [Doc. 574-1, p. 23]. Or somehow alternatively, the high use of absentee ballots by Black voters in 2020 and 2021 meant that legislators knew that a shortened runoff would have a racial impact. [Doc. 574-1, p. 24]. But none of these guesses about what legislators *might* have been thinking establishes any knowledge of an *actual* disparate impact because they are merely guesses about what might have happened.

Further, Plaintiffs freely admit that they seek to impute knowledge to the legislators by presumption alone. *See* [Doc. 574-1, p. 24] (citing *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring)). Justice Stevens's solo concurrence is not binding and relies on the mind of "the actor." *Id*. But who is the actor here? The 236 members of the legislature. Despite having legislator declarations, Plaintiffs do not rely on any legislator statements, witness testimony, or any other communication to any legislators about a theoretical disparate impact. Even with that evidence, they could not establish this prong, *GBM*, 992 F.3d at 1324, but the lack of evidence is fatal.

[6] Decisions about early voting sites, including how many to open and where to locate them, are solely decisions made by county election officials. *See* O.C.G.A. § 21-2-385(d); Germany Decl. ¶¶ 66–67.

Finally, the evidence demonstrates that there were legitimate reasons for the four-week runoff period, ranging from the impact on election officials and voters to the returning to the prior, uniform practice before the impact of federal litigation forced a change of course. Germany Decl. ¶¶ 30, 59–61, 68–71. Thus, this Court cannot "infer 'foreknowledge' of disparate impact" from Plaintiffs' suppositions. *GBM*, 992 F.3d at 1327.

G. What Plaintiffs claim is the availability of "less discriminatory alternatives" is actually just a showcase of alternative policy proposals.

Plaintiffs cabin their discussion of less discriminatory alternatives to a discussion of "tenuous" policy justifications. [Doc. 574-1, pp. 26–27]. But all they show in that section is disagreement among various policy proposals about the proper length of a runoff. As noted above, many states with runoffs use periods of four weeks or less. Plaintiffs even claim that "a longer runoff lead time of even five or six weeks" would be a less discriminatory alternative. *Id*. It is simply not credible to claim that a one-week difference in runoff timelines is the dividing line between intentional racial discrimination and permissible state policy decisions—and one that would invalidate many other states' runoffs laws. Indeed, given the shorter timelines in other states, it is curious why Plaintiffs have not sued those states.

And Georgia's system works: with the shorter timeline, the December

2022 runoff election resulted in a smaller decrease in turnout rate when compared with the general election than the January 2021 runoff even with the shorter timeline. Grimmer Report ¶ 30; Germany Decl. ¶¶ 71–75.

H. Even if the *Arlington Heights* factors supported Plaintiffs' claims, the facts show SB 202 would have been enacted to support the State's interests.

Each of the *Arlington Heights* factors shows that SB 202 was completely consistent with prior efforts to modify election laws after a contentious election. Like HB 316 in 2019, SB 202 was passed after a full vetting, motivated by increasing voter confidence, reducing the burden on election officials, streamlining the process of elections, and promoting uniformity. SB 202 at 4:70-82; Germany Decl. ¶¶ 3–56. That was true of the runoff provisions, which fixed an "exhausting" system—by using ranked choice voting, the runoff period could be made more manageable for everyone involved by using the same schedule as for non-federal races. SB 202 at 5:119-6:122.

Plaintiffs have failed to show that the four-week runoff period is anything other than "a neutral, nondiscriminatory regulation of voting procedure" and that was not "passed with a racially discriminatory intent or purpose." *GBM*, 992 F.3d at 1328. Thus, this Court should deny Plaintiffs' motion because they are not likely to succeed in establishing the first element of a preliminary injunction.

III. Plaintiffs have not adequately shown an irreparable harm.

Plaintiffs also cannot demonstrate any irreparable harm. First, Plaintiffs impermissibly rely exclusively on the Joint Brief for any explanation of harm. And this Court should disregard that incorporation by reference. See Section I, above. But in any event, the Joint Brief relies solely—and erroneously—on the idea that Black *voters*, not the Plaintiff organizations, will suffer harm. *Compare* [Doc. 574-1, p. 29] *with* [Doc. 566-1, pp. 69-70]. Plaintiffs further claim their injury is imminent "given the frequency of runoff elections." But there has been only one nine-week general-election federal runoff and one four-week general-election federal runoff in the last ten years. The only federal offices that could possibly have runoffs in 2024 are congressional races, and Plaintiffs have pointed to no evidence on a district level—only to statewide runoffs. Without the possibility of federal statewide runoffs in 2024, Plaintiffs cannot point to any irreparable harm.

