FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COALITION FOR GOOD GOVERNANCE, et al., **Plaintiffs,** **v.** **BRAD RAFFENSPERGER, et al.,** **Defendants.**	**Civil Action No. 1:20-cv- 01677 -TCB**

PLAINTIFFS' RULE 59 MOTION TO ALTER OR AMEND JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Plaintiffs, pursuant to Fed. R. Civ. P. 59, respectfully move this Court to reconsider its Order (Doc. 43) granting judgment to Defendants on their motion to dismiss and denying Plaintiffs injunctive relief. Plaintiffs respectfully urge that the ground upon which the Court based its Order—that Plaintiffs' claims "present a nonjusticiable political question"—is a manifest error of law. Both controlling authority and examples of other adjudicated cases from the Supreme Court down to this district refute the Defendants' non-justiciability argument. Plaintiffs were unable to brief the Court on the subject of justiciability, so reconsideration is warranted. For reasons set out herein, when it reconsiders, the Court should vacate its Order, revive Plaintiffs' claims, and proceed expeditiously to adjudicate and grant on their merits the Plaintiffs' urgent motions for injunctive relief.

I. This Court's Decision And Its Reasoning

A. Background

The Defendants are planning to conduct a statewide election in Georgia on **June 9**, in the midst of a global pandemic caused by a highly contagious fatal disease, using touchscreen voting machines, despite (1) President Trump's declaration of a national emergency due to the disease; and (2) Governor's Kemp imposition of an emergency shelter-in-place public health order that commands

large numbers of Georgia's citizens to stay inside their houses under penalty of misdemeanor until after **June 12**—without any exceptions for voting.

Holding an election under these circumstances will impermissibly burden Plaintiffs and other voters' fundamental right to vote (for in-person voting) and will unjustifiably subject Plaintiffs and other similarly situated voters to unequal treatment (for absentee voting). On April 20, 2020, to obtain relief from actions and omissions under color of state law that will violate rights their both during the upcoming June 9 election and in other elections to be held later this year during the pandemic, Plaintiffs filed their Complaint (Doc. 1). On April 26, Plaintiffs moved for a preliminary injunction prohibiting the current election from taking place before June 30 and requiring the Defendants to refrain from enforcing unsafe voting processes in all 2020 elections. (Doc. 11.)

On Sunday, May 10, Plaintiffs discovered that the Secretary was mailing hundreds of thousands of ballots to absentee voters that falsely stated the current election will be held (and thus will end) on May 19, without any correcting information in the packet. May 19 is three weeks *before* the actual election date of June 9. To remedy the foreseeable disenfranchisement and voter suppression that the Secretary's distribution of false election information will plainly cause, Plaintiffs immediately supplemented their preliminary injunction motion with a

motion for a temporary restraining order that would require the Secretary to take immediate corrective measures. (Doc. 27.)

The Court set a one-hour Zoom hearing on both of Plaintiffs' motions for 2:00 PM EDT on Thursday, May 14. (Docs. 23, 26, 34, 35, Text-Only Minute Order (May 12, 2020 at 5:51 PM EDT).)

At 7:05 PM EDT on May 11, Defendants filed a motion to dismiss the Complaint. Defendants offered lack of standing, Eleventh Amendment immunity, non-justiciability, and other reasons to show why this Court supposedly lacked jurisdiction to adjudicate Plaintiffs' claims on the merits. (Doc. 32.) The following day, the Court directed Plaintiffs to respond within one day to (only) Defendants' standing and Eleventh Amendment immunity arguments. (NEF Order (May 12, 2020 at 1:50 PM EDT).) Plaintiffs complied by filing a brief well in advance of the Court's evening deadline. (Doc. 37.) In their May 13 brief on the two issues that the Court highlighted, the Plaintiffs reserved their right "to file a full response addressing the entirety of the Defendants' Motion to Dismiss (Doc. 32) pursuant to the Federal Rules of Civil Procedure." (Doc. 37, at 3 n.1.)

