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

THE NEW GEORGIA PROJECT, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and the Chair of the Georgia State Election Board, *et al.*, Defendants.	Civil Action File No. 1:20-cv-01986-ELR

STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants Brad Raffensperger, in his official capacity as Secretary of State and the Chair of the Georgia State Election Board (the "Secretary"), State Election Board Members Rebecca N. Sullivan, David J. Worley, Anh Le, and Matthew Mashburn (collectively, the "State Defendants"), by and through their undersigned counsel, file this Motion to Dismiss Plaintiffs' Amended Complaint. The Amended Complaint must be dismissed because Plaintiffs lack standing and their allegations fail to state any claim for relief.

1. Plaintiffs lack standing. Plaintiffs challenge five aspects of Georgia election law: (1) the statute governing incomplete absentee ballot request forms, O.C.G.A. § 21-2-384(b)(4) (the "Absentee Applicant Notification

Statute"); (2) the statute allowing elderly, disabled, and Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") voters to request absentee ballots for an entire election cycle, O.C.G.A. § 21-2-381(a)(1)(G); (3) the United States Postal Service's ("USPS's") policy of requiring postage to deliver mail (but not official election mail); (4) the statutory requirement that absentee ballots be delivered to a county election official by 7:00 p.m. on Election Day, O.C.G.A. § 21-2-386(a)(1)(F); and (5) Georgia's statutory prohibition on third party ballot harvesting (e.g., allowing third parties to collect and return absentee ballots from voters), O.C.G.A. § 21-2-385(a) (the "Absentee Ballot Security Statute") (collectively, the "Challenged Policies"). [Doc. 33, ¶¶ 130-38.]

To satisfy constitutional standing requirements, each Plaintiff must clearly show that each of the Challenged Policies causes them a cognizable injury. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). Each plaintiff must show that it is likely, not merely speculative, that a favorable judgment will redress her injury." Lewis v. Governor of Ala., 944 F.3d 1287, 1296 (11th Cir. 2019) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and punctuation omitted))

The Amended Complaint satisfies neither the injury nor redressability requirements. On injury, there is no allegation that the individual Plaintiffs:

cannot vote without assistance; have had an absentee ballot request rejected; cannot obtain stamps; cannot access a mail box to take advantage of USPS policy to mail official election mail without sufficient postage; are precluded from requesting an absentee ballot, voting with the absentee ballot, or curing any deficiency in the absentee ballot process by voting in person. [See Doc. 33, ¶¶ 20-22.] No individual plaintiff alleges she is being deprived of the right to vote.

Plaintiff NGP's claim of associational standing based on a diversion of resources from its missions of registering and encouraging voters to vote to its mission of registering and encouraging voters to vote falls short of establishing a cognizable injury. [Id. at ¶¶ 17-19.] Spokeo, Inc., 136 S. Ct. at 1547; Lujan, 504 U.S. at 561; Jacobson v. Fla. Sec'y of State, No. 19-14552 at 21-22 (11th Cir. April 29, 2020); Ga. Republican Party v. SEC, 888 F.3d 1198, 1203 (11th Cir. 2018) (citation omitted). NGP has neither identified a single member nor alleged any specific harm. For NGP, the 2020 election will be no different than any other for the organization: it will seek to register voters and encourage them to vote. [Doc. 33, ¶ 18.]

2. Count I of Plaintiffs' Amended Complaint does not state a claim for relief. To survive a motion to dismiss, Plaintiffs must identify a burden that the challenged law imposes on voting. Crawford v. Marion Cty. Election Bd.,

553 U.S. 181, 205 (2008) (Scalia, J., concurring in judgment). None of the Challenged Policies impose an unconstitutional burden on the Plaintiffs, and to the extent they impose any burdens, sufficient state interests foreclose Plaintiffs' claims.

3. None of Plaintiffs' claims attacking Georgia's Absentee Applicant Notification Statute under the First and Fourteenth Amendments to the Constitution and procedural due process and equal protection grounds state a claim for relief. Plaintiffs have alleged no burden on themselves under O.C.G.A. § 21-2-381(b)(4), however, but merely hypothesize a potential one for unidentified third parties. Their claims can be dismissed on this point alone.

The lack of an as-applied injury renders Plaintiffs' claim a facial challenge, which requires them to "'establish that no set of circumstances exists under which the [law] would be valid.'" J.R. v. Hansen, 803 F. 3d 1315, 1320 (11th Cir. 2015) (Hansen II) (citation omitted); see also Wash. State Grange v. Wash. State Republican Party, 552, U.S. 442, 449 (2008).

The Absentee Applicant Notification Statute easily survives a facial challenge. First, the law can be implemented in a constitutional manner because a county election office could, conceivably, notify a voter of an issue

in time for the voter to cure the problem. Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1250 (11th Cir. 2013).

Second, the statute provides sufficient protections. Counties are not "at liberty to notify voters they are unable to process their absentee applications at their leisure," [Doc. 33, ¶41]; instead, they must do so "promptly." O.C.G.A. § 21-2-384(b)(4).

Third, "there is no fundamental right to vote by absentee ballot," Friedman v. Snipes, 345 F. Supp.2d 1356, 1370 (S.D. Fla. 2004) (citing McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 807 (1969)), much less any fundamental right to request an absentee ballot. State Defendants cannot unlawfully burden an illusory right. Cf. McDonald, 394 U.S. at 807-808 (applying Equal Protection analysis).

Fourth, in the alternative, any purported burden caused by an absentee ballot request is minute.

Finally, any purported burden is "justified by relevant and legitimate state interests." Common Cause/Georgia v. Billups, 554 F.3d 1340, 1352 (11th Cir. 2009). The State has an interest in not only preventing fraud and verifying the eligibility of voters, but also in permitting flexibility to county election officials to do their jobs without unreasonable and unnecessary interference or arbitrary deadlines.

Plaintiffs' procedural due process claim also is a facial challenge to the Absentee Applicant Notification Statute, because Plaintiffs fail to identify a single voter to whom the challenged statute has been unconstitutionally applied. Count IV should be dismissed because Plaintiffs cannot show that the Absentee Applicant Notification Statute always deprives voters of a "constitutionally-protected liberty interest or property interest," and always involves a "constitutionally inadequate process" to remedy that injury. Doe v. Fla. Bar, 630 F.3d 1336, 1342 (11th Cir. 2011); see also Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Again, Plaintiffs have no constitutional interest in voting absentee. Zessar v. Helander, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006) (citing McDonald, 394 U.S. at 807). In addition, under the Mathews analysis, the risk of erroneous deprivation is not high, as Plaintiffs have not shown a single instance of erroneous deprivation let alone a high risk of it. Further, the statute provides procedures to minimize erroneous deprivation. As Plaintiffs acknowledge, [Doc. 33, ¶ 39], under O.C.G.A. § 21-2-381(b)(4), any individual whose identity is not confirmable from the application information is given both notice and opportunity to cure the problem. Finally, Plaintiffs fail to articulate any straightforward additional or substitute procedural safeguards, which is fatal to their facial challenge.

Plaintiffs also assert that Georgia's Absentee Applicant Notification Statute violates the Equal Protection Clause of the Fourteenth Amendment. [Doc. 33, ¶ 165]. Plaintiffs' Equal Protection challenge is facial, and because O.C.G.A. § 21-2-381 (b)(4) is facially neutral, Plaintiffs must allege facts showing discriminatory intent. See Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1319 n.9 (11th Cir. 2019) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977)). Plaintiffs fail to do so, which warrants dismissal. Plaintiffs' reliance on Bush v. Gore, 531 U.S. 98, 104–105, 109 (2000), which was expressly confined to its facts, is misplaced. The instant case is not about counting votes but the methods by which a voter may request an absentee ballot.

4. With Counts I and II, Plaintiffs ask the Court to strike a state law allowing some voters to make a single request for absentee ballots for each election cycle under Anderson-Burdick and 26th Amendment theories.

Plaintiffs assert that the State unconstitutionally burdens voters because only those who are age 65 or older, disabled, or subject to UOCAVA may submit a single request for an absentee ballot that covers all elections in a cycle. The purported burden is not on the vote itself but instead on the means of requesting an absentee ballot before Election Day. This is not actionable. McDonald, 394 U.S. at 807-08.

The alleged harm of this policy is purely hypothetical. Plaintiffs identified no one who has been denied the right to vote because of this law, nor have they alleged that the two Individual Plaintiffs under age 65 are incapable of making multiple requests. [Id., ¶¶ 21-22.]

Even if the risks were a burden on voting, the challenged statute is based on an important or compelling state interest. First, there is a strong interest in helping the most vulnerable. Second, the risk of fraud is reduced when unused absentee ballots are not floating throughout the State. See Billups, 554 F.3d at 1352, (describing anti-fraud efforts as "relevant and legitimate.").

Finally, a host of rational reasons support the law. For example, younger people tend to move more frequently than older Americans, meaning absentee ballots issued for an entire election cycle may be mailed to an address where the voter no longer resides or receives mail. This alone is sufficient to uphold the law.

