Received 9/14/2020 2:56:58 PM Supreme Court Middle District

Filed 9/14/2020 2:56:00 PM Supreme Court Middle District
133 MM 2020

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

PENNSYLVANIA DEMOCRATIC PARTY; *et al.*, Petitioners, v. KATHY BOOCKVAR; *et al.*, Respondent.	)	133 MM 2020

APPLICATION FOR LEAVE TO SUBMIT A REPLY BRIEF

By and through undersigned counsel, Petitioners seek permission for the submission of a reply brief.

1. Pursuant to the order of the Commonwealth Court, Petitioners answered all timely filed preliminary objections on August 27, 2020.
2. In their filing of September 8, 2020, intervenors Joseph B. Scarnati III and Jake Corman (the "Scarnati Intervenors") untimely filed preliminary objections.
3. Petitioners believe this Court must dismiss the preliminary objections as untimely.
4. A reply is required to both raise the timeliness objection and to briefly address the issues newly raised as they are jointly raised as preliminary objections, if the Court chooses to consider them as such, and also, inappropriately, as issues comingled with the substantive brief.

5. Petitioners thus seek permission to submit a reply brief substantially in the form attached hereto as Exhibit 1.

Respectfully submitted,

Kevin Greenberg
A. Michael Pratt
Adam R. Roseman
George Farrell
GREENBERG TRAURIG, LLP
1717 Arch Street, Suite 400
Philadelphia, PA 19103
(t) 215.988.7818
(f) 215.988.7801
greenbergk@gtlaw.com

Clifford B. Levine
Alice Mitinger
Alex Lacey
DENTONS COHEN & GRIGSBY P.C.
625 Liberty Avenue
Pittsburgh, PA 15222-3152
(t) 412.297.4998
clifford.levine@dentons.com

LAZAR M. PALNICK, ESQ.
1216 Heberton St.
Pittsburgh, PA 15206
(t) 412.661.3633
lazarpalnick@gmail.com

September 14, 2020

Exhibit 1 – Proposed Filing

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 133 MM 2020

PENNSYLVANIA DEMOCRATIC PARTY, NILOFER NINA AHMAD, DANILO BURGOS, AUSTIN DAVIS, DWIGHT EVANS, ISABELLA FITZGERALD, EDWARD GAINEY, MANUEL M. GUZMAN, JR., JORDAN A. HARRIS, ARTHUR HAYWOOD, MALCOLM KENYATTA, PATTY H. KIM, STEPHEN KINSEY, PETER SCHWEYER, SHARIF STREET, and ANTHONY H. WILLIAMS,
Petitioners

v.

KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania, and ALL 67 COUNTY BOARDS OF ELECTIONS,
Respondents

Reply Brief of Pennsylvania Democratic Party, Nilofer Nina Ahmad, Danilo Burgos, Austin Davis, Dwight Evans, Isabella Fitzgerald, Edward Gainey, Manuel M. Guzman, Jordan Harris, Arthur Haywood, Malcolm Kenyatta, Patty H. Kim, Stephen Kinsey, Peter Schweyer, Sharif Street, and Anthony H. Williams

Kevin Greenberg
A. Michael Pratt
Adam Roseman
George J. Farrell
GREENBERG TRAURIG, LLP
1717 Arch Street, Suite 400
Philadelphia, PA 19103
(215) 988-7818

LAZAR M. PALNICK, ESQ.
1216 Heberton Street
Pittsburgh, Pennsylvania 15206
(412) 661-3633

Clifford B. Levine
Alice Mitinger
Alex Lacey
DENTONS COHEN & GRIGSBY P.C.
625 Liberty Avenue
Pittsburgh, PA 15222-3152
(412) 297-4998

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

State Cases

Federal Cases

Statutes

Rules

Other Authorities

Contrary to intervenors' protestations, Petitioners do not seek a grand declaration of a Constitutional right to vote-by-mail, an invalidation of Act 77, a declaration to move Election Day, or a declaration to change the qualifications for poll watchers. Petitioners present five narrow legal questions to the Court with targeted and clear prayers for relief. Three are questions of first impression involving plain language interpretations of Act 77, and the fourth and fifth questions seek equitable relief *applicable only to the upcoming general election.* The equitable relief is necessary because of the unprecedented global pandemic and the failures of the Postal Service.

Petitioners file this short reply to address preliminary objections belatedly filed by intervenors and to address new developments in the law. For the reasons set forth below and in Petitioners' September 8 brief, Petitioners' respectfully request that their relief be granted.

I. Scarnati Intervenors' Preliminary Objections are Untimely

As a preliminary matter, the preliminary objections filed by Senators Joseph B. Scarnati III and Jake Corman (the "Scarnati Intervenors") are untimely and should be summarily dismissed. Pursuant to the Commonwealth Court's July 30, 2020 order, preliminary objections were required to be filed no later than August 13, 2020. *See* 407 MD 2020, July 30 Order; *see also* Pa. R. Civ. P. 1026(a) (preliminary objections due within 20 days of initial filing). The Scarnati Intervenors filed their

preliminary objections 25 days late, and, in fact, did not seek to intervene in this matter until 11 days after the deadline. Untimely filed preliminary objections are waived. *McCullough v. Clark*, 784 A.2d 156, 158 (Pa. Super. Ct. 2001).[1]

II. Petitioners Have Standing

Aside from the procedural defect, the Scarnati Intervenors' preliminary objections fail on the merits. First, the Scarnati Intervenors are estopped from arguing the 12 individual petitioners who are members of the General Assembly [2] lack standing, given that the Scarnati Intervenors assert their own standing arises as state legislators. Second, each Petitioner has established an interest which is "direct, substantial and present …, as contrasted with a remote or speculative interest." *Kauffman v. Osser*, 441 Pa. 150, 155, 271 A.2d 236, 239 (1970).

The Pennsylvania Democratic Party has associational standing to bring this action. See *Am. Booksellers Ass'n, Inc. v. Rendell*, 332 Pa. Super. 537, 554 (Pa. Super. Ct. 1984) ("associations or groups can assert representative standing if the group asserts that its members, or any of them, are suffering immediate or threatened injury, resulting from the challenged action." Under the Election Code, the

[1] Nor have the Scarnati Intervenors argued that their delay should be excused because they were not aware of this case – such an argument would not be credible.

[2] Senators Art Haywood, Sharif Street, and Anthony H. Williams and Representatives Danilo Burgos, Austin Davis, Isabella Fitzgerald, Edward Gainey, Jordan Harris, Malcolm Kenyatta, Patty H. Kim, Stephen Kinsey, and Peter Schweyer.

Pennsylvania Democratic Party is a major political party with more than 4.1 million registered members in the Commonwealth, millions of whom are likely to vote in the general election. Many of those registered and affiliated voters electoral franchise is threatened by the statutory interpretations pressed by the intervening parties. The Democratic Party also has candidates running for President, Vice President, Congress, three statewide offices, and more than 200 legislative seats. As a result of the standing of its members, the Democratic Party has standing to ensure that elections are conducted in conformity with the law and declaratory relief sought is based on imminent, real and probable events.

As to the 12 individual legislators, Petitioners incorporate the standing arguments made by the Scarnati Intervenors, Senators Jay Costa and Representative Frank Dermody, and Representatives Bryan Cutler and Kerry Benninghoff.

Thirteen of the 15 individual Petitioners are candidates for office in November and one or more of the individual Petitioners will appear on every ballot cast in the General Election.[3] Candidates for office have standing to challenge issues concerning an election to address a crisis arising from a natural disaster or other unforeseeable issues. *Beharry Appeal*, 109 Pa. Commw. 604, 531 A.2d 836 (Pa.

[3] Congressman Dwight Evans, Senator Sharif Street, and Representatives Danilo Burgos, Austin Davis, Isabella Fitzgerald, Edward Gainey, Jordan Harris, Malcolm Kenyatta, Patty H. Kim, Stephen Kinsey, and Peter Schweyer are candidates for reelection, Nilofer Nina Ahmad is a candidate for Auditor General and Manuel M. Guzman is a candidate for State Representative.

Commw. Ct. 1987) (Candidates have "direct interest in and could suffer direct and substantial harm from a suspension of an election and its resumption at a later date, and, therefore, has standing to challenge the court orders effecting that action.").

As explained more fully in their opposition to the timely filed preliminary objections, Petitioners claims are not speculative and are currently ripe for judicial review. The ripeness doctrine does not prohibit this Court from resolving Petitioners' request for declaratory relief because, Petitioners, as well as all other Pennsylvania voters, will suffer hardships if review of the declaratory relief requested is delayed. *See* **Ex. A** to Petitioners' Brief at II.B.[4]

Substantial harm is evident. The election is 50 days away, necessitating both declaratory and injunctive relief. There are substantial questions of law in dispute, and the failures of the United States Postal Service and the inability of the county boards of election ("Boards") to meet the deadlines in the Election Code will result in injury or threatened injury to voters and candidates in the form of potential disenfranchisement.

[4] The issues raised as matters of declaratory judgment will be resolved by a Court prior to this election, as they are also before the federal court in the Western District of Pennsylvania, on an action that has been stayed to allow this Court to conclusively determine these questions. *See Donald J. Trump for President v. Boockvar*, No. 2:20-cv-966, 2020 WL 4920952 (W.D. Pa., Aug. 23, 2020). If this Court does not address these issues now, confusion will likely increase as the unaddressed questions will be resolved as an interim measure by the federal court, subject, as is always the case with questions of purely state law, to later revision by an alternate, conclusive determination by this Court.

III. Petitioners' Claims Are Justiciable

This Court has rejected the contention that Petitioners' claims are not justiciable after several Boards and Intervenors raised this argument in oppositions to the Secretary's King's Bench Application. Thus, Scarnati Intervenors' attempt to resurrect this argument is foreclosed by the law of the case.

On the merits, Petitioners claims are clearly justiciable. Petitioners have only asked the Judicial Branch to do what it is statutorily authorized and solely equipped to do: *decide what the law is* and whether the facts "as-applied" to the law establish constitutional harms. *See, e.g.,* 42 Pa. C.S. § 764(2). Petitioners incorporate by reference their response filed to the preliminary objections that were timely filed. *See* **Ex. A** to Petitioners' Brief at II.A.

Intervenors assert that there is no judicially manageable standard to guide this Court regarding the as-applied challenge to the extension of the received-by deadline (Count II). That is wrong. This Court can easily manage Petitioners' claims specific standards governing claims seeking declaratory and injunctive relief. *See* Petitioners' Brief at IV.

IV. Non-Severability is Not Implicated in this Case

The Republican Party also facetiously argues that Petitioners' requests for declaratory and injunctive relief triggers Act 77's non-severability clause and thus invalidates Act 77's entire mail-in voting scheme. The non-severability provision is

not implicated by this case as Petitioners do not seek to *invalidate* all or any part of Act 77's mail-in voting scheme. In support of this simple fact, Petitioners adopt and incorporate by reference the severability argument filed by the Secretary of the Commonwealth ("Secretary"). *See* Supplemental Brief of Secretary Kathy Boockvar (Sept. 8, 2020) at 25-27.

V. Unlike in May, the Record Demonstrates the As-Applied Infirmity

The Republican Party argues that this Court's rulings in May somehow conclusively determine that Petitioners' as-applied constitutional claims are too speculative. *See* Republican Party Brief at 24-27; *Delisle v. Boockvar*, No. 95 MM 2020, 2020 WL 3053629, at *1 (Pa. May 29, 2020); *Disability Rights Pennsylvania v. Boockvar*, No. 83 MM 2020, 2020 WL 2820467, at *1 (Pa. May 15, 2020) (Wecht, concurring) (noting "actual evidence of disruption in the [USPS] mail delivery service may be probative of Petitioners' constitutional claims"). In May, this Court decided that there were not then sufficient facts for petitioners in those cases to establish a cognizable injury.

To state the obvious: the facts have drastically changed. Given the current state of affairs—a global pandemic, a wave of mail-in ballot applications and ballots, and USPS's admission that mail delivery delays will disenfranchise voters—it is clear the current ballot received-by deadline violates the Free and Equal Elections Clause and the Court should act. The relevant facts are outlined in the Petitioners'

primary brief, but the affirmative declaration from the Postal Service that a 7-day delay is required to avoid disenfranchising tens of thousands, or more, Pennsylvania voters, should be conclusive.

The Republican Party cites two decisions from federal district courts outside of Pennsylvania that have recently held that their states' received-by deadline was constitutional. Those cases are easily distinguishable. Like *Disability Rights* and *Delisle*, the cited federal court cases were decided before the USPS made clear that voters would be disenfranchised without a 7-day extension of the ballot receipt deadline. **Ex. Z** to Petitioners' Brief.

Other federal and state courts have imposed the requested relief where the facts were clear based on similar concerns regarding the pandemic and mail delivery delays. *See, e.g., New Georgia Project v. Raffensperger*, No. 20-01986, 2020 WL 5200930, at *24 (N.D. Ga. Aug. 31, 2020) (extending the ballot received-by deadline due to pandemic-caused burdens on voting); *LaRose v. Simon*, No. 62-cv-20-3149 (Minn. 2d. Dist. Ct. July 17, 2020) (Stipulation and Partial Consent Decree) (extending ballot received-by deadline by one week for General Election)[5]; *Driscoll v. Stapleton*, No. DV-20-408 (Mont. 13th Dist. Ct. May 22, 2020) (Findings of Fact, Conclusions of Law, Memorandum, and Order) (extending ballot received-by

[5] *LaRose, et al v. Simon*, No. 62-cv-20-3149 (Minn. 2d. Dist. Ct. Aug. 3, 2020) (Order and Memorandum) (granting motion to approve Consent Decree).

deadline for absentee ballots in Montana to until deadline for federal write-in ballots for military and overseas voters, the UOCAVA deadline).

The issue continues to arise with new pieces of evidence. The Postal Service just this week sent postcards to every Pennsylvanian, and to residents of all other states, making clear that the Postal Service cannot meet the 7-day timetable to deliver mail both directions–instead, the Postal Service asserts that voters should not exercise their statutory right to vote by mail in the 15 days before the election, rather than the 7 days permitted under Act 77. *See* **Ex. S-1**; *see also Colorado v. DeJoy*, No. 20-2768, -- F. Supp. 3d --, 2020 WL 5500028 (D. Colo. Sept. 12, 2020) (granting temporary restraining order against the "false and misleading" "conduct intentionally undertaken" by the Postal Service to apply their preferred national standard). This new evidence belies the intervenors' argument that the Postal Service fixed its problems in August.

VI. Extending the Deadline Comports with the Elections Clause

The Republican Party also argues that extending the ballot received-by deadline violates the United States Constitution's Elections Clause. This flawed argument is based on the fictional premise that Petitioners ask this Court to move Election Day or to count ballots cast after Election Day. This is not true. Petitioners seek relief that is clear, unequivocal, and tailored to the current circumstances: an

injunction requiring each Board to count mail-in and absentee ballots mailed on Election Day and received up to 7 days after Election Day.

Petitioners' proposed relief is consistent with the federal Uniformed and Overseas Citizens Absentee Voting Act which requires all Boards to count certain mail-in and absentee ballots received up to 7 days after the election, in this case November 10, 2020. The request comports with the Elections Clause of the United States Constitution and with the processes followed by dozens of other states, many of which have allowed receipt of mailed ballots after Election Day for decades. *See* National Conference of State Legislators, *Voting Outside the Polling Place* report, available at *www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx* (last visited Sept. 14, 2020) (collecting information from all states).

VII. Conclusion

For the foregoing reasons, and for the reasons presented in Petitioners' September 8 brief, Petitioners urge this Court to grant the relief sought by issuing the three declaratory judgments requested, entering an injunction adjusting the ballot received-by deadline until the federal deadline on November 10, and requiring Boards to give voters notice and opportunity to cure facial errors on their outer envelopes.

Respectfully submitted,

Kevin Greenberg
A. Michael Pratt
Adam R. Roseman
George Farrell
GREENBERG TRAURIG, LLP
1717 Arch Street, Suite 400
Philadelphia, PA 19103
(t) 215.988.7818
(f) 215.988.7801
greenbergk@gtlaw.com

Clifford B. Levine
Alice Mitinger
Alex Lacey
DENTONS COHEN & GRIGSBY P.C.
625 Liberty Avenue
Pittsburgh, PA 15222-3152
(t) 412.297.4998
clifford.levine@dentons.com

LAZAR M. PALNICK, ESQ.
1216 Heberton St.
Pittsburgh, PA 15206
(t) 412.661.3633
lazarpalnick@gmail.com

Dated: September 14, 2020

S-1

Dear Postal Customer,

If you vote by mail, we're committed to providing you a secure, effective way to deliver your ballot. Use this checklist to prepare:

- ☐ Start today. Give yourself and your election officials ample time to complete the process.
- ☐ Rules and dates vary by state, so contact your election board to confirm. Find links at **usps.com/votinginfo**.
- ☐ Request your mail-in ballot (often called "absentee" ballot) at least 15 days before Election Day.
- ☐ Once received, follow the instructions. Add postage to the return envelope if needed.
- ☐ We recommend you mail your ballot at least 7 days before Election Day.

We're ready to deliver for you. Make sure you're ready, too.

Your United States Postal Service

UNITED STATES POSTAL SERVICE

475 L'Enfant Plaza SW
Washington, DC 20260

PRESORTED
STANDARD MAIL
POSTAGE & FEES PAID
USPS
PERMIT NO. G-10

MIX
Paper from responsible sour
FSC® C0131

Please Recycle

**********AUTO**SCH 5-DIGIT 15206
F1R9-0855975D 0085050660 747/29792/1
Postal Customer
[redacted] St
Pittsburgh PA 15206-1715

Visit **usps.com/votinginfo**
or contact your election board.

If you plan to vote by mail, plan ahead.

UNITED STATES POSTAL SERVICE®

Please read this important information for U.S. citizens.

RECENT BUT NOT YET PUBLISHED RELEVANT FEDERAL AND STATE COURT DECISIONS

2020 WL 5200930
Only the Westlaw citation is currently available.
United States District Court,
N.D. Georgia, Atlanta Division.

The NEW GEORGIA PROJECT, et al., Plaintiffs,

v.

Brad RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and the Chair of the Georgia State Election Board, et al., Defendants.

1:20-CV-01986-ELR
|
Signed 08/31/2020

Synopsis

Background: Voter education organization and registered voters brought action against Georgia Secretary of State, members of State Election Board, and various election officials, challenging policies governing Georgia's absentee voting process in light of dangers presented by COVID-19 in relation to upcoming general election. Organization and voters filed motion for preliminary injunction seeking to enjoin policies.

Holdings: The District Court, Eleanor L. Ross, J., held that:

[1] burden imposed on organization and voters by Georgia statute governing deadline on receipt of absentee ballots was severe;

[2] Georgia's interests did not justify or outweigh severe burden;

[3] private interest weighed in favor of organization and voters;

[4] erroneous deprivation factor weighed in favor of organization and voters;

[5] government interest factor weighed in favor of organization and voters;

[6] organization and voters were likely to suffer irreparable harm absent injunction;

[7] balance of harms weighed in favor of organization and voters; and

[8] public interest weighed in favor of organization and registered voters.

Motion granted in part and denied in part.

West Headnotes (67)

[1] Federal Courts

Question of standing is, in essence, whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. U.S. Const. art. 3, § 2, cl. 1.

[2] Federal Courts

To establish Article III standing, the party invoking the power of the court must show: (1) injury in fact, which is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical, (2) a causal connection between the injury and the conduct complained of, and (3) that the injury is likely to be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[3] Federal Courts

Organizations, like individuals, can establish standing to sue. U.S. Const. art. 3, § 2, cl. 1.

[4] Election Law

In election law cases, an organization can establish standing by showing that it will need to divert resources from general voting initiatives

or other missions of the organization to address the impacts of election laws or policies. U.S. Const. art. 3, § 2, cl. 1.

[5] Election Law

To establish standing in election law cases, organizations do not necessarily have to show that they have already diverted resources from general voting initiatives or other missions of the organization to address the impacts of election laws or policies. U.S. Const. art. 3, § 2, cl. 1.

[6] Election Law

Reasonably anticipating the organization will need to divert resources in the future to address impacts of election laws or policies suffices to establish standing in election law cases, particularly at the earliest stage of a case. U.S. Const. art. 3, § 2, cl. 1.

[7] Election Law

Registered voters alleged they were disadvantaged by policies governing Georgia's absentee voting process, as required to establish injury-in-fact required for standing in action challenging policies in light of dangers presented by COVID-19 in relation to upcoming general election, where number of confirmed COVID-19 cases in Georgia had grown exponentially, and voters had interest in their ability to vote and in their vote being given the same weight as any other. U.S. Const. art. 3, § 2, cl. 1; Ga. Code Ann. §§ 21-2-381(a)(1)(G), 21-2-381(b)(4), 21-2-385(a), 21-2-386(a)(1)(F).

[8] Election Law

To establish standing in voting rights cases, a plaintiff need not have the franchise wholly denied to suffer injury. U.S. Const. art. 3, § 2, cl. 1.

[9] Election Law

For a plaintiff to establish standing in voting rights cases, any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient. U.S. Const. art. 3, § 2, cl. 1.

[10] Election Law

In voting rights cases, voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage. U.S. Const. art. 3, § 2, cl. 1.

[11] Election Law

Registered voters alleged harm caused by policies governing Georgia's absentee voting process were directly caused by Georgia Secretary of State, as required to establish traceability element for standing in action against Secretary, members of State Election Board, and various election officials challenging policies in light of dangers presented by COVID-19 in relation to upcoming general election, where Secretary was chief election official for Georgia, Secretary had power and authority to manage Georgia's election system, including absentee voting system, and Secretary exercised that authority when he chose to send absentee ballot applications to all active registered voters. U.S. Const. art. 3, § 2, cl. 1; Ga. Code Ann. §§ 21-2-50(b), 21-2-381(a)(1)(G), 21-2-381(b)(4), 21-2-385(a), 21-2-386(a)(1)(F).

[12] Election Law

Georgia Secretary of State and State Election Board had ability to fully redress registered voter's alleged harm caused by policies governing Georgia's absentee voting process, as required to establish redressability required for standing in action against Secretary, members of State Election Board, and various election officials challenging policies in light of dangers presented by COVID-19 in relation to upcoming general election, where Board was governmental body responsible for uniform election practice in Georgia, and Sectary and Board had significant statutory authority to train local election officials

and set election standards. U.S. Const. art. 3, § 2, cl. 1; Ga. Code Ann. §§ 21-2-31, 21-2-381(a)(1)(G), 21-2-381(b)(4), 21-2-385(a), 21-2-386(a)(1)(F).

[13] Election Law

Voter education organization established it was injured by diversion of resources required to address policies governing Georgia's absentee voting process, as required for organizational standing in action challenging policies in light of dangers presented by COVID-19 in relation to upcoming general election, where organization alleged that it typically provided resources and assistances to its constituents to help them complete the process of voting in person, and that policies would force organization to redirect resources away from typical activities to those centered on educating and assisting voters with Georgia's absentee voting system. Ga. Code Ann. §§ 21-2-381(a)(1)(G), 21-2-381(b)(4), 21-2-385(a), 21-2-386(a)(1)(F).

[14] Federal Courts

Under the diversion of resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response. U.S. Const. art. 3, § 2, cl. 1.

[15] Injunction

A temporary restraining order or preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each required element.

[16] Injunction

A plaintiff seeking a preliminary injunction must demonstrate that: (1) there is a substantial likelihood of success on the merits, (2) it will suffer irreparable injury if relief is not granted, (3) the threatened injury outweighs any harm the requested relief would inflict on the non-moving party, and (4) entry of relief would serve the public interest.

[17] Injunction

The decision as to whether a plaintiff carries burden required to grant a preliminary injunction is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion.

[18] Statutes

A litigant may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both.

[19] Statutes

While a facial challenge asserts that the challenged statute always operates unconstitutionally, an as-applied challenge, by contrast, addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party.

[20] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights pursuant to *Anderson-Burdick* test, courts weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. U.S. Const. Amends. 1, 14.

[21] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights pursuant to *Anderson-Burdick* test, which weighs asserted injury against government's justification for

burden, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment. U.S. Const. Amends. 1, 14.

[22] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights under *Anderson-Burdick* test, which weighs asserted injury against government's justification for burden, a court must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. U.S. Const. Amends. 1, 14.

[23] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights under *Anderson-Burdick* test, which weighs asserted injury against government's justification for burden, a court must determine the legitimacy and strength of each of governmental interests, while also considering the extent to which those interests make it necessary to burden the plaintiff's rights. U.S. Const. Amends. 1, 14.

