

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

COALITION FOR GOOD
GOVERNANCE, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his
official capacity as Secretary of State;
et al.,

Defendants.

CIVIL ACTION

FILE NO. 1:20-CV-01677-TCB

**STATE DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Secretary of State Raffensperger (the "Secretary") and State Election Board members Sullivan, Worley, Mashburn, and Le (collectively, "State Defendants") submit this Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction (the "Motion"). (Doc. 11.)

INTRODUCTION

This case is not about the COVID-19 pandemic, nor is it about anyone being unable to vote. Instead, Plaintiffs come to this Court using the virus as the latest means to continue advocating for hand-marked paper ballots. This is nothing new. *See Curling v. Raffensperger*, Case No. 1:17-cv-2989-AT

(alleging potential Russian hacking necessitated hand-marked paper ballots); *Coalition for Good Governance v. Gaston*, Case No. 20CV00077(S) (Sumter Cty. Sup. Ct. 2020) (alleging ballot secrecy necessitated hand-marked paper ballots); *Martin v. Fulton Cty. Bd. of Registration and Elections*, 307 Ga. 193 (2019) (complaint sought hand-marked paper ballots in new race for Lt. Governor). In each case, courts denied Plaintiffs' attempt to achieve their policy aims through judicial fiat. Plaintiffs now ask this Court to do what others refused.

Plaintiffs admit they do not know how long the virus will impact Georgians, and their uncertainty is the basis of Plaintiffs' purported injuries. (Doc. 1, ¶ 40.) They are "afraid" they may feel compelled to vote in person, (Doc. 20 at 109); "wonder" whether their absentee ballot will be counted (Doc. 20 at 115); "hesitat[e] to take action toward preparing to vote" (Doc. 20 at 132); are "concerned" (Doc. 20 at 159, 170, 215, 219, 224 (addressing security sleeve), (Doc. 20 at 207) (addressing feelings about election supervisors' workload); do not "relish the idea of having to travel to" the county election office (Doc. 20 at 170); and are generally "afraid" or "upset" that other voters will have a negative experience in the election. (Doc. 20 at 224.)

Compounding these emotions is Plaintiffs' disappointment that the Secretary did not adopt their policy suggestions of March 23. (Doc. 1, ¶ 30.)

After being rebuffed again by policymakers, they waited almost a month to file this lawsuit on April 20 and claimed an “urgent” need to adopt their policy recommendations. (Doc. 1.) Plaintiffs then waited more than a week to file their Motion, (Doc. 11), then they waited three additional days before filing a brief in support of their Motion. (Doc. 20.)

The Motion seeks an astounding degree of federal incursion into the minutiae of state and local election administration. It claims that the United States Constitution mandates an order outlining at least 26 discrete administrative changes for the 2020 general primary in Georgia, which range from, of course, mandating the use of hand-marked paper ballots in all future elections,¹ to subjecting poll workers to sanction if they fail to precisely mark distances between polling stations. (Docs. 11, 20-1.)

Defendants’ Motion to Dismiss sets forth numerous threshold, jurisdictional bases to dismiss Plaintiffs’ Complaint outright, and Defendants incorporate them into this Brief. (Docs. 32 and 32-1.) This Court should also deny Plaintiffs’ Motion because it fails to satisfy the extraordinary burden of obtaining a mandatory injunction, days before an election.

¹ Despite styling the case as a preliminary injunction, Plaintiffs’ proposed order contains no time limit on the prohibition to use the new ballot marking devices (“BMDs”) (Doc. 20-1), and the Complaint makes irrelevant and false claims that the BMDs cannot be audited. (Doc. 1 at ¶ 67.)

STATEMENT OF FACTS

A. Georgia adapts to an unprecedented pandemic to ensure secure and safe elections.

In March, Governor Brian Kemp issued Executive Order 03.14.20.01, which declared a Public Health State of Emergency in Georgia due to COVID-19.² That same day, Secretary Raffensperger announced that he was postponing the presidential preference primary from March 24 to May 19 to coincide with the then-scheduled general primary election. (Declaration of Chris Harvey, ¶ 8, attached as **Exhibit 1**.) Later, after Governor Kemp imposed a shelter-in-place requirement for populations that were particularly susceptible to the COVID-19 virus, the Secretary announced the unprecedented steps of mailing every voter on Georgia's active voter roll an absentee ballot request form and mailing absentee ballot packets to those who request them. (*Id.*, ¶ 29.) Typically, counties mail absentee ballot request forms and absentee ballots at the voters' request, not the State. (*Id.*, ¶ 27.)

On April 9, 2020, in the light of the continued COVID-19 public health emergency, the Secretary announced he was postponing Georgia's general primary and the presidential preference primary again to June 9. (*Id.*, ¶ 11.)

² Office of Governor Brian Kemp, Executive Order No. 03.14.20.01 (March 14, 2020), *available at* <https://gov.georgia.gov/document/2020-executive-order/03142001/download>

This date was chosen for two reasons: it is latest date on which the presidential preference primary can be held under O.C.G.A. § 21-2-191; and (2) it represents the “latest date on which the general primary can be held because any further delays would make it impossible for overseas and military voters to participate in either the August 11 runoff or the November general election.” (*Id.*, ¶¶ 12–15.) The Secretary has also prepared information for local officials to safely administer in-person voting, based on guidance from the CDC and health officials. (Harvey Decl. at ¶¶ 24–25).

B. The cost of the pandemic borne by the State.

The cost of mailing absentee ballot request forms and ballots to voters is projected to exceed \$5.5 million. (Sterling Decl., ¶ 17, attached as **Exhibit 2**.) One-time federal funding was critical to achieving this policy goal. Beyond these measures, and prior to the filing of this lawsuit, the Secretary and the Georgia Emergency Management Agency utilized one-time federal funding to procure and send personal protective equipment (“PPE”) to county election officials. (*Id.*, ¶ 7–9.) The Secretary is also attempting to procure shields to separate pollworkers from voters, and purchase orders are in place for styluses that allow voters to utilize the BMDs without actually touching

the screens.³ (*Id.*, ¶ 10–11.) Moreover, counties are being provided with a \$3,000 grant to purchase PPE on their own.⁴ (*Id.*, ¶ 8.)

These decisions (and Plaintiffs’ requested relief) must be viewed in the context of the current state budget. In Fiscal Year 2020, the Elections Division of the Secretary’s Office was \$6,118,907.⁵ (Harvey Decl., ¶ 38.) The General Assembly has not yet passed a Fiscal Year 2021 budget (the 2021 Budget), which will fund state government from July 1, 2020, through June 30, 2021. (*Id.*) Last month, the Governor’s Office of Planning and Budget (“OPB”) and the House and Senate Appropriations Committee Chairmen each instructed agencies, including the Secretary’s Office, to prepare 2021 budgets that spend 14% less than the Fiscal Year 2020 budget. (OPB Decl., ¶ 10, attached as **Exhibit 3**.) The State has already announced that revenues have plummeted 35.9% or \$1.03 billion in April alone. (*Id.*, ¶ 11.) Falling revenues are not the end of the story. The pandemic will require state

³ Styluses would allow disinfection between each use and avoid the problem Plaintiffs presume of disinfecting the BMDs themselves.

⁴ The cost of PPE is high: states are competing to replenish their supply of PPE, the price of which has skyrocketed. Daniella Diaz, Geneva Sands and Cristina Alesci, *Protective equipment costs increase over 1,000% amid competition and surge in demand*, CNN (Apr. 16, 2020), <https://www.cnn.com/2020/04/16/politics/ppe-price-costs-rising-economy-personal-protective-equipment/index.html>.

⁵ This does not include the cost of new voting equipment, which is funded by a bond authorized by the General Assembly in 2019.

expenditures to increase due to enhanced need of public assistance programs. (*Id.*, ¶ 8.) As a balanced-budget state, policymakers frequently must choose between competing priorities like elections, healthcare, and education. (*Id.*, ¶ 6.) In sum, Georgia policymakers, including the Secretary, are going to be forced to do far more with much, much less. (*Id.*, ¶ 9.)

C. The cost of Plaintiffs' requested relief.

At this time, the Secretary cannot accurately estimate the full cost of Plaintiffs' requested relief. For example, ballots vary by county, which makes projecting the cost of shelving the recently purchased BMDs, printing ballots, and procuring ballot-markers (other than the BMDs), difficult to ascertain under these expedited circumstances. (Sterling Decl., ¶ 6.) Beyond the June primary, the State cannot predict the number of runoff elections that may result from the general primary, nor can counties currently predict expected outcome for the 2020 general election. It is also too early to know whether the current surge in absentee voting will remain for future elections. In addition to the more straightforward costs of physical equipment and ballots, the costs Plaintiffs' relief would impose on the State to train election superintendents throughout the state (and the counties' cost of their training of pollworkers) on an entirely new and different operating procedure—and alert voters regarding the same—in a matter of weeks is difficult to quantify at this point.

For their part, Plaintiffs, who bear the burdens of persuasion and proof, have not provided any evidence or estimates to quantify the cost of their proposed relief.

D. Plaintiffs' allegations of absentee-by-mail voting complications.

Plaintiffs express concerns about two complications occurring during the State's unprecedented effort to provide absentee ballot applications and ballots to all active voters in the State—the inclusion of a secrecy sleeve in absentee ballot packets and incorrect absentee ballots mailed to Chatham County voters. (Doc. 20 at 9-10.) The Secretary learned about the secrecy sleeve after voters began receiving absentee ballots, and he implemented a number of responses. First, the Secretary directed the mailing vendor to include revised instructions with absentee ballot packets. (Sterling Decl., ¶ 15.) Then, on April 28, 2020, the Secretary provided guidance to counties through the Firefly system, the primary means for the Secretary to communicate with county election officials, explaining that election officials should treat the security sleeve as a traditional security envelope.

Plaintiffs also claim that incorrect absentee ballots were mailed to Chatham County voters residing in Chatham County School Board District 7. (Doc. 20 at 8.) The ballot-building database has been corrected and provided to the ballot printer. (Barnes Decl., ¶ 7, attached as **Exhibit 4**.) Chatham

County officials have already reissued ballots to all voters in District 7, and procedures have been implemented to ensure that only voters in District 7 will be allowed to vote in the District 7 school board election. (*Id.*, ¶¶ 9–10.)

STANDARD OF REVIEW

Because Plaintiffs seek the “extraordinary and drastic remedy” of a preliminary injunction, they must “clearly” satisfy the burden of persuasion, which is more than satisfying a preponderance of the evidence. *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Further, Plaintiffs’ request for a mandatory injunction is particularly “disfavored.” *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976).⁶ Last, in election cases, the burden imposed on plaintiffs is higher still and increases as an election approaches. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Under this precedent, Plaintiffs must at least “clearly” convince this Court that (1) there is a substantial likelihood of success on the merits of the complaint; (2) absent the preliminary injunction, the plaintiffs will suffer an irreparable injury; (3) the threatened injury outweighs the harm to the Defendants; and

⁶ In *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1210 (11th Cir. 1981), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit adopted prior to October 1, 1981.

(4) granting the injunction would not be adverse to the public interest. *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-cv-4391-SCJ (N.D. Ga. Dec. 27, 2019) (Slip Op. at 9–10) (denying plaintiffs’ motion for preliminary injunction).⁷

ARGUMENT AND CITATION TO AUTHORITY

In addition to the reasons set forth in Defendants’ Motion to Dismiss, this Court should deny Plaintiffs’ Motion because it fails to satisfy their heavy burden for several reasons. Plaintiffs fail to articulate a burden on their right to vote that does not implicate the Eleventh Amendment. The fiscal and administrative costs to the State of implementing Plaintiffs’ policy recommendations are significant, and outweigh Plaintiffs’ speculative harms. Finally, with early voting already having commenced, now is not the time to rewrite the rules of the June Primary.

I. Plaintiffs fail to clearly show they are likely to succeed on the merits.

Plaintiffs’ Complaint alleges that holding the June Primary “knowingly burden[s] severely and infringe[s] upon the fundamental right to vote.” (Doc. 1 at ¶ 153.) It is unclear whether Plaintiffs raise a procedural or substantive

⁷ The *Fair Fight Action, Inc.* decision is attached as **Exhibit 5**.

due process claim. (Doc. 1 ¶¶ 151-56; Doc. 20 at 25-29.) Ultimately, both theories fail to identify any cognizable harm.

Plaintiffs’ entire lawsuit depends on this Court’s acceptance of a false choice—that absentee ballots are so problematic, voters must risk COVID-19 exposure to vote in-person or not at all. *See generally* Doc. 20 at 25–34.

There are two essential problems with this approach: (1) the only evidence of a burden on use of absentee ballots is Plaintiffs’ declarants’ personal concerns that the secrecy sleeve undermines their “right” to a secret ballot⁸; and (2)

Plaintiffs ignore that voters concerned about the United States Postal Service can simply hand delivery their absentee ballot to county election officials’ office or newly-sanctioned drop boxes where voters will not come into contact with any other person. *See* Ga. Comp. R. & Regs. 183-1-14-0.6-.14.⁹

The former has no basis in federal law, thus implicating the Eleventh Amendment and raising questions about this Court’s jurisdiction, and the latter demonstrates there is no burden on Plaintiffs’ right to vote. As

⁸ Plaintiffs’ other concerns, mail and the Secretary’s webpage, are addressed below and are either purely speculative or based on Plaintiffs’ misunderstanding. *See also, generally*, (Harvey Decl.), (Sterling Decl.)

⁹ The SEB’s Emergency Rule, adopted April 15, 2020, is attached as **Exhibit 6**. The rule is also publicly available on the Board’s webpage: <https://sos.ga.gov/admin/files/SEB%20Emergency%20Rule%20183-1-14-0.6-.14.pdf>.

importantly, Plaintiffs’ alleged harms are caused by a virus and not any decision of Defendants.

A. Plaintiffs are unlikely to succeed on the merits of their due process claims, whether substantive or procedural.

Plaintiffs have a constitutional right “to vote and in their vote being given the same weight as any other.” *Jacobson v. Florida Sec’y of State*, 19-14552, 2020 WL 2049076, at *5 (11th Cir. Apr. 28, 2020). They do not have a right to vote by any means of their choosing. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). “In fact, the Constitution itself provides that states may prescribe the “Times, Places and Manner of holding Elections” and the United States Supreme Court has recognized that states retain the power to regulate their elections.” *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1373 (S.D. Fla. 2004) (citing *id.*, *Siegel v. Lepore*, 234 F.3d 1163, 1179–80 (11th Cir.2000); U.S. Const. Art. I, § 4, cl. 1).