Also on May 13, Plaintiffs filed a Reply Brief (Doc. 38) that addressed, among other issues, the judicially manageable standards for resolving Plaintiffs' claims under well-established precedent and showed, with respect to each alleged

burden, how "the asserted injury to the right to vote" was not outweighed by "the precise interest put forward by the State." (Doc. 39 at 4 (quoting *Crawford v. Marion County Election Bd.,* 553 U.S. 181, 190 (2008)).

On the morning of May 13, the day before the hearing, the Court clerk sent an email informing the parties that the hearing would be limited to "thirty minutes per side for oral argument only." Then, at 6:10 PM EDT on May 13, the eve of the hearing, the clerk sent a second email directing "counsel for both sides to be prepared to discuss all of the Defendants' grounds for their motion to dismiss—not just standing and 11th Amendment immunity." Although the clerk's second email indicated that grounds for dismissal other than standing and immunity might be discussed at the next afternoon's hearing, the Court did not invite or authorize any additional expedited pre-hearing briefing from Plaintiffs addressed to justiciability or any of the Defendants' other grounds for dismissal. And indeed, at the hearing, the Court noted on the record that the Plaintiffs' filing on standing and immunity had appropriately reserved Plaintiffs' right to fully brief all the other issues raised by the Defendants' motion to dismiss as the Federal Rules of Civil Procedure allow. Under Local Rule 7.1(B), Plaintiffs' response to the motion to dismiss was not due until May 25, or fourteen days after the service of the Defendants' motion.

B. The Order

Shortly after the May 14 Zoom hearing concluded, the Court issued the Order (Doc. 43), which granted Defendants' motion to dismiss and denied the Plaintiffs' requests for injunctive relief. The Court's Order assumed that Plaintiffs had standing but nonetheless dismissed the claims raised by the Complaint because, the Court concluded, "they present a nonjusticiable political question." (Doc. 43, at 7.)

To explain this conclusion, the Court referenced the six indicia of a nonjusticiable political question that were enumerated in *McMahon v. Pres. Airways, Inc.*, 502 F.3d 1331, 1357 (11th Cir. 2007), and held that at least two of those indicia were present—specifically: "(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, and (2) a lack of judicially discoverable and manageable standards for resolving it." (Doc. 43, at 8.)

The Court explained that the "textually demonstrable commitment" indicium was present in this case because, first, the Elections Clause "commits the administration of elections to Congress and state legislatures—not courts," and, second, because state officials "have undertaken measures to slow the spread of the

coronavirus" and "whether the executive branch has done enough is a classic political question involving policy choices." (Doc. 43, at 9.)

The Court next explained that "there are no judicially discoverable and manageable standards for resolving" Plaintiffs' claims because answering whether the executive branch has done enough "with any degree of certainty would be impossible." (Id.) The Court analogized to *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which denied relief in a case challenging a state legislature's partisan gerrymandering, and *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 2049076, 2020 U.S. App. LEXIS 13714 (11th Cir. Apr. 29, 2020), which denied relief in a case challenging a state law that specified the required order of candidates on a general election ballot.

Having found the Plaintiffs' claims to be nonjusticiable and thus inappropriate for adjudication on the merits, and having determined to dismiss the Complaint on that jurisdictional basis, the Court added in a footnote that it would have denied the Plaintiffs injunctive relief on the merits for the same reason—because "the lack of judicially discoverable and manageable standards" meant Plaintiffs could not carry their merits burden to show they were likely to succeed. (Doc. 43, at 11 n.3.)

II. Governing Standard Under Rule 59

An order dismissing a Complaint for a lack of subject-matter jurisdiction is an immediately appealable final order that qualifies as a "judgment." *See Gonczi v. Countrywide Home Loans, Inc.,* 271 Fed. Appx. 928, 929 (11th Cir. 2008) (per curiam) (appeal of grant of defendant's motion to dismiss based on plaintiff's lack of standing); *see also* Fed. R. Civ. P. 54(a) (defining "judgment").

Rule 59(e) permits a party to bring a "motion to alter or amend a judgment" within 28 days after the entry of the judgment. Fed. R. Civ. P. 28(e).

"The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)).