[24] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights under *Anderson-Burdick* test, which weighs asserted injury against government's justification for burden, and the state election scheme imposes severe burdens on the plaintiffs' constitutional rights, the scheme may survive only if it is narrowly tailored and advances a compelling state interest. U.S. Const. Amends. 1, 14.

[25] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights under *Anderson-Burdick* test, which weighs asserted injury against government's justification for burden, and the state's election law imposes only reasonable, nondiscriminatory restrictions upon a plaintiff's constitutional rights, a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. U.S. Const. Amends. 1, 14.

[26] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights under *Anderson-Burdick* test, which weighs asserted injury against government's justification for burden, the level of the scrutiny to which election laws are subject varies with the burden they impose on constitutionally protected rights, as lesser burdens trigger less exacting review. U.S. Const. Amends. 1, 14.

[27] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights under *Anderson-Burdick* test, which weighs asserted injury against government's justification for burden, and the burden on the right to vote is moderate, a court must weigh that burden against the precise interests put forward by the state as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. U.S. Const. Amends. 1, 14.

[28] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights under *Anderson-Burdick* test, which weighs asserted injury against government's justification for burden, and the election regulations impose a more-than-minimal but less-than-severe burden, a flexible analysis is required, weighing the burden on the plaintiffs against the state's asserted interest

and chosen means of pursuing it. U.S. Const. Amends. 1, 14.

[29] Election Law

Burden imposed on voter education organization and registered voters by Georgia statute governing notification process to certain absentee voting applicants was minimal, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; statute did not disenfranchise voters, and statute did not prohibit or preclude a voter from correcting application deficiencies, utilizing early voting, or voting in person. U.S. Const. Amends. 1, 14.; Ga. Code Ann. § 21-2-381(b)(4).

[30] Election Law

Georgia had reasonable, nondiscriminatory, and legitimate interests regarding Georgia statute governing notification process to certain absentee voting applicants, which outweighed minimal burden on voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute, where interests included preventing voter fraud and permitting county officials the flexibly necessary do their jobs. U.S. Const. Amends. 1, 14.; Ga. Code Ann. § 21-2-381(b)(4).

[31] Election Law

Private interest factor as to whether Georgia statute governing notification process to certain absentee voting applicants violated voters' procedural due process rights weighed in favor of voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened procedural due process rights in violation of Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute, where private interest implicated an individual's right to vote and was therefore entitled to substantial weight. U.S. Const. Amend. 14; Ga. Code Ann. § 21-2-381(b)(4).

[32] Constitutional Law

To determine what process is due to the public under the Fourteenth Amendment, courts must balance three considerations: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards, and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. U.S. Const. Amend. 14.

[33] Election Law

Erroneous deprivation factor as to whether Georgia statute governing notification process to certain absentee voting applicants violated voters' procedural due process rights weighed against voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened procedural due process rights in violation of Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; statutory procedures did not deprive voters of right to vote, processing delays as to absentee ballots were not linked to statute, and

statute provided adequate notice and opportunity to be heard. U.S. Const. Amend. 14; Ga. Code Ann. § 21-2-381(b)(4).

[34] Election Law

Government interest factor as to whether Georgia statute governing notification process to certain absentee voting applicants violated voters' procedural due process rights weighed against voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened procedural due process rights in violation of Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; additional procedures suggested by organization and voters would be financially costly and administratively burdensome. U.S. Const. Amend. 14; Ga. Code Ann. § 21-2-381(b)(4).

[35] Election Law

The Equal Protection Clause of the Fourteenth Amendment applies when a state either classifies voters in disparate ways or places restrictions on the right to vote. U.S. Const. Amend. 14.

[36] Election Law

Where a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters in violation of equal protection clause under Fourteenth Amendment, the court reviews the claim under *Anderson-Burdick* flexible standard, which weighs asserted injury against government's justification for burden. U.S. Const. Amend. 14.

[37] Election Law

Burden imposed on voter education organization and registered voters by Georgia statute governing notification process to certain absentee voting applicants was minimal, for purposes of determination whether organization and registered voters were likely to succeed on claim that statute violated equal protection clause of Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute, where Georgia rule governing applicants for absentee ballots ensured uniform treatment of voters. U.S. Const. Amend. 14.; Ga. Code Ann. § 21-2-381(b)(4); Ga. Comp. R. & Regs. 183-1-14.11.

[38] Election Law

Georgia had reasonable, nondiscriminatory, and legitimate interests regarding Georgia statute governing notification process to certain absentee voting applicants, which outweighed minimal burden on voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute violated equal protection clause of Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute, where Georgia had interest in preventing voter fraud and permitting county officials the flexibly necessary do their jobs. U.S. Const. Amend. 14.; Ga. Code Ann. § 21-2-381(b)(4).

[39] Election Law

Burden imposed on voter education organization and registered voters by Georgia statute requiring younger voters to fill out applications for each election was minimal, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; voters had variety of options to submit

absentee ballot applications, whether by mail, email, or through online portal, and voters did not claim that they could not vote at all due to process. U.S. Const. Amends. 1, 14; Ga. Code Ann. § 21-2-381(a)(1)(G).

[40] Election Law

Georgia had reasonable, nondiscriminatory, and legitimate interests regarding Georgia statute requiring younger voters to fill out applications for each election, which outweighed minimal burden on voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; there was strong interest in helping aged population, risk of fraud was reduced when unused absentee ballots were limited, and some absentee voters were temporarily residing in other states. U.S. Const. Amends. 1, 14; Ga. Code Ann. § 21-2-381(a)(1)(G).

[41] Election Law

Voter education organization and registered voters were unlikely to succeed on claim that Georgia statute requiring younger voters to fill out applications for each election facially discriminated against younger voters in violation of Twenty-Sixth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; statute had rational relationship to legitimate interests in helping older citizens vote and minimizing risk of voter fraud. U.S. Const. Amend. 26; Ga. Code Ann. § 21-2-381(a)(1)(G).

[42] Statutes

Under rational basis review, statutory classifications will be set aside only if no grounds can be conceived to justify them.

[43] Statutes

Under rational basis review, a law need only bear some rational relationship to a legitimate state end.

[44] Election Law

Burden imposed on voter education organization and registered voters by Georgia's absentee postage tax was moderate, for purposes of determination whether organization and voters were likely to succeed on claim that tax burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; there were widely available alternatives to voting by mail, including use of drop boxes or hand delivery, and Georgia Secretary and State Election Board had taken several steps to address challenges posed by COVID-19. U.S. Const. Amends. 1, 14.

[45] Election Law

Georgia's fiscal interests regarding Georgia's absentee postage tax outweighed moderate burden on voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that tax burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; Georgia's budget was strained due to decrease in tax revenue, requested relief would cost anywhere between $800,000 and $4.2 million, Georgia had allocated funds and resources to addressing right to vote, and there were alternatives to postage stamps

including drop boxes, hand delivery, and voting in person. U.S. Const. Amends. 1, 14.

[46] Election Law

When deciding whether a state election law violates First and Fourteenth Amendment associational rights under *Anderson-Burdick* test, which weighs asserted injury against government's justification for burden, fiscal responsibility, even if only incrementally served, is undeniably a legitimate and reasonable legislative purpose. U.S. Const. Amends. 1, 14.

[47] Election Law

Voter education organization and registered voters were unlikely to succeed on claim that Georgia's absentee postage tax imposed a fee on voting in violation of Twenty-Fourth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; there were alternative means by which to vote absentee besides voting by mail, voting in person remained an option, and valid public health concerns related to voting during a global pandemic were not specific evils the Twenty-Fourth Amendment was meant to address. U.S. Const. Amend. 24.

[48] Election Law

Burden imposed on voter education organization and registered voters by Georgia statute prohibiting voter assistance was moderate, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; there were voters who either must have or preferred to remain homebound due to COVID-19 pandemic but Georgia Secretary of State and election officials had taken steps to address challenges of voting, and same voters still had option of filling out an absentee ballot and mailing their vote. U.S. Const. Amends. 1, 14; Ga. Code Ann. § 21-2-385(a).

[49] Election Law

Georgia's interests regarding Georgia statute prohibiting voter assistance outweighed moderate burden on voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; Georgia had interest in preventing voter fraud, promoting voter confidence, and in orderly administration of elections, and methods to achieve goals, which was to limit those who could collect voters' absentee ballots to family members, was not unreasonable or unduly burdensome. U.S. Const. Amends. 1, 14; Ga. Code Ann. § 21-2-385(a).

[50] Election Law

Georgia statute prohibiting voter assistance was reasonably related to a legitimate governmental purpose, and thus voter education organization and registered voters were unlikely to succeed on claim that statute prevented them from engaging in election related speech and associational activities in violation of the First Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; collecting ballots was not expressive conduct, and limitations on who may have delivered absentee ballots was rational means of combating election fraud and verifying eligibility of voters. U.S. Const. Amend. 1; Ga. Code Ann. § 21-2-385(a).

[51] Statutes

There is a strong presumption of validity of a statute under rational basis review, so long as there is any reasonably conceivable state of facts that could provide a rational basis for the statute.

[52] Statutes

Under rational basis review of a statute, the burden is on the challenging party to establish that the statute is unconstitutional.

[53] Election Law

Voter education organization and registered voters were unlikely to succeed on claim that Georgia statute prohibiting voter assistance was preempted by Voting Rights Act (VRA), as required to preliminarily enjoin implementation and enforcement of statute, where issue as to whether "voting" under the VRA included delivery of ballots and thus whether statute could co-exist with VRA was too close to call. Voting Rights Act of 1965 §§ 14, 208, 52 U.S.C.A. §§ 10310, 10508; Ga. Code Ann. § 21-2-385(a).

[54] Statutes

Conflict preemption occurs where: (1) compliance with both federal and state regulations is a physical impossibility, or where (2) state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[55] Election Law

Burden imposed on voter education organization and registered voters by Georgia statute governing deadline on receipt of absentee ballots was severe, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; there were record number of absentee ballot requests for primary election and it was likely that there would be even more requests for general election, surge of applications led to delays of application delivery, and voters had been disenfranchised by receipt deadline through no fault of their own. U.S. Const. Amends. 1, 14; Ga. Code Ann. § 21-2-386(a)(1)(F).

[56] Election Law

Georgia's interests regarding Georgia statute governing deadline on receipt of absentee ballots did not justify or outweigh severe burden on voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened right to vote in violation of First and Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; Georgia had interests in efficient elections, maintaining order, quickly certified election results, and prevention of voter fraud, but interests did not overcome burden faced by voters who, through no fault of their own, would be disenfranchised by statute. U.S. Const. Amends. 1, 14; Ga. Code Ann. § 21-2-386(a)(1)(F).

[57] Election Law

Private interest factor as to whether Georgia statute governing deadline on receipt of absentee ballots violated voters' procedural due process rights weighed in favor of voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened procedural due process rights under Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; interest at issue implicated an individual's right to vote and was therefore entitled to substantial weight. U.S.

Const. Amend. 14; Ga. Code Ann. § 21-2-386(a)(1)(F).

[58] Election Law

Erroneous deprivation factor as to whether Georgia statute governing deadline on receipt of absentee ballots violated voters' procedural due process rights weighed in favor of voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened procedural due process rights under Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; thousands of mailed absentee ballots had been rejected for arriving after deadline even before COVID-19 pandemic, and proposed deadline extension would be valuable measure to address risk of voter disenfranchisement. U.S. Const. Amend. 14; Ga. Code Ann. § 21-2-386(a)(1)(F).

[59] Election Law

Government interest factor as to whether Georgia statute governing deadline on receipt of absentee ballots violated voters' procedural due process rights weighed in favor of voting education organization and registered voters, for purposes of determination whether organization and voters were likely to succeed on claim that statute burdened procedural due process rights under Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, as required to preliminarily enjoin implementation and enforcement of statute; although there was strong interest in certifying election results and maintaining integrity of elections, additional procedures imposed minimal burden because there was already an extended deadline for certain absentee voters. U.S. Const. Amend. 14; Ga. Code Ann. §§ 21-2-386(a)(1)(F), 21-2-386(a)(1)(G).

[60] Election Law

Voting education organization and registered voters were likely to suffer irreparable harm absent injunction enjoining implementation and enforcement of Georgia statute governing deadline on receipt of absentee ballots, as required for preliminary injunction; organization and voters were likely to succeed on claims that statute burdened right to vote in violation of First and Fourteenth Amendment and burdened procedural due process rights under Fourteenth Amendment in light of dangers presented by COVID-19 in relation to upcoming general election, and constitutional right to vote was fundamental. U.S. Const. Amends. 1, 14; Ga. Code Ann. § 21-2-386(a)(1)(F).

[61] Election Law

For purposes of irreparable harm element of preliminary injunction standard, an infringement on the fundamental right to vote amounts in an irreparable injury.

[62] Election Law

For purposes of irreparable harm element of preliminary injunction standard, when a plaintiff has alleged her fundamental right to vote has been infringed, irreparable injury is generally presumed.

[63] Injunction

The harm-to-the-opposing-party and public-interest factors of preliminary injunction standard merge when the Government is the opposing party.

[64] Election Law

Balance of harms weighed in favor of voting education organization and registered voters regarding preliminary injunction enjoining implementation and enforcement of Georgia statute governing deadline on receipt of absentee ballots, in light of dangers presented by

COVID-19 in relation to upcoming general election, as required for preliminary injunction; voters would be forever harmed if they were unconstitutionally deprived of right to vote, and deadline extension would only impose minimal burden as Georgia had already extended absentee ballot receipt deadline for certain absentee voters. U.S. Const. Amends. 1, 14; Ga. Code Ann. § 21-2-386(a)(1)(F).

[65] Election Law

Public interest weighed in favor of voting education organization and registered voters regarding preliminary injunction enjoining implementation and enforcement of Georgia statute governing deadline on receipt of absentee ballots, in light of dangers presented by COVID-19 in relation to upcoming general election, as required for preliminary injunction; voters had interest in ensuring their votes were counted. U.S. Const. Amends. 1, 14; Ga. Code Ann. § 21-2-386(a)(1)(F).

[66] Injunction

Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.

[67] Injunction

In formulating the appropriate remedy for a preliminary injunction, a court need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case.

West Codenotes

Validity Called into Doubt
Ga. Code Ann. § 21-2-386(a)(1)(F)

Attorneys and Law Firms

Adam Martin Sparks, Halsey G. Knapp, Jr., Joyce Gist Lewis, Krevolin & Horst, LLC, Atlanta, GA, Amanda R. Callais, Pro Hac Vice, Perkins Coie, K'shaani Smith, Pro Hac Vice, Marc E. Elias, Pro Hac Vice, Perkins Coie LLP, Washington, DC, Kevin J. Hamilton, Pro Hac Vice, Perkins Coie LLP, Stephanie R. Holstein, Pro Hac Vice, Perkins Coie, Seattle, WA, Lilian Magarita Timmermann, Pro Hac Vice, Perkins Coie LLP, Denver, CO, Christian Ramses Ruiz, Perkins Coie, Phoenix, AZ, for Plaintiff The New Georgia Project.

Adam Martin Sparks, Halsey G. Knapp, Jr., Joyce Gist Lewis, Krevolin & Horst, LLC, Atlanta, GA, Amanda R. Callais, Pro Hac Vice, Perkins Coie, K'shaani Smith, Pro Hac Vice, Marc E. Elias, Pro Hac Vice, Perkins Coie LLP, Washington, DC, Kevin J. Hamilton, Pro Hac Vice, Perkins Coie LLP, Stephanie R. Holstein, Pro Hac Vice, Perkins Coie, Seattle, WA, Lilian Magarita Timmermann, Pro Hac Vice, Perkins Coie LLP, Denver, CO, for Plaintiffs Reagan Jennings, Candace Woodall, Beverly Pyne.

Alexander Fraser Denton, Joshua Barrett Belinfante, Melanie Leigh Johnson, Brian Edward Lake, Carey Allen Miller, Vincent Robert Russo, Jr., Robbins Ross Alloy Belinfante Littlefield, LLC, Charlene S. McGowan, Georgia Attorney General's Office, Atlanta, GA, for Defendants Brad Raffensperger, Rebecca N. Sullivan, David J. Worley, Matthew Mashburn, Anh Le.

Irene B. Vander Els, Shelley Driskell Momo, DeKalb County Law Department, Decatur, GA, for Defendants Samuel E. Tillman, Anthony Lewis, Susan Motter, Dele Lowman Smith, Baoky N. Vu.

Daniel Walter White, Haynie, Litchfield & White, PC, Marietta, GA, for Defendants Phil Daniell, Fred Aiken, Jessica M. Brooks, Neera Bahl, Darryl O. Wilson, Jr.

Bryan Francis Jacoutot, Bryan P. Tyson, Diane Festin LaRoss, Loree Anne Paradise, Taylor English Duma LLP, Atlanta, GA, for Defendants Beauty Baldwin, Ben Satterfield, Stephen Day, Alice O'Lenick, John Mangano.

Ralph Jonathan Hart, Chatham County Attorney, Savannah, GA, for Defendant Colin Mcrae.

Bryan P. Tyson, Taylor English Duma LLP, Atlanta, GA, for Defendants Darry Hicks, Addison Lester, Aaron Wright.

Jack Reynolds Hancock, Freeman Mathis & Gary, LLP, Forest Park, GA, for Defendants Carol Wesley, Dorothy Foster Hall, Patricia Pullar, Darlene Johnson, Diane Givens.

Alan G. Snipes, James Clinton Clark, Jr., Page, Scrantom, Sprouse, Tucker & Ford, P.C., Columbus, GA, for Defendants Margaret Jenkins, Uhland Roberts, Diane Scrimpshire, Linda Parker, Eleanor White.

David Alan Cole, Timothy M. Boughey, Freeman Mathis & Gary, LLP, Atlanta, GA, for Defendants David C. Fedack, Robert Proctor, Daniel Zimmermann, Myesha Good, Maurice Hurry.

Kenneth Paul Robin, Jarrard & Davis, LLP, Cumming, GA, for Defendants Pamela Middleton, Dontravious M. Simmons, Benny G. Hand, Annabelle T. Stubbs, Frederick Williams, Barbara Luth, Matthew Blender, Joel Natt, Carla Radzikinas, Randy Ingram.

William J. Linkous, III, Freeman Mathis & Gary, LLP, Atlanta, GA, for Defendants Aldren Sadler, Sr., Karen James, Gerald Barger.

Kenneth Paul Robin, Megan Nicole Martin, Jarrard & Davis, LLP, Cumming, GA, for Defendants Phil Johnson, Kelly Robinson, Dustin Thompson.

Rachel Nicole Mack, Augusta Georgia Law Department, Augusta, GA, for Defendants Tim McFalls, Sherry T. Barnes, Marcia Brown, Terence Dicks, Bob Finnegan.

Virginia Candace Josey, William H. Noland, Noland Law Firm, LLC, Macon, GA, for Defendants Henry Ficklin, Mike Kaplan, Herbert Spangler, Cassandra Powell, Rinda Wilson.

Gregory C. Sowell, Cook & Tolley, LLP, John Matthew Hawkins, Athens-Clarke County Attorney's Office, Athens, GA, for Defendants Jesse Evans, Charles Knapper, Willa Fambrough, Ann Till.

Kenneth Paul Robin, Patrick D. Jaugstetter, Jarrard & Davis, LLP, Cumming, GA, for Defendants Arch Brown, Mildred Schmelz, Dan Richardson, Donna Morris-McBride, Andy Callaway.

Kaylan L. Phillips, Pro Hac Vice, Public Interest Legal Foundation, Indianapolis, IN, Harry W. MacDougald, Caldwell Propst & DeLoach, LLP, Atlanta, GA, for Defendant Public Interest Legal Foundation.

Matthew C. Forys, Pro Hac Vice, Michael J. O'Neill, Pro Hac Vice, Landmark Legal Foundation, Leesburg, VA, Harry W. MacDougald, Caldwell Propst & DeLoach, LLP, Atlanta, GA, for Defendant Landmark Legal Foundation.

ORDER

Eleanor L. Ross, United States District Judge

***1** Presently before the Court is Plaintiffs' Motion for Preliminary Injunction. [Doc. 57]. For the reasons below, the Court grants in part and denies in part Plaintiffs' motion.

I. Background

This case concerns Plaintiffs The New Georgia Project, Reagan Jennings, Candace Woodall, and Beverly Pyne's challenge to five (5) aspects of Georgia's absentee voting system (hereinafter "the Challenged Policies"). Am. Compl. [Doc. 33]. Plaintiffs bring these challenges in light of the dangers presented by COVID-19 in relation to the upcoming November 2020 general election. Id. The Challenged Polices are:

1. O.C.G.A. § 21-2-381(b)(4) (labeled by Plaintiffs as "the Notification Process") — This statute governs Georgia's notification process to voters when the relevant election official is unable to determine the identity of the elector from the information given on an absentee ballot application. O.C.G.A. § 21-2-381(b)(4). Specifically, the statute states: "[i]f the registrar or clerk is unable to determine the identity of the elector from information given on the application, the registrar or clerk should promptly write [to the elector] to request additional information." Id. Plaintiffs claim that the term "promptly" fails to provide a uniform standard to govern the process for notifying voters about any "errors" in their ballot applications.

2. O.C.G.A. § 21-2-381(a)(1)(G) (labeled by Plaintiffs as "Absentee Age Restriction") — This statute allows electors sixty-five (65) years of age or older, voters with disabilities, and Uniformed Overseas Citizens Absentee Voting Act voters to submit one application absentee ballot application for an entire election cycle. O.C.G.A. § 21-2-381(a)(1)(G).[1] All other voters must submit a separate, distinct absentee application for each election (primary, general, etc.). Id. Plaintiffs claim that this

statute discriminates against younger voters by creating an unconstitutional age restriction on those who may submit a single application to vote by mail for an entire election cycle.

3. "Absentee Postage Tax" — There is no portion of the Georgia Code that addresses who must pay for postage for absentee ballot applications and absentee ballots being cast through the mail. Plaintiffs claim that Georgia's failure to provide pre-paid postage for the return mailing of absentee ballots is an unconstitutional poll tax that severely burdens the right to vote in light of the dangers posed by COVID-19.

4. O.C.G.A. § 21-2-386(a)(1)(F) (labeled by Plaintiffs as "Receipt Deadline") — This statute requires that absentee ballots must be delivered to a county election official by 7:00 p.m. on Election Day. O.C.G.A. § 21-2-386(a)(1)(F).[2] Plaintiffs claim that this receipt deadline will disenfranchise voters whose absentee ballots arrive after that time through "no fault of their own."

5. O.C.G.A. § 21-2-385(a) (labeled by Plaintiffs as "Voter Assistance Ban") — This statute prohibits third-party assistance in mailing or delivering completed absentee ballots, subject to certain defined exceptions. O.C.G.A. § 21-2-385(a).[3] Plaintiffs claim that this statute "significantly raises the risk that lawful, eligible voters will be disenfranchised," eliminates critical assistance to voters who are homebound, and "hamstrings the ability of organizations like The New Georgia Project to assist voters in making the transition to absentee voting."

***2** See generally Am. Compl. at 10–14. In sum, Plaintiffs allege that in the context of the public health emergency caused by COVID-19, the Challenged Policies will unconstitutionally burden and disenfranchise thousands of voters in the upcoming November 2020 election. See generally id.

In accordance with these allegations, Plaintiffs seek declaratory and injunctive relief. [Doc. 57]. Specifically, Plaintiffs request the Court to: (a) issue a declaratory judgment that the Challenged Policies are unconstitutional, and (b) preliminarily enjoin Defendants[4] from implementing and enforcing the Challenged Policies. [Doc. 57-1 at 2]. Additionally, Plaintiffs ask the Court to:

***3** • order Defendants to "notify all voters of absentee application deficiencies within three (3) days of receiving the application, or by the next business day for applications received during the eleven (11) days before the election;"

• "permit voters of all ages to submit a single absentee ballot application per election cycle to vote by mail ballot in any election during that cycle;"

• "provide voters with prepaid postage on all absentee ballots;"

• "accept and count otherwise valid absentee ballots from qualified voters that are postmarked by Election Day and arrive at their respective county's office within, at a minimum, five (5) business days after Election Day;" and

• "allow voters to designate any third party to assist in the collection and submission of their absentee ballots."

[Id. at 2–4].

The Court first provides an overview of Georgia's absentee ballot system and other relevant context before addressing the substance of Plaintiffs' motion.

