

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

IN RE GEORGIA SENATE BILL 202

GEORGIA STATE CONFERENCE OF THE
NAACP, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official
capacity as the Secretary of State for the
State of Georgia, *et al.*,

Defendants,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

THE NEW GEORGIA PROJECT, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity
as the Georgia Secretary of State, *et al.*,

Defendants,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

Master Case No.: 1:21-
MI-55555-JPB

Civil Action No.: 1:21-
cv-01259-JPB

Civil Action No.: 1:21-
cv-01229-JPB

SIXTH DISTRICT OF THE AFRICAN
METHODIST EPISCOPAL CHURCH, *et al.*,

Plaintiffs,

v.

BRIAN KEMP, Governor of the State of Georgia,
in his official capacity, *et al.*,

Defendants,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

Civil Action No.: 1:21-
cv-01284-JPB

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT ON ADDITIONAL PROVISIONS**

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INTRODUCTION

This brief responds to the following claims addressed in Defendants’ brief in support of their motion for summary judgment on “Additional Provisions,” ECF No. 757-1: SB 202’s voter challenge provisions as a violation of the fundamental right to vote and SB 202’s out-of-precinct voting provisions as a violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973.¹ As to each claim discussed in this brief, Defendants unsuccessfully attempt to disguise conclusory allegations as undisputed facts and fail to demonstrate a bona fide lack of material factual disputes to support their motion. Defendants’ motion for summary judgment should be denied.

ARGUMENT

Summary judgment is appropriate only when there are no genuine disputes of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “All evidence and factual inferences are viewed in the light most favorable to the non-moving party, and all reasonable doubts about the facts are resolved in favor of the non-moving

¹ In this brief, Plaintiffs do not address the following claims raised by State Defendants: SB 202’s out-of-precinct voting, voter challenge, and State Election Board (SEB) takeover provisions as a violation of the results prong of Section 2 of the Voting Rights Act (“VRA”), and SB 202’s out-of-precinct voting and SEB takeover provisions as a violation of the fundamental right to vote. VRA Section 2 claims as to out-of-precinct voting and SEB takeover provisions are addressed in Plaintiffs’ Brief in Opposition to State and Intervenor Defendants’ Motion for Summary Judgment on Discriminatory Intent Claims.

party.” *Libertarian Party of Alabama v. Merrill*, No. 20-13356, 2021 WL 5407456, at *3 (11th Cir. Nov. 19, 2021) (quoting *Hardigree v. Lofton*, 992 F.3d 1216, 1223 (11th Cir. 2021)).

I. Summary Judgment is Inappropriate as SB 202’s Voter Challenge Provisions Violate the Fundamental Right to Vote

A. Background on Voter Challenges in Georgia

Georgia law, as modified by SB 202, provides two procedures for a voter registered within a county or municipality to challenge the eligibility of other voters therein. SB 202 Section 15 modifies O.C.G.A. § 21-2-229 (“Section 229”), which allows for challenges to the qualifications of any voter registration applicant or registered voter. SB 202 Section 16 modifies O.C.G.A. § 21-2-230 (“Section 230”), which allows for challenges to the right of a registered voter to vote in an election.

Unlike prior law, SB 202 specifically permits and encourages mass private challenges to voter eligibility under both Sections 229 and 230 by emphasizing “[t]here shall not be a limit on the number of persons whose qualifications [an] elector may challenge.” SAMF ¶ 505 (DeKalb Cnty Dep. 113:3-18; Cobb Cnty Dep. 148:6-19; SEB Dep. 217:1-6; Fulton Cnty Dep. 173:23-174:10; Bailey (10/6/2022) Dep. 171:6-10; SB 202 as passed (USA-03870, USA-03892, USA-03894)); Response to Def. SMF ¶ 405. Contrary to Defendants’ characterization, ECF No. 757-1 at 5, this change goes beyond merely clarifying prior law, in part because it signals to would-be challengers that the State endorses and encourages efforts to

challenge thousands of voters at once. *See* SAMF ¶ 505 (Cobb Cnty Dep. 148:6-19). SB 202 further emboldens challengers by failing to impose any penalties for bad-faith or baseless mass challenges, even those that have a discriminatory motive or effect. SAMF ¶ 507 (Bailey (10/6/222) Dep. 175:19-176:5; SEB Dep. 235:25-236:21).²