"An error is 'manifest' if it is 'clear and obvious.'" *Nefsky v. UNUM Life Ins. Co. of Am*., No. 1:15-cv-2119-WSD, 2017 U.S. Dist. LEXIS 137596, at *9 (N.D. Ga. Aug. 28, 2017) (quoting *United States v. Battle*, 272 F. Supp. 2d 1354, 1358 (N.D. Ga. 2003)).

"[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Arthur*, 500 F.3d at1343 (quoting *Michael Linet, Inc. v. Village of Wellington, Fla*., 408 F.3d 757, 763 (11th Cir. 2005)).

Under the foregoing standard, the Order should be reconsidered and vacated because, respectfully, the Court committed a manifest error of law when it concluded (without having the benefit of Plaintiffs' side of briefing on the issue) that Plaintiffs' claims were not justiciable.

As the next sections explain, both case law and examples of actual cases make it "clear and obvious" that the constitutional violations alleged by the Plaintiffs *can* be adjudicated consistently with the Elections Clause and that "judicially discoverable and manageable standards" *have* been established by the Supreme Court that enable the resolution of precisely such claims. The Plaintiffs' claims in this case are validly pled constitutional claims that can and must be resolved on their merits.

III. Dismissing Plaintiffs' Claims Under the Political Question Doctrine for Non-Justiciability Was Manifest Legal Error

The political question doctrine is a limited exception—rarely invoked—to the rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Svc. v. City Council,* 491 U.S. 350, 358 (1989). As the Supreme Court held in *Zivotofsky v. Clinton,* 566 U.S. 189, 194–95 (2012):

> In general, the Judiciary has a responsibility to decide cases properly before it, even those it "would gladly avoid." Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed.

> 257 (1821). Our precedents have identified a narrow exception to that rule, known as the "political question" doctrine. See, e.g., Japan Whaling Assn. v. American Cetacean Soc., 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986).

The "federal courts are not free to invoke the political question doctrine to abstain from deciding politically charged cases like this one, but must exercise their jurisdiction as defined by Congress whenever a question is not exclusively committed to another branch of the federal government." *Comer v. Murphy Oil USA*, 585 F.3d 855, 872–73 (5th Cir. 2009). In other words: "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The Order recites the six indicia of a nonjusticiable political question that were enumerated by the Eleventh Circuit in *McMahon v. Pres. Airways, Inc.*, 502 F.3d at1357, and applies two of them to find Plaintiffs' claims nonjusticiable here. These six indicia were first articulated by *Baker*, 369 U.S. at 186, where the Supreme Court rejected non-justiciability as a defense to a lawsuit asserting that Tennessee's legislative reapportionment plan violated equal protection.

As explained in the following subsections, it was manifest legal error to find the two *Baker* indicia that the Order relies upon and to conclude that they properly

transform Plaintiffs' claims into a nonjusticiable political question. On the contrary, it is clear and obvious that the two indicia of a political question are not present and that the Plaintiffs' claims in this case are, in fact, justiciable.

A. The Elections Clause Does Not Transform State Violations of Voting Rights Into a Nonjusticiable "Political Question"

"The first *Baker* factor asks whether there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" *McMahon*, 502 F.3d at 1358. In *Baker*, the Supreme Court did not consider the Tennessee legislature to be a "coordinate branch of government" for purposes of applying this factor. *See Baker*, 369 U.S. at 226 ("The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court."). Indeed, in explaining the proper application of the political question doctrine, the Supreme Court in *Baker* stated explicitly that, "it is the relationship between the judiciary and the coordinate branches *of the Federal Government*, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Baker*, 369 U.S. at 210 (emphasis added).

The Eleventh Circuit itself noted in *McMahon* that the political question doctrine "protects the separation of powers and prevents federal courts from overstepping their constitutionally defined role" and recognized that the doctrine

thus prevents federal courts from intruding upon co-equal branches of the *federal* government, i.e., the doctrine does not stop federal courts from adjudicating the constitutionality of political acts done by state governments. *Id.* at 1357, 1358–59 ("[U]nder the separation of powers, certain decisions have been exclusively committed to the legislative and executive branches of the *federal* government, and are therefore not subject to judicial review.") (emphasis added).