Count II alleges a violation of the 26th Amendment to the United States Constitution. [Doc. 33, ¶¶ 139-46.] The only federal appellate court to have addressed this issue squarely rejected Plaintiffs' theory. See Texas Democratic Party v. Abbott, No. 20-50407, 2020 WL 2982937 at *14 (5th Cir. June 4, 2020). This Court should as well. By its terms, the 26th Amendment

prohibits only those state laws that "den[y] or abridge[]" the right to vote. The challenged statute does not "deny or abridge" anyone's right or opportunity to vote. See id. As discussed above and in the accompanying brief, numerous rationales support the law.

5. Plaintiffs identify no Georgia statute or policy that requires voters to place a stamp on an absentee ballot request or absentee ballot envelope but nevertheless raise Anderson-Burdick (Count I) and 24th Amendment (Count III) claims to compel Georgia taxpayers to pay all postage associated with absentee ballot requests and absentee ballots. [Doc. 33, ¶¶ 133-34, 147-50.]

The clearest reason to dismiss Count III is that no state statute or regulation raises revenue through absentee voting. A tax is imposed by a government to raise money for itself. Postage is not a requirement imposed by the State, nor does it flow to State coffers. Georgia does not require payment of anything to request or return an absentee ballot, and nothing flows to the State's treasury. See O.C.G.A. §§ 21-2-216(a), 21-2-381, and 21-2-385.

Georgia's policy does not burden Plaintiffs. The Individual Plaintiffs have not alleged that they cannot obtain stamps. Thus, any burden they face would be "incidental" and not actionable under federal law. See Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006), aff'd

sub nom. Crawford v. Marion Cty. Election Bd., 472 F.3d 949 (7th Cir. 2007), aff'd, 553 U.S. 181 (2008) (quoting Burdick v. Takushi, 504 U.S. 428, 433 (1992)). Plaintiffs admit the "burden" of acquiring postage is a "practical" one. [Doc. 33, ¶ 133.] Plaintiffs' reliance on COVID-19 does not save their facial claim. The Amended Complaint alleges that the virus may make it difficult for some to vote in November, but such concerns are speculative and do not show an injury. In addition, Plaintiffs have not alleged that they are unable to take basic precautions such as wearing a mask and washing their hands before and after voting.

Plaintiffs cannot show their alleged harm (purchasing a stamp) is caused by the State, which is fatal to their claims. The USPS, not the State of Georgia, imposes postal fees, and only the USPS benefits from those fees. 39 U.S.C. §§ 3622(c)(2); 101(d); 404(b).

6. Plaintiffs allege that requiring receipt of absentee ballots by the close of polls on Election Day violates procedural due process (Count IV) and imposes an unconstitutional burden (Count I). Both claims should be dismissed.

Plaintiffs fail to show the deprivation of a constitutionally protected interest because there is no federal constitutional right to vote by absentee ballot. Plaintiffs also fail to establish a constitutionally inadequate process. Here, the risk of erroneous deprivation is low, and Plaintiffs identify only

speculative concerns. [Doc. 33, at ¶¶22, 50, 63, 70, 71, 109, 112.] Nor do Plaintiffs articulate any meaningful additional procedural safeguards.

Extending the deadline would impose a heavy burden on the State, however, and frustrate the State's strong interests in conducting an efficient election. Green Party of Georgia v. Kemp, 106 F. Supp. 3d 1314, 1319 (N.D. Ga. 2015). Timely certification of election results also promotes the important state interest of certainty in elections. Broughton v. Douglas Cty. Bd. of Elections, 286 Ga. 528, 528–29 (2010). Finally, requiring absentee ballots to be delivered before unofficial results begin to be publicized cuts down on the potential of voter fraud, which is an important state interest and "eliminates the problem of missing, unclear, or even altered postmarks." See Nielsen v. DeSantis, 4:20cv236-RH-MJF (N.D. Fla. June 24, 2020).

Just as there is not a fundamental right to vote by absentee ballot, making certain that an absentee ballot is returned by election day is not a burden on voting under Anderson-Burdick. Plaintiffs' claim that they must "accurately guess" when to mail their ballot for the county to receive it by the close of the polls on Election Day is not actionable. [Doc. 33, ¶ 135.] "It is reasonable to expect a voter, who is voting by absentee ballot, no matter the reason, to familiarize themselves with the rules governing that procedure—especially when those procedures are provided." Thomas v. Andino, No. 3:20-

cv-1552, 2020 WL 2617329, at *25 n.25. (D.S.C. May 25, 2020). Plaintiffs' alleged injury that voting early deprives them of late-breaking information is equally meritless. [Doc. 33, ¶ 136.] Voters choose to vote early and therefore choose to vote with the information they have at the time. Third, Plaintiffs claim that increases in mail absentee ballots coupled with "unreliable mail service" caused by a budget crisis at USPS and COVID-19 will lead to delays in mail delivery. [Id. at ¶ 112.] Neither of these factors are acts of the State. Moreover, Plaintiffs' requested relief is arbitrary. They do not maintain that five additional business days will be sufficient to ensure absentee ballots are timely returned, further warranting dismissal of this claim.

Finally, the State has strong interests in the current deadlines. Requiring absentee ballots to arrive by the close of the polls on Election Day protects against fraud and allows county election officials to timely complete the ballot-counting process before the certification deadline.

7. Counts I and VI of Plaintiffs' Amended Complaint seek to strike, as facially unconstitutional, the Absentee Ballot Security Statute, which limits the types of persons who may "mail[] or deliver[]" absentee ballots for voters. O.C.G.A. § 21-2-385(a); [Doc. 33, ¶¶ 126-38, 167-72.] Count VII claims the same statute violates the Voting Rights Act. [Id. at ¶¶ 173-80.] Each facial challenge fails as a matter of law.

Georgia law does not require voters to personally mail or deliver their absentee ballot to a county election office. O.C.G.A. § 21-2-395(a); Ga. Comp. R. & Regs. r. 183-1-14-0.6-.14. Instead, any voter may also rely on an array of family members or a roommate to deliver or mail the ballot. Id. Voters in particular circumstances may also rely on "caregiver[s]" or employees of the jail or detention center to deliver their ballots, regardless of whether such person lives with the voter. Id. Further, voters confined to a hospital on Election Day can have a registrar or absentee ballot clerk personally deliver and return their absentee ballots. Id.

None of the individual Plaintiffs allege that they are unable to vote without assistance. [Doc. 33, ¶¶ 20-22.] NGP, however, seeks to (1) "collect[] and deliver[] completed, signed, and sealed absentee ballots," [id. at ¶ 19]; and (2) make sure that voters "prepared the ballot and envelope correctly." [Id. at ¶ 21.] Plaintiffs also allege that "over 64,000 Georgians" live alone and do not have caregivers but fail to allege that those voters lack family members or a nearby mailbox. [Id. at 39]. Plaintiffs also claim that "27.2% of adults in Georgia who have a disability," and that about "one-tenth" of disabled people nationwide say they need assistance in voting. [Id. at ¶¶ 74-75 (emphasis added).] But, Plaintiffs ignore (and do not challenge) O.C.G.A. § 21-2-385(b), which allows disabled voters to "receive assistance in preparing

his or her ballot from any person of the elector's choice." These allegations fail to state a claim under First Amendment and Anderson-Burdick theories.

The Supreme Court rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 375 (1968). By this standard, O.C.G.A. § 21-2-385(a) falls outside of these recognized limitations because it does not regulate speech. The statute only prohibits NGP from taking a ballot from a voter and deliver or mail it, which does not involve speech or impinge on the right of anyone to associate with NGP.

Even if this Court decided that the physical act of delivering an absentee ballot to a county election office or mailbox constitutes speech, that speech is, at best, incidental. Consequently, the Absentee Ballot Security Statute must be upheld if there is an "important governmental interest" to justify the regulation. O'Brien, 391 U.S. at 376. There are numerous, important reasons that justify the law, including protection against voter fraud, promoting voter confidence, and the orderly administration of the election process. See Burdick 504 U.S. at 433. And, recent examples of absentee voter fraud prove that the Supreme Court was correct to distinguish between pre-election speech and gathering completed ballots.

Plaintiffs have no burden. To the extent that any burden exists, it is slight and insufficient to overcome important government interests, which is fatal to Plaintiffs' Anderson-Burdick claim (Count I).

Plaintiffs' Voting Rights Act ("VRA") claim fails because Plaintiffs overlooked Georgia law that is directly on point and consistent with the VRA. Specifically, Plaintiffs allege that the restrictions on assisting voters with their absentee ballots violates Section 208 of the Voting Rights Act of 1965, 52 U.S.C. § 10508. Georgia law expressly addresses this in the same statute that Plaintiffs cite. O.C.G.A. § 21-2-385(b) provides that "[a] physically disabled or illiterate elector may receive assistance in preparing his or her ballot from any person of the elector's choice other than such elector's employer or the agent of such employer or an officer or agent of such elector's union . . . ." O.C.G.A. § 21-2-385(b). This addresses each of the criteria set forth in section 208 of the VRA and shows that Plaintiffs' Count VII must be dismissed.