Plaintiffs do not claim that their right to vote has been extinguished or diluted. (Doc. 20 at 25 (describing a “severe burden”).) What they are really arguing about (again) is the *process* or method by which voters will cast in-person or absentee ballots. Indeed, Plaintiffs’ proposed remedies focus almost exclusively on procedural measures from drive-thru voting to using paper copies of drivers’ licenses to vote. (Doc. 1 at 32-54.) Each of these proposals

speak to *how* ballots can be cast or counted not *if* ballots will be counted, which represents more of a procedural due process claim. “Procedural due process is, as its name suggests, ‘a guarantee of fair procedure.’” *J.R. v. Hansen*, 803 F.3d 1315, 1320 (11th Cir. 2015) (citation omitted). Procedural due process claims require the court to balance the private interest at stake, the risk of an “erroneous deprivation of such interest through the procedures used,” potential alternatives, and the government’s interest involved, including the “fiscal and administrative burdens” that accompany Plaintiffs’ requested relief. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

To the extent Plaintiffs allege a substantive due process claim, a distinct but similar analysis applies based on the Supreme Court’s decisions in *Burdick* and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).¹⁰ (Doc. 20 at 25.) These cases utilize a sliding scale balancing test that weighs the “character and magnitude” of the alleged burden against the government’s interest in the challenged law. *Anderson*, 460 U.S. at 789. “If a State’s election law imposes only ‘reasonable, nondiscriminatory restrictions’ upon

¹⁰ The *Anderson-Burdick* analysis typically applies when voters allege violations of the First and Fourteenth Amendment (which Plaintiffs have not), but the Eleventh Circuit has applied the analysis in a decision involving claims arising only under the Fourteenth Amendment. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346, 1352-53 (11th Cir. 2009).

the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Fair Fight Action, Inc.*, Slip Op. at 22 (citing *Burdick*, 504 U.S. at 434) (denying preliminary injunction). Under *Anderson/Burdick*, the burden of persuasion and proof remains on the Plaintiffs at all times. *Billups*, 554 F.3d at 1353.

i. *Plaintiffs fail to identify actionable state conduct.*

Both substantive and procedural due process claims require plaintiffs to allege some statute, regulation, or policy has interfered with their recognized rights. Except as specifically discussed below, Plaintiffs have not really identified any offensive statutes or regulations. This omission is fatal to their due process claims. On procedural due process, precedent requires that Plaintiffs identify actual “state action,” and it is insufficient to present a claim that is based solely on the “risk” of being deprived of a right. *Arrington v. Helms*, 438 F.3d 1336, 1347, 1348 n.12 (11th Cir. 2006). Applied here, Plaintiffs’ complain that there is a *risk* of voting in person (due to a virus) and a *risk* of voting absentee (cause unknown). The State is not responsible for either concern.

The same is true of Plaintiffs’ substantive due process claims. The *Anderson/Burdick* analysis does not seem to have been applied outside the context of specific state action, and Plaintiffs have cited no case where it has.

See Crawford v. Marion Cty. Elec. Bd., 553 U.S. 181, 190 n.8 (2008) (photo identification requirement); *Burdick*, 504 U.S. at 434 (statutory prohibition on write-in candidates); *Anderson*, 460 U.S. at 789 (early filing deadline). In essence, Plaintiffs urge this Court to make the state “do more.” But, as Judge Grimberg recently held, a government’s willingness to exceed its statutory obligations does not provide a constitutional basis to require the government go further. *Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elections*, 1:20-CV-00912-SDG, 2020 WL 1031897, at *7 (N.D. Ga. Mar. 3, 2020).

ii. *Plaintiffs’ absentee ballot concerns implicate the Eleventh Amendment.*

It is axiomatic that a preliminary injunction must be decided on evidence and not argument. *See Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995). Plaintiffs here have provided no evidence that voting absentee constitutes a burden (in fact, most of Plaintiffs declarants routinely vote absentee). (Harvey Decl. ¶¶ 39–48.) Instead, other than a few declarants who make unsubstantiated claims about the efficacy of the United States Postal Service (not a party to this suit), most declarants complain that the security sleeve deprives them of their “right” to a secret ballot; some then explain that this concern may make them choose to vote in-

person and risk acquiring COVID-19. *See generally*, (Doc. 20, at pp. 101-09, 111-16, 126-39, 157-61, 167-71, 205-07, 215-16, 218-20, 222-25.)

The problem for Plaintiffs, however, is that any right to a secret ballot is based in state law and not federal law. *Compare John Doe No. 1 v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (identifying no federal right to a secret ballot), *with* Ga. Const. art. II, § 1, ¶ I (guaranteeing a secret ballot). Thus, in order to decide that absentee voting imposes some kind of burden on the Plaintiffs’ rights, this Court must necessarily decide—for the first time—that the security sleeve violates Georgia’s constitution.

The Eleventh Amendment precludes this result.¹¹ While *Ex Parte Young* provides an exception to the Eleventh Amendment immunity of the State, it does so only for prospective injunctive relief grounded in *federal* law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105–106 (1984). Thus, *Ex Parte Young* is “inapplicable in a suit against state officials on the basis of state law.” *Id.* Indeed, “it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.” *Id.* at 113, 106. *See also Fair Fight*

¹¹ As a legal matter, O.C.G.A. § 21-2-384(b) authorizes the Secretary to determine the “size and shape” of the security envelope. Further, O.C.G.A. § 21-2-386(c), provides that failure use the security envelope does not spoil and absentee ballot.

Inc., Slip Op. at 12-17 (addressing Eleventh Amendment and rejecting plaintiffs’ attempts to force the federal court to adjudicate a matter of state law);¹² *Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1345 (N.D. Ga. 2018) (citing *Harris v. Birmingham Bd. of Educ.*, 817 F.2d 1525, 1528 n.15 (11th Cir.1987)).

Put simply, Plaintiffs’ purported burden on absentee voting exists only if there is a violation of a state (and not federal) right. And, absent a cognizable burden on absentee voting, Plaintiffs’ cannot reasonably claim that their absentee ballots will not be “given the same weight as any other” ballot. *Jacobson*, 2020 WL 2049076, at *5. Put another way, Plaintiffs’ claims regarding in-person voting fail because they cannot show a likelihood of success on the merits of their absentee voting claims. *Cf. McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994) (concluding that a procedural due process claim fails if the state provides an adequate remedy to a constitutional violation). This is fatal to the Motion.¹³

¹² Judge Jones also concluded that the federal court was not the “preferable way to obtain resolution of” state law issues of first impression based on general abstention doctrines. *Fair Fight, Inc.*, Slip Op. at 17-20.

¹³ In the light of this reality, Plaintiffs’ Brief seeks to expand the “unconstitutional conditions” doctrine to elections cases for the first time despite citing no authority where it has been used in a lawsuit involving voting. *See* (Doc. 20 at 25-28) (citing *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004). Defendants have found no cases that apply the doctrine to

iii. *Plaintiffs have not demonstrated any comparative burden to voting or, in the alternative, any alleged burden is slight.*

Plaintiffs have not alleged any material burden on their right to vote, as demonstrated by the remedies they seek:

1) MOVING THE PRIMARY DATE. Given the inclusion of the presidential preference primary, the timing of the June Primary must be no later “than the second Tuesday in June.” O.C.G.A. § 21-2-191.¹⁴ Nothing about the date of the election inherently burdens the Plaintiffs’ opportunity to vote. Indeed, not one declarant indicated that they would have less of a burden voting in person on June 30 instead of June 9. (Doc. 20, 101-09, 111-16, 126-39, 157-

elections, and this makes sense. Courts applying the unconstitutional conditions doctrine typically review situations where, unlike this case, one constitutional right has to be completely surrendered to exercise another right. *See Thomas v. Rev. Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (addressing denial of unemployment benefits due to free expression of religion); *Elrod v. Burns*, 427 U.S. 347, 360-64 (1976) (addressing First Amendment implications to patronage system and public employment); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (addressing public university tenure); *United States v. Snipes*, 611 F.3d 855, 867 (11th Cir. 2010) (surrendering Fifth Amendment right against self-incrimination against Sixth Amendment right to have venue proven); *Adams v. James*, 784 F.2d 1077, 1080 (11th Cir. 1986) (jailhouse employment). Here, Plaintiffs acknowledge they have not surrendered their right to vote. Moreover, the unconstitutional conditions doctrine also applies only where the choice imposed by government is intentional and based on impermissible motives. *James*, 784 F.2d at 1080. Plaintiffs’ lawsuit does not mention intent.

¹⁴ As discussed more fully below, federal law also warrants having the election on June 9 instead of June 30 as Plaintiffs’ request. (Harvey Decl. ¶ 14.) The United States Justice Department agrees. (Doc. 24, at 8–9).

61, 167-71, 205-07, 215-16, 218-20, 222-25.) This absence of evidence warrants the denial of Plaintiffs' requested relief to move the primary date. *See Levi Strauss & Co.*, 51 F.3d at 985 (discussing need for evidence to grant a preliminary injunction). The Plaintiffs also provide *only speculation* that the COVID-19 situation will improve materially between June 9 and June 30. This should preclude any order moving the date of the June Primary.

2) REPLACING NEW TECHNOLOGY WITH PAPER BALLOTS. The use of BMDs does not represent an unconstitutional burden on voting either. Plaintiffs decry the numerous times they will have to touch something to vote with a BMD, but ignore numerous types of contact required when using hand-marked paper ballots, like handling the ballot and disposable pen. The same is true of Plaintiffs' preference that local officials use laptops or paper pollbooks instead of up-to-date PollPads, as there is no reason to believe that someone will touch a laptop or notebook any less than they do a tablet device. *See* (Doc. 20-1 at 4.) And *no* Declarant testifies that use of hand-marked paper ballots or PollPad alternatives would allay their in-person voting concerns.

That Plaintiffs' proposed order is not limited to the June Primary makes clear they seek nothing short of a ban on BMDs in all elections.¹⁵ (Doc. 20-1 at 2-7.) This is not surprising, as this lawsuit is just Plaintiffs' latest attempt to override the will of the General Assembly and its decision to use technology in elections.¹⁶ Whatever the merits of Plaintiffs' policy arguments may be, the federal courts do not provide a backup to failed legislative advocacy and the Constitution does not convert Plaintiffs' policy disagreements into actionable legal claims. *See Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986).

3) DISREGARDING STATE LAW GOVERNING THE NUMBER OF BMDs REQUIRED AT EACH POLLING PLACE. State law requires counties to provide at least one BMD-based voting station for every 250 voters and Plaintiffs fear this will cause overcrowding somehow burdening. *See O.C.G.A. § 21-2-367(b)*; Doc. 20 at 17. This Court should dispense with this argument quickly

¹⁵ To the extent that Plaintiffs seek to change the August and November elections based on COVID-19, those claims are not ripe. Plaintiffs' confessed inability to predict the status of the outbreak in the coming months renders their concerns insufficiently "concrete, to permit effective decisionmaking by the court." *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995). In other words, Plaintiffs demand that this Court to impermissibly render a decision that is "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

¹⁶ Plaintiffs also repeat their mantra that BMD's do not provide an audit trail. (Doc. 1 ¶ 67.) This is demonstrably false.

because the allegation is absent from Plaintiffs' Complaint. The inquiry into likelihood of success on the merits focuses on the complaint—not the motion. *Fair Fight, Inc.*, Slip Op. at 9 n.8 (citations omitted).

Even if this Court did consider the issue, upholding Georgia's statute will not cause "unnecessary crowding of poll locations." (Doc. 20 at 16.) The evidence is showing the contrary to be true, as over one million voters are choosing to vote absentee and do not share Plaintiffs' unsubstantiated concerns. (Sterling Decl., ¶ 16.) This necessarily reduces the number of in-person voters and means that Plaintiffs have failed to "clearly establish" that the statute would impose a material burden on their right to vote.

4) MANDATES ON NONPARTY LOCAL OFFICIALS REGARDING IN-PERSON VOTING. The United States Constitution entrusts state governments—not the federal judiciary and not individual or organizational plaintiffs—to establish the "manner" of elections and local election officials' statutory discretion and authority. U.S. Const., Art. I, § 4, cl. 1. Georgia's election law also provides significant discretion to local government officials. *See* (Doc. 32-1 at 9–11.)

Ignoring the law, Plaintiffs ask this Court for sweeping relief to dictate the minutiae of local election administration, requiring the Secretary to: (1) "authorize" local election officials to have more early voting days; (2) "direct" local election officials to provide a drive-thru voting option and mandate that

larger counties have multiple such locations¹⁷; (3) “direct” the use of “pop-up” temporary polling locations where one was recently closed; (4) “require” local election officials to allow voters to complete absentee ballots in-person at polling locations; (5) “require” pollworkers to wear PPE (and provide them with the masks and gloves they may need), use tape to mark off six foot increments, and provide other distancing techniques at polling locations; (6) “direct superintendents to allow appointed pollwatcher activities;” and (7) “instruct” superintendents on how to report voter information into the Secretary’s website. (Doc. 20-1 at 3-7.) Relief is not warranted on any of these claims. First, no local official is a party to this action, and binding precedent recognizes that this precludes the relief Plaintiffs seek. *See Jacobson*, 2020 WL 2049076 at *9-13 (denying relief where it would be ordered against a nonparty local government).

Second, the State is already providing counties with PPE and assistance in procuring PPE. (Sterling Decl. ¶¶ 7–8.) Plaintiffs make no allegation that the State’s current efforts are inadequate, and their requested relief is moot. *United States v. Georgia*, 778 F.3d 1202, 1204 (11th Cir. 2015). Similarly, Mr. Sterling’s declaration explains Plaintiffs’ misunderstanding

¹⁷ Plaintiffs provided no analysis on how they arrived at their number of requiring counties to provide at least one drive-thru for every 100,000 voters.

about the Secretary’s website, so there is no relief to be ordered on that point either. (Sterling Decl. ¶ 14.)

Third, Plaintiffs’ Complaint raises no issue regarding poll watchers or moved polling locations, which precludes the Plaintiffs from seeking this kind of relief now. *Fair Fight, Inc.*, Slip Op. at 9, n. 8.

Fourth, Plaintiffs have provided no evidentiary support that the absence of a state mandate to take various prophylactic or website measures will cause any of the declarants to vote in person. Nor have they shown that the absence of the specific types of relief sought (e.g., the lack of drive-thru voting locations) is all that stands between a Georgia voter (much less any of the Plaintiffs) and that voter’s decision to vote in person or absentee.

Fifth, Plaintiffs ignore that local election officials can already accept absentee ballots at multiple locations. Ga. Comp. R. & Regs. 183-1-14-.08(2).¹⁸ Indeed, Plaintiffs’ claim is that government should just “do more” to satisfy Plaintiffs’ policy demands, but another court in this District recently rejected similar demands, because the Constitution does not require governments “to maximize the convenience of all voters.” *Gwinnett Cty.*

¹⁸ This address concerns of declarants like Elizabeth Throop, who would like to vote by a hand-marked absentee ballot and return it to a county election official. (Doc. 20 at 115-16.)

NAACP, 2020 WL 1031897, at *7-8 (citing *Ohio Democratic Party v. Husted*, 834 F.3d 620, 629 (6th Cir. 2016)).

Sixth, while the impact of the COVID-19 virus is significant, the cost of protecting oneself against possible exposure at a polling location (e.g., using hand sanitizer, washing hands after voting, wearing a mask) is relatively low, and Plaintiffs have not alleged that they are unable to take the preventative measures they describe. Under these circumstances, an extraordinary mandatory injunction from a federal court dictating every detail of a polling location and subjecting poll workers to possible sanction is incongruous and unwarranted. (Doc. 20-1 at 5.)

Other courts have found that imposing tangential costs on in-person voting (putting aside the opportunity to vote absentee) is not actionable. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring); *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1354 (N.D. Ga. 2006). Or, as held by another court in this District just last week: Plaintiffs' proffered safeguards:

may very well be the best public policy ... The problem with this argument, however, is that it is not the law. And, it is not the job of this Court to write the law or to decide this case in favor of the party who articulates the most desirable outcome. The Court must follow the law as written and leave the policy decisions for others.