A. Georgia's Absentee Ballot System

In Georgia, the law permits a registered voter to vote via absentee ballot. See O.C.G.A. § 21-2-380. To do so, a voter must submit an application with sufficient identifying information—i.e., name, date of birth, phone number, and registration address—"either by mail, by facsimile transmission, by electronic transmission, or in person in the registrar's or absentee ballot clerk's office[.]" O.C.G.A. § 21-2-381(a)(1)(A). Georgia law does not require a voter to provide a justifying reason to cast an absentee ballot. O.C.G.A. § 21-2-380. Additionally, voters of "advanced age" (sixty-five (65) or older at the time of the request), voters with disabilities, and citizens who are overseas may submit one (1) comprehensive application for an entire election cycle, including the presidential preference primary, primary, and resulting runoffs or general elections. O.C.G.A. § 21-2-381(a)(1)(G). All other voters may not make a single request, but instead must submit separate, distinct applications for each election (i.e. primary, general, runoff). Id.

Upon receipt of a timely application for an absentee ballot, the electoral official must determine if the applicant is eligible to vote in the relevant primary or election. O.C.G.A. § 21-2-381(b)(1). If the official is unable to determine the

identity the voter, the official must "promptly write [to the voter] to request additional information." O.C.G.A. § 21-2-381(b)(4). However, "promptly" is not defined by the statute. Id.

If the voter is determined to be eligible, then the relevant election official must provide the voter with an absentee ballot. O.C.G.A. § 21-2-381(b)(2). Specifically, the official:

> shall mail or issue official absentee ballots to all eligible applicants not more than 49 days but not less than 45 days prior to any presidential preference primary, general primary other than a municipal general primary, general election other than a municipal general election, or special primary or special election in which there is a candidate for a federal office on the ballot.

***4** O.C.G.A. § 21-2-384(a)(2).

Registered absentee voters are supposed to receive three (3) items by mail: (1) the ballot, (2) a small "secrecy" envelope in which to place the ballot, and (3) a larger envelope for mailing the envelope containing the ballot. O.C.G.A. §§ 21-2-384(b); 21-2-385(a). Voters must indicate their vote on the provided ballot, place the ballot inside the "secrecy" envelope, place the "secrecy" envelope inside the larger envelope, and then "fill out, subscribe and swear to the oath printed on" the back of the larger envelope.[5] O.C.G.A. § 21-2-385(a). Once the larger mailing envelope is securely sealed and signed, "the elector shall then personally mail or personally deliver [the] same to the board of registrars or absentee ballot clerk[.]" Id. Georgia does not provide pre-paid postage for the return of the absentee ballot, and thus, voters must pay for their own return postage to vote by mail.[6]

The State of Georgia does not count mail ballots received after the closing of polls at 7:00 p.m. on Election Day. See O.C.G.A. § 21-2-386(a)(1)(F). This is true even if a ballot arrives late for reasons outside the voter's control, and even if the ballot was postmarked before or on Election Day. Id. Thus, as it now stands, for a mail-in ballot to be accepted and deemed valid for this year's November election, the respective county registrar must receive it no later than Tuesday, November 3, 2020, at 7:00 p.m. Id.

Finally, Georgia law prohibits third parties from assisting with the return of a signed, sealed absentee ballot unless the third party is the "elector's mother, father, grandparent, aunt, uncle, brother, sister, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of such elector." O.C.G.A. § 21-2-385(a). Or, if the voter has a disability that qualifies her for an absentee ballot, then her absentee ballot may be mailed or delivered by her caregiver, "regardless of whether such caregiver resides in such disabled elector's household." Id.

B. The COVID-19 Pandemic

As all are no doubt aware, the ongoing global pandemic caused by COVID-19 has triggered mass social disruption. In the United States alone, there have been over 5.7 million documented cases and Georgia remains a national "hotspot."[7] Specifically, in Georgia, there have been over 260,000 confirmed cases of the virus with over 5,000 deaths.[8] In response to the pandemic, Governor Brian Kemp issued several executive orders regarding public safety. Specifically, the Governor declared a public health state of emergency for the State of Georgia due to the spread of COVID-19, effective March 14, 2020, and subsequently extended it through and until September 10, 2020. See 2020 Executive Orders, Office of the Governor, https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders (last visited Aug. 24, 2020). Additionally, Governor Kemp ordered "all residents and visitors in the State of Georgia" to practice social distancing and sanitation in accordance with the guidelines published by the Centers for Disease Control and Prevention and also encouraged residents and visitors to wear masks in public to prevent the spread of COVID-19. Id. These restrictions were imposed to mitigate the spread of the virus.

***5** Similarly, Defendant Secretary of State Brad Raffensperger—in accordance with his duty to oversee Georgia's elections—has taken several measures to adjust the voting process due to the circumstances caused by COVID-19. Am. Compl. at 8, 43; [Docs. 59-31, 59-32]. Such measures included the postponement of the Georgia primary to June 9, 2020,[9] encouraging voting by mail, and sending absentee ballot applications to approximately 6.9 million active voters.[10] [Docs. 58 at 3; 59-31; 59-32; 59-33].

Due to the circumstances presented by the COVID-19 pandemic and the State's responsive measures, Georgia voters have utilized absentee voting in record numbers during recent elections. [Doc. 59-34]. For example, during the June 2020 primary, over 1.9 million absentee ballots were issued to voters, and approximately 1.1 million absentee ballots were recorded as cast. [Doc. 59-1 at 3, 9]. By

comparison, in 2018, approximately 227,000 absentee ballots were returned to registrar's offices. [Id. at 17]. The significant increase in absentee voting has led to well-documented strains on Georgia's election administration infrastructure, including delays in processing absentee ballot applications and delivering absentee ballots. [See, e.g., Docs. 59-34, 59-38, 59-39, 59-40, 59-41, 59-43, 59-45].

C. Impact on Plaintiffs

Plaintiff The New Georgia Project ("NGP") is an non-partisan organization "dedicated to registering Georgians to vote and to helping them become more civically engaged citizens." Am. Compl. at 16. To that end, "NGP engages in voter education and registration activities in churches, college campuses, and neighborhoods across the state to reach voters and help them to register and, eventually, vote." Id. According to the Amended Complaint, "NGP's goal is to register all eligible, unregistered citizens of color in Georgia, and as of September 2019, NGP had registered almost half a million Georgians in all 159 of Georgia's counties[.]" Id.

Plaintiffs Reagan Jennings, Candace Woodall, and Beverly Pyne (hereinafter "the Individual Voter Plaintiffs") are registered Georgia voters who plan on voting absentee in the November 2020 general election.[11] Id. at 19–23; [Docs. 59-4, 59-5, 59-6]. In the Amended Complaint, the Individual Voter Plaintiffs all claim that various aspects of the Challenged Policies either disenfranchise or unduly burden their right to vote. Am. Compl. at 19–23.

For example, Plaintiff Reagan Jennings, a Fulton County voter, is seventy-two (72) years old, lives alone, and suffers from "conditions that place her at high risk for complications from COVID-19." Id. at 20; [see also Doc. 59-4 at 2]. Although she regularly votes in person, due to the ongoing pandemic, Ms. Jennings applied to vote absentee, and plans to do so for the November election. [Doc. 59-4 at 2]. Given her health conditions and the absence of nearby relatives, Ms. Jennings claims she "would benefit from assistance with turning her ballot in to the election office." Am. Compl. at 21. Moreover, Ms. Jennings does not regularly keep stamps in her home, is unsure how much postage to apply for her absentee ballot, and does not have a postage scale. Id. at 20. Since the onset of COVID-19's spread across Georgia, Ms. Jennings has attempted to purchase stamps, but was unable to do so due to long lines and lack of social distancing. Id. She claims the entire process is "confusing" and "and would be easier to manage if Georgia counted ballots that are postmarked on Election Day." [Doc. 59-4 at 3, 4].

***6** Next, Plaintiff Candace Woodall, a voter in Atlanta, claims that the Challenged Policies burden her right to vote. Am. Compl. at 21. Ms. Woodall is almost sixty (60) years old, lives in a senior facility, is unemployed due to the pandemic, and is currently recovering from an operation related to cancer. Id. Due to her restricted budget, Ms. Woodall states that purchasing a book of stamps would be a financial hardship. [Doc. 59-5 ¶ 6]. In her declaration, she further states that "[i]f Georgia counted ballots that are postmarked by Election Day and allowed third parties such as The New Georgia Project to collect my ballot and assist me in making sure that I had prepared the ballot and envelope correctly, the voting process would be much less burdensome for me to accomplish." [Id. ¶ 8]. Additionally, due to her age, Ms. Woodall may not submit one comprehensive absentee application for each election cycle. Am. Compl. at 22. Instead, she must submit a separate application for each election, which she claims is a burden. Id.

Finally, Plaintiff Beverly Pyne is a sixty (60)-year-old nurse temporarily residing in Fort Lauderdale, Florida, for school. Id. at 23. She is registered to vote in Georgia and considers Georgia her home. Id. However, she claims Georgia's absentee voter system disenfranchised her in 2018. Id. Specifically, the Amended Complaint alleges:

> [d]espite requesting her ballot well in advance of the election and subsequently checking with election officials about the status of her ballot, Ms. Pyne's ballot did not arrive at her home in Florida until the day before Election Day. Ms. Pyne's Florida home is a 9.5-hour drive from Gwinnett County. Consequently, she could not turn the ballot in in person or otherwise cast her vote in-person. Therefore, Ms. Pyne was forced to place her ballot in the mail the day before Election Day in the hopes that it would somehow arrive on time. Ms. Pyne will also need to vote by absentee this year both because she is still temporarily living in Florida, and also because of concerns about exposing herself and others to COVID-19.

Id. at 23. Moreover, in her supplemental declaration, Ms. Pyne states that although she applied for an absentee ballot for the June 2020 Primary Election, she never received her ballot. [Doc. 105-3 ¶ 3]. After the June Primary occurred, she later received a notice explaining that her ballot application had been rejected because she did not select a political party on the application. [Id. ¶ 4].

D. Procedural History

On June 3, 2020, Plaintiffs filed their Amended Complaint in this action. Am. Compl. In their Amended Complaint, Plaintiffs bring seven (7) counts against Defendants:

- Count I—Undue Burden on the Right to Vote, in violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment;
- Count II—Denial or Abridgment of the Right to Vote on Account of Age, in violation of the Twenty-Sixth Amendment;
- Count III—Poll Tax, in violation of the Fourteenth and Twenty-Fourth Amendments;
- Count IV—Denial of Procedural Due Process, in violation of the Due Process Clause of the Fourteenth Amendment;
- Count V—Arbitrary and Disparate Treatment, in violation of the Equal Protection Clause of the Fourteenth Amendment;
- Count VI—Infringement on Speech and Associational Rights, in violation of the First and Fourteenth Amendments; and
- Count VII—Violation of Section 208 of the Voting Rights Act of 1965.

Id. at 56–78.

On June 10, 2020, Plaintiffs filed the instant Motion for Preliminary Injunction, seeking to enjoin the Challenged Policies.[12] [Doc. 57]. Having been fully briefed, and with the benefit of oral argument,[13] Plaintiffs' motion is ripe for the Court's review.

II. Preliminary Matter: Standing

***7** Before turning to the merits of Plaintiffs' motion, the Court first address the threshold issue presented by Defendants—namely, their allegation that Plaintiffs lack standing to seek a preliminary injunction regarding their claims. [See Docs. 82, 83, 91].

[1] **[2]** Article III of the Constitution permits federal courts to adjudicate only "actual cases and controversies." U.S. Const. art. III, § 2. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). To establish Article III standing:

> the party invoking the power of the court must show (1) injury in fact, which is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) that the injury is likely to be redressed by a favorable decision.

Cochran v. City of Atlanta, 150 F. Supp. 3d 1305, 1315 (N.D. Ga. 2015) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) (internal marks omitted).

[3] **[4]** **[5]** **[6]** Additionally, "[o]rganizations, like individuals, can establish standing to sue." Fair Fight Action, Inc. v. Raffensperger, 413 F. Supp. 3d 1251, 1266 (N.D. Ga. 2019).

> In election law cases, an organization can establish standing by showing that it will need to divert resources from general voting initiatives or other missions of the organization to address the impacts of election laws or policies. Organizations do not necessarily have to show that they have already diverted resources. Reasonably anticipating the organization will need to divert resources in the future suffices to establish standing, particularly at the earliest stage of a case.

Id.

Here, Defendants argue that Plaintiffs lack Article III standing for various reasons.[14] [See Docs. 82, 83, 91]. The Court will address the arguments regarding the Individual Voter Plaintiffs and Plaintiff NGP separately, beginning with the former.

A. Standing for Individual Voter Plaintiffs

[7] First, Defendants claim the Individual Voter Plaintiffs lack standing because they do not adequately allege injury-in-fact, traceability (causation), or redressability. [See Docs. 82-1 at 4–12, 83-1 at 4–6]. With regards to injury, Defendants argue that Plaintiffs' injuries are hypothetical and speculative. [Docs. 82-1 at 7–9; 83-1 at 4–5]. Additionally, the seventeen (17) County Defendants argue that Plaintiffs have not adequately alleged traceability and redressability because they failed to sue all one hundred and fifty-nine (159) counties in Georgia. [Doc. 82-1 at 10]. Finally, Defendants argue that

because all the alleged harms are not directly caused by the Secretary of State's office, but by the respective county boards of elections or even COVID-19, Plaintiffs have failed to establish redressability. [Doc. 82-1 at 11].

***8** Upon review, the Court finds Defendants' arguments unavailing. First, regarding injury, the Court disposes of Defendants' arguments that the alleged injuries are speculative and hypothetical. As set out in the Amended Complaint, the number of confirmed COVID-19 cases in Georgia has grown exponentially, and the Individual Voter Plaintiffs have alleged facts showing they are disadvantaged and burdened by the Challenged Policies. See Burdick v. Takushi, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) ("Each provision of a[n election] code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects — at least to some degree — the individual's right to vote and his right to associate with others for political ends.' ") (quoting Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)); Baker v. Carr, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue.").

[8] **[9]** Furthermore, in voting rights cases, "[a] plaintiff need not have the franchise wholly denied to suffer injury. Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient." Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1352 (11th Cir. 2005); see also Common Cause/Georgia v. Billups, 554 F.3d 1340, 1352 (11th Cir. 2009) ("The inability of a voter to pay a poll tax, for example, is not required to challenge a statute that imposes a tax on voting, and the lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person."); People First of Alabama v. Merrill, No. 2:20-CV-00619-AKK, —— F.Supp.3d ——, ——, 2020 WL 3207824, at *6 (N.D. Ala. June 15, 2020) ("Simply put, a voter always has standing to challenge a statute that places a requirement on the exercise of his or her right to vote.").

[10] In fact, the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.' " Gill v. Whitford, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (quoting Reynolds v. Sims, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). "Thus, 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." Id. Moreover, the Eleventh Circuit recently held that while "voters have no judicially enforceable interest in the *outcome* of an election," they do "have an interest in their ability to vote and in their vote being given the same weight as any other." Jacobson v. Fla. Sec'y of State, 957 F.3d 1193, 1202 (11th Cir. 2020) (emphasis in original) (internal citations omitted). Here, the Individual Voter Plaintiffs have alleged facts showing disadvantage to themselves regarding each of the Challenged Policies. See *supra* I.C; Am. Compl. at 20–22. Thus, the injury prong is satisfied.

[11] Next, Defendants argue that because all the alleged harms are not directly caused by the Secretary of State's office, the Individual Voter Plaintiffs fail to properly allege traceability and redressability. [Docs. 82-1 at 10–13; 83-1 at 4]. The Court finds this argument misguided. Pursuant to Georgia law, the Secretary of State is the chief election official for the State. O.C.G.A. § 21-2-50(b). As the chief election official, the Secretary has the power and authority to manage Georgia's election system, including the absentee voting system. Id. The Secretary exercised that authority, for example, right before the June 9, 2020 primary when he chose to send absentee ballot applications to all active registered voters. [See Doc. 59-33 at 2].

[12] Additionally, the Secretary is the Chair of the State Election Board, whose members are also Defendants in this case. See Am. Compl. The State Election Board is the governmental body responsible for uniform election practice in Georgia. O.C.G.A. § 21-2-31. Both the Sectary and the State Election Board have significant statutory authority to train local election officials and set election standards.[15] See id.; O.C.G.A. § 21-2-50(b). Thus, these Defendants have the ability to fully redress Plaintiffs' injuries statewide.[16] Accordingly, the Individual Voter Plaintiffs have standing.

B. Standing for the Organizational Plaintiff

***9** **[13]** Because the Court has determined that the Individual Voter Plaintiffs have established standing to bring their claims, the Court need not consider whether Plaintiff NGP has standing. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 n.9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (explaining that if one plaintiff demonstrates standing, the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit"). However, for the benefit of the Parties and out of an abundance of caution, the Court will provide an organizational standing analysis.

As noted above, "[i]n election law cases, an organization can establish standing by showing that it will need to divert resources from general voting initiatives or other missions of the organization to address the impacts of election laws or policies." Fair Fight Action, 413 F. Supp. 3d at 1266. In this case, Defendants argue Plaintiff NGP lacks organizational standing because it has not sufficiently alleged a diversion of resources. [Doc. 91 at 13–14]. Specifically, Defendants argue that Plaintiff NGP has not precisely explained how its resources will be diverted or how that diversion is connected to any alleged wrongful conduct. [Docs. 83-1 at 5–6; 91 at 13–14].

[14] Upon review, the Court finds that Plaintiff NGP has demonstrated it has organizational standing under a diversion of resources theory. Under the diversion of resources theory, "an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." Arcia v. Sec'y of Fla., 772 F.3d 1335, 1341 (11th Cir. 2014). Here, Nse Ufot, CEO of NGP, provided two (2) declarations that specifically explain how NGP's resources will be diverted. [Docs. 59-3; 105-5]. Ms. Ufot states that NGP "typically provides resources and assistances to its constituents to help them complete the process of voting in person." [Doc. 59-3 ¶ 6]. She explains that each of the Challenged Policies will force NGP to redirect its resources away from its typical activities to those centered on educating and assisting voters with Georgia's absentee voting system.[17] [Id. ¶¶ 7–21]. These declarations along with the allegations in the Amended Complaint are sufficient to establish injury under a diversion of resources theory. See Fla. State Conference of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1161–66 (11th Cir. 2008) (finding injury-in-fact for the plaintiff organizations which alleged that they anticipated the need to divert resources from registration, election-day education, and monitoring to educating voters on challenged law); Black Voters Matter Fund v. Raffensperger, No. 1:20-CV-01489-AT, 2020 WL 4597053, at *17 (N.D. Ga. Aug. 11, 2020) (finding the organizational plaintiff had standing based on "evidence that it has already and reasonably anticipates having to further divert resources to assisting socially and economically vulnerable voters obtain postage (or find transportation to deposit absentee ballots in available drop boxes) to avoid having to expose themselves to the potential health dangers associated with in-person voting").

***10** In sum, the Court concludes all Plaintiffs have standing to pursue this case. As such, the Court now reaches the merits of Plaintiffs' motion.[18]

III. Motion for Preliminary Injunction

Having established that Plaintiffs possess Article III standing, the Court now turns to Plaintiffs' Motion for Preliminary Injunction. [Doc. 57]. The Court first sets out the relevant legal standard before addressing the merits of Plaintiffs' arguments.

A. Legal Standard

[15] **[16]** **[17]** A temporary restraining order or preliminary injunction is an "extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four" elements. Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (internal marks and citations omitted). A plaintiff seeking a preliminary injunction must demonstrate that: (1) there is a substantial likelihood of success on the merits; (2) it will suffer irreparable injury if relief is not granted; (3) the threatened injury outweighs any harm the requested relief would inflict on the non-moving party; and (4) entry of relief would serve the public interest. See, e.g., KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1268 (11th Cir. 2006) (enumerating these well-established factors). The decision as to whether a plaintiff carries this burden "is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion." Int'l Cosmetics Exch., Inc. v. Gapardis Health & Beauty, Inc., 303 F.3d 1242, 1246 (11th Cir. 2002) (quoting Palmer v. Braun, 287 F.3d 1325, 1329 (11th Cir. 2002)) (internal quotation marks omitted).

[18] **[19]** Before addressing the merits of this case, the Court finds it necessary to define the nature of Plaintiffs' challenge. A litigant may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both. See Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1308 (11th Cir. 2009). While a facial challenge asserts that the challenged statute "always operates unconstitutionally," an "as-applied challenge, by contrast, addresses whether 'a statute is unconstitutional on the facts of a particular case or to a particular party.' " Id. (internal citations omitted). In this case, Plaintiffs contest the constitutionality of the Challenged Policies as they are applied during the November 2020 election cycle in light of the COVID-19 pandemic. See generally Am. Compl. As such, each of their claims is an as-applied challenge. With this

context in mind, the Court turns to the four (4) preliminary injunction factors.

B. Substantial Likelihood of Success on the Merits

***11** To meet the first element for an injunction, Plaintiffs must demonstrate that they are likely to succeed on their claims regarding each of the five (5) Challenged Policies. The Court will address each of the Challenged Policies in this order: (i) Notification Process, (ii) Absentee Age Restriction, (iii) Absentee Postage Tax, (iv) Voter Assistance Ban, and (v) Receipt Deadline.

i. Notification Process: O.C.G.A. § 21-2-381(b)(4)

As mentioned above, Plaintiffs challenge O.C.G.A. § 21-2-381(b)(4), which states: "If the register or clerk is unable to determine the identity of the elector from information given on the application, the registrar or clerk should promptly write to request additional information." O.C.G.A. § 21-2-381(b)(4). Thus, this particular Challenged Policy has to do with the timeframe within which a county election official should inform an absentee ballot applicant that his or her identity cannot be determined from the absentee ballot application. Id. The statute says the official should so do "promptly," but provides no definition for this term (e.g., three (3) business days, five (5) business days, etc.). Id.

Plaintiffs point to the unquantified term of "promptly" as an ambiguity that could result in different notification times by the various counties. [Doc. 58 at 7]. Specifically, Plaintiffs contend that (1) this lack of a uniform notification standard severely burdens the right to vote, violating the First and Fourteenth Amendments; (2) the Notification Process, as it stands, does not provide adequate due process, in violation of the Fourteenth Amendment; and (3) the Notification Process violates the Equal Protection Clause of the Fourteenth Amendment. [Id. at 16–17, 22–26]. The Court will address each argument in turn, beginning with Plaintiffs' right to vote claim.

a. Anderson-Burdick Test

[20] In their motion, Plaintiffs allege that O.C.G.A. § 21-2-381(b)(4), the Notification Process, unconstitutionally burdens the right to vote. When considering the constitutionality of an election law, the Court applies the framework set out in Anderson, 460 U.S. at 780, 103 S.Ct. 1564, as later refined in Burdick, 504 U.S. at 428, 112 S.Ct. 2059. Pursuant to the Anderson-Burdick test,

> [w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (internal quotation marks omitted).

[21] **[22]** **[23]** **[24]** **[25]** **[26]** Stated differently, the Court:

> must first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment." [Anderson v. Celebrezze,] 460 U.S. [780,] 789, 103 S. Ct. 1564 [75 L.Ed.2d 547 (1983)]. Then the court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." Id. Finally, the court must "determine the legitimacy and strength of each of those interests," while also considering "the extent to which those interests make it necessary to burden the Plaintiff's rights." Id.
>
> ....
>
> [I]f the state election scheme imposes "severe burdens" on the plaintiffs' constitutional rights, it may survive only if it is "narrowly tailored and advance[s] a compelling state interest." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997). But when a state's election law imposes only "reasonable, nondiscriminatory restrictions" upon a plaintiff's First and Fourteenth Amendment rights, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." Id. (quotations omitted). In short, the level of the scrutiny to which election laws are subject varies with the burden they impose on constitutionally protected rights—"Lesser burdens trigger less exacting review." Id.

***12** Stein v. Alabama Sec'y of State, 774 F.3d 689, 694 (11th Cir. 2014).

[27] **[28]** "For [the] intermediate cases, where the burden on the right to vote is moderate," a court must "weigh that

burden against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights."[19] Mays v. LaRose, 951 F.3d 775, 784 (6th Cir. 2020) (citing Burdick, 504 U.S. at 434, 112 S.Ct. 2059) (internal quotation marks omitted); see also People First of Alabama v. Sec'y of State for Alabama, 815 Fed.Appx. 505, 512 (11th Cir. 2020) (Rosenbaum, J. & Pryor, J., concurring) ("But whatever the burden, no matter how slight, 'it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.' ") (internal citations omitted). In sum, 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." Billups, 554 F.3d at 1352 (quotation omitted). The Court turns now to the analysis of the test.