In consideration of the foregoing, and as more fully set forth in the attached memorandum, State Defendants respectfully ask the Court to dismiss Plaintiffs' Amended Complaint in its entirety, with prejudice, as to State Defendants and grant State Defendants such other relief as the Court deems just and proper.

Respectfully submitted this 26th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT was prepared double-spaced in 13-point Century Schoolbook font, approved by the Court in Local Rule 5.1(C).

/s/Josh Belinfante
Josh Belinfante

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

THE NEW GEORGIA PROJECT, et al., Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and the Chair of the Georgia State Election Board, *et al.*, Defendants.	Civil Action File No. 1:20-cv-01986-ELR

STATE DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants Brad Raffensperger, in his official capacity as Secretary of State and the Chair of the Georgia State Election Board (the "Secretary"), State Election Board Members Rebecca N. Sullivan, David J. Worley, Anh Le, and Matthew Mashburn (collectively, the "State Defendants"), by and through their undersigned counsel, file this Brief in Support of their Motion to Dismiss Plaintiffs' Amended Complaint.

I. Facts

As part of their "four pillars" strategy[1], Plaintiffs challenge five aspects

[1] Plaintiffs' counsel explains their partisan national strategy on a website: https://www.democracydocket.com/4pillars/.

of voting in Georgia: (1) the statute governing incomplete absentee ballot request forms, O.C.G.A. § 21-2-384(b)(4) (the "Absentee Applicant Notification Statute"); (2) the statute allowing elderly, disabled, and Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") voters to request absentee ballots for an entire election cycle, O.C.G.A. § 21-2-381(a)(1)(G); (3) the United States Postal Service's ("USPS's") policy of requiring postage to deliver mail (but not official election mail); (4) the statutory requirement that absentee ballots be delivered to a county election official by 7:00 p.m. on Election Day, O.C.G.A. § 21-2-386(a)(1)(F); and (5) Georgia's statutory prohibition on third party ballot harvesting (e.g., allowing third parties to collect and return absentee ballots from voters), O.C.G.A. § 21-2-385(a) (the "Absentee Ballot Security Statute") (collectively, the "Challenged Policies"). [Doc. 33, ¶¶ 130-38.]

No individual plaintiff alleges she is being deprived of the right to vote. Plaintiff Jennings maintains that she could "benefit" from someone collecting her ballot in light of COVID-19, but does not allege she lacks access to a mailbox or is unable to obtain stamps. [Id. at ¶ 20.] Plaintiff Woodall, who states that she "lives alone a senior facility," neither claims that the facility lacks a mailbox, nor that numerous caregivers could not deliver her ballot, nor that she lacks stamps. [Id. at ¶ 21.] Plaintiff Pyne, who has been

temporarily residing in Florida for years, makes no claim of needing assistance of any kind, but instead worries that she cannot return her absentee ballot by election day. [Id. at ¶ 22.] NGP is an advocacy group that describes its mission as "registering Georgians to vote and . . . helping them become more civically engaged citizens," which includes assisting Georgians "exercise the franchise." [Id. at ¶ 17.]

II. Standard of Review

The standard of review applied on a motion to dismiss is that a complaint must "state a claim to relief that is plausible on its face," Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 570 (2007), and the complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). Factual allegations are presumed true, but not legal conclusions when they are "couched as [] factual allegation[s]." Iqbal, 556 U.S. at 678-79. In addition to the complaint, this Court may consider any matters appropriate for judicial notice. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). The Court may not consider, however, "affidavits and other evidence produced on application for a preliminary injunction." Land v. Dollar, 330 U.S. 731, 735 n. 4 (1947). Threshold issues of jurisdiction must be addressed prior to taking any other

action. Georgia Shift v. Gwinnett Cty., No. 1:19-cv-01135-AT, 2020 WL 864938 at *2 (N.D. Ga. Feb. 12, 2020).

III. Argument and Citation to Authority

This case is not about counting votes, as Plaintiffs do not allege they are prevented from voting. Plaintiffs lack standing, and their attacks on each of the Challenged Policies fail to state a claim for which recovery may be had.

A. Plaintiffs Lack Article III Standing

To satisfy constitutional standing requirements, each Plaintiff must clearly show that each of the Challenged Policies causes them a cognizable injury. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). Actionable injuries must be (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Lewis, 944 F.3d 1287, 1296 (11th Cir. 2019) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and punctuation omitted)). The injury must also be "fairly . . . trace[able] to the defendant's conduct," as opposed to the action of an absent third party. Id. Finally, each plaintiff must show that it is likely, not merely speculative, that a favorable judgment will redress her injury." Id.

As discussed more fully below, the Amended Complaint satisfies neither the injury nor redressability requirements. On injury, there is no allegation that the individual Plaintiffs: cannot vote without assistance; have

had an absentee ballot request rejected; cannot obtain stamps; cannot access a mail box to take advantage of USPS policy to mail official election mail without sufficient postage; are precluded from requesting an absentee ballot, voting with the absentee ballot, or curing any deficiency in the absentee ballot process by voting in person. [See Doc. 33, ¶¶ 20-22.]

Nonsensically, Plaintiff NGP claims associational standing because it must divert resources from its missions of registering and encouraging voters to vote to its mission of registering and encouraging voters to vote. [Id. at ¶¶ 17-19.] These allegations fall short of establishing a cognizable injury. Associational standing requires "specific allegations establishing that at least one identified member ha[s] suffered or [will] suffer harm." Ga. Republican Party v. SEC, 888 F.3d 1198, 1203 (11th Cir. 2018) (citation omitted). NGP has neither identified a single member nor alleged any specific harm.

NGP fares no better on its diversion of resources theory, where precedent requires the threatened future injury be a "realistic danger" that is not "merely hypothetical or conjectural." Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1161 (11th Cir. 2008). Recent precedent makes clear that a party cannot simply complain they must divert resources, they must allege (1) what it is diverting resources from; and (2) how that diversion is connected to the alleged wrongful conduct. Jacobson v. Fla. Sec'y of State,

No. 19-14552 at 21-22 (11th Cir. April 29, 2020). NGP does neither, and its vague, formulaic statement that the Challenged Policies cause it to divert resources is insufficient to confer standing. [Doc. 33, ¶¶ 17-18.] Spokeo, Inc., 136 S. Ct. at 1547; Lujan, 504 U.S. at 561. Indeed, for NGP, the 2020 election will be no different than any other for the organization: it will seek to register voters and encourage them to vote. [Doc. 33, ¶ 18.] These threshold infirmities warrant dismissing the Amended Complaint.

B. The Anderson-Burdick Analysis.

In Count I, Plaintiffs claim that each of the Challenged Policies unconstitutionally burdens their right to vote, or for NGP, causes it to expend resources to satisfy its mission. [Id. at ¶¶ 126-38.] To survive a motion to dismiss, Plaintiffs must first identify a burden that the challenged law imposes on voting. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 205 (2008) (Scalia, J., concurring in judgment). If the imposed burden is "severe," the law must be narrowly tailored to achieve a compelling state interest, but if the challenged statute imposes "only 'reasonable, nondiscriminatory restrictions,'" the state law must be upheld so long as the State's interest is "important." Burdick v. Takushi, 504 U.S. 428, 434 (1992) (citation omitted).

Anderson-Burdick's balancing is required because "there must be a substantial regulation of elections if they are to be fair and honest and if

[there is to be] some sort of order, rather than chaos." Storer v. Brown, 415 U.S. 724, 730 (1974); see also Burdick, 504 US at 433 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). None of the Challenged Policies impose an unconstitutional burden on the Plaintiffs, and to the extent they impose any burdens, sufficient state interests foreclose Plaintiffs' claims.

C. Georgia's Absentee Applicant Notification Statute.

Plaintiffs challenge Georgia's Absentee Applicant Notification Statute on several grounds—(1) First and Fourteenth Amendment, Anderson-Burdick analysis (Count I); (2) Procedural Due Process (Count IV); and (3) Equal Protection (Count V)—but none state a claim for which relief may be had.

i. Count I: Anderson-Burdick and the First and Fourteenth Amendments.

Plaintiffs' alleged injury centers on a single portion of a single statute, O.C.G.A. § 21-2-381(b)(4), which states: "If the registrar or clerk is unable to determine the identity of the elector from information given on the application, the registrar or clerk should promptly write to request additional information." O.C.G.A. § 21-2-381(b)(4) (emphasis added). [See Doc. 33, ¶¶ 35–45 (quoting O.C.G.A. § 21-2-381(b)(4)).][2] The Individual Plaintiffs,

[2] The statute—and Plaintiffs' claim—only applies when the identity of the elector cannot be confirmed, not instances in which the voter is ineligible to

however, do not allege that their future absentee ballot requests will be rejected under this statute. Instead, Plaintiffs rely on unidentified other "[v]oters" who are hypothetically notified "late in the process, or not at all . . . [and] may no longer be able to vote absentee" or "may have no choice at all" due to COVID-19, and/or the hypothetical voters' disability, lack transportation, or "inflexible work schedules."[3] [Doc. 33, ¶ 131 (emphasis added).] In short, Plaintiffs have alleged no burden on themselves, but merely hypothesize a potential one for unidentified third parties. Their claims can be dismissed on this point alone.