GALEO v. Gwinnett Cty. Bd. of Registrations and Elections, No. 1:20-cv-1587-WMR (N.D.Ga., May 9, 2020) (Slip Op. at 2).¹⁹

Finally, there is no logical link (much less actual evidence of a link) between much of what Plaintiffs request (e.g., enhanced pollwatcher activities) and the COVID-19 virus. There is certainly no citation to any authority supporting the idea that the Constitution mandates such relief.

5) ABSENTEE BALLOT CHANGES. Shifting their focus from in-person voting to absentee-by-mail voting, Plaintiffs also demand that the Secretary mandate a series of absentee ballot reforms to be implemented by local officials. These include: (1) allowing counties to begin counting (if not tabulating) ballots before 7:00am on election day; (2) identifying voters who received absentee ballot request forms at their residential (not mailing) address and mail them another packet to their mailing address; (3) ordering local election officials to “refrain from rejecting as untimely cast” absentee ballots that are postmarked on or prior to election day (or not postmarked at all) and received “up to three days” later; and (4) accepting UOCAVA ballots that are postmarked by election day and received by the final day before the superintendent’s certification of the election. (Doc. 20-1 at 3-4.) These issues

¹⁹ A filed copy of the Slip Opinion in *GALEO* is attached as **Exhibit 7**.

have either already been addressed or will be addressed by the time of the hearing on Plaintiffs' Motion.

Further, the Secretary is considering additional actions to permit early scanning of absentee-by-mail ballots by local officials. Also, the Secretary has already mailed absentee ballot request forms to voters who received them at their residential address instead of their mailing address. (Sterling Decl., ¶ 13.) These claims for relief are, therefore, moot. *United States v. Georgia*, 778 F.3d at 1204.

This leaves only Plaintiffs' claims for extending the time to return absentee ballots and the necessary striking (or judicial rewriting) of O.C.G.A. § 21-2-386(c).²⁰ Here, Plaintiffs' Complaint cites an unsubstantiated "indication that the U.S. Mail in Georgia will continue to be much slower than normal." (Doc. 1 at 107; *see also* Doc. 20 at 170 (citing "frequent complaints" of problems with mail).) There is no evidence, however, that supports this claim. No declarant said that imposing the remedy would make them any more or less likely to vote. And, they can always return their absentee ballots in person, which alleviates the concern altogether.

²⁰ An exception for overseas and military voters allows their absentee ballots to be counted so long as they reach the county election office within three days of the closing of the polls. Ga. Comp. R. & Regs. 183-1-14-.10.

There is also no legal basis to impose a blunt judicial order against the State for perceived or actual acts of the United States Postal Service. *See Georgia Shift*, 2020 WL 864938, at *5 (declining to use federal judicial power to address every conceivable electoral harm). Under these circumstances, *Billups* is also on point: plaintiffs’ inability to “locate a single voter who would bear a significant burden[] ‘provides significant support for a conclusion that [the challenged law] does not unduly burden the right to vote.’” 554 F.3d at 1354.

6) COUNTING MARCH ABSENTEE BALLOTS. Finally, Plaintiffs ask that the Secretary count both ballots from voters who voted in the March Presidential Preference Primary and will vote in the June Primary. (Doc. 20-1 at 6.) To prevent duplicate voting (and unconstitutional vote dilution), the Secretary will disregard the March ballots for voters who vote in the June Primary, as their June Primary ballot will contain the Democratic or Republican nominees for President, based on which ballot the voter chose. (Doc. 19, at 2). This presents no burden, because government officials are presumed to obey the law, *United States v. Matta*, 937 F.2d 567, 568 (11th Cir. 1991), and Plaintiffs have not articulated or shown any contrary intent.

iv. *The State's interests are important.*

Only if this Court finds that Plaintiffs have provided competent evidence of an actual burden does it consider the government's interest. Plaintiffs do not allege that the acts or omissions they challenge are facially discriminatory or generally unreasonable, so "important regulatory interests" are sufficient to uphold the current election laws. *Burdick*, 504 U.S. at 434. This is also true because of the "minimal" nature of the Plaintiffs' alleged burden. *See Timmons*, 520 U.S. at 358; *De La Fuente v. Padilla*, 930 F.3d 1101, 1105 (9th Cir. 2019) (citing *Timmons*), *cert. denied*, 140 S. Ct. 676, 205 L. Ed. 2d 440 (2019). Under these circumstances, the "State need not establish a compelling interest to tip the constitutional scales in its direction." *Burdick*, 504 U.S. at 434, 439.

First, the State has a strong interest in enforcing its own election laws as written. *Fair Fight, Inc.*, Slip Op. at 28-29. This includes laws governing the time of presidential preference primaries and when absentee ballots must be returned. *See* O.C.G.A. §§ 21-2-191; 21-2-386(c). This interest extends to enforcing federal laws like UOCAVA, and the Justice Department agrees. *See generally* (Doc. 24)

Second, there is a real financial cost associated with Plaintiffs' proposed relief, whether buying an unquantifiable additional amount of PPE,

printing potentially millions of hand marked paper ballots, and providing additional resources like pens, cardboard, and shields. *See generally* (OPB Decl.; Sterling Decl.; Harvey Decl.) The State’s realistic budget projections are dire and those fiscal concerns are “undeniably a legitimate and reasonable legislative purpose.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016); *see also Wilson v. Birnberg*, 667 F.3d 591, 601 (5th Cir. 2012).

Third, the administrative burden of retraining county election officials to accommodate Plaintiffs’ policy preference for hand marked paper ballots is also significant. (Harvey Decl., ¶¶ 34–36.) These last-minute changes will also increase the possibility of human error. (*Id.*) The State has an interest in maintaining the integrity of elections and avoiding this problem. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

Fourth, the state has an interest in preventing voter confusion caused by overloading voters with alternative and new information. *See Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 793 (11th Cir.1983) (addressing voter confusion). For almost a year, voters and election officials have been learning how to use the new BMD voter system, training has taken place on the new devices, and the BMDs have been fully deployed to county election officials. (Sterling Decl., ¶ 3.) Switching to a new system now would require on-the-fly

retraining of county officials to assist voters whose understanding of the elections system would have been discarded at the eleventh-hour. More still may rely on “pop-up” or “drive-thru” polling locations that never materialize. *See Jacobson*, 2020 WL 2049076 at *11 (discussing federal courts’ limitations to enforce orders against nonparties).

The best way to avoid voter confusion is to conduct this election on the set date under the set policies. Voters can vote in-person with the preventative measures that are already being planned for or they can vote by absentee ballot (and even return their ballots in-person if they fear the United States Postal Service). The pandemic is cause for enough confusion; last-minute changes imposed by the federal judiciary should not be another.

B. Plaintiffs are not likely to succeed on the merits of their Equal Protection claim.

Count II alleges Equal Protection violations based on purported discrimination against the aged and the sick. These claims also fail.

First, Plaintiffs’ Equal Protection claim fails for the same reason as their Due Process claim: it presumes, without evidence or legal support, that an absentee ballot is less likely to be effective than an in-person ballot. (Doc. 20 at 30.) There is no basis in law or fact to make this presumption. As shown above, the secrecy sleeve is not a federally cognizable issue, and

generalized and unsupported concerns about postal workers are not a basis to grant a mandatory federal injunction—certainly not against Defendants who have no dominion over USPS. Moreover, government is presumed to act in good faith, which means that it is presumed that State and nonparty local officials will act in accordance with the law. *Matta*, 937 F.2d at 568.

Second, “[t]he Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring); *See also United States v. Marengo Cty. Comm’n*, 731 F.2d 1546, 1571 (11th Cir. 1984). Plaintiffs have alleged no intentional conduct by the Defendants to undermine, harm, or discount the votes of those who may be more vulnerable to the COVID-19 virus. This warrants denial of the Motion based upon Plaintiffs’ Equal Protection claims.

Third, neither the aged nor those that may be more susceptible to the COVID-19 virus are protected classes. *Gary v. City of Warner Robins, Ga.*, 311 F.3d 1334, 1337 (11th Cir. 2002) (age); *cf. Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001) (reaffirming that the disabled are not a suspect class). Accordingly, the rational basis test will uphold the government’s policies. *Id.* As discussed above, there are numerous rational

and important issues to maintain the current election system, especially as it has been already modified to address the COVID-19 virus.²¹

II. Plaintiffs will not suffer an irreparable injury absent issuance of a preliminary injunction.

Even in election cases, Plaintiffs must still show a substantial likelihood of an “actual and imminent” injury to their right to vote. *Siegel*, 234 F.3d at 1176; *NE Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Plaintiffs here failed to do so. Voters concerned about COVID-19 can vote absentee, and the Eleventh Amendment precludes consideration of Plaintiffs’ secret ballot concerns. *See, supra* Section I, A, ii. In addition, Plaintiffs speculate that the pandemic will be in full swing in June, August, and November, but acknowledge they really cannot predict this, thus their requested relief does not avoid the alleged harm. (Doc. 1, ¶ 40.)

²¹ Plaintiffs’ attempt to weave back in the “unconstitutional conditions doctrine” to the Equal Protection claim fails for the same reasons as it does under the Due Process analysis. *See supra*, n. 13.

III. The public interest and balance of the equities weigh against granting Plaintiffs' relief.²²

In the light of the ongoing pandemic and the State's other election obligations, the balance of the equities and the public interests involved clearly favor Defendants. The (at worst) minimal burdens Plaintiffs articulate pale in comparison to the financial and administrative burdens their relief would impose upon the State (much less 159 nonparty county election officials), and the voter confusion imposed upon the public.

This is particularly true given the temporal proximity of the June Primary, potential August runoffs, and November elections. The United States Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (April 6, 2020) (per curiam) (citations omitted). In cases like this one, courts must consider "imminence of the election," *id.*, as there is "a public interest in the Court promoting certainty with elections and not entering orders that create 'voter confusion and consequent incentive to remain away from the polls.'" *Gwinnett Cty. NAACP*, 2020 WL 1031897 at *9 (quoting *Purcell*, 549

²² Courts in this district have considered the remaining two factors—balancing the equities and public interest—together in election cases. *See Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018).

U.S. at 5). The risk of voter confusion from court orders affecting elections increases as the election draws closer. *Purcell*, 549 U.S. at 4-5.

The effects of COVID-19 on elections are unknown, but the relief Plaintiffs seek would fundamentally change the upcoming election and recognized voting procedures for all Georgia voters. The June election is already underway, and over 1 million absentee ballot applications have been accepted. (Sterling Decl. at ¶ 16.) Official absentee ballots have been mailed to many voters already and, as of May 11, 2020, 180,215 absentee ballots have been returned, processed, and accepted. (*Id.*) Early in-person voting will begin in less than a week—on May 18, 2020. (Harvey Decl. at ¶ 17.)

In addition to the obvious public interest in not disturbing an election process already underway, “[a] State indisputably has a compelling interest in preserving the integrity of its election process.” *Eu*, 489 U.S. at 231. The functioning of our democracy demands that voters have confidence in the integrity of the electoral processes. *Purcell*, 549 U.S. at 4. *See also Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Moreover, Plaintiffs’ proposed relief would burden the franchise of military and disabled voters. Plaintiffs’ relief would sacrifice the franchise of military voters to allay their speculative fears and concerns. *See* (Doc. 24). Similarly, in their unrelenting march to override a policy choice of the state,

Plaintiffs' relief would require Georgia's disabled voters utilize a system that (under the logic of their own theory) is constitutionally insufficient for the general public, but permissible for those relegated to a position of "political powerlessness in our society." *Tennessee v. Lane*, 541 U.S. 509, 516 (2004); *see also National Federation of the Blind v. Lamon*, 813 F.3d 494, 506 (4th Cir. 2016).

CONCLUSION

Plaintiffs (once again) request this Court accomplish what their state-level advocacy could not. Plaintiffs' Complaint and Motion are largely the same failed arguments they have pushed for years, repackaged with a COVID-19 wrapper. Whatever the merits of Plaintiffs' preferred method of voting, their claims in this case do not provide a constitutional basis for supplanting a reasonable policy decision of the State at the eleventh-hour. Accordingly, this Court should deny Plaintiffs' Motion.

Respectfully submitted, this 11th day of May 2020.

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EXHIBIT 1

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

COALITION FOR GOOD
GOVERNANCE, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his
official capacity as Secretary of State;
et al.,

Defendants.

CIVIL ACTION

FILE NO. 1:20-CV-01677-TCB

DECLARATION OF CHRIS HARVEY

Pursuant to 28 U.S.C. § 1746, I, CHRIS HARVEY, make the following
declaration:

1.

My name is Chris Harvey. I am over the age of 21 years, and I am
under no legal disability which would prevent me from giving this
declaration. If called to testify, I would testify under oath to these facts.

2.

I currently am the Director of Elections for the State of Georgia. I have
held that position since July 2015. From August 2007 to July 2015, I was the

Chief Investigator and Deputy Inspector General for the Secretary of State's office, investigating, among other things, potential violations of state election law. For more than a decade, I have acquired firsthand knowledge of Georgia's election processes at both the state and county level.

Georgia's 2020 Election Planning

3.

Georgia's elections are governed by strict timelines to ensure that military and overseas voters receive ballots in time to vote in each election, including runoffs.

4.

After each election, runoffs are held nine weeks later for elections that include federal offices, such as the 2020 election cycle. O.C.G.A. § 21-2-501.

5.

Federal law requires absentee ballots to be sent to overseas and military voters no later than 45 days prior to any election. 52 U.S.C. § 20302(a)(8).

6.

The 2020 election cycle began with the Presidential Preference Primary, which was originally set to be held on March 24, 2020—a date set by the Secretary of State under his statutory authority. Early voting

(absentee-in-person) voting for the Presidential Preference Primary began on March 2, 2020.

7.

On March 13, 2020, as the COVID-19 pandemic began to take hold, President Trump declared a national state of emergency. On March 14, 2020, Governor Kemp declared a public health emergency for the state of Georgia in Executive Order 03.14.20.01.

8.

Also on March 15, 2020, the Secretary of State utilized his authority to suspend in-person early voting for a 43-day period, to April 27, 2020, which was then the start of early voting for the May 19, 2020 general primary election.

9.

For the May 19, 2020 general primary, ballots had to be finalized by March 26th. Absentee by mail ballots started going out April 1st. Overseas and military ballots went out by April 4th, and early voting was to start on April 27th.

10.

On April 8, 2020, Governor Kemp extended the public health emergency declaration for an additional 30 days via Executive Order

04.08.20.02. That extension meant that Georgia would still be under a public health emergency within the period for in-person early voting for the general primary.

11.

On April 9, 2020, the Secretary of State again utilized his authority under O.C.G.A. § 21-2-50.1 to delay the general primary, which now also included the Presidential Preference Primary, from May 19, 2020 to June 9, 2020.

12.

Secretary of State staff worked through the statutory and practical deadlines to arrive at June 9, 2020 as the latest practicable date for the general primary for it not to negatively affect the rest of the elections to be held this year.

13.