SB 202 further requires counties to adhere to stringent deadlines in reviewing the mass challenges that it expressly contemplates, and it dictates that counties “shall” be sanctioned by the State Election Board (SEB) for non-compliance. O.C.G.A. § 21-2-229. Specifically, where prior law did not mandate review of challenges within a specified period, SB 202 newly requires that county election officials set hearings on Section 229 challenges within ten days of the challenges

² *Compare* Fla. Stat. § 101.111(2) (first degree misdemeanor to file a frivolous challenge); Va. Code Ann. § 24.2-651 (challenger may be subject to misdemeanor charge for hindering, intimidating, or interfering with a qualified voter); Cal. Elec. Code § 18543 (felony to knowingly challenge a person’s right to vote without probable cause; to engage in mass, indiscriminate, and groundless challenging; to fraudulently advise a qualified voter that they are not eligible); D.C. Code § 1-1001.09(d)(2) (precinct official or poll watcher may be subject to prosecution for challenging a voter based on characteristics not related to their registration); Iowa Code § 39A.3(a)(4) (aggravated misdemeanor to knowingly file a challenge with false information); 950 Mass. Code Regs. § 54.04(23)(c) (person who uses challenge procedure for improper purposes can be fined and subject to other legal penalties); Mich. Comp. Laws § 168.727(3) (misdemeanor to challenge a qualified voter simply to annoy or delay them); 17 R.I. Gen. Laws § 17-9.1-29 (misdemeanor to willfully and maliciously challenge another voter without cause and liability for compensatory and punitive damages); Utah Code Ann. § 20A-3a-804(5) (criminal penalties available for individual who files a challenge with false statements).

being filed without exception, including where an election office receives thousands of challenges at once and without regard to the evidentiary quality of the challenges. *Id.* Exacerbating the adverse impacts of the mass challenges, the law requires only three days' notice by mail to challenged voters about a Section 229 challenge hearing. *Id.*

The board of registrars must “immediately” consider a Section 230 challenge and consider whether probable cause exists to sustain it. If probable cause is found for a Section 230 challenge, notification to the challenged voter is required only “if practical.” O.C.G.A. § 21-2-230. Like challenges made pursuant to Section 229, SB 202 provides that the board of registrars “shall” be subject to sanctions for failure to comply with Section 230. *Id.*

B. Legal Standard

In assessing whether a voting law unconstitutionally burdens the right to vote, courts apply the flexible *Anderson-Burdick* test to “weigh the character and magnitude of the asserted First and Fourteenth Amendment injury against the state’s proffered justifications for the burdens imposed by the rule.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019). Courts must first consider the severity of the burden on the right to vote, and then “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Thus, “the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Courts must consider “the extent to which those justifications require the burden to plaintiffs’ rights.” *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1318. “However severe the burden, [courts] must ensure it is warranted ‘by relevant and legitimate state interests sufficiently weighty to justify the limitation.’” *Indep. Party of Fla. v. Sec’y, State of Fla.*, 967 F.3d 1277, 1281–82 (11th Cir. 2020) (quoting *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009)).

Of particular significance to this motion, the “size of [the] burden is a question of fact, as is the extent to which [the state’s] legitimate interests require that it impose the burden.” *League of Women Voters of Fla., Inc. v. Lee*, 576 F. Supp. 3d 1004, 1012 (N.D. Fla. 2021).

C. SB 202’s Voter Challenge Provisions Violate the Fundamental Right to Vote

SB 202’s voter challenge provisions that encourage the filing of frivolous mass challenges and force counties to respond to them quickly place a significant burden on the right to vote. Defendants do not put forward any evidence that even gestures otherwise, instead asserting that the burden on voters is “minimal” with no citations to factual support. ECF No. 757-1 at 14. The record—which Defendants either ignore or mischaracterize—demonstrates a multitude of material facts in

dispute regarding the degree and extent of the burden imposed by SB 202's voter challenge provisions.

Before the 2020 election cycle, voter challenges were used sparingly, if at all. Challenges were typically used only in discrete instances, such as when an individual personally knew that another registered voter did not live at a particular address. SAMF ¶ 504 (SOS Dep. 223:14-224:11; Gwinnett Cnty Manifold Dep. 42:19-43:2; Cobb Cnty Dep. 62:23-63:6; Fulton Cnty Dep. 147:5-13).