The lack of an as-applied injury renders Plaintiffs' claim as a facial challenge, as it seeks to "invalidate a law even though [the law's] application in the case under consideration may be constitutionally unobjectionable." Jacobs v. The Fla. Bar, 50 F.3d 901, 905-906 (11th Cir. 1995) (citations and internal quotation marks omitted). Facial challenges are generally disfavored and "[a] plaintiff challenging a law as facially unconstitutional 'must

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vote in the election; the signature on the application does not appear to match the signature on file; or the voter is not registered to vote. In those instances, different paragraphs of the same subsection apply. See O.C.G.A. §§ 21-2-381(b)(3) and 21-2-381(b)(5).

[3] Georgia law requires that employers permit employees to take up to two hours of "time off from his or her employment to vote[.]" O.C.G.A. § 21-2-404.

establish that no set of circumstances exists under which the [law] would be valid.'" J.R. v. Hansen, 803 F. 3d 1315, 1320 (11th Cir. 2015) (Hansen II) (citation omitted); see also Wash. State Grange v. Wash. State Republican Party, 552, U.S. 442, 449 (2008).

The Absentee Applicant Notification Statute easily survives a facial challenge. First, the law can be implemented in a constitutional manner because a county election office could, conceivably, notify a voter of an issue in time for the voter to cure the problem. Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1250 (11th Cir. 2013) (facial challenges fail when statute could be implemented in a constitutional manner).

Second, the statute provides sufficient protections. Counties are not "at liberty to notify voters they are unable to process their absentee applications at their leisure," [Doc. 33, ¶41]; instead, they must do so "promptly." O.C.G.A. § 21-2-384(b)(4). Federal law presumes the law is followed as written, United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926), and conclusory allegations to the contrary will not withstand judicial scrutiny. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Third, "there is no fundamental right to vote by absentee ballot," Friedman v. Snipes, 345 F. Supp.2d 1356, 1370 (S.D. Fla. 2004) (citing McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 807 (1969)),

much less any fundamental right to request an absentee ballot. State Defendants cannot unlawfully burden an illusory right. Cf. McDonald, 394 U.S. at 807-808 (applying Equal Protection analysis).

Fourth, in the alternative, any purported burden caused by an absentee ballot request is minute. The Absentee Applicant Notification Statute does not preclude a voter from: (1) remedying the deficiency and voting absentee-by-mail; (2) utilizing early voting (absentee-in-person); or (3) voting on Election Day. See McDonald, 394 U.S. at 808 (applying rational basis review where challenged absentee statute did not preclude plaintiffs from voting). These are not high burdens, Plaintiffs have not alleged they are, and Georgia voters have more opportunities to vote than many Americans.[4]

Finally, any purported burden is "justified by relevant and legitimate state interests." Billups, 554 F.3d at 1352. The State has an interest in not only preventing fraud and verifying the eligibility of voters, but also in

[4] Georgia is one of twenty-nine states with in-person voting, but also provides no excuse absentee-by-mail voting. *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options,* National Conference of State Legislatures, Table 1, https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx. Georgia law also requires that elections have at least sixteen days of early voting. O.C.G.A. § 21-2-385(d)).

permitting flexibility to county election officials to do their jobs without unreasonable and unnecessary interference or arbitrary deadlines.[5]

ii. Count IV: Procedural Due Process.

Plaintiffs' procedural due process claim (Count VI) is another "disfavored" facial challenge to the Absentee Applicant Notification Statute, because Plaintiffs fail to identify a single voter to whom the challenged statute has been unconstitutionally applied. Wash. State Grange, 552 U.S. at 449; [Doc. 33, ¶6]; see also Martin v. Kemp, 341 F. Supp. 3d 1326, 1337 (N.D. Ga. 2018) (plaintiffs raised a facial challenge). Count IV fails because Plaintiffs cannot show that the Absentee Applicant Notification Statute always deprives voters of a "constitutionally-protected liberty interest or property interest," and always involves a "constitutionally inadequate process" to remedy that injury. Doe v. Fla. Bar, 630 F.3d 1336, 1342 (11th Cir. 2011); see also Mathews v. Eldridge, 424 U.S. 319, 335, (1976).

Again, Plaintiffs have no constitutional interest in voting absentee. Zessar v. Helander, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006) (citing McDonald, 394 U.S. at 807). In addition, under the Mathews analysis, the risk of erroneous deprivation is not high, as Plaintiffs have not

[5] Plaintiffs themselves offer no proposed method to address incomplete absentee ballot requests. [See Doc. 33 at 80.]

shown a single instance of erroneous deprivation let alone a high risk of it.[6] Further, the statute provides procedures to minimize erroneous deprivation. As Plaintiffs acknowledge, [Doc. 33, ¶ 39], under O.C.G.A. § 21-2-381(b)(4), any individual whose identity is not confirmable from the application information is given both notice and opportunity to cure the problem. This post-deprivation safeguard provides an additional reason to dismiss Count IV. See McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994).

Finally, Plaintiffs fail to articulate any straightforward additional or substitute procedural safeguards, which is fatal to their facial challenge. [See Doc. 33, ¶¶6, 131, 156.] Uniformity in timing is not a cure because any deadline, however generous, can be exceeded.[7]

iii. Count V: Equal Protection.

Plaintiffs also assert that Georgia's Absentee Applicant Notification Statute violates the Equal Protection Clause of the Fourteenth Amendment. [Doc. 33, ¶ 165]. Plaintiffs erroneously premise their argument on Bush v. Gore, 531 U.S. 98, 104–105, 109 (2000), which was expressly "limited to the

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[6] Plaintiffs contend in 2018 "nearly 1,000 absentee ballot applications were rejected" but do not allege these rejections were erroneous or were not later cured by voters' submission of additional information. [Doc. 33, ¶ 3.]

[7] Plaintiffs' nondescript remedy hinders the State Defendants' ability to determine the administrative burden of implementing it, and the State Defendants reserve the right to more fully respond if Plaintiffs further develop their claim.

present circumstances." Plaintiffs fail to acknowledge this fact and the fact that Bush v. Gore, unlike this case, concerned instances where one person's vote may be counted differently than another's. This case is not about counting votes at all, but the methods by which a voter may request an absentee ballot.

Beyond this distinction, there is a rational basis for the challenged law. See Abbott, 2020 WL 2982937 at *9-10 (applying McDonald and the rational basis test). Plaintiffs' Equal Protection challenge is facial, and because O.C.G.A. § 21-2-381 (b)(4) is facially neutral, Plaintiffs must allege facts showing discriminatory intent. See Lee, 915 F.3d at 1319 n.9 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977)). Plaintiffs fail to do so, which warrants dismissal.

D. Requesting Absentee Ballots for Each Election.

Counts I and II seek to strike a state law that allows some voters to request an absentee ballot once for each election in the cycle under Anderson-Burdick and 26th Amendment theories, respectively.

i. The Anderson-Burdick Analysis (Count I).

Plaintiffs assert that the State unconstitutionally burdens voters because only those who are age 65 or older, disabled, or subject to UOCAVA may submit a single request for an absentee ballot that covers all elections in

a cycle. Here, too, the purported burden is not on the vote itself but instead on the means of requesting an absentee ballot before Election Day. This is not actionable. McDonald, 394 U.S. at 807-08.

Worse yet, the alleged harm of this policy is purely hypothetical; it relies on Plaintiffs' unfounded speculation that persons who request an absentee ballot for each election "are at greater risk" of something going wrong. [Doc. 33, ¶ 132.] But Plaintiffs identified no one who has been denied the right to vote because of this law, nor have they alleged that the two Individual Plaintiffs under age 65 (Woodall and Pyne) are incapable of making multiple requests. [Id., ¶¶ 21-22.] These manufactured "risks" do not articulate a cognizable claim: "[t]he Constitution is not offended simply because some groups find voting more convenient than" others. Abbott, 2020 WL 2982937 at *11 (5th Cir. Jun. 4, 2020) (quoting McDonald, 394 U.S. at 810).

Even if the risks were a burden on voting, the challenged statute is based on an important or compelling state interest. First, there is a strong interest in helping the most vulnerable. "'Ironically, it is [Georgia's] willingness' to afford flexibility to older [and disabled] citizens 'that has provided [Plaintiffs] with a basis for arguing that the provision . . .'" is unconstitutional. Abbott, 2020 WL 2982937 at *11 (quoting McDonald, 394

U.S. at 810–811). Second, the risk of fraud is reduced when unused absentee ballots are not floating throughout the State. See Billups, 554 F.3d at 1352, (describing anti-fraud efforts as "relevant and legitimate."