Because the runoff for the general primary is held nine weeks after the June 9, 2020 date to allow sufficient time for Georgia counties to comply with the federal law that requires ballots for military and overseas voters to be sent 45 days prior the election, it would be held on August 11, 2020. Counties have ten days after the runoff election to certify election results, meaning their certification deadline is August 21, 2020. The Secretary of State then

has seven additional days to certify, meaning the final certification date for the primary runoff August 28, 2020.

14.

After the Secretary of State certifies the general primary results, ballots have to be built, proofed, and printed in sufficient time for them to begin going out to overseas and military voters. Ballots start going out 49 days prior the November 3, 2020 general election, which is September 15, 2020 in order to meet the 45-day deadline under federal law to send ballots to military and overseas voters. This year, the 45-day deadline falls on September 19, 2020.

15.

The August 28, 2020 certification date gives election officials 11 business days (18 calendar days) to build and proof ballot databases so that absentee ballots can be printed and sent to overseas and military voters by the UOCAVA deadline. This is an aggressive schedule for these activities but we felt it was achievable.

16.

Any delay in the August 11, 2020 primary runoff endangers Georgia's compliance with federal law and the opportunity for military and overseas voters to participate in the November election.

17.

Early (absentee-in-person) voting for the June 9, 2020 general primary begins on May 18, 2020.

18.

Pushing back the general primary any further than the June 9, 2020 date already set by the Secretary would have negative consequences on effectively conducting elections later this year, including the November general election. Those negative consequences include but are not limited to non-compliance with absentee ballot deadlines set by federal law for overseas and military voters.

19.

A three-week delay in the primary means a three-week delay in the runoff according to Georgia law, where the runoff would be held on September 1, 2020. County certification deadlines would be September 11, with the Secretary of State's certification deadline on September 18. Even if the entirety of the building, proofing, and building of absentee ballots could be completed in 15 calendar days (which is far more aggressive than our already-aggressive schedule), absentee ballots would not be ready to go out until September 26, 2020—almost two weeks past the deadline.

20.

The hardship waiver referenced by Plaintiffs in 52 U.S.C. § 20302 requires a delay is limited to particular types of hardships, which do not include declared emergencies, and requires a “comprehensive plan” that ensures that military and overseas voters receive the ballots with sufficient time to have those ballots counted. In my experience, I have never seen a hardship waiver granted as a result of an emergency declaration.

21.

If Georgia does not comply with the requirements of 52 U.S.C. § 20302, it can be subject to liability. The state has been in litigation over its compliance with federal law related to military and overseas voters previously. *United States v. Georgia*, 892 F. Supp. 2d 1367 (N.D. Ga. 2012).

22.

Based on my experience with elections, it would be exceedingly difficult for the State of Georgia to timely prepare and send absentee ballots to military and overseas voters in the November general election if the primary election is delayed beyond June 9, 2020.

BMDs and precincts in a pandemic

23.

Plaintiffs are correct that the general instructions for Dominion voting equipment requires the units to be powered down between cleanings.

24.

Our office has consulted with Dominion regarding the wiping down of ballot-marking devices (BMDs) while in use. As part of our efforts to develop guidelines for county election officials, Dominion has advised us that the machines may be safely wiped down without being powered off. Instructions on how to clean the machines without powering them down have been sent to counties.

25.

Relying on the CDC's guidance on elections and additional information from the U.S. Election Assistance Commission, the Secretary of State's office is in the process of developing guidelines for local election officials for holding in-person voting for the general primary.

Absentee ballot mailing

26.

As in prior elections since 2005, voters in Georgia are not required to provide a reason in order to cast an absentee ballot in the 2020 General Primary, or any runoff, general election, or special election.

27.

Under normal circumstances, absentee ballot request forms are handled by county election officials. O.C.G.A. § 21-2-381 (a)(1)(A) provides that a voter may make an application for an absentee ballot by sending an application to the county registrar or absentee ballot clerk by mail, by facsimile transmission, by electronic transmission, or by delivering it in person to the registrar's or absentee ballot clerk's office.

28.

O.C.G.A. §21-2-381(a)(1)(C) requires that the application "shall be in writing and shall contain sufficient information for the proper identification of the elector; the permanent or temporary address of the elector to which the absentee ballot shall be mailed; the identity of the primary, election, or runoff in which the elector wishes to vote; and the name and relationship of the person requesting the ballot if other than the elector. The voter must complete and sign the application unless the voter is physically disabled or

temporarily residing out of the voter's county, in which case the application can be made by the voter's mother, father, grandparent, aunt, uncle, sister, brother, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, or sister-in-law of the age of 18 or over.

29.

In the light of the COVID-19 pandemic, the Secretary undertook extraordinary measures to make sure that eligible Georgia voters would be able to utilize Georgia's long-standing law that allows any voter to request an absentee ballot without excuse in the 2020 general primary. The Secretary, recognizing that there would be increased interest in absentee voting due to the COVID-19 pandemic, announced that the State, working through third-party vendors, would mail every voter on Georgia's active voter roll a personalized absentee ballot request form. The total cost for printing, personalizing, and mailing the absentee ballot applications is approximately \$3.1 million. The funds were taken from a grant given by the federal government pursuant to HAVA/CARE one-time funds. The federal funds are not provided on an ongoing basis.

30.

Because of the goal of getting the absentee-ballot applications out as quickly as possible, the Secretary of State first mailed the ballots to the residential addresses of all voters.

31.

On April 15, 2020, the State Election Board also authorized the creation of no-contact dropboxes for voters to return their absentee ballots without using the mail system or having to have any physical contact with an election official.

Handling paper ballots

32.

One of the unique features of the June 9 general primary is that a voter may be eligible to receive up to five different ballot designs. Because some voters had already voted in the Presidential Preference Primary, some voters will be eligible receive Democratic or Republican ballots with only the general primary races included. Other voters who did not vote in the Presidential Preference Primary will receive Democratic or Republican ballots with the presidential preference candidates included. And all voters may request a nonpartisan ballot containing only the nonpartisan elections for which that voter is eligible.

33.

Plaintiffs' plan to utilize hand-marked paper ballots for the general primary will cause election officials to have sufficient ballots printed for each ballot combination for:

- a. The Democratic Presidential Preference Primary, Democratic General Primary, and Nonpartisan General Election;
- b. The Republican Presidential Preference Primary, Republican General Primary, and Nonpartisan General Election;
- c. The Democratic General Primary and Nonpartisan General Election;
- d. The Republican General Primary and Nonpartisan General Election; and
- e. The Nonpartisan General Election.

34.

Requiring pollworkers to correctly handle five different possible ballots for each ballot combination (and there could be multiple ballot combinations in each precinct) introduces significant opportunities for human error in the voting process.

35.

Further, counties will have to print a sufficient number of ballots for both early and election-day voting. Because this election includes five different possible ballots for each ballot style, counties will have to print significantly more ballots than will be used in an election.

36.

Plaintiffs' proposal to include options like curbside voting creates a significant number of practical problems that would require processes and training. For example, processes would have to exist for (1) how to handle vehicle traffic flow at a site offering curbside voting, (2) how a voter is checked in while remaining in their vehicle, (3) how to deal with multiple voters in the same vehicle, (4) how the election worker retrieves the ballot once a voter in a curbside-voting setup finishes, (5) what security precautions are taken to ensure the ballot is not altered from the time it leaves the voter's hands to the time it is inserted in a ballot box. There is not sufficient time to design appropriate processes and conduct training of all relevant officials for these novel proposals in time for early voting that begins on Monday, May 18, 2020.

37.

Accepting absentee ballots up to the date of certification, as Plaintiffs propose, delays all post-election tasks and would lead to delays in releasing any unofficial results, conducting audits, and certifying results. These delays would endanger the efficient administration of elections for the rest of the election cycle, including complying with federal deadlines for sending military and overseas ballots.

Costs imposed through process

38.

In Fiscal Year 2020, the total budget for the Elections Division of the Secretary's Office was \$6,118,907. The General Assembly has not yet passed a Fiscal Year 2021 budget (the 2021 Budget), which will fund state government from July 1, 2020, through June 30, 2021.

Plaintiffs and Declarants

39.

My staff has reviewed the records our office has in ENET, the statewide voter registration database, for each of the Plaintiffs. Those records show the information in the following paragraphs.

40.

Plaintiff Rhonda Martin last voted in person in July 2018. She voted using a paper absentee-by-mail ballot in the November 2018 general election and the December 2018 runoff election. Both of the paper ballots for 2018 were accepted.

41.

Plaintiff Jeanne Dufort last voted in person in July 2018. She voted using a paper absentee-by-mail ballot in the November 2018 general election and the December 2018 runoff election. Both of the paper ballots for 2018 were accepted. Ms. Dufort's request for an absentee ballot for the general primary was received on April 6, 2020.

42.

Plaintiff Aileen Nakamura voted in person for the December 2018 runoff election when she voted early. She voted using a paper absentee-by-mail ballot in the November 2018 general election and her paper ballot was accepted. Ms. Nakamura voted in person during early voting for the Presidential Preference Primary election on March 9, 2020.

43.

Plaintiff B. Joy Wasson last voted in person for the November 5, 2019 municipal election when she voted early. She voted using a paper absentee-

by-mail ballot in the November 2018 general election and her paper ballot was accepted. Ms. Wasson requested an absentee-by-mail ballot for the Presidential Preference Primary on January 21, 2020 and returned it on March 23, 2020. That ballot was accepted. Her request for an absentee-by-mail ballot for the general primary was received on April 28, 2020.

44.

Plaintiff Elizabeth Throop voted using a paper absentee-by-mail ballot in the November 2018 general election and her paper ballot was accepted. Ms. Wasson voted early in person for the Presidential Preference Primary on March 7, 2020. Her request for an absentee-by-mail ballot for the general primary was received on April 14, 2020.

45.

Declarant Tabitha Johnson-Green regularly votes in person using early voting, most recently on March 3, 2020 for the Presidential Preference Primary. She last voted an absentee-by-mail paper ballot for the November 2012 general election, which was accepted. Her request for an absentee ballot for the general primary was received on April 9, 2020.

46.

Declarant Susan Riese has voted in person using early voting, most recently on November 30, 2018 for the December 2018 runoff. Her request for mail absentee ballots for all 2020 elections was received on April 15, 2020.

47.

Declarant Gary Riese has voted in person using early voting, most recently on March 6, 2020 for the Presidential Preference Primary. His request for mail absentee ballots for all 2020 elections was received on April 16, 2020. His absentee ballot for was returned and accepted on April 27, 2020.

48.

Declarant Mary Beckman voted using a paper absentee-by-mail ballot in the November 2018 general election and her paper ballot was accepted. Ms. Beckman's request for an absentee-by-mail ballot for the general primary was received on April 15, 2020.

[signature on following page]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of May, 2020.



CHRIS HARVEY

EXHIBIT 2

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

COALITION FOR GOOD	)	
GOVERNANCE, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	
v.	)	FILE NO. 1:20-CV-01677-TCB
	)	
BRAD RAFFENSPERGER, in his	)	
official capacity as Secretary of State	)	
of the State of Georgia, et al.,	)	
	)	
Defendant.	)	

**DECLARATION UNDER PENALTY OF PERJURY
OF GABRIEL STERLING**

1. I am over the age of majority, of sound mind, and otherwise qualified to make this Declaration based upon my own personal knowledge. This Declaration is offered pursuant to 28 U.S.C. § 1746 in support of Georgia Secretary of State Brad Raffensperger’s (“Defendant” or “Secretary”) in the above-captioned matter.

2. I am the Implementation Manager for the Statewide Voting System for the Office of the Georgia Secretary of State. I have held that position since October 2019. Since taking this position, I have acquired firsthand knowledge of Georgia’s upgrade to the new voting system and the rollout of the new Dominion system.

3. At the time of giving this declaration, Georgia’s new ballot marking devices (“BMDs”) have been delivered to each of Georgia’s 159 counties. The new election management system (“EMS”) has also been deployed in all 159 counties.

4. The new BMDs produce a paper ballot that is marked with the voter's choice(s) in a format readable by the voter. The paper ballots can be audited.
5. Early voting for the June 9 primary election (the "June Primary") commences on Monday, May 18.
6. It is difficult to determine the cost of replacing the BMDs with hand marked paper ballots for several reasons, including that voters residing in different counties (and polling locations) will have different ballots.
7. Before April 20, 2020, the Secretary's Office began working on several fronts to procure personal protective equipment ("PPE") for use during the June Primary, as well as sanitizing and disinfectant materials.
8. These efforts include using one-time federal funds to provide reimbursable grants for Georgia's counties to purchase PPE. The federal grant funds allow counties to be reimbursed on a 90/10 basis; in other words, for every \$1 a county spends, the State will reimburse up to \$9, up to \$3,000 total. This means that a county can purchase \$3,333.33 worth of PPE and pay only \$333.33.
9. The Secretary's Office is also working in conjunction with the Georgia Emergency Management Agency to directly procure PPE and distribute it to counties.
10. Purchase orders are currently in place for styluses (that may be disinfected between uses so voters do not have to directly touch BMD screens), gloves, hand sanitizers, disinfecting wipes, and reusable FDA approved masks.
11. The Secretary has also identified a source for plexiglass shields to separate poll workers from voters, and it is working with Georgia's counties to ascertain possible configurations.

12. To obtain additional hand marked paper ballots would cost significantly more, as the types of ballots vary by county and by political party. At this time, it is unclear if one-time federal funds could be used to purchase these additional ballots.
13. When the Secretary decided to mail each of Georgia's voters on the active voter list an absentee ballot request form, he had to act quickly. Due to limitations with the way the State's mail vendor could pull data, the Secretary had to choose between sending absentee ballot request forms to mailing and residential addresses. Given that only approximately 20% of Georgia's active voters have the mailing address field filled and 100% have the residential address, the decision was made to use residential addresses. On May 6, 2020, the Secretary reissued applications to voters' mailing addresses if that address differed from their residential address, and if they had not already requested an absentee ballot. This represents about 276,000 Georgia voters.
14. When county election officials receive absentee ballot request forms for Georgia voters, they upload the ballot request information into what is known as the eNet system. Georgia's My Voter Page shows when counties record the information in the eNet system and not when the ballot is mailed via the United States Postal Service.
15. The Secretary learned that the vendor sent a secrecy sleeve after voters began receiving the absentee ballot packets. Among other responses, the Secretary directed the mailing vendor to include revised instructions with absentee ballot packets.
16. As of Monday, May 11, 1,287,632 absentee ballot applications have been accepted. 1,237,181 absentee ballots have been mailed or in the process of being mailed. 1,055,502 have been scanned as delivered to voters'

mailboxes, and 180,215 absentee ballots have been returned, processed, and accepted by local election officials.

17. The total cost of the Secretary's mail efforts for the 2020 June Primary will be at least \$5.5 million, and one time federal funds have been used to fund this project.

{Signature On Following Page}

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 11th day of May 2020.