The Order's determination that the Elections Clause is the sort of "textually demonstrable constitutional commitment of [an] issue to a coordinate political department" that renders Fourteenth Amendment civil rights claims nonjusticiable against States has been thoroughly and repeatedly rejected by the Supreme Court. Years before *Anderson* and *Burdick,* the Supreme Court wrote in *Williams v. Rhodes,* 393 U.S. 23, 28–30 (1968) (emphasis added):

> The State also contends that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution, providing that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors * * *' to choose a President and Vice President. There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the

> Constitution. For example, Congress is granted broad power to 'lay and collect Taxes,' but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination. Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections. And the Twenty-fourth Amendment clearly and literally bars any State from imposing a poll tax on the right to vote 'for electors for President or Vice President.' Obviously we must reject the notion that Art. II, s 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall * * * deny to any person * * * the equal protection of the laws.'

In this case, as in *Rhodes* and as in *Baker*, the Plaintiffs are bringing a federal constitutional challenge to state action in the context of elections. The Supreme Court has repeatedly held that constitutional claims under these circumstances are justiciable. *See, e.g.*, *Baker*, 369 U.S. at 237 ("We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."). So too here. The fact that the States have been

granted constitutional authority to regulate the conduct of elections under the Elections Clause does not stop Plaintiffs from seeking relief in this Court to prevent threatened constitutional violations because, as the Supreme Court observed nearly 80 years ago, the States' regulation of elections must be exercised "in conformity to the Constitution." *United States v. Classic*, 313 U.S. 299, 314 (1941). In sum, it was manifest legal error to conclude that Georgia's authority to regulate the time, place, and manner of elections under Elections Clause amounts to "a textually demonstrable constitutional commitment of the issue to a coordinate political department" that makes Plaintiffs' claims nonjusticiable.

B. *Anderson*, *Burdick*, and *Crawford* Provide the "Judicially Discoverable and Manageable Standard" That Governs Adjudication of Plaintiffs' Claims

Turning to the second indicia of a political question that the Order cites, it was manifestly erroneous for the Court to conclude that answering the question "whether the executive branch has done enough" "with any degree of certainty would be impossible, as there are no judicially discoverable and manageable standards for resolving it." (Doc. 43, at 9.) Respectfully, this conclusion is incorrect. The Plaintiffs have identified a manageable and well-established judicial standard that must be applied—namely, the balancing test (weighing burdens

against state interests) that the Supreme Court has developed for voting rights cases in *Anderson*, *Burdick*, and *Crawford*.

This Court's opinion states that *Burdick* and *Anderson* do not apply here because "this is not a case in which the state applied its own policy, adopted a rule, or enacted a statute that burdened the right to vote," (Doc. 43, at 10–11, n.2), and thus in this case "the underlying burden on the right to vote emanates from a virus, which obviously was not created or imposed by Defendants." (Id.) According to the Order's analysis, the fact that the virus is the danger means that the constitutionality of the State's actions (of forcing voters to expose themselves to the virus) is incapable of adjudication—even though that forced exposure would be unnecessary if the State were to simply choose different, but lawful, ways to conduct the upcoming elections.

The Court cites Judge William Pryor's concurring opinion in *Jacobson* as authority for its conclusion that Plaintiffs' claims are nonjusticiable. But Judge Pryor's concurring opinion itself distinguishes nonjusticiable ballot order and gerrymandering claims, which are not based on burdening the right to vote, from voting rights challenges that *do* allege actual burdens on the right to vote and thus *are* justiciable under the *Anderson*, *Burdick*, and *Crawford* standard:

> The basic problem with the voters and organizations' complaint is that it is not based on the right to vote *at all*,

so we cannot evaluate their complaint using the legal standards that apply to laws that burden the right to vote. As the voters and organizations correctly point out, we must evaluate laws that burden voting rights using the approach of *Anderson* and *Burdick*, which requires us to weigh the burden imposed by the law against the state interests justifying the law. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009). But "we have to identify a burden before we can weigh it." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (Scalia, J., concurring in the judgment). And here it is impossible to identify a burden on voting rights imposed by the ballot statute that is susceptible to the balancing test of *Anderson* and *Burdick*.