1. Severity of the burden

[29] Under the Anderson-Burdick test, the Court's first step is to determine the character and magnitude of the asserted burden (whether the burden is light, moderate, or severe). Here, Plaintiffs argue that the burden imposed by the Notification Process is severe. [Doc. 58 at 16]. Specifically, Plaintiffs contend that because the state lacks a uniform guideline, each county may apply its own standards and procedures, which Plaintiffs claim will lead to a delay in processing applications. [Id. at 16–17].

However, the Court disagrees. As a preliminary matter, the Court notes that none of Plaintiffs' proffered authority or evidence links the notification statute with any untimely delay in processing ballot applications or with disenfranchisement.[20] Plaintiffs have submitted numerous declarations from voters who either did not receive a ballot, experienced significant delay in receiving any update on the status of their application, or whose ballot applications were rejected. [See, e.g., 59-3 ¶¶ 8–10; 59-9 ¶ 4; 59-11 ¶ 10; 59-13 ¶ 4; 59-14 ¶¶ 4–5; 59-16 ¶¶ 6–13; 59-17 ¶ 9; 59-68 ¶¶ 5–8; 59-70 ¶ 5; 59-71 ¶¶ 3–4; 59-90 ¶ 3; 105-3; 105-4 ¶¶ 3–5; 105-7 ¶¶ 3–5; 105-12 ¶¶ 3–5; 105-12 ¶ 3]. While these issues are troubling, they highlight injuries that are different than that which this provision addresses—namely, the rejection of an absentee ballot application because: (1) the election official could not ascertain the voter's identity, *and* (2) the rejection happening without proper notice. Put plainly, none of the declarants contend they were disenfranchised because an election official could not ascertain their identity, the subject of the statute challenged herein (O.C.G.A. § 21-2-381(b)(4)).[21]

***13** Thus, the Court finds that based on the record currently before it, the burden imposed by this statute on voters is, at most, minimal. There is no evidence on the record before the Court that the statute disenfranchises voters.[22] Additionally, the statute does not prohibit or preclude a voter from correcting the deficiency, utilizing early voting, or voting in person. See O.C.G.A. § 21-2-381(b)(4). Accordingly, the Court finds the burden is minimal.

2. Identification and Evaluation of the State's Interest

[30] The second and third steps in the Anderson-Burdick test require the Court to "identify the interests advanced by the State as justifications for the burdens" and then to "evaluate the legitimacy and strength of each asserted state interest and determine the extent to which those interests necessitate the burdening of the plaintiffs' rights." Bergland v. Harris, 767 F.2d 1551, 1553–54 (11th Cir. 1985). Defendants identify two (2) interests for Georgia's Notification Process: (1) preventing voter fraud; and (2) permitting county officials the flexibly necessary do their jobs. [Doc. 83-1 at 10–11]. Because the Court categorizes Plaintiffs' burden as minimal, the "State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." Stein, 774 F.3d at 694.

Here, the State's interests are reasonable, nondiscriminatory, and legitimate. See Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 185, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) ("There is no question about the legitimacy or importance of a State's interest in counting only eligible voters' votes."); see also People First of Alabama, 815 Fed.Appx. at 513 (noting that although infrequent in the state of Alabama, combatting voter fraud was certainly "a legitimate interest"). Thus, the Court finds that the State's interests outweigh the minimal burden on Plaintiffs.

Accordingly, the Court finds that Plaintiffs do not satisfy their burden to show a substantial likelihood of success on the merits of their right to vote claim regarding the Notification Process. Thus, the Court denies Plaintiffs' request for injunctive relief premised on this basis.

b. Procedural Due Process

[31] **[32]** Second, Plaintiffs raise a procedural due process argument regarding the Notification Process. Specifically, Plaintiffs contend that the Notification Process "deprive[s] voters of their liberty interest in voting without adequate procedural safeguards." [Doc. 58 at 22]. To determine what process is due to the public, courts must apply the test from Mathews v. Eldridge, which requires balancing three (3) considerations. 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

> ***14** First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

J.R. v. Hansen, 736 F.3d 959, 966 (11th Cir. 2013) (quoting Mathews, 424 U.S. at 335, 96 S.Ct. 893).

Here, the private interest at issue implicates an individual's right to vote and is therefore entitled to substantial weight. See Martin v. Kemp, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) ("Given that the State has provided voters with the opportunity to vote by absentee ballot, the State must now recognize that the privilege of absentee voting is certainly deserving of due process.") (internal marks omitted). As to the second step, Plaintiffs argue that the risk of erroneous deprivation is high because there is no uniform standard defining the word "promptly." [Doc. 58 at 23–24]. Elections officials may interpret " 'promptly' in differing and arbitrary ways—which is neither fair no reliable." [Id. at 24]. Plaintiffs suggest that their proposed remedy—requiring county officials to notify voters within three (3) days of any "error"—would provide clarity. [Id.] As to the third step, Plaintiffs argue that this requirement is not burdensome because the procedure they suggest is nearly identical to the one already utilized by the State to notify voters of a rejected ballot for signature mismatch. [Id. at 25].

[33] The Court disagrees with Plaintiffs' conclusion. After due consideration, the Court finds that while the first Mathews factor weighs in Plaintiffs' favor, the second and third factors weigh in Defendants' favor. While the private interest at issue implicates an individual's right to vote and thus, shall be afforded substantial weight, Plaintiffs have not satisfied the second Mathews factor because they do not demonstrate a substantial risk of erroneous deprivation. No evidence in the record demonstrates the procedures in the statute unconstitutionally deprived voters of their right to vote. See *supra* III.B.i.a.1. Although there is evidence to suggest that processing delays impaired voters' ability to cast an absentee ballot, again, Plaintiffs have not linked any processing delays to the challenged statute, which addresses the inability to *identify* a voter and subsequent notification. Moreover, the statute provides adequate notice and an opportunity to be heard,[23] which is what procedural due process requires. See New Port Largo v. Monroe Cty., 873 F. Supp. 633, 644 (S.D. Fla. 1994) ("Procedural due process requires adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner.") (citing Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). Additionally, the Court finds that the probative value of any additional procedure is minimal, since the risk of erroneous deprivation is low. Therefore, this factor weighs in favor of Defendants.

[34] Finally, regarding the third Mathews factor, Defendants explain that the additional procedures suggested by Plaintiffs will be financially costly and administratively burdensome. [See Docs. 83-1; 90 at 20, 24; 91 at 29]. Defendants provide evidence that suggests that the changes Plaintiffs seek would strain the State's already limited budget; thus, they argue the government's interest is strong. [Docs. 91 at 10, 18; 91-1 at 1–2]. The Court agrees with Defendants and finds that this factor weighs in their favor. See Mathews, 424 U.S. at 348, 96 S.Ct. 893 ("[T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.").

***15** In sum, although the first Mathews factor weighs in favor of Plaintiffs, the second and third factors weigh in Defendants' favor. Thus, Plaintiffs have failed to establish a substantial likelihood of success on the merits on this issue and are not entitled to related injunctive relief.

c. Equal Protection

[35] **[36]** Finally, Plaintiffs assert that the Notification Process violates the Equal Protection Clause of the Fourteenth Amendment. [Doc. 58 at 25–26]. The Constitution guarantees "equal protection of the laws." U.S. Const. amend. XIV. The Equal Protection Clause applies when a state either classifies voters in disparate ways or places restrictions on

the right to vote. Dunn v. Blumstein, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction ... [but this right] is not absolute."). Where, as here, a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, the court reviews the claim under the Anderson-Burdick flexible standard. See Obama for Am. v. Husted, 697 F.3d 423, 429 (6th Cir. 2012); see also Fla. Democratic Party v. Detzner, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016).

[37] As noted above, the first step of the Anderson-Burdick analysis is to define the severity of the burden. Here, Plaintiffs argue that because the timing and method of notification is determined by an individual's respective county board of election, "similarly situated voters are placed on unequal terms, and their right to vote is burdened without justification." [Doc. 58 at 25].

However, the Court disagrees and finds any burden on Plaintiffs is minimal. Again, as noted above, the harm that Plaintiffs identify is not directly connected to this provision of Georgia law.[24] See *supra.* Additionally, the State Election Board Rule recently issued a rule which provides:

> During early voting, as additional applicants for absentee ballots are determined to be eligible, the board of registrars or absentee ballot clerk shall mail or issue official absentee ballots or provisional absentee ballots, if appropriate, to such additional applicants immediately upon determining their eligibility. The board or clerk shall make such determination and mail or issue official absentee ballots; provisional absentee ballots, if appropriate, or notices of rejection of absentee ballot applications to such additional applicants within 3 business days after receiving the absentee ballot applications.

Ga. Comp. R. & Regs. 183-1-14-.11. Thus, contrary to Plaintiffs' assertion, there is a specific rule in Georgia that ensures uniform treatment.

[38] Because the burden on voters is minimal, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." Stein, 774 F.3d at 694. As mentioned above, the State identifies its interests here as (1) preventing voter fraud and (2) permitting county officials the flexibly necessary do their jobs. [Doc. 83-1 at 10–11]. Again, the Court finds that the State's interests are reasonable, nondiscriminatory, and legitimate. See Crawford, 553 U.S. at 185, 128 S.Ct. 1610 ("There is no question about the legitimacy or importance of a State's interest in counting only eligible voters' votes."); see also People First of Alabama, 815 Fed.Appx. at 513 (noting that although infrequent in the state of Alabama, combatting voter fraud was certainly "a legitimate interest"). Thus, the Court finds that the State's interests outweigh the minimal burden on Plaintiffs

***16** In sum, the justifications proffered by the State sufficiently outweigh the minimal burden on Plaintiffs' voting rights. Consequently, Plaintiffs have failed to establish a substantial likelihood of success on the merits of their equal protection claim. Because Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claims regarding O.C.G.A. § 21-2-381(b)(4), the Notification Process, the Court declines to enter any related injunctive relief.

ii. Absentee Age Restriction: O.C.G.A. § 21-2-381(a)(1)(G)

Next, the Court addresses Plaintiffs' arguments regarding the Absentee Age Restriction. Pursuant to O.C.G.A. § 21-2-381(a)(1)(G), voters of "advanced age" (sixty-five (65) or older at the time of the request), voters with disabilities, and citizens who are overseas may submit one (1) application for presidential preference primary, primary, and resulting runoffs or general elections. O.C.G.A. § 21-2-381(a)(1)(G). However, other voters cannot make a single request and must submit a separate application for each election during an election cycle. Id. Here, Plaintiffs assert two (2) theories regarding the unlawfulness of the Absentee Age Restriction. First, Plaintiffs claim the Absentee Age Restriction imposes a substantial burden on the right to vote for those under sixty-five (65). [Doc. 58 at 17]. Second, they claim that O.C.G.A. § 21-2-381(a)(1)(G) facially discriminates on the basis of age in violation of the Twenty-Sixth Amendment, thus invoking strict scrutiny review. [Id. at 27–28]. The Court addresses each theory in turn, beginning with Plaintiffs' right to vote argument.

a. Anderson-Burdick Test

Plaintiffs' argument that O.C.G.A. § 21-2-381(a)(1)(G) burdens the right to vote must be analyzed under the Anderson-Burdick test. See *supra.*

1. Severity of Burden

[39] Again, the first step of the Anderson-Burdick test is to define the severity of the burden. Here, Plaintiffs argue that the burden on younger voters is "substantial" because they are "forced to apply for absentee ballots each election" which increases "the risk of errors, substantial processing times, and late ballot returns." [Doc. 58 at 17]. Plaintiffs contend there is no justification for these substantial burdens. [Id.]

However, the Court disagrees. While it is a burden to fill out a new application for each election in an election cycle, the Court finds the burden to be minimal. Georgia voters have a variety of options to submit their absentee ballot applications: whether by mail, email, or through an online portal. [See Docs. 126 at 18–19; 126-3]. Moreover, In Plaintiffs' submitted declarations, voters claim that the application process is *inconvenient*, but they do not claim that they cannot vote at all due to the process. [See, e.g., Docs. 59-6, 59-7]. As the Supreme Court noted in Crawford, nominal inconveniences do not qualify as a substantial burden on most voters' right to vote. 553 U.S. at 198, 128 S.Ct. 1610; see also Texas Democratic Party v. Abbott, 961 F.3d 389, 405 (5th Cir. 2020) ("The Constitution is not offended simply because some groups find voting more convenient than [others].") (internal marks and citations omitted).

[40] Because the burden is minimal, "the States' regulatory interest is generally enough to uphold a reasonable, nondiscriminatory restriction on voting rights." Timmons, 520 U.S. at 358, 117 S.Ct. 1364. Here, Defendants offer several reasons for the State's interest:

> First, there is a strong interest in helping the most vulnerable, including Georgia's aged population. See Abbott, 961 F.3d at 404–05 (quoting [McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 810–811, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969)]). Second, the risk of fraud is reduced when unused absentee ballots are limited. See Billups, 554 F.3d at 1352, (describing anti-fraud efforts as "relevant and legitimate"). Third, as demonstrated by Plaintiffs' own declarants, some voters are temporarily residing in other states due to education, familial, or other obligations. See Docs. No. [59-6, 7, 12, 70, 90]. As personal circumstances change, these voters may return to Georgia[,] but their absentee ballot will be sent across the country. From both an administrative and security standpoint, this potential outcome outweighs the de minimis harm of requesting another absentee ballot online or by mail.
>
> ***17** [Doc. 91 at 29–21].

Upon review, the Court finds Defendants' reasons are legitimate and sufficient. See Abbott, 961 F.3d at 402 (noting that the state has a legitimate interest "in giving older citizens special protection and in guarding against election fraud"). Thus, Plaintiffs have not demonstrated a likelihood of success on the merits on this argument challenging the Absentee Age Restriction Policy.

b. Twenty-Sixth Amendment

[41] Next, the Court turns to Plaintiffs' Twenty-Sixth Amendment argument. Plaintiffs argue that the statute facially discriminates against younger voters because older voters only need to apply for an absentee ballot once during an election cycle while younger voters must apply for a new absentee ballot for each election; thus, Plaintiffs claim the statute violates the Twenty-Sixth Amendment.[25] [Doc. 58 at 27–28].

Plaintiffs' theory for their Twenty-Sixth Amendment claim seems to be a novel issue of law, which has not been widely addressed. Courts considering Twenty-Sixth Amendment claims have acknowledged "the dearth of guidance on what test applies." League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) (quoting N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 522 (M.D. N.C. 2016), rev'd on other grounds, 831 F.3d 204 (4th Cir. 2016)); Nashville Student Org. Comm. v. Hargett, 155 F. Supp. 3d 749, 757 (M.D. Tenn. 2015) ("[T]here is no controlling caselaw ... regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote."); see also Middleton v. Andino, No. 3:20-CV-01730-JMC, 2020 WL 4251401, at *4 (D.S.C. July 24, 2020) (noting the debate surrounding the Twenty-Sixth Amendment).

The only appellate case on point is Abbott from the Fifth Circuit. 961 F.3d 389. In Texas Democratic Party v. Abbott, the Texas Democratic Party challenged Texas' law limiting absentee ballots to voters aged sixty-five (65) or older and voters with disabilities. No. CV SA-20-CA-438-FB, —— F.Supp.3d ——, ——, 2020 WL 2541971, at *2 (W.D. Tex.

May 19, 2020). The district court held that the statute's limitation on absentee voting to voters over sixty-five (65) was unconstitutional age discrimination, and thus, "also violates the clear text of the Twenty-Sixth Amendment under a strict scrutiny analysis." Id. at ——, 2020 WL 2541971 at *5.

On an application for stay to the Fifth Circuit, the motions panel unanimously granted a stay of the injunction. Abbott, 961 F.3d at 403. The panel disagreed with the district court about the applicable level of scrutiny and stated that rational basis, rather than strict scrutiny, would "probably" apply to an absentee ballot voter classification that does not "absolutely prohibit" some group from voting. Id. The panel cited to the Supreme Court's decision in McDonald, to support its analysis. Id. at 403–04. Specifically, the panel stated that McDonald stood for the proposition that unless voters "are in fact absolutely prohibited from voting by the State," the right to vote is not "at stake" and thus, "rational-basis review follows." Id. at 404 (internal citations and marks omitted).

***18** Defendants argue that the holding in Abbott—the only appellate court to address this issue—should inform the Court's decision on Plaintiffs' Twenty-Sixth Amendment argument. [Doc. 83 at 15]. Plaintiffs disagree and point out that McDonald was decided two (2) years before the Twenty-Sixth Amendment was ratified and addressed an Equal Protection claim, not a Twenty-Sixth Amendment claim. [Docs. 96 at 32; 97 at 15]. Thus, Plaintiffs contend the Fifth Circuit panel in Abbott was mistaken in relying on McDonald to apply rational basis review.

While there is some merit to Plaintiffs' argument, the Court notes that the Supreme Court denied the emergency application to vacate the stay of the injunction granted by the Fifth Circuit panel in Abbott. See Tex. Democratic Party v. Abbott, —— U.S. ——, 140 S. Ct. 2015, 2105, —— L.Ed.2d —— (2020). Thus, for now, the Court finds it is appropriate to follow the Fifth Circuit panel's reasoning in Abbott and apply rational basis review to the analysis of O.C.G.A. § 21-2-381(a)(1)(G) rather than strict scrutiny.

[42] **[43]** Under rational basis review, "statutory classifications will be set aside only if no grounds can be conceived to justify them. The law need only bear some rational relationship to a legitimate state end." Abbott, 961 F.3d at 406 (internal citations omitted). Here, the law has a rational relationship to at least two legitimate state interests: (1) the state's interest in helping older citizens vote, see id. at 404–05, and (2) minimizing the risk of voter fraud. See Crawford, 553 U.S. at 185, 128 S.Ct. 1610. Therefore, Plaintiffs have not demonstrated they are likely to succeed on the merits of their Twenty-Sixth Amendment argument.

In sum, Plaintiffs have not demonstrated they are likely to succeed on the merits of their claims regarding O.C.G.A. § 21-2-381(a)(1)(G), the Absentee Age Restriction. Therefore, they are not entitled to the requested injunctive relief.

iii. Absentee Postage Tax

The Court now turns to Plaintiffs' argument regarding postage for absentee ballots. As mentioned previously, the Georgia Code does not address who must pay for return postage on absentee ballots. Plaintiffs argue that Georgia's failure to provide pre-paid postage: (1) severely burdens the right to vote, and (2) is an unconstitutional poll tax in violation of the Twenty-Fourth Amendment. [Doc. 58 at 17–18, 28–30]. The Court will discuss each argument in turn, beginning with Plaintiffs' right to vote argument, before turning to Plaintiffs' argument that the failure to provide pre-paid postage acts as a *de facto* poll tax.

a. Anderson-Burdick

The Court begins with its assessment of the Anderson-Burdick test, outlined *supra*. As a reminder, the test first mandates that the Court determine the character and magnitude of the asserted burden (whether the burden is light, moderate or severe). Bergland, 767 F.2d at 1553. Then, the Court must "identify the interests advanced by the State as justifications for the burdens" and "evaluate the legitimacy and strength of each asserted state interest and determine the extent to which those interests necessitate the burdening of the plaintiffs' rights." Id. at 1553–54.

1. Severity of Burden

[44] The first step of the Anderson-Burdick test is to characterize the severity of the burden. Here, Plaintiffs characterize the burden as "severe." [Doc. 58 at 17]. They maintain that the monetary costs are particularly burdensome in a health pandemic, when the ability to obtain postage is curtailed. [Id. at 17–18]. Defendants argue that the burden is merely incidental and minimal. [Doc. 91 at 23–24].

***19** Judge Amy Totenberg, a fellow judge in this District, recently rejected a similar argument to that of Plaintiffs' in Black Voters Matter Fund. See 2020 WL 4597053 at *25. In that case, the plaintiffs asserted that buying postage was a severe burden on the right to vote, especially during the COVID-19 public health crisis. Id. However, Judge Totenberg disagreed and instead characterized the burden on the plaintiffs' right to vote as moderate. Id. at *34. Specifically, she stated due to "the potential alternatives to purchasing stamps available to many (though not all) voters, the Court cannot say the burden of obtaining postage is severe, and instead characterizes it as moderate for present purposes."[26] Id.

The Court finds this reasoning persuasive. As Defendants noted, there are widely available alternatives to voting by mail, including use of drop boxes or hand delivery. [Docs. 90 at 19; 90-10 ¶¶ 4–5]. Additionally, the Secretary and the State Election Board have taken several steps to address the challenges posed by COVID-19. [See Doc. 90-1 ¶ 4]. Based on this evidence, in light of the specific facts of this case, the Court cannot say the burden of obtaining postage is severe. Instead, after considering the hardships of the COVID-19 pandemic and Defendants' responsive measures thus far, the Court finds that the postage requirement poses a moderate burden on Plaintiffs. See Black Voters Matter Fund, 2020 WL 4597053, at *34.

2. Identification and Balance of State Interest

[45] **[46]** Because the Court categorizes Plaintiffs' burden as moderate, the undersigned must weigh the "burden on [Plaintiffs] against the State's asserted interest and chosen means of pursuing it." Esshaki, —— F.Supp.3d at ——, 2020 WL 1910154, at *4. Defendants' interest is mainly fiscal. [Doc. 91 at 24]. Specifically, Defendants provide evidence that due to a decrease in tax revenue, the State's budget is strained. [Doc. 91-1 ¶¶ 8–10]. "Fiscal responsibility, even if only incrementally served, is undeniably a legitimate and reasonable legislative purpose." Ohio Democratic Party v. Husted, 834 F.3d 620, 634 n.8 (6th Cir. 2016). Defendants maintain that Plaintiffs' requested relief regarding postage would cost anywhere between $800,000–$4.2 million (depending on voter participation and the cost per ballot) during a time when the budget is already strained. [Doc. 91 at 11–12; see also Docs. 90-16 ¶ 6; 91-1 at 1–2]. The State has a limited amount of resources (particularly scarce during the current pandemic) and has already allocated funds and resources to addressing burdens on the right to vote. [See Doc. 91 at 10]; see also Ga. Comp. R. & Regs. 183-1-14-0.6-.14.

Additionally, Plaintiffs have failed to present sufficient evidence at this time to show their burden outweighs the State's interest. Although Plaintiffs presented declarations from voters who claim they could not afford a stamp, the Court notes there are alternative to purchasing a postage stamp including utilizing drop boxes, hand delivery, and voting in person. See *supra.* In light of these alternatives, Plaintiffs have not demonstrated a likelihood of success on the merits of their argument regarding the Absentee Postage Tax as it relates to their right to vote claim. Accordingly, the Court denies preliminary injunctive relief on this basis.

b. Twenty-Fourth Amendment

[47] Next, Plaintiffs argue that by failing to provide postage, Georgia has imposed a fee on voting, which violates the Twenty-Fourth Amendment.[27] [Doc. 58 at 28–29]. Again, Judge Totenberg rejected an identical argument in Black Voters Matter Fund. See 2020 WL 4597053 at *25. There, the plaintiffs argued that requiring voters to buy postage was an unconstitutional poll tax. Id. at *26. But Judge Totenberg disagreed and held that the plaintiffs' argument failed. Id. at *27.

***20** In her order, Judge Totenberg discussed at length the case law as it relates to poll tax cases. Id. at *21–25 (collecting cases). Ultimately, these cases stood for "the narrow proposition that payments to the government 'in connection' with voting can be considered poll taxes under [Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)], and [Harman v. Forssenius, 380 U.S. 528, 529, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965)], even if not designated as such." Id. at *25. Judge Totenberg further stated that "incidental payments to a government agency may in some circumstances be sufficiently 'connected' with voting if such payments are a necessary condition of accessing the polls generally applicable to all voters, such as payments for required documentation in order to establish eligibility to vote." Id. (internal citations omitted).

However, upon reviewing the facts, Judge Totenberg held that the State of Georgia has not imposed an unconstitutional *de*

facto poll tax by failing to provide pre-paid return postage for absentee ballots. Id. at *27. As Judge Totenberg observed:

> The fact that any registered voter may vote in Georgia on election day without purchasing a stamp, and without undertaking any "extra steps" besides showing up at the voting precinct and complying with generally applicable election regulations, necessitates a conclusion that stamps are not poll taxes under the Twenty-Fourth Amendment prism. In-person voting theoretically remains an option for voters in Georgia, though potentially a difficult one for many voters, particularly during a pandemic. The Court recognizes that voting in person is materially burdensome for a sizable segment of the population, both due to the COVID-19 pandemic and for the elderly, disabled, or those out-of-town. But these concerns—while completely justifiable and pragmatically solvable—are not the specific evils the Twenty-Fourth Amendment was meant to address.