Gabriel Sterling

EXHIBIT 3

- IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

4. During the 2020 legislative session, the General Assembly revised the 2020 budget, which the General Assembly first passed last year. The revised budget, which funds State government through June 30, 2020, is known as the "Amended Budget." The General Assembly has not yet passed the Fiscal Year 2021 budget (the "2021 Budget").
5. State budgets are based on revenue estimates, and the General Assembly is prohibited from appropriating funds that exceed the revenue estimates set by the Governor.
6. Because Georgia has a constitutional requirement to balance the State budget, it cannot engage in deficit spending. Consequently, budget priorities frequently compete in a zero-sum environment: every dollar spent on healthcare, for example, is a dollar that cannot be spent on education, elections, or other priorities.
7. Due to declining State revenues before the outbreak of the Coronavirus pandemic and, excluding reserve funds that were used to combat the pandemic, the Amended Budget reflects less state revenues than the budget that passed the General Assembly in 2019.
8. The pandemic's economic impact cannot be understated, and it negatively impacts State budgets in two ways. First, the slower economy generates less revenue for the State Treasury. Second, many of these same factors also lead to increased enrollment in public assistance programs. Put simply, the State will be required to provide much more with far less.
9. Current projections indicate that the State will likely and simultaneously be forced to cut overall spending (beyond those already in the Amended Budget) and dramatically increase healthcare expenditures.
10. Already, the Director of OPB, the Chairman of the House Appropriations Committee, and the Chairman of the Senate Appropriations Committee,

have instructed state agencies to prepare their 2021 budgets with a 14% reduction from the 2020 base budget. This includes the Secretary of State's Office.

11. On May 6, 2020, the Georgia Department of Revenue announced that April 2020 tax collections were down 35.9% or \$1.03 billion from April 2019.
12. In the light of these numbers, it appears that the Coronavirus's negative impact on the State revenues will exceed that of the Great Recession of 2008. At the same time, it is equally true that spending on healthcare related matters is anticipated to increase.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 11, 2020.

3
Stephanie Beck
Deputy Director

& Ju

EXHIBIT 4

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

COALITION FOR GOOD
GOVERNANCE, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his
official capacity as Secretary of State;
et al.,

Defendants.

CIVIL ACTION

FILE NO. 1:20-CV-01677-TCB

DECLARATION OF MICHAEL BARNES

Pursuant to 28 U.S.C. § 1746, I, MICHAEL BARNES, make the following declaration:

1.

My name is Michael Barnes. I am over the age of 21 years, and I am under no legal disability which would prevent me from giving this declaration. If called to testify, I would testify under oath to these facts.

2.

I currently am the Director of the Center for Election Systems in the Office of Secretary of State Brad Raffensperger. I have held that position

since January 2018. From 2010 to December 31, 2017, I was Director of the Center for Election Systems at Kennesaw State University (“KSU”), which was an outside contractor with the Office of the Secretary of State. From my time at the Center for Election Systems, both at KSU and currently, I have acquired firsthand knowledge of Georgia’s voting system and ballot building process.

Savannah-Chatham County School Board Election

3.

The Savannah-Chatham County Public School System (“SCCPSS”) is governed by an elected School Board of Public Education, which has elections on the ballot in the June 9, 2020 election for school board members representing District 1, District 2, District 3, and District 7.

4.

On or about April 24, 2020, the Secretary of State’s Office was notified that the absentee ballots issued to voters who reside in SCCPSS District 7 did not contain the election for the District 7 school board race. Further, the race for the SCCPSS District 7 election was inadvertently placed on the absentee ballots issued to voters residing in SCCPSS District 4, although those voters are not eligible to vote in the District 7 election. The school board position for SCCPSS District 4 is not up for election this year.

5.

Upon reviewing this issue, the Secretary of State's Office discovered that the ballot combinations in the database assigned to voters in SCCPSS District 4 contained the race for the SCCPSS District 7 election, which resulted in the SCCPSS District 7 race appearing on the absentee ballots issued to voters residing in SCCPSS District 4. Additionally, the ballot combinations in the database assigned to voters residing in SCCPSS District 7 did not include the SCCPSS District 7 race, which resulted in voters residing in District 7 receiving absentee ballots without the SCCPSS District 7 race on the ballot.

6.

Because absentee ballots need to be tabulated using the database from which the ballots were built, we could not simply update the original database that contained the erroneous ballot combinations to address this issue. Instead, a second database had to be created containing the correct ballot combinations assigned to voters in District 4 and District 7, which would allow voters in District 4 and District 7 to receive ballots with the correct races.

7.

On April 26, 2020, we completed building the second database and sent the updated ballot images to the vendor for printing.

8.

Because the ballots built using the second database will need to be tabulated using the second database, the header on the ballots built using the second database is shaded. Any absentee ballots without a shaded header were built using the original database. By including this distinguishing characteristic on the ballot header, Chatham County elections officials will know whether an absentee ballot needs to be tabulated using the original database or the second database. In other words, all absentee ballots received by the Chatham County Board of Registrars without a shaded header will be tabulated using the original database, and all absentee ballots received by the Chatham County Board of Registrars containing the shaded header will be tabulated using the second database.

9.

I understand that the Chatham County Board of Registrars has reissued a new absentee ballot to every voter in SCCPSS District 7 who previously received an absentee ballot without that race, and the original ballot was cancelled.

10.

Additionally, because voters residing in SCCPSS District 4 received absentee ballots containing the race for SCCPSS District 7, any absentee ballots from the original database (i.e. ballots without the shaded header) that the Chatham County Board of Registrars receives from voters in SCCPSS District 4 will be duplicated by the county elections officials onto absentee ballots with the corrected ballot style built using the second database prior to being tabulated. This will ensure that voters in District 4 who received an absentee ballot containing the District 7 race, and are not entitled to vote in the District 7 election, will not be able to vote in the District 7 race. The duplication process is the same as the process for duplicating provisional ballots.

11.

After all ballots are tabulated using their corresponding database, the votes tabulated using the original database will be manually input into the second database so that a single database contains the entire vote totals.

[Signature on following page]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of May, 2020.



MICHAEL BARNES

EXHIBIT 5

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

FAIR FIGHT ACTION, INC., *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

CIVIL ACTION FILE NO.

1:18-CV-5391-SCJ

ORDER

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction concerning the State of Georgia's recent voter list maintenance activities in which the status of a large number of Georgia voters on the State's inactive elector list was changed to cancelled status. Doc. No. [159].¹

¹ The Court recognizes that Plaintiffs use the words "removed" and "purged" throughout their arguments. However, Defendants have presented evidence and assert that the use of these words to describe the present circumstances is not correct, because no voter is ever removed from the voter rolls. In the process of voter list maintenance (which is permitted under applicable federal law, specifically the National Voter Registration Act, "NVRA," 52 U.S.C. § 20501, *et al.*), the affected voter's

According to a press release from the Secretary of State's Office, the list was comprised of 313,243 inactive voters.² Of these 313,243, there were 108,306, who had filed a change of address request with the United States Postal Service showing they have moved to a different county or state and 84,376, who had election mail returned as undeliverable, totaling 192,682. For purposes of the pending motion, Plaintiffs are not contesting the cancellation of the registrations of these 192,682 voters. It is the remaining 120,561 voters (defined as having had no contact with their county election officials since January 1, 2012 and did not respond to two notices), which are at issue. Subsequent to the filing of Plaintiffs' motion, the Secretary of State returned 22,000 of the 120,561 voters to the voting roll (after review of Plaintiffs' briefing

status is changed from inactive to cancelled, which means that the voter is no longer eligible to vote. Doc. No. [172], p. 10, n.6 (citing Harvey Dec. ¶ 5). Notwithstanding Defendants' argument, the Court recognizes that the applicable Georgia statute utilizes the word "removed." See O.C.G.A. § 21-2-235(b) ("the elector shall be *removed* from the inactive list of electors.") (emphasis added).

² https://sos.ga.gov/index.php/elections/georgia_secretary_of_states_office_cleans_voter_file_by_4_as_required_by_law (last visited Dec. 23, 2019); see also Defs. Hearing Ex. 1 (Dec. 19, 2019).

and based upon the definition of a calendar year). Thus, it is now approximately 98,000 voters that are at issue.³

I. BACKGROUND⁴

In 2018, Plaintiffs Fair Fight Action, Inc. (“Fair Fight Action”), Care in Action, Inc. (“Care in Action”), Ebenezer Baptist Church of Atlanta, Georgia, Inc. (“Ebenezer”), Baconton Missionary Baptist Church, Inc. (“Baconton”), Virginia-Highland Church, Inc. (“Virginia-Highland”), and The Sixth Episcopal District, Inc. (“Sixth Episcopal District”) (collectively, the “Plaintiffs”) sued Defendants Brad Raffensperger (in his official capacity as Secretary of State of the State of Georgia and as Chair of the State Election Board of Georgia), Members of the State Election Board in their official capacities (Rebecca N. Sullivan, David J. Worley, and Seth Harp), and the State Election

³ At the December 16, 2019 hearing, Defense Counsel indicated that there were about 50,000 of these individuals who would have been canceled under Plaintiffs’ interpretation of the law. However, Plaintiffs state that this number is incorrect and was probably based on the misunderstanding as to the calendar year for purposes of counting inactivity. Plaintiffs expert also explained that other corrections were also made by the Secretary of State based on a data transfer issue. See Dec. 19, 2019 Hearing Transcript at 27:7-10.

⁴ All citations are to the electronic docket unless otherwise noted, and all page numbers are those imprinted by the Court’s docketing software.

Board (collectively, the “Defendants”), alleging that there are “serious and unconstitutional flaws in Georgia’s elections process” and that Defendants’ actions have “deprived Georgia citizens . . . particularly citizens of color, of their fundamental right to vote.” Doc. No. [41], ¶ 2. More specifically, Plaintiffs allege that Defendants enforced unconstitutional and otherwise unlawful legislation, such as O.C.G.A. § 21-2-234, which Plaintiffs refer to as “Use it or Lose it” and Defendants characterize as voter list maintenance.⁵

At the time of the filing of Plaintiffs’ lawsuit, Georgia’s statutory voter list maintenance authority was found in O.C.G.A. §§ 21-2-234 and 235 and required the Secretary of State to send a postcard to voters with whom there had been “no contact” for *three* calendar years. If the voter failed to return the postcard, the voter’s status was changed to “inactive.” If the voter still did not vote in the next two general elections, he or she was removed from the registration rolls (or as Defendants’ assert, the registration status was changed to cancelled).

⁵ Plaintiffs also refer to the statute as “voter list purge,” which as stated above, Defendants have presented evidence showing that this is an inaccurate description. See n.1, *supra*.

During the 2019 Legislative Session, the Georgia General Assembly passed House Bill 316 (“HB 316”). HB 316, which was signed into law by the Governor on April 2, 2019, amends the Georgia Election Code to, among other things, provide for more notice under Georgia’s voter-list-maintenance process. HB 316 amended O.C.G.A. § 21-2-234 to mandate that the Secretary of State cannot remove voters from registrations rolls unless there has been “no contact” with them for *five* calendar years—as opposed to the previous *three* calendar years. See O.C.G.A. § 21-2-234(a)(2). HB 316 also amended O.C.G.A. § 21-2-234 to require notice to the voter not less than thirty days but no more than sixty days prior to the cancellation of the voter’s registration. Id. § 235(b).

The approximately 98,000 voters presently at issue are the voters who were placed on the inactive list (for no contact) under the prior statutory provision of three years “no contact” and prior to the enactment of HB 316’s five year “no contact” provisions. Defendants do not see HB 316 as retroactive or “backward” looking and have subjected the voters at issue to voter registration cancellation, even though they had less than five calendar years of no contact prior to being placed on the inactive elector list. Doc. No. [159-2], p. 11.

In Count IV of their Complaint, *as amended*, Plaintiffs allege that Georgia's voter-list-maintenance process violates Georgia voters' rights to procedural Due Process under the First and Fourteenth Amendments of the United States Constitution. Doc. No. [41], ¶¶ 69–81, 205. The Complaint further states: “[t]he “use it or lose it” statute, as well as its enforcement by Defendants, unlawfully disenfranchise voters or severely burden their right to vote by penalizing voters based on their voting choices, providing voters inadequate notice, and failing to ameliorate the [registration cancellations] by offering same-day registration.” *Id.* ¶ 77.

On December 16, 2019, Plaintiffs filed an emergency Motion for Temporary Restraining Order and Preliminary Injunction in which they seek to enjoin Defendants from canceling the voter registrations of 98,561 “inactive” voters. Doc. No. [159].⁶ The Court held a hearing on the same date. During this hearing, Defense Counsel indicated that the “nuclear silo start process” began

⁶ Plaintiffs indicated at the hearing that a supplemental pleading was unnecessary to address the recent circumstances presented in their motion. However, the Court finds that because the events at issue happened after the filing of the complaint, the better practice is to supplement the complaint. *See* Fed. R. Civ. P. 15(d) (“On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.”).

on September 24, 2019 and the system completes the program on December 16, 2019, without anyone taking an action to “push the button,” to complete the process. Counsel also indicated that undoing the coding to stop the process, was challenging because there were other categories of cancellation in the program (besides the active voter cancellation). Counsel further indicated that if the already-running automated list maintenance process were stopped, the process becomes manual, which introduces the possibility for human error. Counsel also indicated that the State of Georgia was already within the ninety-day federal statutory timeline in which it could perform list maintenance and stopping the process would render the State of Georgia not being able to perform list maintenance again until the year 2021. Counsel further indicated that it is easier to reinstate the voters rather than stop the ongoing automated process, because the voter registrations could be restored in an overnight, twenty-four to forty-eight-hour process.

The Court declined to grant an emergency restraining order, finding the absence of imminent irreparable injury, based in large part on Defense Counsel’s representation as to the ease of ability to restore the registrations of the voters at issue within twenty-four to forty-eight hours. Doc. No. [164].

The parties thereafter briefed the preliminary injunction portion of the motion (Doc. Nos. [172] and [177]) and the Court held a second hearing on December 19, 2019. Doc. No. [180]. As stated above, in the interim time period between the emergency December 16, 2019 hearing and the December 19, 2019 preliminary injunction hearing, Defendants returned approximately 22,000 Georgia voters to the voter roll by changing their status from cancelled to inactive status. During the December 19, 2019 hearing, the parties presented testimony (from expert witness, Dr. Michael McDonald and Georgia Elections Director, Chris Harvey) and exhibits. Doc. Nos. [180], [181].

Post-hearing, the Court posed two additional questions to the parties, concerning the asserted injury and state interests.⁷ The parties submitted their responses on December 23, 2019. Doc. Nos. [184], [185].

⁷ The Court's exact questions are as follows:

The Court notes the parties' different statutory interpretations of HB 316.

Pursuant to Anderson v. Celebrezze, 460 U.S. 779 (1983), the Court must consider "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff[s] seek[] to vindicate." Id. at 789. The Court asks Plaintiffs to address the following question: What is the precise injury that will be suffered by the

This matter is now ripe for review.

II. LEGAL STANDARD

The Court considers four factors when deciding whether to issue a preliminary injunction pursuant to Federal Rule of Civil Procedure 65: (1) whether there is a substantial likelihood of success on the merits of the complaint;⁸ (2) whether the preliminary injunction is necessary to prevent

approximately 120,000 people at issue here if this preliminary injunction is denied?

Additionally, pursuant to Anderson, the State must put forward “precise interests” as “justifications for the burden imposed by its rule.” Id. at 789. “[T]he Court must not only determine the legitimacy and strength of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” Id. The Court asks Defendants to address the following question: Notwithstanding its Eleventh Amendment argument, what interest does the State have in applying its interpretation of H.B. 316 to the approximately 120,000 people at issue here?