The statute at issue here is unlike any law that this Court or the Supreme Court has ever evaluated under *Anderson* and *Burdick*. The statute does not make it more difficult for individuals to vote, *see, e.g.*, *Crawford*, 553 U.S. at 198, 128 S.Ct. 1610 (plurality opinion) (photo-identification law); *Common Cause/Ga.*, 554 F.3d at 1354 (same), or to choose the candidate of their choice, *see Burdick*, 504 U.S. at 430, 112 S.Ct. 2059 (prohibition on write-in voting). It does not limit any political party's or candidate's access to the ballot, which would interfere with voters' ability to vote for and support that party or candidate. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353–54, 358–59, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (law forbidding individuals to appear on the ballot as the candidate of more than one party); *Norman v. Reed*, 502 U.S. 279, 288–89, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992) (ballot-access law for new parties); *Munro v. Socialist Workers Party*, 479 U.S. 189, 199, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) (ballot-access law for minor-party candidates); *Anderson*, 460 U.S. at 782, 786, 103 S.Ct. 1564 (early filing deadline for candidate paperwork); *Fulani v. Krivanek*, 973 F.2d

1539, 1539, 1543 (11th Cir. 1992) (ballot-access law for minor-party candidates). Nor does it burden the associational rights of political parties by interfering with their ability to freely associate with voters and candidates of their choosing. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451–52, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008); *Clingman v. Beaver*, 544 U.S. 581, 587, 593, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213–14, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986). And to state the obvious, the statute certainly does not create the risk that some votes will go uncounted or be improperly counted. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318–20 (11th Cir. 2019) (challenge to signature-match procedures for absentee and provisional ballots); *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006) (challenge to manual-recount procedures under which some ballots might "receive a different, and allegedly inferior, type of review in the event of a manual recount"). All the statute does is determine the order in which candidates appear in each office block on the ballot.

If the statute burdened voting or associational rights even slightly, we could apply legal standards to determine whether the burden was unconstitutional. Under *Anderson* and *Burdick*, we would weigh the burden imposed by the law against the state interests justifying that burden. *See Common Cause/Ga.*, 554 F.3d at 1352. But because the statute does not burden the right to vote, we cannot engage in that kind of review. The voters and organizations ask us to decide not whether the ballot statute burdens identifiable voting or associational rights, but whether it confers an unfair partisan advantage on the Republican Party.

Jacobson v. Fla. Sec'y of State, No. 19-14552, 2020 U.S. App. LEXIS 13714, at

*54–56 (11th Cir. Apr. 29, 2020) (William Pryor, J. concurring) (bolded emphasis added).

Here the Plaintiffs have explicitly and plausibly alleged that the Defendants' conduct will burden Plaintiffs' fundamental right to vote by forcing Plaintiffs to accept exposure to risks of contracting a fatal illness as the price of voting in person and, in the alternative, will cause Plaintiffs to suffer a substantial risk of casting a less effective vote if they choose instead to vote absentee. These burdens on the right to vote bring this case squarely under the *Anderson*, *Burdick*, and *Crawford* framework. It is clear and obvious that a judicially discoverable and manageable standard exists to resolve Plaintiffs' claims.

Plaintiffs have also alleged specific details of additional burdens that require the application of the *Anderson*, *Burdick*, and *Crawford* framework. Not counting completed March Ballots and not counting absentee ballots that are post-marked by election day are, even under Judge Pryor's concurring opinion, burdens on the right to vote for absentee voters. And the right to vote in person is plainly burdened by scheduling elections at a time when voters over 65 years old and voters with underlying health conditions cannot lawfully leave their houses to go to the polls. The Order's dismissal of Plaintiffs' claims as nonjusticiable in the face of allegations and evidence that shows these burdens to be real was a manifest error

of law. Whether these burdens are justified (and they are not) is a merits question that Plaintiffs and Defendants can argue over, using evidence and testimony. But whether Plaintiffs' claims for relief from the burdens that have been alleged are amenable to resolution using a judicially discoverable and manageable standard is not an open question—Plaintiffs' claims are manifestly justiciable.