Finally, a host of rational reasons support the law. For example, younger people tend to move more frequently than older Americans, meaning absentee ballots issued for an entire election cycle may be mailed to an address where the voter no longer resides or receives mail.[8] This alone is sufficient to uphold the law.

ii. The 26th Amendment Claim (Count II)

Count II alleges a violation of the 26th Amendment to the United States Constitution. [Doc. 33, ¶¶ 139-46.] The only federal appellate court to have addressed this issue squarely rejected Plaintiffs' theory. See Abbott, 2020 WL 2982937 at *14.[9] This Court should as well.

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[8] United States Census, Young Adult Migration: 2007-2009, 2010-2012: American Community Surveys, (March 2015) available at https://www.census.gov/content/dam/Census/library/publications/2015/acs/acs-31.pdf.

[9] The Amended Complaint cites an earlier trial-court order from Abbott, which the Fifth Circuit decided was erroneous and described as "an order that will be remembered more for audacity than legal reasoning." [Doc. 33 at 63]. Abbott, 2020 WL 2982937, at *1.

The 26th Amendment provides, in relevant part: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI (emphasis added). By its terms, the 26th Amendment prohibits only those state laws that "den[y] or abridge[]" the right to vote. The statute expands opportunities for some voters to request multiple absentee ballots, but all voters can request an absentee ballot for any election. O.C.G.A. § 21-2-381(a)(1)(G). Put simply, the challenged statute does not "deny or abridge" anyone's right or opportunity to vote. See Abbott, 2020 WL 2982937 at *14 (deciding a more restrictive law was constitutional because "qualified voters [could] still exercise the franchise").

Other cases have rejected similar challenges by applying a rational basis test to questions about absentee ballots.[10] See Abbott, 2020 WL 2982937 at *14; Walgren v. Bd. of Selectmen of Town of Amherst, Mass., 373 F. Supp. 624, 634 (D. Mass. 1974), aff'd sub nom. Walgren v. Bd. of Selectmen

[10] Cases cited in Plaintiffs' Amended Complaint, however, are easily distinguishable, as none involved absentee voting. [See Doc. 33 at 63 (citing Worden v. Mercer Cty. Bd. Of Elections, 294 A.2d 233, 243 (N.J. 1972); Colo. Project-Common Cause v. Anderson, 495 P.2d 220, 223 (Colo. 1972); and League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205, 1221-23 (N.D. Fla. 2018)].

of Town of Amherst, 519 F.2d 1364 (1st Cir. 1975). Under this analysis, the statute must be upheld unless "no grounds can be conceived to justify the different treatment of voters," McDonald, 394 U.S. at 809, and the "policy merits of [Georgia's] voting procedures [are] not before [this] court." . . . Abbott, 2020 WL 2982937 at *13 (citing Heller v. Doe ex rel. Doe, 509 U.S. 312, 319 (1993)). As discussed above, numerous rationales support the law.

E. Postage (Counts I and III).

Plaintiffs identify no Georgia statute or policy that requires voters to place a stamp on an absentee ballot request or absentee ballot envelope. Nevertheless, they raise Anderson-Burdick (Count I) and 24th Amendment (Count III) claims to compel Georgia taxpayers to pay all postage associated with absentee ballot requests and absentee ballots. [Doc. 33, ¶¶ 133-34, 147-50.] No Court has endorsed Plaintiffs' radical theory, and this Court should not be the first.

i. Georgia's Decision Not To Prepay Voters' Postage Is Not A Poll Tax (Count III).

The U.S. Constitution prohibits a state from denying the right of citizen to vote in a federal election "by reason of failure to pay any poll **tax** or other

tax." U.S. Const. amend. XXIV (emphasis added).[11]

The clearest reason to dismiss Count III is that no state statute or regulation raises revenue through absentee voting. While Plaintiffs offer no definition of what constitutes a tax under the United States Constitution, binding precedent has. Under federal law, a tax is an "enforced contribution to provide for the support of the government." United States v. State Tax Comm'n, 421 U.S. 599, 606 (1975) (quoting United States v. La Franca, 282 U.S. 568, 572 (1931)); see also N.J. v. Anderson, 203 U.S. 483, 492 (1906) ("[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government."). In other words, a tax is imposed by a government to raise money for itself. Postage is not a requirement imposed by the State, nor does it flow to State coffers. In fact, postage is a service charge and not a tax. In re Adams, 40 B.R. 545, 548 (E.D. Pa. 1984).

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[11] There is no difference in the definition of a per se poll tax under either the 14th or 24th Amendment. See, e.g., Johnson v. Governor of State of Fla., 405 F.3d 1214, 1217 (11th Cir. 2005) (summarily disposing of plaintiffs' poll tax claims brought under the 14th Amendment, the 24th Amendment, and section 10 of the Voting Rights Act). As such, Plaintiffs' poll tax claim under the 14th Amendment fails for all the reasons discussed herein. In addition, Plaintiffs claims fails they have not alleged that Defendants acted with discriminatory intent or purpose and shown a discriminatory impact. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); United States v. Marengo Cty. Comm'n, 731 F.2d 1546, 1571 (11th Cir. 1984).

(distinguishing between taxes and charges); In re Lorber Indus. of Cal., Inc., 675 F.2d 1062, 1067 (9th Cir. 1982) (deciding mandatory fees are not taxes).

In Harman v. Forssenius, 380 U.S. 528, 542 (1965), the seminal poll tax case under the 24th Amendment, Virginia required voters to either pay an express poll tax or complete a cumbersome and burdensome "certificate of residence." 380 U.S. at 532. The Court concluded the choice was a false one, and it struck the poll tax statute as unconstitutional. Id. Here, Plaintiffs do not allege that voting in person (early or on Election Day) is inherently burdensome and necessitates the use of U.S. Mail. Also, unlike Virginia in Harman, Georgia does not require payment of anything to request or return an absentee ballot, and nothing flows to the State's treasury. See O.C.G.A. §§ 21-2-216(a) (elector's qualifications); 21-2-381 (application for absentee ballot); 21-2-385 (voting by absentee electors).

Unsurprisingly, similar polices in other states have easily withstood similar challenges. See League of Women Voters of Ohio v. LaRose, No. 2:20-cv-01638-MHW-EPD (S.D. Ohio Apr. 3, 2020) (Slip Op. at 25); Bruce v. City of Colorado Springs, 971 P.2d 679, 685 (Colo. App. 1998) (deciding a requirement that voters "affix a stamp to their ballots" is reasonable and not an unconstitutional poll tax). Such should be the case here as well.

ii. Georgia's Postage Policy Imposes No Unconstitutional Burden

(Count I).

Georgia's policy does not burden Plaintiffs. The Individual Plaintiffs have not alleged that they cannot obtain stamps. Thus, any burden they face would be "incidental" and not actionable under federal law. See Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006), aff'd sub nom. Crawford, 472 F.3d 949 (7th Cir. 2007), aff'd, 553 U.S. 181 (2008) ("It is axiomatic that "(e)lection laws will invariably impose some burden upon individual voters," . . . [but] the cost of time and transportation cannot plausibly qualify as a prohibited poll tax . . .") (quoting Burdick, 504 U.S. at 433). In fact, Plaintiffs agree and admit the "burden" of acquiring postage is a "practical" one. [Doc. 33, ¶ 133.] Plaintiffs' reliance on COVID-19 does not save their facial claim either. The Amended Complaint alleges that the virus may make it difficult for some to vote in November, but such concerns are speculative and do not show an injury. In addition, Plaintiffs have not alleged that they are unable to take basic precautions such as wearing a mask and washing their hands before and after voting.

Other courts have held that such incidental burdens to voting are not actionable. See Veasey v. Abbott, 796 F.3d 487, 268 (5th Cir. 2015) (photo identification requirement); Gonzalez v. Arizona, 677 F.3d 383, 407 (9th Cir. 2012) (same) Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1335

(N.D. Ga. 2006) (same); Ind. Democratic Party, 458 F. Supp. 2d at 827 ("the imposition of tangential burdens does not transform a regulation into a poll tax"). This incidental burden is no more actionable than the State's decision not to reimburse voters for gas, bus fare, or cab fare utilized to drive to polling locations.

Moreover, while the Amended Complaint alleges that the virus may make it difficult for some to vote in November, such concerns are speculative and do not show an injury. Plaintiffs have also not alleged that they are unable to take basic precautions such as wearing a mask and washing their hands before and after voting. The State also has an important interest in not pre-paying postage: it is in the midst of a budget crisis of historical proportions. *Curling v. Raffensperger*, No. 1:17-cv-2989-AT (N.D. Ga. May 26, 2020) (order denying motions for attorney's fees and expenses).[12] Thus, Plaintiffs' Anderson-Burdick claim also fails.

iii. Plaintiffs have failed to plead causation as the State does not impose, control, or otherwise require the use of a stamp to mail in a ballot.