⁸ It appears to the Court that Plaintiffs are arguing the likelihood of success on the merits of their motion for preliminary injunction; however, the Court’s review of applicable authority indicates that the standard involves likelihood of success on the merits of the *complaint*. See Forsyth Cty. v. U.S. Army Corps of Engineers, 633 F.3d 1032, 1042 (11th Cir. 2011) (noting that “[t]he County failed to establish a substantial likelihood of success on the merits of its complaint.”); Mann v. Palmer, 713 F.3d 1306, 1310 (11th Cir. 2013) (indicating that the petitioner had to establish “a substantial likelihood of success on the merits of his complaint.”); Indigo Room, Inc. v. City of Fort Myers, 710 F.3d 1294, 1299 (11th Cir. 2013) (noting that the district court did not

irreparable injury; (3) whether the threatened injury outweighs the harm that the preliminary injunction would cause to the non-movant; and (4) whether the preliminary injunction would be adverse to the public interest.⁹ Parker v. State Bd. of Pardons and Paroles, 275 F.3d 1032, 1034–35 (11th Cir. 2001). Injunctive relief is an extraordinary and drastic remedy and should not be granted unless the movant clearly establishes the burden of persuasion as to each of these four factors. Siegel v. LePore, 234 F. 3d 1163, 1176 (11th Cir. 2000).¹⁰ In addition, “[a]t the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is ‘appropriate given the character and objectives of

abuse its discretion in denying injunction motion because it properly concluded that movants failed to show a substantial likelihood of success on the merits of two counts of their complaint); and Common Cause/Georgia v. Billups, 554 F.3d 1340, 1348 (11th Cir. 2009) (noting that the district court ruled that the organizations and voters had proved a substantial likelihood of success on the merits of their complaint).

⁹ Factors three and four also involve consideration of whether the movant has shown reasonable diligence. See Benisek v. Lamone, --- U.S. ---, 138 S. Ct. 1942, 1944, 201 L. Ed. 2d 398 (2018) (“a party requesting a preliminary injunction must generally show reasonable diligence.”).

¹⁰ However, if a movant is unable to show a substantial likelihood of success on the merits, the court need not consider the other preliminary injunction requirements. See Bloedorn v. Grube, 631 F.3d 1218, 1229 (11th Cir. 2011).

the injunctive proceeding.” Levi Strauss & Co. v. Sunrise Int’l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995). The decision to grant preliminary injunctive relief is within the broad discretion of the district court. Majd-Pour v. Georgiana Cmty. Hosp., Inc., 724 F.2d 901 (11th Cir. 1984).

III. ANALYSIS

The crux of Plaintiffs’ preliminary injunction motion involves the question of what should happen to the approximately 98,000 voters that were placed on the State of Georgia’s inactive list (for no contact) prior to the enactment of HB 316. Plaintiffs assert that a constitutional question is presented by the circumstances and this Court should apply the Supreme Court’s Anderson-Burdick balancing test (involving consideration of the asserted injury and the state’s interest) to evaluate whether the voting restriction at issue violates Due Process or the First Amendment. Plaintiffs also assert that the State of Georgia has no interest in removing voters from the rolls in violation of its own laws. Doc. No. [176], p. 2. In contrast, Defendants assert the Eleventh Amendment and the Pullman Doctrine *inter alia* to challenge the propriety of Plaintiffs’ motion. As the Defendants’ arguments are

jurisdictionally based, the Court will consider those arguments first.¹¹ The Court will thereafter consider Plaintiffs' constitutional claim.

A. Eleventh Amendment

In opposition to Plaintiffs' motion, Defendants argue that Plaintiffs' motion and legal theory are barred by the Eleventh Amendment, because Plaintiffs are essentially asking this Court to adjudicate state law for the first time (and otherwise address state-law claims in federal court). Doc. No. [172], pp. 2, 8, 16. More specifically, Defendants' argument recognizes that Plaintiffs and Defendants have different interpretations of the effect of HB 316 on the approximately 98,000 voters at issue. Defendants argue that Plaintiffs' requested injunctive relief requires this Court to endorse Plaintiffs' interpretation of state law, which is barred by the Eleventh Amendment and State sovereign immunity. *Id.* at p. 16. Defendants assert that the reality of

¹¹ "Because the Eleventh Amendment represents a constitutional limitation on the federal judicial power established in Article III, federal courts lack jurisdiction to entertain claims that are barred by the Eleventh Amendment." McClendon v. Ga. Dep't of Cmty. Health, 261 F.3d 1252, 1256 (11th Cir. 2001) (citations omitted); see also Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("the Eleventh Amendment defense . . . partakes of the nature of a jurisdictional bar") and Duke v. James, 713 F.2d 1506, 1510 (11th Cir. 1983) (discussing the Pullman abstention (from the exercise of federal jurisdiction) doctrine).

Plaintiffs' motion is that "it is a declaratory judgment claim regarding compliance with HB 316 masquerading as a constitutional argument." Id. at p. 17. Defendants further argue that "Plaintiffs cannot succeed in suggesting their relief is based in federal law when it requires this Court to determine a novel issue of state law." Id. at p. 18.

In opposition, Plaintiffs state that their claims arise from the First and Fourteenth Amendments of the United States Constitution, not state law – and that their arguments do not require the Court to analyze novel issues of state law. Doc. No. [177], p. 3.

The Eleventh Amendment states in relevant part: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State" U.S. Const. amend. XI. The United States Supreme Court has held that "a suit against state officials on the basis of state law contravenes the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 117 (1984).¹² The Court also indicated that when injunctive relief is

¹² "The Supreme Court [in Pennhurst] has explained that the rationale for the

sought, “an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it.” Id. at 113 (citations omitted). The Court further stated: “it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.” Id. at 106.

The Eleventh Circuit Court of Appeals has addressed the Pennhurst decision on numerous occasions. In their briefing, Plaintiffs primarily rely upon the Eleventh Circuit’s 1989 decision in Brown v. Georgia Department of Revenue, 881 F.2d 1018, 1023 (11th Cir. 1989). In Brown, the Eleventh Circuit held that the Supreme Court’s decision in Pennhurst does not apply when a plaintiff alleges a violation of the federal Constitution. Id. at 1023. The Eleventh Circuit stated that under Pennhurst, “the determinative question is not the relief ordered, but whether the relief was ordered pursuant to state or federal

[exception to the Eleventh Amendment that allows state officials to be sued for prospective relief, i.e., Ex parte Young doctrine] ‘rests on the need to promote the vindication of federal rights,’ but in a case alleging that a state official has violated state law, this federal interest ‘disappears.’” Ala. v. PCI Gaming Auth., 801 F.3d 1278, 1290 (11th Cir. 2015) (citations omitted).

law.” Id. In the case *sub judice*, no relief has been ordered, so the Court cannot necessarily answer this determinative question.¹³

Additional Eleventh Circuit authority indicates that when the gravamen of the complaint appears to be that the State improperly interpreted and failed to adhere to a state statute, there is a Pennhurst problem – as despite references to the United States Constitution in the pleadings, the claims necessarily rely on a determination that a state official has not complied with state law,¹⁴ a determination that is barred by sovereign immunity. See S&M Brands, Inc. v. Georgia ex rel. Carr, 925 F.3d 1198, 1205 (11th Cir. 2019) and DeKalb Cty. Sch. Dist. v. Schrenko, 109 F.3d 680, 688 (11th Cir. 1997); see also Hand v. Scott, 888 F.3d 1206, 1213–14 (11th Cir. 2018) (holding that “the district court cannot

¹³ Phrased a different way, in Pennhurst, the Supreme Court indicated that “the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought.” Pennhurst, 465 U.S. at 107 (emphasis added). In the case *sub judice*, the Court finds that the effect of the relief sought by Plaintiffs is a determination by this Court that Defendants have not complied with state law.

¹⁴ For example, Plaintiffs use the phrase “violation of state law” at numerous times in their briefing and hearing exhibit/PowerPoint. See e.g., Doc. Nos. [159-1], p. 23; [176], pp. 2, 7 n.1.

enjoin [a state] to follow the district court's interpretation of [the state's] own constitution."').¹⁵

While the Court recognizes Plaintiffs' arguments and citation of authority to the contrary, as well as its ability to review state statutes,¹⁶ the gravamen of the Plaintiffs' pending motion appears to be that the Secretary of State (and therefore the State of Georgia) has improperly interpreted and failed to adhere to Georgia's new voter list maintenance statute (HB 316).¹⁷ This is evidenced by the motion's numerous references to violation of state law and the fact that Plaintiffs are not seeking an injunction as to the entirety of the

¹⁵ This Court's independent research only found one case to the contrary, Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981); however, the applicability and precedential weight of that case is doubtful, considering that it was decided pre-Pennhurst and involved a substantive due process claim, as opposed to the procedural due process claim at issue here.

¹⁶ As stated by Judge Gerald Tjoflat, the Supremacy Clause of the United States Constitution "allows federal courts to review state statutes, but federal courts are limited to refusing to apply the provisions they find unconstitutional." Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1348 (11th Cir. 2019) (Tjoflat, J., dissenting). Here, the Court is not being asked to find a statute unconstitutional. Plaintiffs are asking the Court to find a state official's interpretation of a statute unconstitutional.

¹⁷ More specifically, the case of Democratic Executive Committee v. Lee, 915 F.3d 1312 (11th Cir. 2019) cited by Plaintiffs is distinguishable in that the arguments in that case did not center upon a violation of state law.

approximately 300,000 voter registrations that were subject to cancellation. Accordingly, in light of the above-stated authority, the Eleventh Amendment bars Plaintiffs' motion to the extent that it requires a conclusion by this Court that Plaintiffs' interpretation of HB 316 is correct.¹⁸

B. Pullman Doctrine

While the Court considers the Eleventh Amendment analysis determinative, in the interest of caution, the Court will consider Defendants' Pullman abstention doctrine argument. Defendants assert the Pullman abstention doctrine, on the ground that "Plaintiffs' Motion is predicated upon only one discrete subset of list-maintenance activities that has not been adjudicated by state courts [and further argue that] this Court should refrain from adopting Plaintiffs' arguments on an unsettled issue of state law." Doc. No. [172], p. 20.

"Under the Pullman abstention doctrine, a federal court will defer to 'state court resolution of underlying issues of state law,'" before a substantial

¹⁸ The Court recognizes that Plaintiffs also present an alternative argument in the event that the Court declines to engage in statutory interpretation or otherwise finds that HB 316 is ambiguous as to the voters at issue. To this regard, the Court will continue with its analysis and consider the constitutional question, *infra*.

federal constitutional question can be decided. Siegel, 234 F.3d at 1174; see also Railroad Comm’n v. Pullman Co., 312 U.S. 496 (1941). In considering abstention, the court “must take into account the nature of the controversy and the importance of the right allegedly impaired.” Id. In light of said consideration, the Eleventh Circuit has held that “voting rights cases are particularly inappropriate for abstention.” Id. In lieu of abstention, the Eleventh Circuit has indicated that “the preferable way to obtain state court resolution of those state law issues is through the certification process established by” the state supreme court. Pittman v. Cole, 267 F.3d 1269, 1288 (11th Cir. 2001); cf. Roe v. State of Ala., 43 F.3d 574, 582 (11th Cir. 1995) (“We agree that federal courts should refrain from holding a state election law unconstitutional when a reasonable alternative course of action exists. We are, therefore, reluctant to reach a final decision in this case while the proper application of the [State] Election Code remains muddled. There are two ways to show deference to the state decisionmakers in this matter: we can leave the plaintiffs to their state remedies; or we can certify a question to the Supreme Court of [the state], retain jurisdiction, and await that court’s answer.”) (citations omitted). In light of this authority, the Court finds that it would not

be appropriate to apply the Pullman abstention doctrine to this voting rights case. Nevertheless, the Court still does not proceed to interpreting the statute, because from this Court's brief review, the answer as to how HB 316 applies to the voters who were already on the State of Georgia's inactive elector list (prior to enactment of HB 316) is not clear cut and both Plaintiffs and Defendants have offered reasonable interpretations for how HB 316 affects the voters at issue. Cf. Duncan, 657 F.2d at 699 (providing an overview of authority concerning clear and vague statutes in the context of the Pullman abstention doctrine). In essence, HB 316 is open to interpretation and could reasonably be interpreted as either party contends. In addition, an interpretation of HB 316 by this Court at this stage of the case creates a possibility for conflicting interpretations in the event that a state court later decides the issue — there would be an interpretation by the federal court and an interpretation by the state court. Cf. Pennhurst, 465 U.S. at 122 n.32 (“when a federal decision on state law is obtained, the federal court's construction often is uncertain and ephemeral”).

As stated above, the preferable way to obtain resolution of the state law issue is through the certification process by the state supreme court. However,

neither party has asked to certify a question to the Georgia Supreme Court.¹⁹ Plaintiffs also have an additional remedy in the form of seeking a mandamus in the state courts. Nevertheless, as stated above, the Court considers the Eleventh Amendment analysis, *supra*, determinative to the extent that the issues involve proper interpretation (and violation) of state law.²⁰

¹⁹ The Court recognizes that it may *sua sponte* certify a question the Georgia Supreme Court; however, as indicated at the December 19, 2019 hearing, the Court is concerned as to timing in that the date that the Georgia Supreme Court will return an answer is unknown and Plaintiffs have continuously expressed a desire to resolve this case in March of 2020.

²⁰ The interplay between the Pennhurst/Eleventh Amendment ruling and the Pullman abstention doctrine has been described as follows.

The configuration of the Pennhurst litigation was identical to the litigation in Pullman. Both cases involved lawsuits filed in federal court, which raised both state claims and federal constitutional claims against state officials, but which could have been resolved on the state law claims alone. The Supreme Court, however, did not consider Pullman abstention as a potential resolution of the Pennhurst litigation. Instead, the Court replaced the methodology of a discretionary stay envisioned in Pullman with a rule of mandatory dismissal. As a result, the role of Pullman abstention in allocating decisionmaking responsibility in suits against state officials was transmuted substantially without a word of explanation by the Court.

Keith Werhan, Pullman Abstention After Pennhurst: A Comment on Judicial Federalism, 27 Wm. & Mary L. Rev. 449, 454 (1986).

C. Constitutional Claim

Assuming, *arguendo*, that Plaintiffs' motion does not seek a ruling by the Court regarding the correct statutory interpretation of HB 316 and whether the three-year or five-year "no contact" provision applies to the approximately 98,000 voters at issue, the Court proceeds with the following constitutional analysis of HB 316 and, in particular, the "no contact" scheme therein.

The Supreme Court "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." Dunn v. Blumstein, 405 U.S. 330, 336 (1972). This equal right to vote, however, "is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways." Id.; see also Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute.").