C. Federal Courts Routinely Adjudicate Similar Challenges Requesting Similar Relief Against Similar Practices by State Election Officials

A panoply of cases makes it "clear and obvious" by example that Plaintiffs' claims are justiciable. Just last month, the U.S. Supreme Court granted a stay in *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 2020 U.S. LEXIS 2195, 140 S. Ct. 1205 (2020), a case that considered "a narrow, technical question about the absentee ballot process" in Wisconsin in an election being conducted during the current COVID-19 pandemic. The Wisconsin case involved three consolidated lawsuits brought by plaintiffs "comprising individual Wisconsin voters, community organizations, and the state and national Democratic parties" who collectively "sought several forms of relief, all aimed at easing the effects of the COVID-19 pandemic on the upcoming election." *Id.* at **8 (Ginsburg, Breyer, Sotomayor, Kagan, JJ., dissenting). In granting relief to the Wisconsin plaintiffs, the district court applied the same judicially discoverable and manageable standard

for resolving claims that has been urged by the Plaintiffs in this case—namely, the burden-balancing framework established by *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). *Id.* at **8–9 (Ginsburg, Breyer, Sotomayor, Kagan, JJ., dissenting)

The majority's opinion granting a stay on the district court's injunction considered only the narrow question "whether absentee ballots now must be mailed and postmarked by election day, Tuesday, April 7, as state law would necessarily require, or instead may be mailed and postmarked after election day, so long as they are received by Monday, April 13." *Id.* at **1 (per curiam). The majority stayed the district court's order permitting ballots mailed after election day to be counted, but—importantly—the conservative majority expressed no concerns whatsoever about justiciability. Given that the circumstances of the Wisconsin case, and the relief sought by it, are so closely similar to the circumstances and relief that are at issue in this case, the utter absence of any suggestion by the Supreme Court majority that the Wisconsin case was not justiciable must be understood as a complete, albeit implicit, refutation of the Defendants' assertion that the Plaintiffs' similar claims are not justiciable here. The Supreme Court's majority itself expressly recognized that numerous broader issues of election administration still remained to be adjudicated in the Wisconsin case:

> The Court's decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID-19 are appropriate. That point cannot be stressed enough.

Id. at **6 (per curiam).

Although the Order recognizes Supreme Court authorities in which burdens on the right to vote caused by state action in the election context have been adjudicated, the Court differentiated those cases from this one because "[h]ere, the underlying burden on the right to vote emanates from a virus, which obviously was not created or imposed by the Defendants." (Doc. 43, at 10–11, n.2.) This distinction cannot be given weight in light of the *Republican National Committee* decision, which involves the identical burden on voting that is at issue in this case—the burden of exposure to a deadly virus that voters are forced to bear as a result of state action. If the Wisconsin district court and the Supreme Court identified no justiciability problems with *Republican National Committee*, then the inescapable conclusion is that justiciability does not present a valid obstacle to adjudication of the Plaintiffs' claims in this case.

Republican National Committee is a recent Supreme Court decision that involves the same sorts of claims and relief, all arising from the current COVID-19 pandemic. The Wisconsin case is directly on point. As the Supreme Court's

consideration of the merits in *Republican National Committee* suggest, the fact that the pandemic may be a contributing cause of disenfranchisement does not relieve the Defendants of their constitutional responsibilities or come close to rendering this case nonjusticiable. In *Curling v. Raffensperger*, 397 F. Supp. 3d 1334 (N.D. Ga. 2019), for example, the Secretary's failures to secure the State's old DRE election machines against malicious attacks burdened the right to vote by making the State's voting system untrustworthy even though it was never suggested that the Secretary himself bore any responsibility for the existence of malicious digital actors. Similarly, the existence of the pandemic is obviously not the Secretary's fault. But choosing to conduct elections on such a schedule and in such a way that forces voters to expose themselves to the pandemic in order to be able to participate does create burdens on voting that *are* the Secretary's fault—and that are unnecessary, given the existence of lawful alternatives. The difficulty of determining whether the Secretary's interest in his preferred course of conduct outweighs the burdens that that conduct will impose on voters, under *Anderson* and *Burdick*, does not make this case nonjusticiable.