Plaintiffs cannot show their alleged harm (purchasing a stamp) is caused by the State, which is fatal to their claims. The USPS, not the State of

[12] A copy of this Order is attached as Exhibit A.

Georgia, imposes postal fees, and only the USPS benefits from those fees. 39 U.S.C. §§ 3622(c)(2); 101(d); 404(b). The State cannot impose a tax on it, and it neither controls nor benefits from postal fees. Similarly, voters in need of a stamp choose to vote absentee by mail; they are not compelled to do so.

F. Election Day Deadline

Plaintiffs allege that requiring receipt of absentee ballots by the close of polls on Election Day violates procedural due process (Count IV) and imposes an unconstitutional burden (Count I). Both claims should be dismissed.

i. Procedural Due Process (Count IV)

To show a violation of procedural due process, Plaintiffs must allege the challenged policy (1) deprives them of a constitutional right to vote; (2) is a state action; and (3) constitutes constitutionally inadequate process. Grayden v. Rhodes, 345, F.3d 1225 1232 (11th Cir. 2003). Plaintiffs have failed to allege any of these required elements.

First, Plaintiffs fail to show the deprivation of a constitutionally-protected interest because, as previously discussed, there is no federal constitutional right to vote by absentee ballot. McDonald, 394 U.S. at 807-08.

Second, Plaintiffs fail to establish a constitutionally inadequate process. This requires an analysis of the right at issue, weighed against the risk of erroneous deprivation, the value of additional procedural safeguards,

and the state's interest or burden of implementing those safeguards. Mathews, 424 U.S. at 334. Here, the risk of erroneous deprivation is low, and Plaintiffs identify only speculative concerns. [Doc. 33, at ¶¶22, 50, 63, 70, 71, 109, 112.]

Next, Plaintiffs fail to articulate any meaningful additional procedural safeguards. It is anyone's guess why an absentee ballot receipt deadline of 5 days after Election Day is constitutional but Election Day itself is unconstitutional. Moreover, Plaintiffs do not allege that the "generality of cases" are those voters whose absentee ballots arrive after Election Day. Mathews, 424 U.S. at 344.

Extending the deadline, however, would impose a heavy burden on the State and frustrate the State's strong interests in conducting an efficient election. Green Party of Georgia v. Kemp, 106 F. Supp. 3d 1314, 1319 (N.D. Ga. 2015). After Election Day, elections officials need time to send out required cure notifications for absentee ballots, deal with provisional ballots, conduct post-election audits, certify election results and prepare and plan for any runoffs. Delaying these actions to count late absentee ballots would be detrimental; slowing the State's efforts to finalize the last election and plan for the next.

Timely certification of election results also promotes the important state interest of certainty in elections, as there is a "strong desire to avoid election uncertainty and the confusion and prejudice which can come in its wake." Broughton v. Douglas Cty. Bd. of Elections, 286 Ga. 528, 528–29 (2010). This certainty would be compromised if late absentee ballots were counted, as voters' confidence in the elections process would be undermined by a late change in the procedures they know and plan for. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." Purcell v. Gonzalez, 549 U.S. 1, 4 (2006); see also Eu v. San Francisco Cty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989). Finally, requiring absentee ballots to be delivered before unofficial results begin to be publicized cuts down on the potential of voter fraud, which is an important state interest and "eliminates the problem of missing, unclear, or even altered postmarks." See Nielsen v. DeSantis, 4:20cv236-RH-MJF (N.D.Fla. June 24, 2020) (Order Denying Preliminary Injunction).

ii. Anderson-Burdick (Count I)

As shown, there is no fundamental right to vote by absentee ballot. McDonald, 394 U.S. at 807. Likewise, there is certainly no burden on making sure the absentee ballot is returned by the close of polls on Election Day. This is particularly true given the fact that absentee voters can start receiving

ballots by mail as early as forty-five days prior to election day, O.C.G.A. § 21-2-384(a)(2), and absentee ballot requests can be made as early as 180 days before a primary election or the November election, O.C.G.A. § 21-2-381(a)(1)(A). Georgia voters have numerous opportunities to vote absentee—return by mail, at a county drop box, hand-delivery to the county elections office, and early in-person voting. *See* O.C.G.A. § 21-2-385; Ga. Comp. R. & Regs. r. 183-1-14-0.6-.14. Moreover, absentee voters can still vote in person after requesting and receiving their absentee ballot. *See* O.C.G.A. § 21-2-388.

Plaintiffs' advance various theories of unconstitutional burdens. Each fails. First, Plaintiffs' claim that they must "accurately guess" when to mail their ballot for the county to receive it by the close of the polls on Election Day is not actionable. [Doc. 33, ¶ 135.] "It is reasonable to expect a voter, who is voting by absentee ballot, no matter the reason, to familiarize themselves with the rules governing that procedure—especially when those procedures are provided." Thomas v. Andino, No. 3:20-cv-1552, 2020 WL 2617329, at *25 n.25. (D.S.C. May 25, 2020). Here, the voter signs an oath on the absentee ballot envelope indicating that the voter read and understands the instructions for voting an absentee ballot. See O.C.G.A. § 21-2-384(c)(1). Under these circumstances, "voters who fail to get their vote in early cannot blame [Georgia] law for their inability to vote; they must blame 'their own

failure to take timely steps to effect their enrollment." Id. (quoting Rosario v. Rockefeller, 410 U.S. 752, 758 (1973)); see also Mays v. LaRose, 951 F.3d 775, 792 (6th Cir. 2020) (upholding "Ohio's deadline of noon, three days before Election Day" for requesting a mail-in ballot).

Second, Plaintiffs' alleged injury that voting early deprives them of late-breaking information is equally meritless. [Doc. 33, ¶ 136.] Voters choose to vote early, and therefore choose to vote with the information they have at the time.

Third, Plaintiffs claim that increases in mail absentee ballots coupled with "unreliable mail service" caused by a budget crisis at USPS and COVID-19 will lead to delays in mail delivery. [Id. at ¶ 112.] This "effectively moves election day forward for absentee voters—depending on postal delays, potentially by a week or more," due to the current public-health emergency. [Id. at ¶ 136.] Neither of these factors are acts of the State: "[t]he real problem here is COVID-19, which all but the craziest conspiracy theorists would concede is not the result of any act or failure to act by the Government." Coalition for Good Governance v. Raffensperger, No. 1:20-CV-1677-TCB, 2020 WL 2509092, at *3 (N.D. Ga. May 14, 2020). Moreover, Plaintiffs' requested relief is arbitrary. They do not maintain that five additional business days will be sufficient to ensure absentee ballots are

timely returned, further warranting dismissal of this claim. See e.g., id. ("Similarly here, there are no discernable and manageable standards to decide issues such as how early is too early to hold the election or how many safety measures are enough.").

Finally, as shown above, the State has strong interests in the current deadlines. Requiring absentee ballots to arrive by the close of the polls on Election Day protects against fraud and allows county election officials to timely complete the ballot-counting process before the certification deadline.

G. Georgia's Absentee Ballot Security Statute (Counts I, VI and VII).

Counts I and VI of Plaintiffs' Amended Complaint seek to strike, as facially unconstitutional, the Absentee Ballot Security Statute, which limits the types of persons who may "mail[] or deliver[]" absentee ballots for voters. O.C.G.A. § 21-2-385(a); [Doc. 33, ¶¶ 126-38, 167-72.] Count VII claims the same statute violates the Voting Rights Act. [Id. at ¶¶ 173-80.] Each facial challenge fails as a matter of law.

Georgia law does not require voters to personally mail or deliver their absentee ballot to a county election office (or currently, county drop-box). O.C.G.A. § 21-2-395(a); Ga. Comp. R. & Regs. r. 183-1-14-0.6-.14. Instead, any voter may also rely on an array of family members or a roommate to deliver

or mail the ballot. Id. Voters in particular circumstances—disabled or in custody in a jail or other detention center—may also rely on "caregiver[s]" or employees of the jail or detention center to deliver their ballots, regardless of whether such person lives with the voter. Id. Further, voters confined to a hospital on Election Day can have a registrar or absentee ballot clerk personally deliver and return their absentee ballots. Id.

None of the individual plaintiffs allege that they are unable to vote without assistance. [Doc. 33, ¶¶ 20-22.] NGP, however, seeks to (1) "collect[] and deliver[]completed, signed, and sealed absentee ballots," [id. at ¶ 19]; and (2) make sure that voters "prepared the ballot and envelope correctly." [Id. at ¶ 21.][13] Plaintiffs also allege that "over 64,000 Georgians" live alone and do not have caregivers, but fail to allege that those voters lack family members or a nearby mailbox. [Id. at 39]. Plaintiffs also claim that "27.2% of adults in

[13] These two goals are not the same. The first is a purely physical act where the voter has already completed their ballot and sealed it in an envelope. The second involves assisting the voter in "prepar[ing]" or voting the ballot. (Doc. 33 at 22). The statute identified in the Complaint, O.C.G.A. § 21-2-385(a), does not address helping individuals with voting itself; that is covered by O.C.G.A. § 21-2-385(b), which limits voter assistance to the disabled and illiterate. The State Defendants reserve the right to respond more fully if Plaintiffs amended their complaint to address ballot assistance. Suffice it to say, for now, that concerns about voter fraud and voter intimidation are magnified if the NGP seeks to assist voters with their ballot preparation.