"The Supreme Court has rejected a litmus-paper test for constitutional challenges to specific provisions of a State's election laws and instead has applied a flexible standard." Common Cause/Georgia v. Billups, 554 F.3d 1340, 1351 (11th Cir. 2009) (internal quotation marks omitted). Consequently, a

reviewing court must first “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.” Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). A court must then “identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule.” Id. “Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.” Id.; see also Burdick, 504 U.S. at 434. If a State’s election law imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions. Burdick, 504 U.S. at 434 (citing Anderson, 460 U.S. at 788). But if a State’s election law imposes a “severe” burden, it must be “narrowly drawn to advance a state interest of compelling importance.” Id. (citing Norman v. Reed, 502 U.S. 279, 289 (1992)). In other words, “lesser burdens . . . trigger less exacting review.” Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

Accordingly, the Court begins by evaluating the burden of this “no contact” scheme on Plaintiffs’ First and Fourteenth Amendment rights.

“Ordinary and widespread burdens, such as those requiring nominal effort of everyone, are not severe.” Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 205 (2008) (Scalia, J., concurring) (quotation omitted). However, burdens “are severe if they go beyond the merely inconvenient.” Id. Plaintiffs argue that the burden imposed on voters by the “no contact” scheme is “severe” and that, should their motion for preliminary injunction be denied, the “precise injury” the approximately 98,000 voters at issue will suffer is “complete disenfranchisement.” See generally Doc. Nos. [159-1]; [184]. Plaintiffs contend that removing voters solely due to inactivity – without any other evidence that said voters have moved – raises a substantial risk that individuals will be erroneously deprived of their constitutional right to vote. See Doc. No. [169-1], p. 19. They specifically cite to a 2018 Election Assistance Commission Report, in which statistics show that the State of Georgia mailed 478,295 voter confirmation notices in advance of the 2018 election to individuals it suspected of having moved. See Doc. No. [184-2]. Of those confirmation notices, more than 75% of the notices were neither responded to nor returned as

undeliverable, suggesting that a substantial number of the notices were never read.²¹ Id.

Additionally, Plaintiffs argue that once a voter is removed from the voter roll under the “no contact” scheme, the likelihood of complete disenfranchisement is high for two reasons. See Doc. No. [184], pp. 3–5. First, the State of Georgia does not notify individuals that their voter registration has been cancelled. Thus, Plaintiffs argue that the first moment that many voters learn that they have been removed from the voter rolls is when they arrive at the polls on Election Day. Because the State of Georgia does not offer same-day registration, said individuals are therefore ineligible to vote. Second, for the individuals who have learned that they have been removed from the voter rolls, there is only a narrow window of time for said individuals to re-register before the next election, as Georgia law requires voters to register weeks before any election. See O.C.G.A. § 21-2-224.

²¹ Plaintiffs also point to Mr. Harvey’s testimony at the preliminary injunction hearing, in which he acknowledged that “[t]here are a lot of people that don’t check their mail” and that, upon receiving confirmation notices, voters may think it’s a “mailer,” “an advertisement,” or “marketing things that look like . . . official documents.” See Dec. 19, 2019 Hearing Transcript at 79:1–79:18.

Defendants, in response, argue that Plaintiffs have provided no evidence of *any* burden that the “no contact” scheme imposes on the right to vote, let alone a “severe” burden. See generally Doc. Nos. [172]; [185]. In support of this contention, Defendants rely on the Eleventh Circuit’s ruling in Billups. Therein, the Eleventh Circuit upheld the constitutionality of a state law requiring voters to produce photo identification prior to casting a ballot. See 554 F.3d at 1355. Employing the Anderson-Burdick balancing test, the Eleventh Circuit found that the plaintiffs “failed to prove that any individual would bear a significant burden” because they could not “identify a single individual who would be unable to vote because of the Georgia statute or would face an undue burden to obtain a free voter identification card.” Id. at 1354. Accordingly, the Eleventh Circuit found that “the burden on Georgia voters is ‘slight’” and, thus, that the state interest need not be “compelling.” Id. (citing Burdick, 504 U.S. at 439).

Defendants argue that, like the plaintiffs in Billups, Plaintiffs have failed to prove that any individual would bear a significant or “severe” burden due to the “no contact” scheme. Namely, in support of their motion, Plaintiffs include eight declarations from Georgia voters. See Doc. Nos. [159-3]; [159-4]; [159-5]; [159-6]; [159-7]; [159-8]; [159-9]; [159-12]. Plaintiffs initially stated that

all eight of these voters were due to be removed from the voter rolls under the “no contact” scheme despite that fact that none of these voters had ever moved. Doc. No. [159-1], p. 15. In response, however, Defendants contend that four of the voters (Linda Bradshaw, Keme Hawkins, Tommie Jordan, and Deepak Eidnani) remain on the official list of voters as “active” voters. See Doc. No. [172], pp. 13–14. Thus, these four voters are eligible and able to vote.

Moreover, Defendants contend that the other four voters (Clifford Thomas, David Hopkins, Charlesetta Young, and Kilton Smith) were removed from the voter rolls after failing to respond to the two confirmation notices sent pursuant to the “no contact” scheme under HB 316.²² At this time, there is no evidence that any of these four voters were burdened or precluded from returning the two confirmation notices, which are prepaid and preaddressed.

²² The Court notes that these four voters dispute that they ever actually received confirmation notices. However, Defendants contend that Secretary of State records show that confirmation notices were in fact sent to these four voters. See Doc. No. [172-1]. “The common law has long recognized a rebuttable presumption that an item properly mailed was received by the addressee.” Chung v. JPMorgan Chase Bank, N.A., 975 F. Supp. 2d 1333, 1348 (N.D. Ga. 2013) (quoting In re Farris, 365 F. App’x 198, 199 (11th Cir. 2010)). Plaintiffs’ conclusory allegation that these four voters never actually received confirmation notices “is insufficient to rebut the presumption.” In re Farris, 365 F. App’x at 200 (“The mere denial of receipt, without more, is insufficient to rebut the presumption.”).

Additionally, there is no evidence at this time that any of the four voters are precluded or burdened by registering to vote again. In fact, at the preliminary injunction hearing, Mr. Harvey testified that re-registering to vote after being removed from the voter rolls for “no contact” is no different from registering to vote in the first instance. See Dec. 19, 2019 Hearing Transcript at 47:23–48:4. A voter can re-register to vote by going online to use the Online Voter Registration system or renewing one’s driver’s license or identification card with the Department of Driver Services. Id.

Based on the limited factual record before the Court, the Court finds that Plaintiffs have not shown a substantial likelihood of success that the burden imposed by the “no contact” scheme (*i.e.*, returning a prepaid, preaddressed confirmation notice and/or re-registering to voter) is severe.

The Court now turns to the State’s purported interests in enforcing the “no contact” provision under its interpretation of HB 316. Because the burden of said provision is “slight,” the state interest need not be “compelling . . . to tip the constitutional scales in its direction.” Burdick, 504 U.S. at 439. Rather, “the State’s important regulatory interests are generally sufficient to justify” the restrictions. Id. at 434.

Defendants have identified three State interests in enforcing the “no contact” provision under its interpretation of HB 316. First, Defendants state that State of Georgia has an interest—both generally and as compelled by federal law—in maintaining reliable lists of electors. See Doc. No. [185], p. 4. Under the NVRA, states are required to make “a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters.”²³ 52 U.S.C. § 21083(a)(4)(a). Congress mandates this, in part, “to protect the integrity of the electoral process; and . . . [to] ensure that accurate and current voter registration rolls are maintained.” 52 U.S.C. §§ 20501(b)(3) and (b)(4). Second, Defendants state that the State of Georgia and the Secretary of State have an interest in applying election laws as written specifically. See Doc. No. [185], p. 5. Finally, Defendants maintain that the “no contact” scheme eliminates voter confusion and improves election-day operations. Doc. No. [185], p. 5. For example, Defendants argue that inaccurate voter lists that

²³ The method employed by the State of Georgia—both prior to and after the enactment of HB 316—is contemplated by the NVRA and has been upheld by the Supreme Court in Husted v. A. Philip Randolph Inst., ---U.S.---, 138 S. Ct. 1833, 1842 (2018). As Plaintiffs correctly note, however, the Supreme Court in Husted only addressed whether the challenged voter-list-maintenance process complied with the NVRA and did not address the constitutionality of said process.

incorporate individuals who have moved and are no longer eligible may cause local election officials to improperly assess where equipment and personnel should be deployed on election day in 2020. Id. at pp. 5–6.

Plaintiffs, in response, argue that the State has waived or disclaimed any such interest in applying a three-year “no contact” provision to the approximately 98,000 individuals at issue since HB 316 amended the “no contact” provision to require five years of inactivity. In doing so, Plaintiffs overstate the burden on the State under the Anderson-Burdick test. As discussed *supra*, Plaintiffs failed to show a substantial likelihood of success that the burden imposed by the “no contact” scheme is “severe.” Accordingly, under the Anderson-Burdick, the State is only required to articulate an important regulatory interest in enforcing their interpretation of said provision. See Burdick, 504 U.S. at 439. The Court finds that all three of the above-stated regulatory interests are sufficient to satisfy that obligation under the Anderson-Burdick test.

The Court therefore concludes that, at this time, Plaintiffs have not met their burden of showing a substantial likelihood of success that the “no contact” scheme set forth in HB 316 violates the First and Fourteenth Amendments.

Because Plaintiffs have failed to establish a substantial likelihood of success on the merits, the Court need not examine whether Plaintiffs have will irreparable harm, or whether a balance of hardships weighs in Plaintiffs' favor, or, finally, whether the public interest would support the issuance of a preliminary injunction. See Bloedorn, 631 F.3d at 1242.

IV. CONCLUSION

Plaintiffs' Motion for Preliminary Injunction (Doc. No. [159]) is **DENIED** on the ground that the Eleventh Amendment of the United States Constitution and the principles of sovereign immunity do not permit a federal court to enjoin a state (or its officers) to follow a federal court's interpretation of the State of Georgia's laws. Such interpretation is within the province of the state court. As to the remainder of Plaintiffs' constitutional claim, the motion is also **DENIED** on the ground that Plaintiffs have failed to show a substantial likelihood of success on the merits of their claim that the "no contact" provision violates the First and Fourteenth Amendments. It is important to note that the Court has not conclusively determined the rights of the parties, but in accordance with

applicable authority, only balanced the equities in the interim as this litigation proceeds.²⁴

While the denial of this motion is based upon the Eleventh Amendment and respect for state sovereignty, the Court has not ignored the fundamental significance of voting under our constitutional structure.²⁵ In recognition of this important right, the Court would be remiss not to express its serious concern that there needs to be an immediate and accurate interpretation by the state court of HB 316 as to its effect on the voters who were already on the State's inactive list prior to the effective date of HB 316. To this regard, the Court will allow Plaintiffs, upon request, to stay the pending litigation to seek emergency relief at the state court level (or otherwise certify a question the Georgia Supreme Court). In light of the immediacy of the situation in District 171, it is within the authority of the Secretary of State to return any cancelled voters to inactive status to allow Plaintiffs reasonable time to seek a decision from the state court.

²⁴ See Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1327 (11th Cir. 2019) (noting that "the purpose of the injunction is not to conclusively determine the rights of parties, but only to balance the equities in the interim as the litigation proceeds.").

²⁵ Burdick, 504 U.S. at 432.

The Court also, pursuant to its inherent authority to control the conduct of the parties, **ORDERS** Defendants to make additional diligent and reasonable efforts (through notices on the Secretary of State's website and press releases) to inform the general public (especially those in House District 171, who face a December 30, 2019 deadline to re-register) of this Court's order in regard to the voter list maintenance process and the need for the canceled voters to re-register to vote during the applicable registration time period.²⁶

IT IS SO ORDERED this 27th day of December, 2019.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

²⁶ See generally Martin v. Automobili Lamborghini Exclusive, Inc., 307 F.3d 1332, 1335 (11th Cir. 2002) (discussing inherent authority).

EXHIBIT 6

**RULES
OF
STATE ELECTION BOARD**

**CHAPTER 183-1
GEORGIA ELECTION CODE**

**SUBJECT 183-1-14
ABSENTEE VOTING**

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183-1-14-0.6-.14 Secure Absentee Ballot Drop Boxes

RULE 183-1-14-0.6-.14 Secure Absentee Ballot Drop Boxes

- (1) For the Elections held on June 9, 2020, County registrars are authorized to establish one or more drop box locations as a means for absentee by mail electors to deliver their ballots to the county registrars. Placing a voted absentee ballot into the drop box shall be deemed delivery pursuant to O.C.G.A. § 21-2-385 and is subject to the limitations on who may deliver a ballot on behalf of an elector.
- (2) A drop box shall only be located on county or municipal government property generally accessible to the public.
- (3) Drop box locations may open beginning 49 days before Election Day and shall close at 7:00 p.m. on Election Day. On Election Day, every drop box shall be closed and ballots collected at 7:00 p.m. Counties shall provide notice of the location of each drop box by posting such information on the home page of the county election website no later than the day the drop boxes are placed in a location.
- (4) Drop box locations must have adequate lighting and use a video recording device to monitor each drop box location. The video recording device must either continuously record the drop box location or use motion detection that records one frame, or more, per minute until detection of motion triggers continuous recording.
- (5) Video recordings of the drop box locations must be retained by the county registrars for 30 days after the final certification of the election, or until conclusion of any contest involving an election on the ballot in the county jurisdiction, whichever is later, and shall be made available to Secretary of State investigators upon request.
- (6) A drop box shall be constructed of durable material able to withstand vandalism and inclement weather. The opening slot of a drop box shall not allow ballots to be tampered with or removed and shall be designed to minimize the ability for liquid to be poured into the drop box or rain water to seep in.
- (7) A drop box shall be securely fastened to the ground or an immovable fixture.

(8) If the drop box utilizes a drop-slot into a building, the ballots must drop into a locked container, and both the drop-slot and the container must be monitored by video recording devices.

(9) A drop box shall be clearly labeled “OFFICIAL ABSENTEE BALLOT DROP BOX”. Each drop box location shall clearly display signage developed by the Secretary of State regarding Georgia law related to absentee ballot harvesting and destroying, defacing, or delaying delivery of ballots.

(10) The county registrars must arrange for collection of the ballots from each drop box location at least once every 24 hours. On Election Day, every drop box shall be closed and ballots collected at 7:00 p.m. Collection of ballots from a drop box must be made by a team of at least two people. Any person collecting ballots from a drop box must have sworn an oath in the same form as the oath for poll officers set forth in O.C.G.A. § 21-2-95. The collection team shall complete and sign a ballot transfer form upon removing the ballots from the drop box, which shall include the date, time, location and number of ballots. The ballots from the drop box shall be immediately transported to the county registrar and processed and stored in the same manner as absentee ballots returned by mail are processed and stored. The county registrar or a designee thereof shall sign the ballot transfer form upon receipt of the ballots from the collection team.

Authority: O.C.G.A. § 21-2-31

EXHIBIT 7

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

GEORGIA ASSOCIATION OF
LATINO ELECTED OFFICIALS,
INC., et al.,

Plaintiffs,

v.

GWINNETT COUNTY BOARD OF
REGISTRATIONS AND
ELECTIONS, et al.,

Defendants.

CIVIL ACTION FILE NO.:

1:20-cv-1587-WMR

ORDER

Gwinnett County Board of Registrations and Elections (“Gwinnett BOE”) is subject to federal law that requires that it provide its election and voting related materials in Spanish given the significant percentage of its voters who speak and read the Spanish language. Indeed, as a resident of Gwinnett County for 30 years and having formerly served as a Judge of the Superior Court of Gwinnett County, the Presiding Judge is intimately familiar with the diversity of Gwinnett County. The central issue in this lawsuit really isn’t about what Gwinnett BOE did, but rather,

about what Georgia Secretary of State Brad Raffensperger did (or didn't do) when he sent absentee ballot applications to all Georgia registered voters (including those in Gwinnett County) in English only. However, neither Secretary Raffensperger nor the State of Georgia is subject to the federal provisions that apply to Gwinnett BOE.