Indeed, it takes only a cursory survey of recent election law cases in the Northern District of Georgia to reveal that even subtle matters of election

administration are routinely adjudicated when constitutional rights are burdened. For example:

- *Curling v. Raffensperger*, 397 F. Supp. 3d at 1334 (Totenberg, J.) (adjudicating challenge to use of DRE voting machines);
- *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019) (Jones, J.) (adjudicating challenges to registered voters list-maintenance policy, signature match policy, and administration of precincts and polling places);
- *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1341 (N.D. Ga. 2018) (May, J.) (adjudicating challenge to processing of absentee ballots); and
- *Ga. Coalition for Peoples' Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (Ross, J.) (adjudicating challenge to errors in maintenance of voter registration list).

These cases demonstrate that the Order is manifestly in error when it states that the relief Plaintiffs seek in this case "bears little resemblance to the type of relief plaintiffs typically seek in election cases aimed to redress state wrongs." (Doc. 43, at 11.) Both authority and examples, from the Supreme Court all the way down to multiple recent cases in this judicial district, show not only that the

relief sought by the Plaintiffs in this case utterly typical of voting rights cases, but also that the kinds of claims raised by the Plaintiffs is this case are routinely adjudicated and considered non-controversially justiciable.

Finally, it should be noted that the Order appears to be based at least in part upon a misunderstanding—namely, that the Plaintiffs are asking the Court to "micromanage the State's election process" and to supervise the State's "measures to slow the spread of the coronavirus." (Doc. 43, at 12, 9.). It cannot be overemphasized that the Plaintiffs seek to do nothing of the kind. Plaintiffs only ask the Court to apply the standard that was laid down by the Supreme Court in *Anderson*, *Burdick*, and *Crawford* and to enjoin acts and omissions that threaten to burden their individual right to vote (and to equal protection) without appropriate justification. The Plaintiffs have requested *no* relief that is not related to alleviating the very real and unjustified burdens on voting that are imposed by the State's plans for administering the elections due to be held during the present pandemic. The mere fact that Plaintiffs have proposed items of equitable relief that they believe will avoid the threatened constitutional violations does not render the Plaintiffs' claims incapable of being adjudicated. It remains to the Court to craft appropriate relief to which the Plaintiffs are entitled. The existence of the pandemic—conceded by Defendants and confirmed by Governor Kemp's

Executive Orders—is obviously a major reason why the Defendant's challenged conduct will burden Plaintiff's rights. But the Plaintiffs seek no relief relating to how the State is responding to the pandemic as a general matter, and it remains the Court's responsibility to fashion relief that will address the constitutional violations that Plaintiffs will suffer in the absence of court action.

IV. Conclusion

The Elections Clause does not transform a legitimate controversy about threatened violations of individual constitutional rights into a "political question" that is thus insulated from adjudication in a court of law. The Plaintiffs' claims for prospective relief against state officials seek to prevent imminent violations of their individual rights, and the circumstances of this action present this Court with a quintessential case or controversy. Plaintiffs' claims are plainly justiciable. The reason why the Founders established the judicial branch as the guarantor of individual rights under our Constitution was so courts could adjudicate exactly these kinds of claims.

This Court was deprived of Plaintiffs' adversarial perspective when it issued the Order dismissing the Plaintiffs claims as nonjusticiable. But the Court has the benefit of Plaintiffs' perspective and briefing now. Accordingly, Plaintiffs respectfully urge the Court to vacate its dismissal of the complaint and denial of

injunctive relief, both of which was based on the manifest legal error of concluding that the merits of Plaintiffs' claims were not justiciable. (Doc. 43.)

Having vacated the Order, the Court should revive the Plaintiffs' motions for preliminary injunction (Doc. 11) and for temporary restraining order (Doc 27), should proceed to adjudicate those motions on the merits, and should grant Plaintiffs the injunctive relief they have requested, which the Constitution requires.

Respectfully submitted this 19th day of May, 2020.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing pleading has been prepared in accordance with the font type and margin requirements of LR 5.1, using font type of Times New Roman and a point size of 14, and served upon counsel this 19th day of May, 2020.

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