Id.

The same reasoning applies here. As noted above, there are alternative means by which to vote absentee besides voting by mail. These other options include delivering any completed ballot at the registrar's office or depositing the ballot at a secure drop-box location. Of course, voting in person also remains an option. While the public health concerns related to voting during a global pandemic are valid, they are "not the specific evils the Twenty-Fourth Amendment was meant to address." Id. For the foregoing reasons, Plaintiffs have not shown a substantial likelihood of success on the merits as to their poll tax claim. Thus, the Court denies any related injunctive relief.

iv. Voter Assistance Ban: O.C.G.A. § 21-2-385(a)

The Court now turns to Plaintiffs' arguments challenging O.C.G.A. § 21-2-385(a), the statute they label as the Voter Assistance Ban. As discussed *supra*, Georgia law prohibits third parties from assisting with returning a signed, sealed absentee ballot unless the third party is the "elector's mother, father, grandparent, aunt, uncle, brother, sister, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of such elector." O.C.G.A. § 21-2-385(a). Plaintiffs make three (3) arguments regarding the invalidity of O.C.G.A., § 21-2-385(a). Plaintiffs claim the ban: (1) unreasonably burdens the right to vote, (2) violates the First Amendment, and (3) is preempted by Section 208 of the Voting Rights Act. The Court discusses each argument in turn.

a. Anderson-Burdick

1. Severity of Burden

[48] The Court begins with Plaintiffs' right to vote argument, which is analyzed pursuant to the Anderson-Burdick framework. See *supra.* The Court's first task under Anderson-Burdick is to determine the character and magnitude of the asserted burden. In their motion, Plaintiffs characterize the burden as severe, especially for voters with disabilities, voters with health conditions, low-income voters, voters who lack easy access to reliable transportation, and young voters. [Doc. 58 at 13, 21–22]. While Plaintiffs' arguments are compelling, the Court finds that based on the evidence before the Court, the burden is, at most, moderate rather than severe. Mays, 951 F.3d at 786 (finding that the burden on the right to vote for jailed voters was moderate given the alternative voting opportunities that the state provided); League of Women Voters v. LaRose, No. 2:20-CV-1638, 2020 WL 2771911, at *, 2020 U.S. Dist. LEXIS 91631, at *20 (S.D. Ohio Apr. 3, 2020) (finding that the burden on the right to vote was not severe, even in the midst of challenges posed by COVID-19, because voters had various means by which to vote, both by mail and in person).

***21** The Court recognizes that due to the current COVID-19 pandemic, voters may face difficulty, and there are voters who either must or prefer to remain homebound. But Defendants have taken steps to address the challenges of voting during the COVID-19 public health emergency, and these same voters still have the option of filling out an absentee ballot and mailing their vote. See *supra.* Thus, the Court finds that although a burden does exist, it is only moderate.

2. Identification and Balance of State Interest

[49] Having determined that the burden imposed is moderate, the Court must weigh the "burden on [Plaintiffs] against the State's asserted interest and chosen means of pursuing it." Esshaki, —— F.Supp.3d at ——, 2020 WL 1910154, at *4. Here, Defendants identify three (3) interests: (1) the State's interest in preventing voter fraud, (2) the State's interest in promoting voter confidence, and (3) the State's

generalized interest in the orderly administration of elections. [Docs. 83-1 at 31; 91 at 21; 126 at 19–21]. Defendants' method to achieve those goals is to limit those who can collect voters' absentee ballots to family members, with certain statutory exceptions. See O.C.G.A. § 21-2-385(a).

In balancing the State's interest with its chosen means, based on the current record, the Court cannot say that the State's means are unreasonable or unduly burdensome.[28] See Crawford, 553 U.S. at 192–97, 128 S.Ct. 1610 (holding that deterring voter fraud is a legitimate policy on which to enact an election law); Burdick, 504 U.S. at 433, 112 S.Ct. 2059 (explaining that states have a role in ensuring their elections are fair, honest, and orderly); Purcell v. Gonzalez, 549 U.S. 1, 4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) ("Confidence in the election process is essential to the functioning of our participatory democracy."); Eu v. San Francisco Cty. Democratic Central Comm., 489 U.S. 214, 231, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); Greater Birmingham Ministries v. Sec'y of State for Alabama, 966 F.3d 1202, 1238 (11th Cir. 2020) (finding Alabama's policy justification of combatting voter fraud was a valid policy justification for enacting the voter ID law at issue). In sum, Defendants have demonstrated that their interests and methods outweigh the burden suffered by Plaintiffs. Thus, Plaintiffs are unlikely to succeed on the merits of their right to vote claim as it relates to the Voter Assistance Ban. Accordingly, the Court denies any related injunctive relief.

b. First Amendment

[50] Next, Plaintiffs claim the Voter Assistance Ban prevents them from engaging in election related speech and associational activities, in violation of the First Amendment. [Doc. 58 at 30–31]. However, several courts have determined that collecting ballots does not qualify as expressive conduct protected by the First Amendment. See Knox v. Brnovich, 907 F.3d 1167, 1181 (9th Cir. 2018) (finding the collection of absentee ballots is not expressive conduct); Feldman v. Ariz. Sec'y. of State's Office, 843 F.3d 366, 372 (9th Cir. 2016) (holding that collecting ballots is not expressive conduct "[e]ven if ballot collectors intend to communicate that voting is important"); Voting for Am. Inc. v. Steen, 732 F.3d 382, 391 (5th Cir. 2013) (finding the collection and delivering of voter-registration applications are not expressive conduct); Democracy N. Carolina v. N. Carolina State Bd. of Elections, No. 1:20CV457, —— F.Supp.3d ——, ——, 2020 WL 4484063, at *50 (M.D. N.C. Aug. 4, 2020) ("Regarding the delivering of the absentee ballot requests, however, the court will follow the Fifth and Ninth Circuits in finding that the collecting and delivering of absentee ballot request forms is not expressive conduct and therefore does not implicate the First Amendment."). In accordance with this persuasive authority, the Court finds that collecting ballots is not expressive conduct.

***22** **[51]** **[52]** Because delivering absentee ballot requests is not expressive conduct, it is subject only to rational basis review. See Johnson v. Robison, 415 U.S. 361, 375 n.14, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) ("[S]ince we hold ... that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test."); Voting for Am., 732 F.3d at 392 ("Because the Non-Resident and County provisions regulate conduct only and do not implicate the First Amendment, rational basis scrutiny is appropriate."). Again, rational basis review only requires that legislative action, "[a]t a minimum, ... be rationally related to a legitimate governmental purpose." Clark v. Jeter, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). There is a "strong presumption of validity" under rational basis review, so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the [statute.]" FCC v. Beach Commc'ns, 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). The burden is on the challenging party to establish that the statute is unconstitutional. Id. at 315, 113 S.Ct. 2096.

Here, Defendants contend the limitations on who may deliver absentee ballots is a rational means of combating election fraud and verifying the eligibility of voters. [Doc. 91 at 32]. Upon rational basis review, the Court finds that this restriction is reasonably related to a legitimate governmental purpose and Plaintiffs have not carried their burden to demonstrate the law is unconstitutional. See Crawford, 553 U.S. at 185, 128 S.Ct. 1610; Democracy N. Carolina, —— F.Supp.3d at ——, 2020 WL 4484063, at *52 (finding that North Carolina's limitation on delivery of absentee ballot requests "is a rational means of promoting the government's legitimate interest combating election fraud"). The State wants to guard against voter fraud, and the Court defers to the legislature's chosen method to pursue that goal. Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001) ("Rational basis scrutiny is a highly deferential standard that proscribes only the very outer limits of a legislature's power."). Accordingly, the Court finds

that Plaintiffs do not demonstrate a substantial likelihood of success on the merits of their First Amendment argument regarding the Voter Assistance Ban. Thus, the Court denies injunctive relief on this basis.

c. Section 208 Preemption Claim

[53] **[54]** Finally, Plaintiffs maintain that O.C.G.A. § 21-2-385(a), the Voter Assistance Ban, is at odds with Section 208 of the Voting Rights Act ("VRA") because it prohibits voters with a disability from receiving assistance from persons of their choice. [Doc. 58 at 32]. Thus, Plaintiffs present an argument of conflict preemption. [Id.] Conflict preemption occurs "where [1] compliance with both federal and state regulations is a physical impossibility, or where [2] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (internal marks and citations omitted). Plaintiffs argue that both are true here.

Section 208 provides: "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. Thus, the VRA promises freedom of choice for voters with disabilities or who lack literacy. Id. The VRA defines the terms "vote" and "voting" to include:

> [A]ll action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

***23** 52 U.S.C. § 10310.

Here, Plaintiffs argue that "voting" in the context of the VRA includes delivery of ballots. They argue that because the ban restricts the delivery of ballots, it cannot co-exist with the VRA. However, at this juncture, the Court finds that Plaintiffs have not demonstrated a substantial likelihood of success on the merits because this issue presents a question too close to call.[29] See Stockstill v. City of Picayune, No. 1:16CV4-LG-RHW, 2017 WL 3037431, at *10-11 (S.D. Miss. July 18, 2017) ("But at the end of the day, a close question, in the Court's view, means that the plaintiff has not shown a substantial likelihood of success on the merits, which is the high burden he must carry at a preliminary injunction hearing."). The Court finds that further briefing and discovery are necessary to determine whether Plaintiffs' argument will ultimately be successful. Thus, Plaintiffs have not demonstrated a likelihood of success with regards to their Section 208 preemption claim at this stage of the proceedings.

For the foregoing reasons, the Court finds that Plaintiffs have not shown a substantial likelihood of success on the merits of their claims with regards to O.C.G.A. § 21-2-385(a), the Voter Assistance Ban. Accordingly, the Court denies any related injunctive relief.

v. Receipt Deadline: O.C.G.A. § 21-2-386(a)(1)(F)

The Court now turns to the Parties' arguments regarding O.C.G.A. § 21-2-386(a)(1)(F), the Receipt Deadline. As a refresher, the State of Georgia does not count absentee ballots received after the closing of polls on Election Day, which this year will be November 3, 2020, at 7:00 p.m. See O.C.G.A. § 21-2-386(a)(1)(F). This is true regardless of whether the late arrival was outside the voter's control and even if the ballot was postmarked on Election Day. Id. Plaintiffs argue that in light of COVID-19, the Receipt Deadline: (1) imposes severe burdens on the right to vote and (2) deprives voters of their liberty interest without adequate procedural safeguards (that is to say, violates procedural due process). [Doc. 58 at 18–20; 22–25]. The Court address each argument in turn.

a. Anderson-Burdick

The Court begins with Plaintiffs' right to vote argument, which must be analyzed under the Anderson-Burdick test. See *supra.*

1. Severity of Burden

[55] The first step is to characterize the severity of the burden. Plaintiffs argue that the burden is severe and proffer compelling evidence in support of this position. Their evidence demonstrates that there were a record number of absentee ballot requests for the Georgia June 2020 Primary Election, and there will likely be even more requests for

November 2020 election. [See Doc. 59-1 at 3]. As mentioned above, the State issued over 1.9 million absentee ballots to voters for the June 2020 Primary. [Id. at 3, 9]. Ultimately, 1.1 million absentee ballots were recorded as cast. [Id.] This surge of absentee voting applications has led to well-documented delays concerning the delivery of absentee ballot applications. [See, e.g., Docs. 59-38, 59-39, 59-40, 59-41, 59-43, 59-44, 59-45].

***24** Additionally, Plaintiffs have shown that Georgia voters can be and have been disenfranchised by the current receipt deadline through no fault of their own. [See, e.g., Doc. 59-6 ¶ 6] (Plaintiff voter received her absentee ballot on the day before Election Day). In 2018—a time free from the current complications of the COVID-19 pandemic and related strains on voting infrastructure—over 3,500 absentee ballots were rejected in Georgia for arriving after the Election Day receipt deadline. [Doc. 59-1 at 4]. During the June 2020 Primary Election, the number of rejected-as-late ballots doubled to 7,281. [Doc. 105-1 at 13]. This evidence suggests the burden on many voters will be severe.

A Wisconsin district court addressed this very issue in Democratic Nat'l Comm. v. Bostelmann, No. 20-CV-249-WMC, —— F.Supp.3d ——, ——, 2020 WL 1638374, at *3 (W.D. Wis. Apr. 2, 2020). In that case, the plaintiffs sought an injunction postponing the election and prohibiting enforcement of several aspects of Wisconsin's election regulations, including the requirement that "absentee ballots must be received by 8:00 p.m. on election day to be counted." Id. at ——, 2020 WL 1638374 at *2. The district court noted the plaintiffs would experience a severe burden in the upcoming election due to the backlog of absentee voting requests and the dangers posed by COVID-19. Id. at ——, 2020 WL 1638374 at *5. While the state's interests in that case were strong (maintaining order and preventing confusion), the district court held these interests were not so compelling as to overcome the severe burden the state's receipt deadline imposed on its citizens' right to vote via absentee ballot. Id. at ——, 2020 WL 1638374 at *13. Therefore, the court held that plaintiffs demonstrated a likelihood of success on the merits on this issue. Id. As a result, the district court issued an injunction that, in part, extended the deadline for receipt of absentee ballots from election day, April 7, 2020, to April 13, 2020. Id. at ——, 2020 WL 1638374 at *16–18. However, the district court did not impose a postmarked-by date requirement; thus, ballots would be accepted until 4:00 p.m. on April 13, 2020, regardless of the postmark date. Id. The Seventh Circuit affirmed that portion of the injunction. Democratic Nat'l Comm. v. Bostelmann, No. 20-1538, 2020 WL 3619499, at *1 (7th Cir. Apr. 3, 2020).

However, the United States Supreme Court granted a partial stay on the injunction a day before the election. Republican Nat'l Comm. v. Democratic Nat'l Comm., —— U.S. ——, 140 S. Ct. 1205, 1206, 206 L.Ed.2d 452 (2020). The Court's primary issue with the district court's injunction was that it did not impose a postmarked-by date requirement. Id. By failing to require that ballots be postmarked by the election date (April 7, 2020), the Court felt that the injunction improperly extended the length of the voting period, which "fundamentally alters the nature of the election." Id. at 1207. Consequently, the Court upheld the district court's ruling in requiring the state to count ballots received by April 13, 2020, but also added the requirement that the absentee ballots had to be postmarked by election day, which was April 7, 2020, to be counted. Id. at 1208. This new postmarked-by deadline resulted in 79,054 absentee ballots being counted. [Doc. 59-54 at 7].

The situation here is similar to that of Bostelmann. As in Wisconsin, there is evidence that a record number of absentee ballot requests in Georgia will lead to a potentially substantial backlog, increasing the possibility that voters will receive their ballots on a later date. [See generally Doc. 59-1]. It has been established that more than 7,000 voters were disenfranchised by Georgia's June 2020 Primary Election ballot receipt deadline. [Doc. 105-1 at 13]. According to Plaintiffs, these voters were disenfranchised for no error of their own, but due to Georgia's poor administration of absentee ballots and the policy they now challenge, the Receipt Deadline. [Doc. 103 at 15–16]. Based on this evidence, the Court finds that burden imposed on voters by Georgia's current absentee ballot receipt deadline is severe. See Bostelmann, —— F.Supp.3d at ——, 2020 WL 1638374, at *17; accord Doe v. Walker, 746 F. Supp. 2d 667, 679–80 (D. Md. 2010) ("By imposing a deadline which does not allow sufficient time for absent uniformed services and overseas voters to receive, fill out, and return their absentee ballots, the state imposes a severe burden on absent uniformed services and overseas voters' fundamental right to vote.").

2. Identification and Balance of State Interest

***25** **[56]** Because the burden is severe, O.C.G.A. § 21-2-386(a)(1)(F) may survive only if it is "narrowly tailored and advance[s] a compelling state interest." Timmons,

520 U.S. at 358, 117 S.Ct. 1364. Defendants claim that a postmarked-by deadline and/or extension will frustrate the State's interests in conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud. [Docs. 90 at 24–25; 91 at 26]. While these interests are strong, the Court finds that Defendants' chosen means of pursing them is not justified by the severe burden faced by certain voters. "More to the point, the state's general interest in the absentee receipt deadline is not so compelling as to overcome the burden faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of the law." Bostelmann, —— F.Supp.3d at ——, 2020 WL 1638374 at *17. In other words, while the Court recognizes the State's important interests, the statutorily imposed deadline acts as an undue burden on the right to vote.

For these reasons, as applied to Plaintiffs for the upcoming November 2020 general election, the Court concludes the State's asserted interests do not justify or outweigh the severe burden imposed on Plaintiffs by the Receipt Deadline. As such, Plaintiffs show a substantial likelihood of success, satisfying the first of the preliminary injunction factors. See KH Outdoor, 458 F.3d at 1268.

b. *Due Process*

[57] Plaintiffs also argue that the Receipt Deadline violates procedural due process. As set forth above, to determine the adequacy of procedural protections, courts must apply the Mathews balancing test. The Court must balance three factors: (1) the private interest that will be affected by the official action; (2) the risk that the procedures used will cause an erroneous deprivation, and the probative value of any additional or substitute procedural safeguards; and (3) the government's interest, including any fiscal and administrate burdens. Mathews, 424 U.S. at 334–35, 96 S.Ct. 893.

[58] Upon review, the Court finds the Mathews balancing test tips in Plaintiffs' favor. Here, like before, the private interest at issue implicates an individual's right to vote and is therefore entitled to substantial weight. See Martin, 341 F. Supp. 3d at 1338 ("Given that the State has provided voters with the opportunity to vote by absentee ballot, the State must now recognize that the privilege of absentee voting is certainly deserving of due process.") (internal marks and citation omitted). As for the second Mathews factor, the Court finds that risk of erroneous deprivation is high due to massive delays and exigent circumstances caused by COVID-19. [See, e.g., Docs. 59-38, 59-39, 59-40, 59-41, 59-43, 59-44, 59-45].

[59] Even before the pandemic, thousands of mailed absentee ballots have been rejected in Georgia for arriving after the receipt deadline during recent election cycles. [See Doc. 103 at 15]. For example, in 2018, at least 3,045 of the 3,581 absentee ballots arrived within seven (7) days of Election Day, implying that many were mailed either before or on Election Day.[30] [Doc. 59-1 at 18]. Plaintiffs' proposed remedy—extending the deadline for receiving absentee ballots—would be a valuable measure to address the risk of absentee voter disenfranchisement. [See Doc. 58 at 24]. Extending the deadline would ensure that voters who receive their ballots shortly before Election Day are able to mail their ballots without fear that their vote will not count.[31] [See Doc. 59-1 at 18] (demonstrating that in the 2018 General Election, around 67% percent of late ballots arrived within three (3) business days after the election). As to the third Mathews factor, the Court acknowledges that Defendants have a strong interest in certifying election results and maintaining the integrity of elections. But the Court also finds that any additional procedures impose a minimal burden on Defendants, because they already have an extended deadline for Uniformed Overseas Citizens Absentee Voting Act voters.[32]

***26** In light of the foregoing, the Court finds that Plaintiffs have established a substantial likelihood of success on the merits of their procedural due process claim regarding O.C.G.A. 21-2-386(a)(1)(F), the Receipt Deadline.

vi. Summary

In sum, the Court finds that Plaintiffs have not demonstrated that they are likely to succeed on the merits of their claims regarding O.C.G.A. § 21-2-381(b)(4), the Notification Process; O.C.G.A. § 21-2-381(a)(1)(G), the Absentee Age Restriction; the Absentee Postage Tax; or O.C.G.A. § 21-2-385(a), the Voter Assistance Ban. However, the Court finds that Plaintiffs have demonstrated they are likely to succeed on the merits of their claims regarding O.C.G.A. § 21-2-386(a)(1)(F), the Receipt Deadline. Having made this determination, the Court discusses the remaining preliminary injunction factors in light of the relief requested related to the Receipt Deadline. Again, Plaintiffs must satisfy all four (4)

factors in order to be entitled to injunctive relief. Siegel, 234 F.3d at 1176.

C. Irreparable Injury

[60] **[61]** **[62]** The Court turns to its assessment of the second element of the preliminary injunction standard: irreparable harm. Id. It is well-settled that an infringement on the fundamental right to vote amounts in an irreparable injury. See Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion) (The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Thus, when a plaintiff has alleged her fundamental right to vote has been infringed, irreparable injury is generally presumed. See id.; Martin, 341 F. Supp. 3d at 1340 ("The Court finds that [p]laintiffs have established irreparable injury as a violation of the right to vote cannot be undone through monetary relief and, once the election results are tallied, the rejected electors will have been disenfranchised without a future opportunity to cast their votes."); see also League of Women Voters v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury ... [because] once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin the law.").

In light of the constitutional rights at stake, as well as the Court's determination regarding Plaintiffs' likelihood of success on the merits with regards to the Receipt Deadline, the undersigned finds that Plaintiffs will suffer irreparable harm absent an injunction. Thus, the Court finds Plaintiffs satisfy the second element necessary to obtain a preliminary injunction.

D. Balance of the Harms and Public Interest

[63] The remaining two (2) factors of the four-part preliminary injunction test, "harm to the opposing party and weighing the public interest[,] ... merge when the Government is the opposing party." Nken v. Holder, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). The Court must consider each factor in view of Plaintiffs' proposed relief.

[64] Here, the Court finds Plaintiffs satisfy both factors. First, the balance of the harms weighs in Plaintiffs' favor. Plaintiffs will be forever harmed if they are unconstitutionally deprived of their right to vote. See Martin, 341 F. Supp. 3d at 1340. Defendants, on the other hand, argue that changing the deadline this close to the election will be burdensome on election officials, disrupt the State's statutory scheme for certifying elections, and undermine the integrity of the election process. [Docs. 90 at 20-22; 91 at 23–25]. As an initial response to Defendants' arguments, as Judge May stated in Martin, this Court "does not understand how assuring that all eligible voters are permitted to vote undermines [the] integrity of the election process. To the contrary, it strengthens it." Martin, 341 F. Supp. 3d at 1340. Additionally, extending the deadline would only impose a minimal burden on Defendants because the State already has an extended absentee ballot receipt deadline for Uniformed Overseas Citizens Absentee Voting Act voters. See id. at 1339–40 ("Because many of the procedures Plaintiffs request are already in place, the Court finds that additional procedures would involve minimal administrative burdens while still furthering the State's asserted interest in maintaining the integrity of its elections."). As for any delay in certification, the Court notes that the burden on voters outweighs the State's interest. See Doe, 746 F. Supp. 2d at 678–80 (finding that Maryland's statutory deadline for the receipt of absentee ballots imposed a severe burden on the absent uniformed services and overseas voters that was not justified by the state's interest in certifying election results).

***27** **[65]** Second, the public will be served by this injunction. Georgia voters have an interest in ensuring their votes are counted. Jones v. Governor of Fla., 950 F.3d 795, 831 (11th Cir. 2020) ("The public, of course, has every interest in ensuring that their peers who are eligible to vote are able to do so in every election."); Husted, 697 F.3d at 437 ("The public interest therefore favors permitting as many qualified voters to vote as possible."); see also Madera v. Detzner, 325 F. Supp. 3d 1269, 1283 (N.D. Fla. 2018) ("The public interest is always served by more equitable, easier access to the ballot.").

Accordingly, Plaintiffs have carried their burden as to each of the four (4) preliminary injunction factors as they relate to the Receipt Deadline. See KH Outdoor, 458 F.3d at 1283. Thus, the Court turns now to its remedy.[33]

IV. Remedy

[66] **[67]** "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." Trump v. Int'l Refugee Assistance Project, ––– U.S. ––––, 137 S. Ct. 2080, 2087, 198 L.Ed.2d 643 (2017) (per curiam). In formulating the appropriate remedy, "a court

need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case." Id. (citation omitted).

Here, Plaintiffs request the Court extend the absentee ballot receipt deadline by five (5) business days. [Doc. 57-1]. However, the Court declines to grant Plaintiffs' specific request and instead directs that Defendants accept as otherwise valid, absentee ballots from qualified voters that are postmarked by Election Day and arrive at their respective county's office within three (3) business days after Election Day.