Georgia who have a disability," and that about "one-tenth" of disabled people nationwide say they need assistance in voting. [Id. at ¶¶ 74-75 (emphasis added).] But, Plaintiffs ignore (and do not challenge) O.C.G.A. § 21-2-385(b), which allows disabled voters to "receive assistance in preparing his or her ballot from any person of the elector's choice."[14]

These allegations fail to state a claim under First Amendment and Anderson-Burdick theories, and the analysis for both is effectively the same for Counts I and VI. Once again, Plaintiffs put forward a theory that no court has ever adopted, and this Court should not be the first. Georgia's statute regulates conduct, not speech, and the Amended Complaint, though replete with case citations, provides no authority to the contrary. [Id. at ¶¶ 72-78.]

i. First Amendment & Anderson-Burdick Claims (Counts I and VI).

State laws will withstand First Amendment scrutiny if the State's interests are sufficiently important and narrowly tailored to withstand judicial scrutiny. See, e.g., Burdick, 504 U.S. at 434; United States v. O'Brien, 391 U.S. 367, 376-78 (1968) (applying First Amendment analysis). The

[14] As discussed in subsection (ii) below, Plaintiffs wrongly claim that Georgia law "restricts [the disabled] from receiving assistance from anyone of their choice." (Doc. 33 at 76). Their description of the law is entitled to no deference by this Court, even on a motion to dismiss. S. Florida Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 409 n.10 (11th Cir. 1996).

Supreme Court rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." O'Brien, 391 U.S. at 375. By this standard, O.C.G.A. § 21-2-385(a) falls outside of these recognized limitations because it does not regulate speech. This analysis is substantively similar to that in Anderson-Burdick.

Even in the context of the First Amendment, a party alleging a facial challenge must show that "that no set of circumstances exists under which the [regulations] would be valid." Worley, 717 F.3d at 1250. Plaintiffs cannot make that showing for several reasons. Third parties like NGP are not prohibited from urging individuals to vote or from explaining how the voting and absentee voting process works. O.C.G.A. § 21-2-385. They can facilitate and coordinate absentee-ballot delivery from approved family members, roommates, or caregivers. NGP members can be present to explain the importance of voting and even help a voter get to a mailbox or coordinate a visit from a family member. The only thing NGP cannot do is take a ballot from a voter and deliver or mail it, which does not involve speech or impinge on the right of anyone to associate with NGP.

Other First Amendment cases make this point. Just two years ago, the Ninth Circuit held that that the physical collection of ballots is non-

expressive conduct that does not "[c]onvey [ ] a symbolic message of any sort." Knox v. Brnovich, 907 F.3d 1167, 1181 (9th Cir. 2018). Likewise, the Fifth Circuit held that "there is nothing inherently expressive about receiving a person's completed [voter-registration] application and being charged with getting that application to the proper place." Voting for Am., Inc. v. Steen, 732 F.3d 382, 392 (5th Cir. 2013) (internal quotation marks omitted).[15]

But, even if this Court decided that the physical (and silent) act of delivering an absentee ballot to a county election office or mailbox constitutes speech, that speech is, at best, incidental. Consequently, the Absentee Ballot Security Statute must be upheld if there is an "important governmental interest" to justify the regulation. O'Brien, 391 U.S. at 376. This standard of judicial scrutiny is a "lenient" one. Johnson, 491 U.S. at 407.

There are numerous, important reasons that justify the law, including protection against voter fraud, promoting voter confidence, and the orderly administration of the election process. See Burdick 504 U.S. at 433. The Supreme Court itself acknowledged an important government interest in the handling of ballots (as opposed to voter registration efforts). Meyer, 486 U.S.

[15] The Steen court also distinguished collecting voter-registration applications from voter-registration drives, which is the bulk of Plaintiffs' authority. [Doc 33 at 72-75.] Id. at 388-389.

at 427-28. And, recent examples of absentee voter fraud prove that the Supreme Court was correct to distinguish between pre-election speech and gathering completed ballots. In 2018, North Carolina voters were subject to ballot harvesting fraud that overturned a congressional election.[16] In Indiana, a court concluded that a political candidate induced

> voters that were first-time voters or otherwise less informed or lacking in knowledge of the voting process, the infirm, the poor, and those with limited skills in the English language, to engage in absentee voting; [and provided] compensation and/or creating the expectation of compensation to induce voters to cast their ballot via the absentee process.

Pabey v. Pastrick, 816 N.E.2d 1138, 1144 (Ind. 2004). Other incidents of absentee voter fraud occurred in Florida and Pennsylvania. See In re Election for City of Miami, 707 So. 2d 1170, 1171 (Fla. Dist. Ct. App. 1998); Marks v. Stinson, 19 F.3d 873, 877 (3d Cir. 1994).

Moreover, NGP itself has had real trouble in its past efforts to engage voters. In 2017, upon inquiries by numerous Republican and Democratic county officials, the State Election Board referred 14 individuals affiliated

[16] Rich Lowry, The Scandal in North Carolina Proves That Voter Fraud is Real, N.Y. Post (Dec. 6, 2018), https://nypost.com/2018/12/06/the-scandal-in-north-carolina-proves-voter-fraud-is-real/.

with NGP to the State Attorney General's office for investigation regarding improper voter registration efforts.[17]

In short, Plaintiffs have no burden. To the extent that any burden exists, it is slight and insufficient to overcome important government interests, which is fatal to Plaintiffs' Anderson-Burdick claim (Count I).

ii. Georgia's voter assistance statute is not preempted by Section 208 of the Voting Rights Act.

Plaintiffs' Voting Rights Act ("VRA") claim fails because Plaintiffs overlooked Georgia law that is directly on point and consistent with the VRA. Specifically, Plaintiffs allege that the restrictions on assisting voters with their absentee ballots violates Section 208 of the Voting Rights Act of 1965, 52 U.S.C. § 10508. That federal provision allows "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508.

Georgia law expressly addresses this in the same statute that Plaintiffs cite. O.C.G.A. § 21-2-385(b) provides that "[a] physically disabled or illiterate

[17] State Election Board, Hr'g Tr. (Sept. 20, 2017), https://sos.ga.gov/admin/uploads/September_20,_2017_Transcript.pdf.

elector may receive assistance in preparing his or her ballot from any person of the elector's choice other than such elector's employer or the agent of such employer or an officer or agent of such elector's union . . . .” O.C.G.A. § 21-2-385(b). This addresses each of the criteria set forth in section 208 of the VRA and shows that Plaintiffs' Count VII must be dismissed.[18]

IV. Conclusion

Plaintiffs' Amended Complaint should be dismissed for failing to state a claim for relief. Their preferred policies are not compelled by the United States Constitution, and the attempt to seek legislative changes through judicial fiat should be given no quarter. For these reasons, State Defendants respectfully request that this Court GRANT the State Defendants' Motion to Dismiss and DISMISS Plaintiffs' Amended Complaint with prejudice.

[18] To the extent that Plaintiffs' argument is based on an impermissible expansion of the VRA, the claim still fails. The Senate Judiciary Committee expressly recognized “State provisions would be preempted only to the extent that they unduly burden the right recognized in this section [addressing disabled voters], with that determination being a practical one dependent upon the facts.” S. Rep. 97–417, at 241 (1982). “[B]ecause of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated.” S. Rep. 97–417, at 240 (1982). O.C.G.A. § 21-2-385(b) assists disabled and illiterate voters by allowing them to receive assistance from whomever they choose subject to limited restrictions. It cannot, therefore, burden their rights in the slightest, and, consequently, the Georgia statute is not preempted by the VRA.

Respectfully submitted this 26th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing STATE DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT was prepared double-spaced in 13-point Century Schoolbook font, approved by the Court in Local Rule 5.1(C).

/s/Josh Belinfante
Josh Belinfante

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

DONNA CURLING, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	1:17-cv-2989-AT
BRAD RAFFENSPERGER, *et al.*,	:	
	:	
Defendants.	:	

ORDER

This matter is before the Court on the Plaintiffs' Motions for Attorney's Fees and Expenses [Docs. 595, 596]. Plaintiffs seek an award of attorney's fees and expense as prevailing parties under 42 U.S.C. § 1988 in light of this Court's August 15, 2019 Order granting in part their Motions for Preliminary Injunction. Collectively, Plaintiffs seek a total of $6,302,766.30 in attorney's fees and expenses up through the date of the Court's preliminary injunction Order.[1]

Although they do not expressly acknowledge the nature of their request, Plaintiffs are requesting an interim award as no final judgment has been entered in this case and Plaintiffs have filed amended complaints asserting additional challenges to the State's newly enacted Ballot Marking Device (BMD) voting system.