Moreover, Plaintiffs cannot demonstrate irreparable injury because they have waited for more than two years after filing this case to seek a preliminary injunction on what they argue as essentially a legal issue. *Wreal, LLC v. Amazon.com*, 840 F.3d 1244, 1248 (11th Cir. 2016). Indeed, such a delay runs counter to the purpose of such relief because "the very idea of a *preliminary* injunction is premised on the need for speedy and *urgent* action to protect a

plaintiff's rights before a case can be resolved on the merits." *Id.* (emphasis added). Thus, their failure to act with urgency "necessarily undermines a finding of irreparable harm." *Id.* (citations omitted).

SB 202 was enacted on March 25, 2021, and Plaintiffs filed their complaints within a month after that, making the same claims as in the currently pending motion. *Ga. NAACP* Case No. 1:21-cv-01259-JPB [Doc. 1] (March 28, 2021); *Sixth District AME* Case No. 1:21-cv-01284-JPB [Doc. 1] (March 29, 2021); *Concerned Black Clergy* Case No. 1:21-cv-01728-JPB [Doc. 1] (April 27, 2021). While Plaintiffs cite some evidence from experts, the declarations they rely on were almost all signed more than a year ago. *See* [Doc. 574-8, p. 5] (May 11, 2022); [Doc. 574-9, p. 5] (May 24, 2022); [Doc. 574-10, p. 6] (May 9, 2022); [Doc. 574-18, p. 22] (May 2, 2022); [Doc. 574-19, p. 10] (May 4, 2022); [Doc. 574-21, p. 16] (May 6, 2022).

By failing to act "with speed and urgency," even when they had their declarations in hand, Plaintiffs have not shown a likelihood of irreparable harm. *Wreal*, 840 F.3d at 1248. Further, Plaintiffs only proceeded after allowing an entire general-election cycle to utilize the provision they challenge, including a four-week runoff—a process that produced evidence that should extinguish Plaintiffs' claims. Plaintiffs have failed to demonstrate irreparable injury, which is sufficient to deny their motion. *Siegel*, 234 F.3d at 1176.

IV. The equities and public interest do not favor an injunction.

The Court should also deny Plaintiffs' motion because the harm it would cause the State and the public outweighs any harm Plaintiffs might face absent an injunction. First, a state is irreparably harmed when it is unable to enforce its statutes. *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013).

Second, even if Plaintiffs have shown some harm, the impact on the public and the State is far greater. There are significant state interests in having the same runoff schedule for all elections, and those interests far outweigh any impact from voters having to vote within the four-week timeline, including timely seating of members of Congress and avoiding potential dual-track runoffs that occurred in 2020. Germany Decl. ¶¶ 59–61, 70, 76–82.

CONCLUSION

Plaintiffs provide no basis to determine that a four-week runoff for federal offices that matches the four-week runoff for state offices is racially discriminatory, much less that it is so discriminatory as to be unconstitutional. This Court should deny Plaintiffs' motion because they do not have standing, because they are not likely to succeed on the merits, and because they have not shown any irreparable harm or equities that favor granting an injunction.

Respectfully submitted this 10th day of August, 2023.

Christopher M. Carr
Attorney General
Georgia Bar No. 112505
Bryan K. Webb
Deputy Attorney General
Georgia Bar No. 743580
Russell D. Willard
Senior Assistant Attorney General
Georgia Bar No. 760280
Elizabeth Vaughan
Assistant Attorney General
Georgia Bar No. 762715
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Gene C. Schaerr*
Special Assistant Attorney General
Erik Jaffe*
H. Christopher Bartolomucci*
Donald M. Falk*
Brian J. Field*
Cristina Martinez Squiers*
Edward H. Trent*
Nicholas P. Miller*
Annika Boone Barkdull*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com
**Admitted pro hac vice*

/s/Bryan P. Tyson
Bryan P. Tyson
Special Assistant Attorney General
Georgia Bar No. 515411
btyson@taylorenglish.com
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@taylorenglish.com
Diane Festin LaRoss
Georgia Bar No. 430830
dlaross@taylorenglish.com
Donald P. Boyle, Jr.
Georgia Bar No. 073519
dboyle@taylorenglish.com
Deborah A. Ausburn
Georgia Bar No. 028610
dausburn@taylorenglish.com
Daniel H. Weigel
Georgia Bar No. 956419
dweigel@taylorenglish.com
Tobias C. Tatum, Sr.
Georgia Bar No. 307104
ttatum@taylorenglish.com
Taylor English Duma LLP
1600 Parkwood Circle
Suite 200
Atlanta, Georgia 30339
(678) 336-7249

Counsel for State Defendants

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).

/s/Bryan P. Tyson
Bryan P. Tyson