In crafting this remedy, the Court by no means discounts the challenges absentee voters face amid the COVID-19 pandemic. However, the Court must balance these difficulties with the need to honor the State's legitimate interest in certifying the election. Accordingly, the Court finds that extending the receipt deadline by three (3) business days balances the interests of all Parties. Thus, the Court directs Defendants to accept otherwise valid absentee ballots from qualified voters that are postmarked by Election Day and arrive at their respective county's office within three (3) business days after Election Day. In other words, valid absentee ballots postmarked on or before November 3, 2020, must be counted if received by 7:00 p.m. on November 6, 2020.

The Court notes it is reluctant to interfere with Georgia's statutory election machinery. However, where the risk of disenfranchisement is great, as is the case here, narrowly tailored injunctive relief is appropriate. Consequently, the Court finds that extending the absentee ballot receipt deadline by three (3) business days is appropriate. The Court emphasizes that the equitable relief it provides is limited to the November 2020 election during these extraordinary times.

V. Conclusion

***28** Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion for Preliminary Injunction. [Doc. 57]. Specifically, the Court denies Plaintiffs' request to enjoin Defendants from implementing or enforcing O.C.G.A. § 21-2-381(b)(4); O.C.G.A. § 21-2-381(a)(1)(G); the Absentee Postage requirement; and O.C.G.A. § 21-2-385(a). However, the Court grants Plaintiffs' request to enjoin Defendants from enforcing O.C.G.A. § 21-2-386(a)(1)(F) and **EXTENDS** the receipt deadline for absentee ballots as detailed below.

The Court **PRELIMINARY ENJOINS** Defendants, their officers, employees, and agents, all persons acting in active concert or participation with Defendants, or under Defendants' supervision, direction, or control from enforcing O.C.G.A. § 21-2-386(a)(1)(F), which requires absentee ballots to be received by 7:00 p.m. on Election Day to be counted. The Court **ORDERS** that Defendants, their officers, employees, and agents, all persons acting in active concert or participation with Defendants, or under Defendants' supervision, direction, or control shall accept and count otherwise valid absentee ballots from qualified voters that are postmarked by Election Day, and arrive at their respective county's office within three (3) business days of Election Day by 7:00 p.m.[34]

SO ORDERED, this 31st day of August, 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 5200930

Footnotes

1 The full text reads:

> Any elector meeting criteria of advanced age or disability specified by rule or regulation of the State Election Board or any elector who is entitled to vote by absentee ballot under the federal Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. Section 1973ff, *et seq.*, as amended, may request in writing on one application a ballot for a presidential preference primary held pursuant to Article 5 of this chapter and for a primary as well as for any runoffs resulting therefrom and for the election for which such primary shall nominate candidates as well as any runoffs resulting therefrom. If not so requested by such person, a separate and distinct application shall be required for each primary, run-off primary, election, and run-off election. Except as otherwise provided in this subparagraph, a separate and distinct application for an absentee ballot shall always be required for any special election or special primary.

O.C.G.A. § 21-2-381(a)(1)(G). According to the Official Compilation of Rules and Regulations of the State of Georgia, "[f]or purposes of applying O.C.G.A. § 21-2-381(a)(1)(G), 'advanced age' shall mean any elector who is 65 years of age or older at the time of the absentee ballot request." Ga. Comp. R. & Regs. 183-1-14-.01(1).

2 The relevant portion of the statute states:

> All absentee ballots returned to the board or absentee ballot clerk after the closing of the polls on the day of the primary or election shall be safely kept unopened by the board or absentee ballot clerk and then transferred to the appropriate clerk for storage for the period of time required for the preservation of ballots used at the primary or election and shall then, without being opened, be destroyed in like manner as the used ballots of the primary or election. The board of registrars or absentee ballot clerk shall promptly notify the elector by first-class mail that the elector's ballot was returned too late to be counted and that the elector will not receive credit for voting in the primary or election.

O.C.G.A. § 21-2-386(a)(1)(F).

3 The relevant portion of the statute states:

> [M]ailing or delivery [of an absentee ballot] may be made by the elector's mother, father, grandparent, aunt, uncle, brother, sister, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of such elector. The absentee ballot of a disabled elector may be mailed or delivered by the caregiver of such disabled elector, regardless of whether such caregiver resides in such disabled elector's household. The absentee ballot of an elector who is in custody in a jail or other detention facility may be mailed or delivered by any employee of such jail or facility having custody of such elector.

O.C.G.A. § 21-2-385(a).

4 There are eighty-three (83) Defendants in this case, including various state election officials and members of seventeen (17) county boards of elections. See Am. Compl. For ease of reference, the Court refers to Defendants collectively, unless otherwise noted.

5 According to Plaintiffs' expert, Dr. Kenneth R. Mayer, the ballot design was changed for the 2020 primary election to eliminate the secrecy envelope. [Doc. 59-1 at 10]. Instead, the 2020 primary ballot included a "privacy sleeve," a change that was made to "allow faster processing of returned ballots by election officials." [Id.]

6 O.C.G.A. § 21-2-389 provides that the postage for sending the ballot to absentee voters "shall be paid by the county or municipality," but no other portion of the Georgia Code addresses the payment for postage for absentee ballots and absentee ballot applications.

7 Cases in the U.S., Centers for Disease Control, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Aug. 27, 2020).

8 COVID-19 Daily Status Report, Ga. Dep't of Pub. Health, https://dph.georgia.gov/COVID-19-daily-status-report (last visited Aug. 27, 2020).

9 Raffensperger Announces Postponement of Primary Election Until June 9, Ga. Sec'y of State, https://sos.ga.gov/index.php/elections/raffensperger_announces_postponement_of_primary_election_until_june_9 (last visited Aug. 24, 2020); [Docs. 59-31, 59-34].

10 In addition, the State Election Board extended the emergency measure authorizing counties to utilize secured absentee ballot drop boxes for the November 2020 election. [Doc. 90 at 19].

11 Additionally, Plaintiffs submitted one hundred and fifteen (115) declarations from Georgia voters to support their Motion for Preliminary Injunction. [See Docs. 59, 105, 106, 107].

12 Additionally, the County Defendants and the State Defendants have filed separate motions to dismiss. [Docs. 82, 83]. The Court will not reach Defendants' motions at this time and will instead issue a subsequent order addressing their arguments. But see n.16, *infra.*

13 The undersigned held oral argument regarding Plaintiffs' motion on August 19, 2020, via Zoom. [Doc. 121].

14 In their response to Plaintiffs' Motion for Preliminary Injunction, Defendants request that this Court address the standing arguments presented in their motions to dismiss [Docs. 82, 83] before addressing the merits of Plaintiffs' motion. [Docs. 90, 91]. The Court grants Defendants' request to address their arguments with regards to standing and will address the other arguments from Defendants' motions to dismiss in a subsequent order. See n.14, *supra.*

15 Additionally, the County Defendants are in charge of the day-to-day operations of running elections in their respective counties. See O.C.G.A. § 21-2-70. The Georgia election code tasks the local election superintendents with the preparation, delivery, processing of absentee ballots. See O.C.G.A. § 21-2-381; O.C.G.A. § 21-2-383; O.C.G.A. § 21-2-386. The County Defendants also have the authority under Georgia law to implement any instructions issued by the State Election Board and Secretary of State. See O.C.G.A. § 21-2-70

16 In support of the argument regarding redressability, the County Defendants specifically contend that Plaintiffs should have sued all one hundred and fifty-nine (159) counties in Georgia. [Docs. 82-1 at 10–13; 90 at 21]. Because Plaintiffs did not do so, the County Defendants submit that Plaintiffs' injuries are not traceable to the Secretary, and thus, not redressable. [Doc 82-1 at 13]. However, upon review, the Court finds that Jacobson, upon which the County Defendants rely in support of their argument, is distinguishable. 957 F.3d 1193 at 1208. In Jacobson, the plaintiffs sued the Florida Secretary of State to challenge Florida's ballot order laws. Id. at 1197. On appeal, the Eleventh Circuit held that the plaintiffs lacked standing because, pursuant to Florida state law, the Florida Secretary of State did not have the power to redress the plaintiffs' injuries. Id. at 1208. However, Georgia law differs from Florida law on this point. See O.C.G.A. § 21-2-50(b). As noted above, the Georgia Secretary of State and the State Election Board have broad powers to ensure the uniformity in the administration of election laws. O.C.G.A. § 21-2-31; O.C.G.A. § 21-2-50(b). Therefore, the County Defendants' reliance on Jacobson is inapposite.

17 As just one example, with regards to the Absentee Age Restriction, Ms. Ufot states that: "if all voters regardless of age, were permitted to apply to vote absentee just once per election cycle and request that they receive absentee ballots automatically for all remaining elections in that cycle, NGP could save significant time and funding that it spends educating and assisting voters with the absentee application process. The Absentee Application Age Restriction forces NGP to divert resources toward application outreach election after election and away from its core mission of registering voters and civic engagement." [Doc. 59-3 ¶ 11].

18 Additionally, the Court notes that during oral arguments, Defendants argued that the Court should decline to grant Plaintiffs' motion due to the political question doctrine. To support this position, Defendants cited to a recent order from this District: Coalition for Good Governance, et al. v. Raffensperger, et al., No. 1:20-CV-01677-TCB, —— F.Supp.3d ——, 2020 WL 2509092 (N.D. Ga. May 14, 2020). However, the Court notes that the instant matter is different in kind from Coalition. As even more recently explained by the Fifth Circuit in Tex. Democratic Party v. Abbott, the "challenge [in Coalition] was directed at the specific procedures Georgia planned to use to conduct the election, such as whether to use electronic voting machines or paper ballots. In other words, the suit challenged the wisdom of Georgia's policy choices." 961 F.3d 389, 398–99 (5th Cir. 2020). Here, however, "the Court must decide only whether the challenged provisions of the [state] Election Code run afoul of the Constitution, not whether they offend the policy preferences of a federal district judge." Id. at 399. As the Fifth Circuit noted, "[t]he standards for resolving such claims are familiar and manageable, and federal courts routinely entertain suits to vindicate voting rights." Id. Thus, the Court finds that Plaintiffs' claims are justiciable.

19 Put another way, "[r]egulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a flexible analysis, weighing the burden on the plaintiffs against the [s]tate's asserted interest and chosen means of pursuing it." Esshaki v. Whitmer, No. 2:20-CV-10831-TGB, —— F.Supp.3d ——, ——, 2020 WL 1910154, at *4 (E.D. Mich. Apr. 20, 2020) (citing Ohio Democratic Party v. Husted, 834 F.3d 620, 627 (6th Cir. 2016)) (internal marks omitted).

20 As just one example, in her supplemental declaration, Plaintiff Pyne declared that she applied for an absentee ballot in May for the June 2020 election, but never received her ballot. [Doc. 105-3 ¶ 3]. She later received a notice from the county during the week of June 29—three (3) weeks after Election Day—informing her that her absentee ballot application had been rejected because she did not select a political party on her application. [Id. ¶ 4]. While the delay is concerning, as the declaration highlights, Plaintiff Pyne's application was rejected because she did not *select a political party*, not because the election official was unable to ascertain her *identity.* [Id.]

21 Additionally, in their sur-reply and during oral arguments, Defendants indicated that Plaintiffs' claim challenging the Notification Policy was mooted by the State Election Board Rule 183-1-14-.11, which provides:

> During early voting, as additional applicants for absentee ballots are determined to be eligible, the board of registrars or absentee ballot clerk shall mail or issue official absentee ballots or provisional absentee ballots, if appropriate, to such additional applicants immediately upon determining their eligibility. The board or clerk shall make such determination and mail or issue official absentee ballots; provisional absentee ballots, if appropriate, or notices of rejection of absentee ballot applications to such additional applicants within 3 business days after receiving the absentee ballot applications."

Ga. Comp. R. & Regs. 183-1-14-.11.

22 In fact, the Court finds evidence on the record which seems to belie Plaintiffs' position. [See Doc. 59-7]. In her declaration, Ms. Carly Weikle, who was temporarily residing in Texas, explains that she applied for a Primary Election application. [Id. ¶ 6]. However, "[a]bout a week after applying," Ms. Weikle received an email informing her that her initial application was rejected because of a signature mismatch. [Id.] She was able to provide additional information, received her ballot in time, and cast a vote in the June 2020 primary. [Id.] Thus, contrary to Plaintiffs' contention, although there was a delay

in processing Ms. Weikle's application, the Court finds that delay was not untimely because Ms. Weikle was able to vote absentee. Accordingly, the facts seem to suggest that any burden imposed by the statute on voters is minimal.

23 If an official is unable to identify an elector, the elector is contacted and given an opportunity to provide additional information. See O.C.G.A. § 21-2-381(b)(4). Thus, this provision provides both notice and an opportunity to be heard.

24 The statute states that if the election official "is unable to determine the identity of the elector from information given on the application, the registrar or clerk should promptly write to request additional information." O.C.G.A. § 21-2-381(b)(4). Simply put, there is nothing in the Challenged Policy's text that dictates the timeline for processing absentee ballot applications or the timely delivery of absentee ballots, which are the main problems Plaintiffs identify in their arguments.

25 The Twenty-Sixth Amendment states: "The right of citizens of the United States, who are eighteen years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age." U.S. Const. amend. XXVI.

26 The alternatives include voting in person, dropping off the ballot at a secure drop-off location, or hand delivering the ballot to the registrar's office. See Black Voters Matter Fund, 2020 WL 4597053, at *26.

27 The Twenty-Fourth Amendment states:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. amend. XXIV.

28 The Court notes that discovery and factual development may potentially fortify Plaintiffs' claim for permanent injunctive relief.

29 Plaintiffs fail to cite to any authority from the Eleventh Circuit on this issue, and the authority that Plaintiffs do present to the Court address state laws that are distinguishable from O.C.G.A. § 21-2-385(a). [See Doc. 58 at 31–32].

30 In fact, the majority of the rejected ballots (2,427) were received within three (3) days of Election Day. [Doc. 59-1 at 18].

31 Indeed, even the United States Postal Service "recommends that voters mail their marked return ballots at least 1 week before the due date to account for any unforeseen events or weather issue[s,]" acknowledging the potential for delay even under non-exigent circumstances. [See Doc. 59-1 at 18].

32 The Georgia law addressing the receipt deadline for overseas citizens reads as follows:

> [A]bsentee ballots cast in a primary, election, or runoff by eligible absentee electors who reside outside the county or municipality in which the primary, election, or runoff is held and are members of the armed forces of the United States, members of the merchant marine of the United States, spouses or dependents of members of the armed forces or merchant marine residing with or accompanying such members, or overseas citizens that are postmarked by the date of such primary, election, or runoff and are received within the three-day period following such primary, election, or runoff, if proper in all other respects, shall be valid ballots and shall be counted and included in the certified election results.

O.C.G.A. § 21-2-386(a)(1)(G).

33 Federal Rule of Civil Procedure 65(c) provides that a "court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). While Plaintiffs do mention the bond requirement, the Court, in its discretion, waives it. See BellSouth Telecoms., Inc. v. MCIMetro Access Transmission Serv., LLC, 425 F.3d 964, 971 (11th Cir. 2005) ("[I]t is well-established that the amount of security required by [Rule 65(c)] is a matter within the discretion of the trial court, and the court may elect to require no security at all.") (internal citation and punctuation omitted).

34 The term "postmark" as used herein refers to any type of imprint applied by the postal service to indicate the location and date the postal service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks.

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Case Type: Civil

Robert LaRose, Teresa Maples, Mary Sansom, Gary Severson, and Minnesota Alliance for Retired Americans,

Plaintiffs,

v.

Steve Simon, in his official capacity as Minnesota Secretary of State,

Defendant.

STIPULATION AND PARTIAL CONSENT DECREE

Court File No: 62-CV-20-3149

Plaintiffs Robert LaRose, Teresa Maples, Mary Sansom, Gary Severson, and Minnesota Alliance for Retired Americans, and Defendant Steve Simon (collectively, "the Parties") stipulate to the following and request that this Court approve this Partial Consent Decree. This Stipulation and Partial Consent Decree is limited only to Plaintiffs' claims as they pertain to the November 3, 2020 general election ("November General Election") and is premised upon the current public health crisis facing Minnesota caused by the ongoing spread of the novel coronavirus.

I.
RECITALS

WHEREAS on May 13, 2020, Plaintiffs filed a complaint against Defendant challenging the constitutionality and enforcement of Minnesota's requirement that each mail-in ballot be witnessed by a registered Minnesota voter, a notary, or person otherwise authorized to administer oaths ("Witness Requirement"), Minn. Stat. §§ 203B.07, 204B.45, and 204B.46, and its requirement that ballots be received by 8:00 p.m. on Election Day if delivered by mail (the

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

"Election Day Receipt Deadline"), *id.* §§ 203B.08 subd. 3; 204B.45, and 204B.46, Minn. R .8210.2200 subp. 1 and 8210.3000 (collectively, "Challenged Provisions"), in general and specifically during the ongoing public health crisis caused by the spread of the novel coronavirus;

WHEREAS among other relief requested, the Complaint seeks to enjoin enforcement of the Challenged Provisions during the November General Election due, in part, to the public health crisis caused by the spread of the novel coronavirus;

WHEREAS the coronavirus public health crisis is ongoing and Minnesota remains under "Stay Safe" Emergency Executive Order 20-74, which contemplates a phased reopening of Minnesota that continues to require social distancing and mandates that "[i]ndividuals engaging in activities outside of the home follow the requirements of [the Stay Safe Order and Minnesota Department of Health and Centers for Disease Control and Prevention ("CDC")] Guidelines," Exec. Order 20-74 ¶ 6(a), and states that individuals "at risk of severe illness from COVID-19 . . . [are] strongly urged to stay at home or in their place of residence," *id.* ¶4;

WHEREAS Minnesota remains under a peacetime emergency, declared by the governor, because the "COVID-19 pandemic continues to present an unprecedented and rapidly evolving challenge to our State," Emergency Executive Order 20-78;

WHEREAS Minnesota is currently witnessing an increase in positive COVID-19 cases, Minnesota has had over 42,000 confirmed COVID-19 cases, with over 4,300 hospitalizations and over 1,500 fatalities, and current projections indicate that the coronavirus crisis will continue into the fall and well into the November General Election cycle;

WHEREAS cases continue to spread and climb across the country, and the director of the National Institute of Allergy and Infectious Diseases recently warned that the country is still "knee-deep" in the first wave of the pandemic;

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

WHEREAS federal guidelines state "[e]veryone should avoid close contact" by "keeping distance from others," CDC, Coronavirus Disease 2019: How to Protect Yourself & Others, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited July 13, 2020), and advise that jurisdictions "offer alternative voting methods that minimize direct contact," including "alternatives to in-person voting" such as absentee voting, CDC, Recommendations for Election Polling Locations: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19), https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html (last visited July 13, 2020);

WHEREAS Minnesota is anticipated to be required to maintain social distancing and abide by CDC Guidelines until the crisis subsides;

WHEREAS the absentee voting period for the November General Election begins on September 18, 2020, 46 days prior to the date of the election, Minn. Stat. § 203B.081 subd.1; *id.* § 204B.35, and absentee instructions, ballots, and envelopes, including the certificate of eligibility, must be prepared in time to have a supply for every precinct available to cover absentee voting prior to that date;

WHEREAS available public data regarding transmission of COVID-19 supports Plaintiffs' concerns for their safety if they are required to interact with others to cast their ballot in the November General Election;

WHEREAS anticipated increases in absentee balloting are already being observed for the August 11, 2020 Primary Election and will continue in the November General Election, and coupled with corresponding shortages of elections personnel and mail delays, appear likely to impact the November General Election and threaten to slow down the process of mailing and returning absentee ballots;

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

WHEREAS the delivery standards for the Postal Service, even in ordinary times contemplate, at a minimum, at least a week for ballots to be processed through the postal system and delivered to election officials, "State And Local Election Mail—User's Guide," United States Postal Service, January 2020, available at https://about.usps.com/publications/pub632.pdf (last visited, July 13, 2020);

WHEREAS the Office of Inspector General for the United States Postal Service has reported that states with absentee ballot request deadlines less than seven days before Election Day, including Minnesota, are at "high risk" of ballots "not being delivered, completed by voters, and returned to the election offices in time . . . due to the time required for election commissions to produce ballots and Postal Service delivery standards." Office of Inspector General, U.S.P.S., Rpt. No. 20-235-R20, Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area 6-7 (2020), available at https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf (last visited, July 13, 2020);

WHEREAS it was recently reported: "Mail deliveries could be delayed by a day or more under cost-cutting efforts being imposed by the new postmaster general. The plan eliminates overtime for hundreds of thousands of postal workers and says employees must adopt a 'different mindset' to ensure the Postal Service's survival during the coronavirus pandemic." Matthew Daly, *Mail delays likely as new postal boss pushes cost-cutting*, Mpls. Star Tribune (July 15, 2020);

WHEREAS on April 28, 2020, the Wisconsin Department of Health Services reported that 52 people who voted in person or worked the polls for Wisconsin's April 7, 2020 primary election have tested positive for COVID-19 thus far;

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

WHEREAS courts in other states have enjoined those states from enforcing witness requirements, similar to Minnesota's witness requirement, for primary elections this spring. *See Thomas v. Andino*, -- F. Supp. 3d. --, 2020 WL 2617329 (D.S.C. May 25, 2020); *League of Women Voters of Va. v. Va. State Bd. of Elections*, -- F. Supp. 3d --, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("In our current era of social distancing-where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household–the burden [of the witness requirement] is substantial for a substantial and discrete class of Virginia's electorate. During this pandemic, the witness requirement has become both too restrictive and not restrictive enough to effectively prevent voter fraud.");

WHEREAS for the April 7, 2020 primary election in Wisconsin, the U.S. Supreme Court affirmed the implementation of a postmark rule, whereby ballots postmarked by Election Day could be counted as long as they were received within six days of Election Day, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020), and other courts have also enjoined Election Day Receipt Deadlines during the current public health crisis, *see Driscoll v. Stapleton*, No. DV 20-408, slip op. at 11 (Mont. Dist. Ct. May 22, 2020); *see also Republican Nat'l Comm.*, 140 S.Ct. at 1210 (Ginsburg, J., dissenting) (noting that, in Wisconsin, the "surge in absentee-ballot requests has overwhelmed election officials, who face a huge backlog in sending ballots");

WHEREAS multiple courts have found that the pandemic requires or justifies changes to other aspects of states' election laws, *see, e.g., People Not Politicians Oregon v. Clarno*, 20-cv-1053, 2020 WL 3960440 (D. Or. July 13, 2020); *Cooper v. Raffensperger*, -- F. Supp. 3d --, 20-cv-1312, 2020 WL 3892454 (N.D. Ga. July 9, 2020); *Reclaim Idaho v. Little*, 20-cv-268, 2020 WL 3892454 (D. Idaho June 26, 2020); *Libertarian Party of Ill. v. Pritzker*, 20-cv-2112, 2020 WL

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

1951687 (N.D. Ill. Apr. 23, 2020); *Paher v. Cegavske*, -- F. Supp. 3d --, 20-cv-243, 2020 WL 2089813 (D. Nev. Apr. 30, 2020);

WHEREAS the Parties agree that an expeditious resolution of this matter for the November General Election, in the manner contemplated by the terms of this Stipulation and Partial Consent Decree, will limit confusion and increase certainty surrounding the November General Election, including in the days remaining before the September 18, 2020 deadline for absentee ballot preparation, and is in the best interests of the health, safety, and constitutional rights of the citizens of Minnesota, and, therefore, in the public interest;

WHEREAS the Parties wish to avoid the burden and expense of litigation over an expedited preliminary injunction for the November General Election;

WHEREAS the Parties, in agreeing to these terms, acting by and through their counsel, have engaged in arms' length negotiations, and both Parties are represented by counsel knowledgeable in this area of the law;

WHEREAS, on June 17, 2020, this Court signed and approved a stipulation and partial consent decree implementing substantially similar relief for the August 11, 2020 primary election;

WHEREAS voters have been informed about the rule changes for the primary election, voting has begun with those rules in place, and it would minimize confusion to have consistent rules regarding how elections are conducted during this pandemic;

WHEREAS it is the finding of this Court, made on the pleadings and upon agreement of the Parties, that: (i) the requirements of the Minnesota Constitution, Art. I, §§ 2, 7, and Art. VII, § 1, and U.S. Constitution, Amend. I and XIV, will be carried out by the implementation of this Partial Consent Decree, (ii) the terms of this Partial Consent Decree constitute a fair and equitable settlement of the issues raised with respect to the November General Election, (iii) this Partial

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

Consent Decree is intended to and does resolve Plaintiffs' claims with respect to the November General Election; and (iv) this Partial Consent Decree is not intended to and does resolve Plaintiffs' claims generally or with respect to any election held after the November General Election;

NOW, THEREFORE, upon consent of the Parties, in consideration of the mutual promises and recitals contained in this Stipulation and Partial Consent Decree, including relinquishment of certain legal rights, the Parties agree as follows:

II.
JURISDICTION

This Court has jurisdiction over the subject matter of this action pursuant to Minn. Const. Art. VI, § 3 and Minn. Stat. § 484.01 and has jurisdiction over the Parties herein. The Court shall retain jurisdiction of this Stipulation and Consent Decree for the duration of the term of this Partial Consent Decree for purposes of entering all orders, judgments, and decrees that may be necessary to implement and enforce compliance with the terms provided herein.