[1] Coalition Plaintiffs request an award of $1,899,381 in attorney's fees and expenses. (Coalition Reply, Doc. 705 at 3.) Curling Plaintiffs request an award of attorneys' fees and expenses of $4,403,385.30. (Curling Reply, Doc. 706 at 44.)

Section 1988 authorizes the Court, in its discretion, to award prevailing parties in civil rights actions reasonable attorney's fees as part of the costs in an action as private attorneys general. 42 U.S.C. § 1988; *Fox v. Vice*, 563 U.S. 826, 833 (2011) (recognizing that prevailing civil rights plaintiffs ordinarily are entitled to a fee award under § 1988 because they serve as "private attorneys general" who vindicate policies that "Congress has considered of the highest priority"); *Farrar v. Hobby*, 506 U.S. 103, 122 (1992) (O'Connor, J., concurring). "The statute itself prescribes no time frame for filing the request for attorney's fees." *Clark v. Hous. Auth. of City of Alma*, 971 F.2d 723, 724 (11th Cir. 1992). Generally, attorney's fee requests "must be made within a reasonable period of time *after the entry of final judgment*." *Id.* (emphasis added) (citing *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers*, 817 F.2d 1533, 1536 (11th Cir. 1987) and *Gordon v. Heimann*, 715 F.2d 531, 539 (11th Cir. 1983)).

At the same time, however, the Supreme Court has recognized that in some circumstances a person may be a "prevailing party" under § 1988 without having obtained a favorable "final judgment following a full trial on the merits," and that Congress contemplated the award of fees *pendente lite* to be appropriate in some cases. *Hanrahan v. Hampton*, 446 U.S. 754, 756–57 (1980). Section 1988 permits such an interlocutory award of counsel fees only when a party has prevailed on the merits and established his entitlement to relief on at least some of his claims. *Id.* at 757-58. Eleventh Circuit precedent also recognizes that the availability of interim fee awards can further the purposes of § 1988 by enabling civil rights

attorneys to undertake representation when litigation is likely to be protracted in difficult and complex cases that require significant investment of time and resources. *See James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 358–59 (5th Cir. 1977)[2] ("There is a danger that litigants will be discouraged from bringing [civil rights] suits because of the risks of protracted litigation and the extended financial drain represented by such a risk. An award of interim attorneys' fees will prevent extreme cash-flow problems for plaintiffs and their attorneys."); *McGuire v. Murphy*, 285 F. Supp. 3d 1272, 1284 (M.D. Ala. 2018); *Walters v. City of Atlanta*, 652 F. Supp. 755, 761 (N.D. Ga. 1985), *modified on other grounds*, 803 F.2d 1135 (11th Cir. 1986).

In considering whether to allow Plaintiffs to recover an interim fee award, the Court is mindful of the following factors relevant to the propriety of an interim award of attorney's fees: "(1) whether the grounds for an interim award are sufficiently discrete from matters remaining to be litigated; (2) whether the moving party will be unable to continue litigating the case absent an interim award; (3) whether the party opposing the interim award has been guilty of dilatory tactics; and (4) whether the action has been or is likely to be unduly protracted." *McGuire v. Murphy*, 285 F. Supp. 3d at 1284 (quoting *Walters v. City of Atlanta*, 652 F. Supp. at 761).

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

Again, Plaintiffs have not addressed these factors in their fee motions, instead focusing solely on their entitlement as prevailing parties and the asserted reasonableness of the amount of fees and expenses requested. Along with an additional consideration discussed below, at least two of these factors counsel against a finding that an interim award is necessary under the circumstances.

First, the Court notes (without commenting on the merits of such an argument) that Plaintiffs themselves argue that their original claims challenging Georgia's former DRE voting system which has been discontinued are fundamentally the same in their objective as their newly asserted claims challenging Georgia's BMD voting system.[3] Indeed, the ultimate relief requested – an order requiring Georgia to move to hand-marked paper ballots for all elections – is identical for both sets of claims.[4] Thus, if Plaintiffs' arguments are to be accepted, the first factor would weigh against an award now because the

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[3] Plaintiffs made this argument days after Governor Kemp signed HB 316 into law mandating implementation of BMDs as the new uniform statewide voting system and again in support of their requests to assert their BMD claims alongside the DRE claims and in response to Defendants' motions to dismiss the amended complaints. (*See* Coalition Status Report, Doc. 351, arguing that their existing complaint encompassed a challenge to BMDs because "[l]ike the touchscreen DRE machines, the proposed new BMD touchscreen voting system does not produce an accountable vote or auditable results, offers no improvement over the DRE system, and shares the DRE's security flaws," and indicating they would seek to permanently enjoin DREs and BMDs); (*see also* Coalition Mot. for Leave to File Suppl. Compl., Doc. 600 at 7) ("[T[there is no prejudice to the Defendants since they have been well aware for months now that the Coalition Plaintiffs understand the scope of this action to properly encompass claims against any of the BMD systems that the State has been considering to replace DREs."); (*see also* Curling Resp. to Mot. to Dismiss Am. Compl., Doc. 651 at 17) ("While Curling Plaintiffs' claims regarding the [BMD] Election System arise from recent actions taken by State Defendants, they are legally identical to the DRE-related claims that this Court previously ruled Curling Plaintiffs have standing to pursue.")

[4] Though the ultimate hand-marked paper ballot relief requested may be similar, the Court notes there are differences in the evidentiary record, at least at present, regarding Plaintiffs' claims in connection with the DRE and BMD claims.

grounds for an interim fee award may arguably not be sufficiently discrete from matters remaining to be litigated. While the Court's view as to the similarity of the claims, as opposed to relief requested, may turn out to be different than that advocated by Plaintiffs, the Court recognizes that all parties here are capable of arguing both sides of this coin at different points.

Second, neither group of Plaintiffs has asserted that their counsel will be unable to continue litigating this case, or unable to take on other election cases, due to a lack of resources. And as this Court is aware, counsel for Curling Plaintiffs at Krevolin and Horst and counsel for the Coalition Plaintiffs, Bruce Brown, Robert McGuire, and the Lawyer's Committee for Civil Rights, have filed several other cases involving challenges to Georgia's election provisions since the Court issued its August 2019 preliminary injunction Order. Therefore, Plaintiffs have not at this time shown that they will be unable to continue litigating this case without the Court granting their fee award *pendente lite*.

The Court recognizes that awards of costs and fees under § 1988 exist to enable plaintiffs with meritorious claims to attract competent counsel in cases such as this one – cases that benefit the public by securing compliance with constitutional law, but that do not promise much, if anything, in the way of a monetary damages award. And very capable counsel are handling the respective Plaintiffs' claims here. While there are certainly cases where requiring counsel to wait years between entry of final judgment and a fee award would undermine one purpose of § 1988 by making representation in civil rights cases financially

untenable and by discouraging members of the bar from undertaking similar cases in the future, this does not appear to be the case here. At least Plaintiffs have not argued as much in their motions as a basis to justify an award prior to the entry of final judgment in this case.

This is not to diminish Plaintiffs and their counsel's contribution and commitment to protecting the constitutional rights of Georgia voters through their efforts in litigating this and other cases in this district. Nor is it an indication that the Court does not believe that Plaintiffs are entitled as prevailing parties on some portion of their claims here to an eventual award of reasonable attorney's fees and expenses under § 1988. However, the Court in its discretion finds that it is more prudent to wait until a final resolution of this case to award fees at this juncture. This determination is influenced by the factors discussed above – but also in part by the Court's recognition of the immediate pressing needs and deficits the State must address due to the current public health crisis and the reverberating economic fallout from the COVID-19 pandemic.[5] This is especially so given the monetary size of interim fees and expenses sought in this case. It would not be in the public interest to add significant strain to the State's available financial resources necessary to address the welfare and safety of Georgians in these

[5] The Court also recognizes that the 2020 election cycle under the pandemic circumstances may well demand State expenditures beyond the norm. The Secretary of State has recently expended more than $3,000,000 to expand Georgia voters' access to the absentee ballot voting process to assist voters in avoiding the risk of exposure posed by in-person voting during the imminent federal and statewide primary and general elections. *See Black Voters Matter Fund et al v. Raffensperger*, Civil Action No. 1:20-cv-1489-AT. And far more expenditures, beyond the norm for a Presidential election cycle, may well be required under the current circumstances.

unprecedented times. But time and circumstances may also change the Court's determination.

Accordingly, the Court **DENIES WITHOUT PREJUDICE** Plaintiffs' Motions for Attorney's Fees and Expenses [Docs. 595, 596]. Plaintiffs may renew their request once a final judgment has been entered on their claims or if circumstances change that would support an interim award under the factors discussed herein.

IT IS SO ORDERED this 26th day of May, 2020.

Amy Totenberg
United States District Judge