Plaintiffs argue that this shouldn't matter. They contend that the Secretary of State assumes the obligations imposed upon Gwinnett BOE even when he unilaterally decides to communicate with voting citizens of Gwinnett County about election matters and that he was required to send a Spanish version of the absentee ballot application, or alternatively, that when the Secretary sent absentee ballot applications to Gwinnett voters in English only that it triggered a duty upon Gwinnett BOE to follow-up with a similar communication in Spanish. The end result sought by Plaintiffs seems reasonable and a desirable outcome. It may very well be the best public policy, particularly in a place like Gwinnett County that enjoys such rich diversity. The problem with this argument, however, is that it is not the law. And, it is not the job of this Court to write the law or to decide this case in favor of the party who articulates the most desirable outcome. The Court must follow the law as written and leave the policy decisions for others.

As such, the Court concludes that Plaintiffs are not likely to succeed on the merits of their lawsuit. Accordingly, the Court denies Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction [Doc. 17].¹

I. FACTUAL BACKGROUND

On March 15, 2020, in light of the ongoing public health crisis, Secretary Raffensperger postponed Georgia's presidential primary election from March 24 to May 19, combining the presidential primary with the previously scheduled primary date for other offices. [Doc. 13 at ¶ 25]. Following Governor Brian Kemp's decision to extend the state of emergency in Georgia until May 13, Secretary Raffensperger again postponed the presidential primary from May 19 to June 9. [*Id.* at ¶¶ 27-28; Doc. 17-2 (hereinafter "Powers Decl."), Exhibits 19, 23]. Secretary Raffensperger explained that the additional time would allow officials to finalize contingency plans and find additional poll workers. [Doc. 13 at ¶ 28; Powers Decl., Exhibit 19]. During the week of March 30, Secretary Raffensperger also began mailing out English-only absentee ballot applications to all Georgia registered voters, including

¹ While it is generally the Court's practice to have an evidentiary hearing when considering whether to grant a preliminary injunction, the Court notes that this motion was filed in the midst of and because of the disruption that the Coronavirus epidemic has imposed on our society, making an evidentiary hearing impractical. Further, the relevant facts seem rather straightforward and not in dispute. And, the Court is unaware that any party has requested an evidentiary hearing.

those in Gwinnett County, to encourage them to vote by mail in the upcoming election due to the health risks posed by in-person voting. [Doc. 13 at ¶¶ 2, 29; Powers Decl., Exhibit 8].

Plaintiffs Limary Ruiz Torres and Albert Mendez (the “Individual Plaintiffs”) are limited-English proficient (“LEP”) Gwinnett County voters who were educated in Spanish-speaking schools in Puerto Rico. [Doc. 13 at ¶¶ 7, 18, 19]. The Individual Plaintiffs claim that they received English-only absentee ballot applications by mail and are unable to read them. [*Id.*]. To date, the Individual Plaintiffs have not completed the application. [*Id.*].² The remaining Plaintiffs, the Georgia Association of Latino Elected Officials, Inc.; the Georgia Coalition for the People’s Agenda, Inc.; Asian Americans Advancing Justice – Atlanta, Inc.; the New Georgia Project; and Common Cause (the “Organizational Plaintiffs”), are organizations engaged in “get out the vote” activities and other voter registration efforts. [*Id.* at ¶¶ 13-17]. On April 13, 2020, Plaintiffs filed suit against Gwinnett BOE and several of its individual members (together, the “Gwinnett Defendants”), as well as Secretary Raffensperger, alleging violations of Sections 203 and 4(e) of the Voting Rights Act (“VRA”), 52 U.S.C. §§ 10503, 10303, and seeking declaratory

² The Court notes the irony of the Individual Plaintiffs being unable to read and complete the absentee ballot application, but nonetheless being capable of finding their place as plaintiffs in this lawsuit.

and injunctive relief. [Doc. 1]. Four days later, Plaintiffs filed an Amended Complaint. [Doc. 13].

On April 20, 2020, Plaintiffs filed the present Motion for a Temporary Restraining Order and Preliminary Injunction [Doc. 17] asking this Court to (1) enjoin all continuing violations of Section 203 of the VRA by the Gwinnett Defendants and Section 4(e) of the VRA by all Defendants; (2) require the mailing of “an accurately translated bilingual absentee ballot application” to the Individual Plaintiffs; and (3) require the mailing of “an accurately translated bilingual absentee ballot application to Gwinnett County voters who were sent English-only applications, or, alternatively, to all Gwinnett County voters who self-identified as ‘Hispanic/Latino’ when they registered to vote and all voters residing in Gwinnett County precincts for which at least five percent of voters identified as Hispanic on their voter registration cards without any further delay and with appropriate public notice.” [*Id.* at 2].

The Gwinnett Defendants oppose Plaintiffs’ request for injunctive relief, arguing that they have no duty under the VRA to mail out bilingual absentee ballot applications to Gwinnett County voters because the Secretary of State, not Gwinnett BOE, provided the English-only voting materials in question. [Doc. 24 at 2]. Secretary Raffensperger also opposes Plaintiffs’ request on the basis that Section

203 of the VRA does not apply to him and Section 4(e) of the VRA does not require him to provide bilingual ballot applications to Gwinnet County voters [Doc. 26 at 15].

II. LEGAL STANDARD

To prevail on their request for a preliminary injunction, Plaintiffs must show (1) a substantial likelihood of success on the merits of their claims; (2) that they will suffer irreparable harm absent the injunction; (3) that the harm suffered by Plaintiffs in the absence of the injunction outweighs the harm suffered by Defendants if the injunction is issued; and (4) that the injunction would not disserve the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1307 (11th Cir. 2010) (quoting *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1217 (11th Cir. 2008)). “To support a preliminary injunction, a district court need not find that the evidence positively guarantees a final verdict in [the movant’s] favor.” *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995). However, courts may not grant such relief “unless the movant clearly established the ‘burden of persuasion’ as to the four requisites.” *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (quoting *All Care Nursing Serv., Inc. v. Bethesda Memorial Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989)). At this stage, “a district court may rely on

affidavits and hearsay materials . . . if the evidence is ‘appropriate given the character and objectives of the injunctive proceeding.’” *Levi Strauss & Co.*, 51 F.3d at 985 (quoting *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986)).

III. DISCUSSION

Assuming Plaintiffs can establish standing to bring this lawsuit,³ they must ultimately satisfy the four requisites for a preliminary injunction to prevail on their Motion. Thus, the Court begins its analysis by addressing whether Plaintiffs have shown they are likely to succeed on the merits of their claims. Upon the Court’s review of the record and the parties’ briefing, it concludes they have not. As such, the Court cannot issue the requested injunctive relief.

Plaintiffs’ success in this case ultimately hinges on whether the Gwinnett Defendants have some duty under the VRA to correct, or supplement, the voting materials independently sent out by Secretary Raffensperger to Gwinnett County voters. Plaintiffs are correct, and Defendants do not dispute, that Gwinnett County is a “covered political subdivision” under Section 203 of the VRA. 52 U.S.C. § 10503(b)(2). Pursuant to Section 203’s “[b]ilingual election requirements,”

³ Because the Court concludes herein that the Plaintiffs are unlikely to succeed on the merits on this action, the Court does not address the issue of standing at this time. However, as this lawsuit moves forward, the Court will address the Defendants’ allegation that both the Individual Plaintiffs and the Organizational Plaintiffs do not have standing to pursue their claims.

Gwinnett County, as a covered subdivision, cannot “provide voting materials only in the English language.” 52 U.S.C. § 10503(b)(1). Whenever a covered jurisdiction, such as Gwinnett County, “provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process,” it must “provide them in the language of the applicable minority group as well as in the English language.” 52 U.S.C. § 10503(c). For Gwinnett County, the “language of the applicable minority group” is Spanish.

The problem with Plaintiffs’ theory in this case, however, is that Section 203’s requirements only apply “[w]henver a State or political subdivision subject to the prohibition of subsection (b) of this section **provides**” the voting materials in question. *Id.* (emphasis added). Here, Secretary Raffensperger unilaterally mailed out the absentee ballot applications to Georgia voters, including those in Gwinnett County, without any coordination or involvement with the Gwinnett Defendants whatsoever.⁴ In other words, despite being a “covered political subdivision” for

⁴ In their Reply Brief, Plaintiffs rely upon coordination between the Secretary of State and Gwinnett BOE officials in sending out the 2019 “last chance” notices and the absentee ballots for the upcoming primary. [See Doc. 30 at 12-14]. Plaintiffs, however, failed to allege any coordination between Secretary Raffensperger and the Gwinnett Defendants as it relates to the mailing at issue in this case, the absentee ballot *applications*. In fact, Plaintiffs explicitly concede there was no coordination as to the applications. [*Id.* at 14 (“For two of these three mailings, the Secretary coordinated with Gwinnett [BOE] officials to comply with Section 203; here, he did not.”)].

purposes of the statute, Gwinnett County did not “provide” the voting materials in question, and, as such, has no duty under the VRA to send out bilingual absentee ballot applications to Gwinnett County voters.⁵

Plaintiffs cite to no cases, and the Court finds none, where a court has interpreted Section 203 of the VRA to require an otherwise inactive jurisdiction to correct or supplement voting materials independently distributed by another governmental entity. Instead, courts focus on who provided the voting materials at issue and whether that entity is a covered jurisdiction under the statute. *See, e.g., Delgado v. Smith*, 861 F.2d 1489, 1490, 1496-97 (11th Cir. 1988) (holding that a State’s involvement in the administration of a citizen initiative to amend the state constitution, which included the State’s approval of the form of the petition and the State’s submission of the petition to the State Supreme Court for an advisory opinion, was not sufficient state action to trigger any obligation under Section 203 of the VRA); *Padilla v. Lever*, 463 F.3d 1046, 1051 (9th Cir. 2006) (explaining that a State’s regulation of the format of recall petitions “does not mean that the petitions are *provided* by the State or subdivision” within the meaning of the VRA); *Montero v. Meyer*, 861 F.2d 603, 609-10 (10th Cir. 1988) (analyzing whether the petitions at

⁵ Plaintiffs do not appear to allege or argue that the State of Georgia is a covered jurisdiction under Section 203 of the VRA.

issue were, in fact, provided by the State to the electorate when determining whether plaintiffs were likely to succeed on the merits of their Section 203 claim).

Regarding Plaintiffs' claims under Section 4(e) of the VRA, the Court concludes those claims similarly lack merit. To protect the Fourteenth Amendment rights of "persons educated in American-flag schools in which the predominant classroom language was other than English," Section 4(e) prohibits "the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language." 52 U.S.C. § 10303(e)(1). Here, the Court identifies no allegations from which it can be inferred that the Gwinnett Defendants or Secretary Raffensperger are "conditioning the right to vote" on a voter's ability to use the English language.

Regarding the Gwinnett Defendants, any voting materials they have provided to Gwinnett County voters have been in Spanish pursuant to their obligations as a "covered political subdivision" under Section 203 of the VRA. It was Secretary Raffensperger, not the Gwinnett Defendants, who mailed out the English-only applications at issue in this case. Additionally, there are no allegations that the Gwinnett Defendants are somehow prohibiting Gwinnett County voters from otherwise choosing to vote in-person on June 9.

Further, regarding Secretary Raffensperger, the Court finds that his mailing of English-only absentee ballot applications to Georgia voters did not transform the election into an “English-only election process” sufficient to give rise to Section 4(e) liability. *See United States v. Berks Cty.*, 277 F. Supp. 2d 570, 579 (E.D. Pa. 2003) (granting an injunction where a jurisdiction used an English-only election process and where poll workers made discriminatory and hostile remarks to Hispanic and LEP voters, treated Hispanic voters differently than other voters with regard to voter identification requirements, and otherwise discouraged and prohibited Hispanic voters from participating in the election process). Here, despite the mailing of the English-only applications, absentee ballots will be sent in English and Spanish pursuant to Gwinnett County’s obligations under Section 203. There is also a Spanish absentee ballot application on Gwinnett County’s website. And, as noted above, Gwinnett County voters are still able to vote in-person on June 9. As such, the Court finds Plaintiffs are not likely to succeed on the merits of their Section 4(e) claims against the Gwinnett Defendants or Secretary Raffensperger.

Because the Court finds that Plaintiffs have not demonstrated they are likely to succeed on the merits of their claims in this case, it need not determine whether Plaintiffs can establish the remaining three requisites for the issuance of a preliminary injunction. The Court, however, expresses doubt that Plaintiffs could

do so. For example, it is unlikely the Individual Plaintiffs will suffer irreparable harm in the absence of an injunction, as it appears that they have now received bilingual applications from Gwinnett BOE. The Individual Plaintiffs, and others like them, may also choose to vote in-person on June 9 if they are unable to vote absentee. Further, the Organizational Plaintiffs' need to switch from "get out the vote" efforts to education about absentee ballots is a result of the ongoing health crisis and its impact on in-person voting, not Secretary Raffensperger's decision to mail out English-only applications to Georgia voters. And, while the Court recognizes that it may serve the public interest to provide bilingual applications to voters in Gwinnett County, the Court is not convinced that the balance of equities clearly weighs in favor of Plaintiffs. If the Court issued the injunction as requested by Plaintiffs, Gwinnett County would potentially be forced to expend significant taxpayer funds duplicating all English-only voting materials sent out by Secretary Raffensperger in the future.

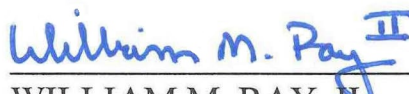
In sum, the result sought by Plaintiffs is a desirable outcome rooted in valid public policy concerns. Plaintiffs, however, ask this Court to read beyond the plain language of the VRA to impose duties upon the Gwinnett Defendants and Secretary Raffensperger that do not currently exist under the law as written. As such, the Court

finds Plaintiffs are unlikely to succeed on the merits of their claims in this lawsuit, and, therefore, have failed to meet their burden for a preliminary injunction.

IV. CONCLUSION

In light of the foregoing, the Court finds that Plaintiffs are not likely to succeed on the merits of their claims, and, therefore, are not entitled to a temporary restraining order or a preliminary injunction. Accordingly, the Court hereby **DENIES** Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction [Doc. 17].⁶

IT IS SO ORDERED, this 8th day of May, 2020.



WILLIAM M. RAY, II
UNITED STATES DISTRICT JUDGE

⁶ Following the submission of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction [Doc. 17] for consideration by this Court, Secretary Raffensperger filed a Motion to Strike [Doc. 31] asking the Court to strike new declarations and legal arguments raised in Plaintiffs' Reply Brief or, alternatively, to grant Secretary Raffensperger leave to file a surreply brief. In light of this Order denying Plaintiffs' request for injunctive relief, the Court finds that Secretary Raffensperger's Motion to Strike is now moot. Accordingly, the Motion to Strike [Doc. 31] is hereby **DENIED**.