III.
PARTIES

This Stipulation and Partial Consent Decree applies to and is binding upon the following parties:

A. The State of Minnesota by Steve Simon, Secretary of State of Minnesota; and

B. All Plaintiffs.

IV.
SCOPE OF CONSENT DECREE

A. This Stipulation and Partial Consent Decree constitutes a partial settlement and resolution of Plaintiffs' claims against Defendant pending in this Lawsuit. Plaintiffs recognize that by signing this Stipulation and Partial Consent Decree, they are releasing any claims under the Minnesota or U.S. Constitutions that they might have against Defendant with respect to the

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

Witness Requirement and Election Day Receipt Deadline in the November General Election. Plaintiffs' release of claims will become final upon the effective date of this Stipulation and Partial Consent Decree.

B. The Parties to this Stipulation and Partial Consent Decree acknowledge that this does not resolve or purport to resolve any claims pertaining to the constitutionality or enforcement of the Witness Requirement and Election Day Receipt Deadline for elections held after the November General Election. Neither Party releases any claims or defenses with respect to the Witness Requirement and Election Day Receipt Deadline related to elections occurring after the November General Election.

C. The Parties to this Stipulation and Partial Consent Decree further acknowledge that by signing this Stipulation and Partial Consent Decree, the Parties do not release or waive the following: (i) any rights, claims, or defenses that are based on any events that occur after they sign this Stipulation and Partial Consent Decree, (ii) any claims or defenses that are unrelated to the allegations filed by Plaintiffs in this Lawsuit, and (iii) any right to institute legal action for the purpose of enforcing this Stipulation and Partial Consent Decree or defenses thereto.

D. By entering this Stipulation and Partial Consent Decree, Plaintiffs are partially settling a disputed matter between themselves and Defendant. The Parties are entering this Stipulation and Partial Consent Decree for the purpose of resolving a disputed claim, avoiding the burdens and costs associated with the costs of a preliminary injunction motion and hearing, and ensuring both safety and certainty in advance of the November General Election. Nothing in this Stipulation and Partial Consent Decree constitutes an admission by any party of liability or wrongdoing. The Parties acknowledge that a court may seek to consider this Stipulation and Partial

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

Consent Decree, including the violations alleged in Plaintiffs' Complaint, in a future proceeding distinct from this Lawsuit.

V.
CONSENT DECREE OBJECTIVES

In addition to partially settling the claims of the Parties, the objective of this Stipulation and Partial Consent Decree is to ensure that Minnesota voters can safely and constitutionally exercise the franchise in the November General Election, and to ensure that election officials have sufficient time to implement changes for the November General Election and educate voters about these changes before voting begins.

VI.
INJUNCTIVE RELIEF

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED FOR THE REASONS STATED ABOVE THAT:

A. For the November General Election Defendant shall not enforce the Witness Requirement, with respect to voting only, as set out in Minn. Stat. § 203B.07, subd. 3 (1) and (2), that each absentee ballot and designated mail ballot for voters previously registered in Minnesota be witnessed by a registered Minnesota voter, a notary, or person otherwise authorized to administer oaths, Minn. Stat. § 204B.45 - .46, and Minn. R. 8210.3000.

B. For the November General Election Defendant shall not enforce the Election Day Receipt Deadline for mail-in ballots, as set out in Minn. Stat. §§ 203B.08 subd. 3, 204B.45, and 204B.46 and Minn. R. 8210.2200 subp. 1, and 8210.3000, that ballots be received by 8:00 p.m. on Election Day if delivered by mail. Instead, the deadline set forth in paragraph VI.D below shall govern.

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

C. Defendant shall issue guidance instructing all relevant local election officials to count all absentee and designated mail ballots in the November General Election, as long as they are otherwise validly cast by voters who registered in Minnesota before casting their absentee or designated mail ballot. No witness signature will be required on those ballots.

D. Defendant shall issue guidance instructing all relevant local election officials to count all mail-in ballots in the November General Election that are otherwise validly cast and postmarked on or before Election Day but received by 8 p.m. within 5 business days of Election Day (i.e., seven calendar days, or one week). For the purposes of this Stipulation and Partial Consent Decree, postmark shall refer to any type of imprint applied by the United States Postal Service to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.

E. Defendant shall issue instructions to include with all absentee ballots and designated mail ballots—or issue guidance instructing all relevant local election officials to modify, amend, or print the instructions accompanying each absentee ballot and designated mail ballot—to inform voters that any absentee ballot or designated mail ballot cast by a previously registered voter in the November General Election without a witness signature will not be rejected on that basis and that the witness signature line and associated language for witnesses to certify a previously registered voter's ballot, Minn. Stat. §§ 203B.07, subd. 3 (1) and (2), 204B.45, 204B.46; Minn. R. 8210.2200, subp.1; Minn. R. 8210.3000, be removed from the certification of

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

eligibility altogether for absentee ballot and designated mail ballot materials sent to previously registered voters.

F. Defendant shall issue instructions to include with all absentee and designated mail ballots—or issue guidance instructing all relevant local election officials to modify, amend, or print instructions accompanying each absentee and designated mail ballot—to inform voters that any absentee or designated mail ballot cast in the November General Election and postmarked on or before Election Day and received by 8 p.m. within 5 business days of Election Day (i.e., seven calendar days, or one week) will be counted.

G. Defendant shall take additional reasonable steps to inform the public that the Witness Requirement for voting will not be enforced for the November General Election and issue guidance instructing all relevant city and county election officials to do the same.

H. Defendant shall take additional reasonable steps to inform the public that the Election Day Receipt Deadline will not be enforced for the November General Election and that any absentee or designated mail ballot cast in the November General Election and postmarked on or before Election Day and received by 8 p.m. within 5 business days of Election Day (i.e., seven calendar days, or one week) will be counted.

I. Plaintiffs will withdraw their Motion for Temporary Injunction for the November General Election, filed on July 2, 2020, and will not file any further motions for injunctive relief for the November General Election based on the claims raised in their Complaint of May 13, 2020.

J. In accordance with the terms of this Stipulation and Partial Consent Decree, the Parties shall each bear their own fees, expenses, and costs incurred as of the date of this Order with respect to Plaintiffs' claims raised as to the November General Election against Defendant.

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

VII.
ENFORCEMENT AND RESERVATION OF REMEDIES

The Parties to this Stipulation and Partial Consent Decree may request relief from this Court if issues arise concerning the interpretation of this Stipulation and Partial Consent Decree that cannot be resolved through the process described below. This Court specifically retains continuing jurisdiction over the subject matter hereof and the Parties hereto for the purposes of interpreting, enforcing, or modifying the terms of this Stipulation and Partial Consent Decree, or for granting any other relief not inconsistent with the terms of this Partial Consent Decree, until this Partial Consent Decree is terminated. The Parties may apply to this Court for any orders or other relief necessary to construe or effectuate this Stipulation and Partial Consent Decree or seek informal conferences for direction as may be appropriate. The Parties shall attempt to meet and confer regarding any dispute prior to seeking relief from the Court.

If either Party believes that the other has not complied with the requirements of this Stipulation and Partial Consent Decree, it shall notify the other Party of its noncompliance by emailing the Party's counsel. Notice shall be given at least one business day prior to initiating any action or filing any motion with the Court.

The Parties specifically reserve their right to seek recovery of their litigation costs and expenses arising from any violation of this Stipulation and Partial Consent Decree that requires either Party to file a motion with this Court for enforcement of this Stipulation and Partial Consent Decree.

VIII.
GENERAL TERMS

A. Voluntary Agreement. The Parties acknowledge that no person has exerted undue pressure on them to sign this Stipulation and Partial Consent Decree. Each Party is voluntarily

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

choosing to enter into this Stipulation and Partial Consent Decree because of the benefits that are provided under the agreement. The Parties acknowledge that they have read and understand the terms of this Stipulation and Partial Consent Decree; they have been represented by legal counsel or had the opportunity to obtain legal counsel; and they are voluntarily entering into this Stipulation and Partial Consent Decree to resolve the dispute among them.

B. Severability. The provisions of this Stipulation and Partial Consent Decree shall be severable, and should any provisions be declared by a court of competent jurisdiction to be unenforceable, the remaining provisions of this Stipulation and Partial Consent Decree shall remain in full force and effect.

C. Agreement. This Stipulation and Partial Consent Decree is binding. The Parties acknowledge that they have been advised that (i) the other Party has no duty to protect their interest or provide them with information about their legal rights, (ii) signing this Stipulation and Partial Consent Decree may adversely affect their legal rights, and (iii) they should consult an attorney before signing this Stipulation and Partial Consent Decree if they are uncertain of their rights.

D. Entire Agreement. This Stipulation and Consent Decree constitutes the entire agreement between the Parties relating to the constitutionality and enforcement of the Witness Requirement and Election Day Receipt Deadline as they pertain to the November General Election. No Party has relied upon any statements, promises, or representations that are not stated in this document. No changes to this Stipulation and Partial Consent Decree are valid unless they are in writing, identified as an amendment to this Stipulation and Partial Consent Decree, and signed by all Parties. There are no inducements or representations leading to the execution of this Stipulation and Partial Consent Decree except as herein explicitly contained.

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

E. Warranty. The persons signing this Stipulation and Partial Consent Decree warrant that they have full authority to enter this Stipulation and Partial Consent Decree on behalf of the Party each represents, and that this Stipulation and Partial Consent Decree is valid and enforceable as to that Party.

F. Counterparts. This Stipulation and Partial Consent Decree may be executed in multiple counterparts, which shall be construed together as if one instrument. Any Party shall be entitled to rely on an electronic or facsimile copy of a signature as if it were an original.

G. Effective Date. This Stipulation and Partial Consent Decree is effective upon the date it is entered by the Court. Defendant agrees to continue to initiate and implement all activities necessary to comply with the provisions of this Stipulation and Partial Consent Decree pending entry by the Court.

IX.
TERMINATION

This Stipulation and Partial Consent Decree shall remain in effect through the certification of ballots for the November General Election. The Court shall retain jurisdiction to enforce the terms of the Partial Consent Decree for the duration of this Partial Consent Decree. This Court's jurisdiction over this Stipulation and Partial Consent Decree shall automatically terminate after the certification of all ballots for the November General Election.

THE PARTIES ENTER INTO AND APPROVE THIS STIPULATION AND PARTIAL CONSENT DECREE AND SUBMIT IT TO THE COURT SO THAT IT MAY BE APPROVED AND ENTERED. THE PARTIES HAVE CAUSED THIS STIPULATION AND CONSENT DECREE TO BE SIGNED ON THE DATES OPPOSITE THEIR SIGNATURES.

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

SECRETARY OF STATE OF MINNESOTA

Dated: __July 17, 2020_____

By: _____
Steve Simon
Secretary of State

GREENE ESPEL PLLP

Dated: __July 17, 2020_____

By: /s/ *Sybil L. Dunlop*
Sybil L. Dunlop (Reg. No. 390186)
Samuel J. Clark (Reg. No. 388955)
222 South Ninth Street, Suite 2200
Minneapolis, MN 55402
Phone: (612) 373-0830
Fax: (612) 373-0929
Email: SDunlop@GreeneEspel.com
Email: SClark@GreeneEspel.com

PERKINS COIE LLP

Marc E. Elias*
Amanda R. Callais*
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6200
Fax: (202) 654-9106
Email: MElias@perkinscoie.com
Email: ACallais@perkinscoie.com

Abha Khanna*
1201 Third Avenue Suite 4900
Seattle, WA 98101-3099
Phone: (206) 359-8312
Fax: (206) 359-9312
Email: AKhanna@perkinscoie.com

Charles G. Curtis, Jr.*
33 East Main Street, Suite 201
Madison, Wisconsin 53703-3095
Phone: (608) 663-7460
Fax: (608) 663-7499
Email: CCurtis@perkinscoie.com

Filed in District Court
State of Minnesota
7/17/2020 3:24 PM

*Admitted pro hac vice

Attorneys for Plaintiffs

IT IS SO DECREED AND ORDERED. JUDGMENT SHALL BE ENTERED IN ACCORDANCE WITH THE FOREGOING CONSENT DECREE.

Dated: August 3, 2020

Sara Grewing
Grewing, Sara (Judge)
Aug 3 2020 3:05 PM

The Honorable Judge Sara Grewing
Judge of District Court

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

ROBYN DRISCOLL; MONTANA DEMOCRATIC PARTY; and DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, Plaintiffs, vs. COREY STAPLETON, in his official capacity as Montana Secretary of State, Defendant.	Cause No. DV 20-408 JUDGE DONALD L. HARRIS FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM, AND ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs Robyn Driscoll, Montana Democratic Party, and Democratic Senatorial Campaign Committee have sued Defendant Corey Stapleton, in his official capacity as Montana Secretary of State, to enjoin enforcement of the Ballot Interference Prevention Act, Mont. Code Ann. § 13-35-701 *et seq.,* and the election day receipt deadline for absentee ballots set forth in Mont. Code Ann. § 13-13-201(3), Mont. Code Ann. § 13-13-211(3), and Mont. Code Ann. § 13-19-106(5)(b). Pending before the Court is Plaintiffs' Motion for Preliminary Injunction. The parties have agreed to submit the issue of whether the Court should issue a preliminary injunction based upon the parties' briefs and affidavits. Both parties have waived their right to a hearing under Mont. Code Ann. §27-19-

303. The preliminary injunction issues have been fully briefed and the matter is now ripe for decision.

I. The Ballot Interference Protection Act.

Except for election officials or United States postal workers, the Ballot Interference Protection Act (BIPA) restricts who can collect a voter's voted or unvoted ballot. Mont. Code Ann. § 13-35-703. BIPA permits only caregivers, family members, household members, or acquaintances to collect ballots, but prohibits them from collecting and conveying more than six ballots. Mont. Code Ann. § 13-35-703(2) and (3). The BIPA also requires every caregiver, family member, household member, or acquaintance who delivers another person's ballot to sign a registry and provide: (1) the individual's name, address, and phone number; (2) the voter's name and address; and (3) the individual's relationship to the voter whose ballot is being delivered. Mont. Code Ann. § 13-35-704. The BIPA imposes a $500.00 fine for each ballot unlawfully collected. Mont. Code Ann. § 13-35-705.

II. The Absentee Ballot Election Day Receipt Deadline.

The absentee ballot election day receipt deadline (Receipt Deadline) requires absentee ballots to be received at a designated election office, polling place, place of deposit, or by an authorized election official before 8:00 p.m. on election day. Mont. Code Ann. § 13-13-201(2)(e)(i)-(iv). Absentee ballots received after the 8:00 p.m. election day deadline are not counted. Mont. Code Ann. § 13-13-201(3); Mont. Code Ann. § 13-13-211(3); Mont. Code Ann. § 13-19-106(5)(b).

III. Plaintiffs Alleged Constitutional Violations.

Plaintiffs claim that, without furthering any legitimate state interests, the BIPA and Receipt Deadline significantly burden the right to vote and infringe upon the rights to free speech, association, and due process. The Plaintiffs argue that the BIPA and Receipt Deadline violate the fundamental constitutional rights of suffrage, assembly, speech, and due process under Montana's Constitution. Mont. Const. art. II, § 13, § 6, § 7, and § 17[1]. Unless enjoined, Plaintiffs assert that the BIPA and Receipt Deadline will make it significantly more difficult for many Montanans to vote or to have their votes counted.

IV. State's Justifications for the BIPA and Receipt Deadline.

The State argues that the BIPA is necessary to prevent fraud when absentee ballots are collected and delivered. The State contends that the Receipt Deadline is necessary to treat absentee voters the same as in person voters and to provide timely, accurate election results. Because the BIPA and Receipt Deadline are alleged to serve legitimate and compelling state interests, the State argues that the laws are constitutional. The State further argues that Plaintiffs have failed to establish a *prima facie* case showing that a preliminary injunction is necessary.

V. Preliminary Injunction Requirements.

Under Mont. Code Ann. § 27-19-201, a preliminary injunction may be granted:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
> (3) when it appears during the litigation that the adverse party is doing or

[1] Because of time constraints, the Court will address the Plaintiffs' Article II, Section 13 claim and reserve ruling upon the other alleged constitutional violations at this time.

> threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
> (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;
> (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

The above subsections are disjunctive, "meaning that findings that satisfy one subsection are sufficient." *Sweet Grass Farms, Ltd. v. Bd. Of Cty. Comm'rs of Sweet Grass Cty.*, 2000 MT 147, ¶ 27 (quoting *Stark v. Borner*, 226 Mont. 356, 359, 735 P.2d 314, 317 (1987)). Consequently, only one subsection of Mont. Code Ann. 27-19-201 needs be met to support the issuance of a preliminary injunction. *See Stark*, 735 P.2d at 317. Additionally, the "grant or denial of injunctive relief is a matter within the broad discretion of the district court based on applicable findings of fact and conclusions of law." *Weems v. State by & through Fox*, 2019 MT 98, ¶ 7 (quoting *Davis v. Westphal*, 2017 MT 276, ¶ 10).

Further, the district court "does not determine the underlying merits of the case in resolving a request for preliminary injunction." *Weems*, ¶ 18. And "[i]n the context of a constitutional challenge, an applicant for preliminary injunction need not demonstrate that the statute is unconstitutional beyond a reasonable doubt, but 'must establish a *prima facie* case of a violation of its rights under' the Constitution." *Id.* (quoting *City of Billings v. Cty. Water Dist. of Billings Heights*, 281 Mont. 219, 227, 935 P.2d 246, 251 (1997)). "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Weems*, ¶ 18 (quoting *Prima facie*, *Black's Law Dictionary* (10th ed. 2014)). Because Plaintiffs have moved for a preliminary injunction

based on constitutional challenges, they must establish a *prima facie* case of a constitutional violation.

Section 13 of Montana's Constitution states: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13. The right of suffrage is a fundamental right. *See e.g. State v. Riggs,* 2005 MT 124, ¶ 47 (citations omitted) ("A right is 'fundamental' under Montana's Constitution if the right ... is found in the Declaration of Rights.")

Because voting rights are fundamental, statutes like the BIPA and the Receipt Deadline that allegedly infringe upon the right to vote "must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *Montana Envtl. Info. Ctr. v. Dep't. of Envtl. Quality,* 1999 MT 248, ¶ 63; *Finke v. State ex. Rel. McGrath,* 2003 MT 48, ¶ 15. The State must "prove the compelling interest by competent evidence." *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1174 (1996). Merely alleging that a compelling interest exists is not enough to justify interference with the exercise of a fundamental right. *Id.*

VI. Findings of Fact.

1. In support of their Motion for Preliminary Injunction, the Plaintiffs submitted the following Affidavits:

   a. Affidavit of Kenneth Mayer, Ph.D.
   - expert opinions on voter suppression effects of BIPA and Receipt Deadline;

b. Affidavit of Trent Bolger
- Montana Democratic Party Get Out the Vote (GOTV), absentee ballot collection, Receipt Deadline;

c. Affidavit of Beth Brenneman
- Disability Rights of Montana, absentee ballot collection, Receipt Deadline;

d. Affidavit of Shelbi Dantic
- Montana Conservation Voters, absentee ballot collection, Receipt Deadline;

e. Affidavit of Robyn Driscoll
- Chair, Montana Democratic Party, GOTV, absentee ballot collection;

f. Affidavit of Mary Glueckert
- College student, MontPIRG, ASUM, student voting, absentee ballot collection;

g. Affidavit of Denver Henderson
- Missoula County Election Advisory Committee, BIPA, absentee ballot collection, Receipt Deadline, COVID-19;

h. Affidavit of Sophie Moon
- MontPIRG, student voting, Receipt Deadline, working class voters, minority voters;

i. Affidavit of Linda Stoll
- Montana Association of County Clerk and Recorders; BIPA, absentee ballot collection, absentee ballot tracking, absentee ballot verification, proposed BIPA amendments, Native American voting;

j. Affidavit of Mary Hall
- Chief election official for Thurston County, Washington; postmark deadline, counting postmarked ballots after Election Day;

k. Affidavit of Marci McLean
- Executive director of Montana Native Vote and Western Native Voice; GOTV for Indigenous voters on reservations in Montana BIPA.

2. The Court finds that, without exception, all Affidavits were verified and that the material allegations in each Affidavit were made positively and not upon information and belief.

3. The Court finds that, for the purposes of determining whether the Plaintiffs have presented a *prima facie* case for a preliminary injunction, the statements made by the Affiants are credible and based upon extensive personal experience. The Court further finds that the expert opinions expressed by Dr. Mayer are credible and persuasive. Dr. Mayer has extensive education, training, and experience in the field of election administration, the impact of direct and indirect costs[2] on voter turnout, and the relationship between socioeconomic and educational status on the ability to absorb voting costs[3]. The methodology Dr. Mayer used is widely recognized and accepted in his field. Dr. Mayer's expert testimony has been accepted by both state and federal courts[4]. His research has been published in many peer reviewed journals[5]. The Court finds that the State has not challenged Dr. Mayer's opinions.

4. Based upon Plaintiffs' Affidavits, the Court finds that the BIPA and Receipt Deadline will significantly suppress voter turnout by disproportionately burdening voters who are Native American[6], elderly[7], disabled[8], poor[9], parents working low-wage jobs[10], college students[11], first-time voters[12], and voters who have historically relied on GOTV and

---

[2] Includes administrative burdens and compliance costs.
[3] Affidavit of Dr. Kenneth Mayer at 2-3
[4] *Id.*
[5] *Id.*
[6] Affidavit of Linda Stoll
[7] Affidavit of Trent Badger and Affidavit of Robyn Driscoll
[8] Affidavit of Beth Brenneman
[9] Affidavit of Robyn Driscoll and Affidavit of Mary Glueckert
[10] Affidavit of Shelbi Dantic
[11] Affidavit of Mary Glueckert and Affidavit of Sophie Moon
[12] Affidavit of Mary Glueckert

ballot collection services like those provided by Western Native Voice[13], MontPIRG[14], Disability Rights Montana[15], Forward Montana[16], Montana Conservation Voters[17], unionized labor[18], and the Montana Democratic Party[19].

5. The Court further finds that, in opposing the Plaintiffs' Motion for Preliminary Injunction, the State failed to present any evidence to dispute the Plaintiffs' evidence (1) that the BIPA and Receipt Deadline statutes disproportionately burden the voters identified in paragraph 4 above or (2) that the statutes significantly suppress voter turnout by making voting more burdensome and costly for absentee voters.

6. The Court finds that the BIPA and Receipt Deadline statutes will only exacerbate voter suppression because of the COVID-19 pandemic. Requiring absentee voters to line up, fill out a registry form, and be quizzed by an election official before delivering someone else's ballot violates the social distancing required to prevent the unnecessary spread of COVID-19. Because a significant percentage of absentee voters deliver their ballots shortly before or on election day, long lines and crowded election offices will be commonplace[20]. The BIPA's registry requirement eliminated the previous use of secure ballot drop boxes that election officials could place at various sites throughout a community or county to make absentee voting easy, convenient, and safe. The COVID-19 pandemic will only increase absentee voting, thereby amplifying the voter suppression effects of the BIPA and Receipt Deadline[21].

---

[13] Affidavit of Dr. Kenneth Mayer
[14] Affidavit of Mary Glueckert
[15] Affidavit of Beth Brenneman
[16] Affidavit of Dr. Kenneth Mayer
[17] Declaration of Shelbi Dantic
[18] Affidavit of Denver Henderson
[19] Affidavit of Dr. Kenneth Mayer
[20] Affidavit of Dr. Kenneth Mayer
[21] *Id.*

7. Based upon Dr. Mayer's Affidavit, the Court finds that there has never been a documented case of absentee ballot collection fraud in Montana.

8. The Court finds that the Receipt Deadline disproportionately burdens voters who mail their absentee ballots when compared to voters who vote in person. The Receipt Deadline requires mailed absentee ballots to be received by 8:00 p.m. on election day. If a mailed absentee ballot is not received by 8:00 p.m. on election day, it is not counted. The Receipt Deadline deadline disenfranchises voters who vote before election day, but whose ballots are not delivered by the United States Postal Service until after election day. Delivery times can vary as much as two weeks in Montana depending upon a voter's location[22]. Even if living in the same city, delivery times can vary from one to seven days.

9. The Court finds that the disparity and inconsistency of how long it takes to deliver a mailed absentee ballot significantly burdens absentee voters (1) because they must vote at least a week before the election to have a good chance of having their vote counted; (2) because they have less time and information to decide how to vote; and (3) because there is no guarantee that, even by voting a week early, their ballot will be delivered in time to be counted.

10. The Court also finds that there is considerable confusion and misunderstanding among voters about when they must vote by mail. Many believe, based upon filing income tax returns and paying property taxes, that their vote will be counted if postmarked on or before election day. Others reasonably believe that their mailed ballot will be delivered expeditiously if mailed a day or two before election day, especially if mailed to their local election office.

---

[22] *Id.*

11. The Court finds that this misunderstanding and confusion disproportionately burdens first time voters, persons with less education, and persons who have historically relied on ballot collection services.

12. The Court finds that, during the current 2020 election cycle, the combined effects of the BIPA and Receipt Deadline will cause thousands of Montanans to not vote or will result in their votes not being counted.

13. Though the State alleges that the BIPA promotes the State's compelling interest in preventing voting fraud, the Court finds that the State has failed to present any evidence of absentee ballot collection fraud in Montana.

14. The Court finds that the BIPA serves no legitimate purpose: it does not enhance the security or integrity of absentee voting; it does not reduce the costs or burdens of conducting elections; it does not make absentee voting easer or more efficient; it does not reduce confusion about absentee voting requirements; and it does not increase voter turnout.

15. The Court finds that not a single election official in Montana supported the BIPA in legislative hearings; nor has the State presented any evidence from any election official that the BIPA: (1) will promote the integrity, security or efficiency of absentee voting; (2) will reduce election costs or burdens; and (3) will increase voter turnout. The evidence from election officials has been just the opposite. In fact, one election official from Cascade County who testified before the State Administration and Veteran Affairs Committee on February 27, 2020 characterized the BIPA as the "Voter Suppression Act of 2018." Plaintiffs' Ex.3 at p. 24.

16. The Court finds that the State also failed to present any evidence that the Receipt Deadline promotes a compelling state interest.

17. The Court finds that the Receipt Deadline fails to treat in person and absentee ballot voters uniformly. As long as in person voters are in line by 8:00 p.m. on election day, their ballots are counted no matter how many hours after the 8:00 p.m. deadline they actually vote. Not so with absentee voters, whose votes will not be counted if received after the 8:00 p.m. deadline even if they voted days before the deadline.

18. While the State has a compelling interest in accurately tabulating and reporting election results in a timely fashion, the State failed to present any evidence that the Receipt Deadline furthers that interest. The State does not limit the time period for certifying election results; Montana counts federal write-in ballots for military and overseas votes until the Monday after election day and provisional ballots are not even counted until six days after election day. The State failed to present any evidence that using a postmark deadline, where all mailed ballots are counted if postmarked on or before election day and received by the same deadline for federal write-in ballots for military and overseas voters, would frustrate the State's ability to timely certify election results. The Court finds that, by using a postmark deadline, the State can accurately and timely certify election results without disenfranchising the thousands of eligible voters whose ballots are now ignored under the Receipt Deadline.

VII. Conclusions of Law.

1. The Plaintiffs have satisfied their burden of presenting a *prima facie* case through credible and persuasive evidence that the BIPA and Receipt Deadline statutes

burden and interfere with the fundamental right to vote guaranteed by article II, section 13 of Montana's Constitution.

2. The State has failed to demonstrate through competent evidence that there is any compelling state interest that warrants the burdens and interference on the right to vote imposed by the BIPA and Receipt Deadline statutes.

3. If a preliminary injunction is not granted, the BIPA and Receipt Deadline statutes will cause irreparable harm to thousands of Montana voters by preventing absentee ballot voters from voting or by disenfranchising those whose absentee ballots are received after election day.

4. This Court concludes that the BIPA and Receipt Deadline statutes are subject to strict scrutiny and that the State must demonstrate though competent evidence that the statutes further compelling state interests. This Court's decision to grant a preliminary injunction, however, would not change even under the balancing test advocated by the State, i.e. balancing the burdens the statutes impose against the interests the state advances for burdening voting rights. The Court has found that the BIPA and Receipt Deadline statutes advance no legitimate state interests, yet place significant burdens on the fundamental right to vote. The State would not prevail even under the balancing test it advocates.

5. Based upon the evidence submitted thus far, the Court concludes that the Plaintiffs are likely to prevail on the merits and would be entitled to a permanent injunction to enjoin the enforcement of the BIPA and Receipt Deadlines statutes.

6. The Court concludes that, pursuant to Mont. Code Ann. § 27-19-201(1) and (2), a preliminary injunction should issue enjoining the enforcement of the BIPA and

Receipt Deadline statutes because the BIPA and Receipt Deadline statutes violate the right to vote. The Court reserves ruling upon whether these statutes also violate additional constitutional rights as Plaintiffs allege.

VIII. Memorandum.

While not essential to the Court's Findings of Fact and Conclusions of Law, the Court will address the additional arguments asserted by the State.

1. Plaintiffs' delay in seeking a preliminary injunction.

The State argues that Plaintiffs' preliminary injunction motion should be denied because Plaintiffs' delay in seeking a preliminary injunction until just before the June 2 primary election undermines their claim of irreparable harm. Def.'s Resp. 2. In Montana, the right to vote is a fundamental right guaranteed by Montana's Constitution. *State v. Riggs,* 2005 MT 124, ¶ 47. The loss of a constitutional right "constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *Mont. Cannabis Indus. Ass'n v. State,* 2012 MT 201, ¶ 15 (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). As set forth above, the Plaintiffs have shown the BIPA and the Receipt Deadline violate Montanans' constitutional right to vote. The Plaintiffs have demonstrated irreparable harm for the purposes of determining whether a preliminary injunction should be issued.

The State also argues that Plaintiffs should be estopped from complaining about irreparable harm due to their delay in bringing the case. Def.'s Resp. 2. The cases the State cites to support its argument, however, are inapplicable here because those courts were faced with determining irreparable injury for copyright, trademark, and antitrust and trade violations, not constitutional violations. Def.'s Resp. 2-3 (citing *Oakland Tribune, Inc.*

v. Chronical Publ'g Co., 762 F.2d 1374, 1377 (9th Cir. 1985); *Garcia v. Google, Inc.* 768 F.3d 733, 746 (9th Cir. 2015); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2nd Cit. 1985)). The Plaintiffs have shown irreparable harm per se by presenting a *prima facie* case that the BIPA and Receipt Deadline statutes violate Montanans' constitutional right to vote.

2. Timing of preliminary injunction.

The State also argues that the U.S. Supreme Court has "repeatedly emphasized" its disfavor of altering election rules by injunction on the eve of an election because such orders can result in "voter confusion and consequent incentive to remain away from the polls." Def.'s Resp. 3 (quoting *Rep. Nat'l Comm. V. Dem. Nat'l Comm.*, 206 L.Ed. 2d 452, 453-54 (2020) (*pur curiam*); *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). However, the U.S. Supreme Court explained:

> [i]mportantly, in their preliminary injunction motions, the plaintiffs did not ask the District Court allow ballots mailed and postmarked after election day . . . be counted . . . [t]hat is a critical point in the case . . . the District Court unilaterally ordered absentee ballots mailed and postmarked after election day . . . still be counted . . . [e]xtending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election.
>
> *Rep. Nat'l Comm.* 206 L. Ed. 2d 452 at 1206-7.

Rep. Nat'l Comm. is not applicable here for several reasons. First, the relief sought by the Plaintiffs here is the relief granted by this Court. Second, this Court is not altering the "date by which ballots may be cast by voters," but rather whether absentee ballots postmarked on or before election day can be counted. The preliminary injunction does not "fundamentally alter the nature of the election". *Id.* Third, the injunction here will not result in voter confusion nor will it disenfranchise voters. Instead, the Court's preliminary

injunction will mitigate the voter suppression effects of the BIPA and Receipt Deadline statutes. Specifically, those absentee ballots received by the election office after the Receipt Deadline and those delivered by persons outside the statutory exceptions in BIPA will now be counted. Because the preliminary injunction granted here does not "fundamentally alter the nature of the election" or result in voter confusion or disenfranchisement, the State's reliance on *Rep. Nat'l Comm* is misplaced. *Id.*

3. BIPA's passage by referendum.

The State next argues that because the BIPA was passed by Montana voters by a wide majority, the referendum was a "demonstration of a compelling state interest." Def.'s Resp. at 6 (citing *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 384, 632 P.2d 300, 303 (1981)). In *Montana Auto. Ass'n,* the Montana Supreme Court stated that "the statewide vote on I-85 is a demonstration of a compelling state interest in the enactment of I-85." *Id.* However, the Court also declared portions of the initiative unconstitutional. *Id.* While the Montana Supreme Court has recognized that a statewide initiative passed by Montana voters can indicate a compelling state interest, initiatives must still pass constitutional muster. Whether enacted by the legislature or by voter referendum, statutes cannot violate the Constitution. The State's argument that the BIPA's enactment by referendum shields the BIPA from constitutional scrutiny is mistaken.

4. Voter fraud in other states.

The State argues that voter fraud in other states constitutes a compelling state interest for adopting the BIPA. The State contends that Montana "need not wait for evidence of fraud [in Montana] to justify preventative measures." Def.'s Resp. at 7. The State's argument ignores the Plaintiffs' evidence: (1) that the BIPA targets **non-fraudulent**

absentee ballot collection in Montana; (2) that Montana already has a comprehensive set of statutes that prohibit and criminalize fraudulent voting activities, Mont. Code Ann. § 13-35-101 *et seq.;* and (3) that while the BIPA suppresses voting, it does nothing to advance the integrity or security of Montana elections. The State failed to present any evidence that Montana's pre-BIPA statutory scheme for preventing voter fraud would be insufficient to deter fraudulent absentee ballot collection practices. To put in perspective the success of Montana's pre-BIPA statutes prohibiting voter fraud, for the decade from 2006 through 2016, there has not been a single case of ballot collection fraud even though voters cast 7,079,953 absentee or mail ballots in Montana.[23]

For those reasons, the State's reliance on the Morley blog-posting entitled "Election Modifications to Avoid During the Covid-19 Pandemic," Lawfare (Apr. 17, 2020), is misplaced. Morley warns that elections officials should avoid adopting new election strategies in response to the Covid-19 epidemic that may create unforeseen problems with election administration and security. Morley identifies one such strategy as authorizing absentee ballot collection. Morley advises that "election officials should reject ... the use of third-party 'designated persons' – frequently referred to as 'ballot harvesters' – to collect absentee ballots from voters (except in jurisdictions where state law expressly authorizes their use)." Morley recommends that, "[e]lection officials should not expand the use of third-party ballot harvesting, particularly as a response to the pandemic." Morley's concerns do not support the BIPA. The BIPA was not enacted in response to COVID-19; the BIPA targets non-fraudulent absentee ballot collection; and Montana has permitted

[23] Affidavit of Dr. Kenneth Mayer

third-party absentee ballot collection for many years without a single case of fraud being reported.

Based upon the above Findings of Fact, Conclusions of Law, and Memorandum:

IT IS HEREBY ORDERED:

1. The Plaintiffs' Motion for Preliminary Injunction is **GRANTED;**

2. The Defendant and his agents, officers, employees, successors, and all persons acting in concert with each or any of them are **IMMEDIATELY** restrained and prohibited from enforcing the provisions of the Ballot Interference Prevention Act, Mont. Code Ann. § 13-35-701 *et seq.* and the election receipt deadline for absentee ballots set forth in Mont. Code Ann. § 13-13-201(3), Mont. Code Ann. § 13-13-211(3), and Mont. Code Ann. § 13-19-106(5)(b) pending resolution of the Plaintiffs' request that the Defendant be permanently enjoined from enforcing the statutes cited above;

3. All absentee ballots postmarked on or before election day shall be counted, if otherwise valid, provided such ballots are received by the deadline for federal write-in ballots for military and overseas voters; and

4. The Court waives the requirement that the Plaintiffs post a security bond for the payment of costs and damages as permitted by Mont. Code Ann. § 27-19-306(1)(b)(ii).

DATED this 22nd day of May, 2020.

DONALD L. HARRIS, District Court Judge

cc: Peter M. (Mike) Meloy
Matthew Gordon
J. Stuart Segrest, Asst. A.G.
Aislinn W. Brown, Asst. A.G.
Hannah Tokerud, Asst. A.G.

2020 WL 5500028
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

State of COLORADO, and Jena Griswold, Colorado Secretary of State, Plaintiffs,
v.
Louis DEJOY, in his official capacity as Postmaster General, Samarn S. Reed, in his official capacity as the Denver, Colorado Regional Postmaster, Chris J. Yazzie, in his official capacity as the Albuquerque, New Mexico Regional Postmaster, and United States Postal Service, Defendants.

Civil Action No. 20-cv-2768-WJM
|
Signed 09/12/2020

Attorneys and Law Firms

Emily B. Buckley, Michael T. Kotlarczyk, Peter G. Baumann, LeeAnn Morrill, Eric R. Olson, Colorado Attorney General's Office, Denver, CO, for Plaintiffs.

Kevin Thomas Traskos, Lauren Marie Dickey, U.S. Attorney's Office, Denver, CO, for Defendants.

TEMPORARY RESTRAINING ORDER

William J. Martínez, United States District Judge

***1** Plaintiffs State of Colorado and Secretary of State Jena Griswold (jointly, "Plaintiffs"), file this lawsuit against Louis DeJoy, in his official capacity as Postmaster General, Samarn S. Reed, in his official capacity as the Denver, Colorado Regional Postmaster, Chris J. Yazzie, in his official capacity as the Albuquerque, New Mexico Regional Postmaster, and the United States Postal Service (collectively, "Defendants") to enjoin Defendants from delivering by mail to Colorado households a notice regarding the 2020 election.[1]

Currently before the Court is Plaintiffs' Motion for a Temporary Restraining Order ("TRO") (the "Motion"), which was filed earlier today, September 12, 2020. (ECF No. 8.) Given that Plaintiffs also request an injunction in their prayer for relief in their Complaint (ECF No. 1 at 15), the Court will construe the Motion as seeking both a TRO and a preliminary injunction. As to the TRO portion of this motion, the Court finds and concludes as follows.

I. LEGAL STANDARD

"A party seeking a temporary restraining order or preliminary injunction must show (1) a substantial likelihood that the movant eventually will prevail on the merits; (2) that the movant will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest." *NRC Broad. Inc. v. Cool Radio, LLC*, 2009 WL 2965279, at *1 (D. Colo. Sept. 14, 2009). The balance of the harms and public interest factors merge when the government is a party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

II. ANALYSIS

A. Substantial Likelihood of Success on the Merits

On this record, the Court finds a substantial likelihood of success on the merits. Under Article I, section 4, clause 1 of the United States Constitution, the States have the sole authority to determine the "Times, Places and Manner of holdings Elections for Senators and Representatives," subject to the supervisory power of Congress to "make or alter such Regulations." This power is "comprehensive" and

> embrace[s] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of false and corrupt practices, ... in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932). In 2013, Colorado passed the Voter Access and Modernized Elections Act, 2013 Sess. Laws 681, under which all registered voters are sent a mail ballot. (ECF No. 8-1 ¶¶ 4, 6.)

The Notice provides false or misleading information about the manner of Colorado's elections by stating that voters should

"[r]equest [their] mail-in ballot (often called 'absentee' ballot) at least 15 days before Election Day" and "mail [their] ballot at least 7 days before Election Day." (¶ 4; ECF No. 8-2.)[2] In reality, Colorado voters do not need to request a ballot at any time. (¶ 6.) Voters who receive a ballot do not need to mail the ballot back at least 7 days before the election; they may alternatively deposit that ballot at a drop-box or may choose to vote in person up to and including on election day. (¶ 7.) If a ballot is lost for whatever reason, a Colorado voter can request a replacement ballot at any time or vote in person. (¶ 6.) Thus, the Notice, which provides patently false information regarding Colorado elections, jeopardizes Colorado's constitutional right to establish the "Times, Places and Manner of holding Elections."[3]

***2** Plaintiffs have also shown that the Notice likely interferes with Colorado citizens' fundamental right to vote. *See Tashjian v. Rep. Party of Conn.*, 479 U.S. 208, 217 (1986)(recognizing that the right to vote is a fundamental right). As stated above, the Notice gives Colorado voters false and misleading instructions about how they should vote in the 2020 election and does not advise voters of alternative methods to cast their ballot. As a result of false information contained in the Notice, some Colorado voters may not vote because they erroneously believe that: (1) they must request a ballot at least 15 days before the election; (2) they must mail their ballot at least 7 days prior to the election; or (3) they may not vote if they lose their ballot.

Assuming the factual accuracy of Plaintiffs' allegations in the Motion, the Court is deeply troubled by the challenged conduct intentionally undertaken by these Defendants. Accordingly, the Court finds that Plaintiffs have shown a likelihood of success on the merits.[4]

B. Irreparable Harm Unless the Injunction is Issued

The Court finds that Colorado will suffer irreparable harm if the Notice is delivered to Colorado households and that no adequate remedy exists to undo or mitigate Colorado's injury. As Plaintiffs contend, the harm caused to Colorado and its residents implicate basic constitutional rights, namely, Colorado's right to determine the time, place and manner of its elections, as well as Colorado voters' fundamental right to have their votes counted. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote ... constitutes irreparable injury."); *Fleming v. Gutierrez*, 2014 WL 12650657, at *10 (D.N.M. Sept. 12, 2014) (recognizing plaintiffs "would certainly be irreparably harmed if they are unable to vote because of another mismanagement of the election"); *Garbett v. Herbert*, 2020 WL 2064101, at *15 (D. Utah Apr. 29, 2020) (holding the potential of being "unjustifiably shut out from an elections constitutes irreparable injury").

Moreover, the harm to Colorado and its residents will occur as soon as the Notice is distributed to its voters. *See Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016) (recognizing that irreparable injury exists where a court is unable to remedy the harm following a final determination on the merits). Colorado voters have been repeatedly informed that they do not need to request a ballot to vote in the 2020 election. (¶ 6.) The Notice, if distributed, will sow confusion amongst voters by delivering a contradictory message. For example, Colorado voters may wonder whether the Colorado's election laws have changed; wonder whether their voter registration has lapsed; wonder whether they need to request a ballot; wonder whether they need to mail their ballot at least 7 days prior to the election; or wonder whether they can no longer submit a ballot if they have not mailed their ballot at least a week before the election. Even if a subsequent corrective communication is sent to Colorado voters, voters will be left to decide which of the contradictory communications to believe.

Accordingly, the Court finds that Plaintiffs have shown that Colorado and its residents will suffer irreparable harm unless the TRO is issued.

C. Balance of Harms and Public Interest

The Court further finds that the balance of harms and public interest weigh heavily in favor of temporarily restraining Defendants from mailing the Notice to Colorado residents. After all, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1147 (10th Cir. 2013). The Court recognizes that removing the Notice from circulation may impose limited burdens on Defendants. Such burdens, however, pale in comparison to the potential disenfranchisement of registered voters within Colorado and are insufficient to tilt the balance of the equities in the Defendants' favor. *See Fish*, 840 F.3d at 755 (recognizing that imminent disenfranchisement outweighs potential light administrative burdens).

***3** The Court therefore finds that the balance of harms and public interest weigh in favor of the issuance of a TRO.

D. Issuance of a TRO Before Defendants Can Appear or Respond

To obtain a temporary restraining order before the party to be restrained has an opportunity to appear and respond, a plaintiff must present

> (A) specific facts in an affidavit or a verified complaint clearly show[ing] that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> (B) the movant's attorney['s] certifi[cation] in writing [regarding] any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b)(1). As for requirement "A," Plaintiffs provide a sworn declaration from Judd Choate, the Director of Elections for the Colorado Secretary of State, on which the Court has relied to discern the facts meriting a TRO. The Court finds that Plaintiffs have made a sufficient showing that a TRO should issue without further notice, so that the Notice is not immediately distributed to Colorado households. As for requirement "B," Plaintiffs have indicated that they have emailed notice of the action to Defendants' counsel. (ECF No. 6 at 2.) Plaintiffs have also complied with D.C.COLO.LCivR 65.1, describing their efforts to communicate with Defendants' counsel. (ECF No. 6 at 2.)

E. Whether To Issue a Bond

Rule 65(c) states that this Court "may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Although phrased as mandatory, in practice the Court has discretion under this Rule whether to require a bond, particularly in public interest cases involving the fundamental rights of citizens. *See* 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2954 n.29 (3d ed., Apr. 2017 update) (citing public rights cases where the bond was excused or significantly reduced). The Court finds that waiving the bond is appropriate in this case.

III. CONCLUSION

Accordingly, for the reasons set forth above, the Court ORDERS as follows:

1. Plaintiffs' Motion for Temporary Restraining Order (ECF No. 8) is GRANTED;

2. That portion of Plaintiffs' Motion which the Court has construed as a motion for a preliminary injunction remains under advisement;

3. Defendants Louis DeJoy, Samarn S. Reed, Chris J. Yazzie, the United States Postal Service, as well as their officers, directors, agents, employees, successors and assigns, and all other persons in active concert or participation with them, are hereby IMMEDIATELY ORDERED AND RESTRAINED from delivering by mail to Colorado households the official notices attached as Exhibit A to the Declaration of Judd Choate, Director of Elections for the Colorado Secretary of State (ECF No. 8-2);

4. This Temporary Restraining Order shall remain in effect until **11:59 p.m. on September 22, 2020**, unless extended by the Court for good cause;

5. Plaintiffs shall send or deliver a copy of this Order to counsel for Defendants by any means (including multiple means, if appropriate) reasonably calculated to reach counsel for Defendants as soon as practicable. Not later than **9:00 a.m. on September 14, 2020**, Plaintiffs shall file a Certificate of Service confirming their compliance with this directive;

***4** 6. Defendants shall respond to the construed motion for a preliminary injunction by no later than **12:00 p.m. on Tuesday, September 15, 2020**. If Defendants have not been provided actual notice of Plaintiffs' filings and a copy of this Order by 8:00 a.m. on September 14, 2020, Defendants may seek an extension of this filing deadline;

7. Plaintiffs shall file a reply in further support of their construed motion for a preliminary injunction by no later than **12:00 p.m. on Wednesday, September 16, 2020**;

8. No later than **9:00 a.m. on Thursday, September 17, 2020,** Defendants are ORDERED to file with this Court an accounting of **all** notices which are the same, or substantially the same, as the Notice attached as Exhibit A to the Declaration of Judd Choate, and which have already been mailed to postal patrons within the State of Colorado. This accounting will, at a minimum, include the number of such notices mailed to Colorado postal patrons broken down by the first three digits of

the destination U.S. Postal Service Zip Code, *viz.,* **800 through 816**; and

9. A hearing on Plaintiffs' construed motion for preliminary injunction will be held on **Friday, September 18, 2020 at 9:30 a.m. in Courtroom 801A** in the Alfred A. Arraj Courthouse, 901 19th Street, Denver, Colorado, 80294. Among other things, counsel should be prepared at this hearing to address, in the event this Court grants Plaintiffs' construed Motion for Preliminary Injunction, the issue of what steps it may be necessary and appropriate for this Court to order in light of the Notices already mailed and accounted for by the Defendants in Paragraph 8.

All Citations

--- F.Supp.3d ----, 2020 WL 5500028

Footnotes

1 A copy of the notice at issue in the Motion ("Notice") is attached as Exhibit A to the Declaration of Judd Choate, Director of Elections for the Colorado Secretary of State. (ECF No. 8-2.)

2 All "¶" citations, without more, are to the Complaint. (ECF No. 1.)

3 For the same reasons, Plaintiffs have also shown a likelihood of success on their argument that Defendants' mailing of the Notice violates the Tenth Amendment, which grants States the authority to administer elections. U.S. Const., amend. X; *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991) ("[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." (internal citations and quotation marks omitted)).

4 Because Plaintiffs have shown a likelihood of success on their constitutional claims, the Court need not address their statutory claims at this time.