Since SB 202 was enacted, voter challenges have ballooned to the tens of thousands, putting the onus on voters to attend hearings on short notice and otherwise actively defend their eligibility. SAMF ¶ 505 (Gwinnett Cnty Manifold Dep. 42:19-45:13; DeKalb Cnty Dep. 115:16-22; Cobb Cnty Dep. 62:3-63:13; SEB Dep. 223:2-13; Fulton Cnty Dep. 170:2-8, 173:11-174:10).

As recent examples indicate, thousands of registered voters have had their ability to vote thrown into limbo by mass challenges. At its March 16, 2023 meeting, the Fulton County Board of Registration and Elections (BRE) voted unanimously to put approximately 4,000 voters into challenged status and stated that they would need to vote provisionally at the next election. SAMF ¶ 513 (Fulton BRE March 16, 2023 Meeting Minutes at 4-5; Fulton BRE March 16, 2023 Meeting at 25:24-2:21:13; Fulton Cnty Dep. 279:15-283:1). On September 6, 2022, the Forsyth County Board of Voter Registrations & Elections (BVRE) sustained hundreds of

voter challenges within 90 days of a federal election. SAMF ¶ 515 (Forsyth BVRE September 6, 2022 Regular Monthly Meeting Minutes at 8-28). Numerous challenges have been filed and even erroneously upheld on the basis that voters are registered at a commercial address or non-traditional residence, despite the law permitting voters to register wherever they reside. SAMF ¶ 509 (SEB Dep. 224:21-228:12, 231:8-232:17; GC013403, GC013405 (Gwinnett BRE August 11, 2022 Meeting Minutes) (placing voters in challenged status for registering at now closed extended stay or RV park)).

Responding to a voter challenge—particularly a mass challenge not based on individualized knowledge—does not merely ask a registered voter to “comply with the registration requirements,” as Defendants claim. ECF No. 757-1 at 14. It is not a “usual burden” for a duly registered voter to be compelled to present evidence of their eligibility at a formal hearing on, at best, a few days’ notice; nor is it a “usual burden” for a duly registered voter to be forced to provide additional evidence of their eligibility at the polls or vote a provisional ballot that may not count—all on the basis of allegations from an unfamiliar private citizen who lacks knowledge of their personal circumstances. Unfortunately, this is the reality created by SB 202. *See* SAMF ¶¶ 501, 508 (CDR01374757-60 (Oct. 11, 2022 OEB); CDR01369922, CDR01370004-06 (2021 Georgia Poll Worker Manual); DeKalb BRE October 25, 2023 Meeting Minutes; GC013446, GC013447 (Gwinnett BRE July 20, 2022

Regular Meeting Minutes); Gwinnett BRE July 20, 2022 Regular Meeting at 5:48-14:54; Gwinnett Cnty Manifold Dep. 49:17-51:24; Fulton Cnty Dep. 165:15-166:24; GCPA Battles Dep. 88:10-89:15; Common Cause Dep. 166:4-167:15; Kaplan, CBS News).

In fact, even when a county ultimately rejects a voter challenge, challenged voters are often forced to overcome significant burdens to maintain their right to vote. As just one example, a registered voter testified at a July 2022 Gwinnett County BRE meeting that she had received notice that she had been challenged by someone she did not know only hours before the hearing; she had lived at her residence for seven years and had correct information on file with the county. SAMF ¶ 508 (GC013446, GC013447 (Gwinnett BRE July 20, 2022 Regular Meeting Minutes); Gwinnett BRE July 20, 2022 Regular Meeting at 5:48-14:54). Had she not managed to testify on her own behalf, it is likely that this appropriately registered voter would have been placed in provisional status.

Challenged voters who testified at the March 2023 meeting during which the Fulton BRE placed thousands of voters into challenged status were the victims of a clerical error, a street name-change by the city, or simply bad analysis by the challenger—none of which are indicia of ineligibility. SAMF ¶ 514 (Fulton BRE Meeting March 16, 2023 Minutes; Fulton BRE March 16, 2023 Meeting at 25:24-2:21:13; Fulton Cnty Dep. 279:15-283:1). At least one voter who spoke at the

hearing stated that they received notice only the day before. SAMF ¶ 514 (Fulton BRE March 16, 2023 Meeting at 1:24:40-1:25:04). Another voter, who stated he was battling cancer and generally homebound, testified that his registration appeared to have an incorrectly transposed digit that he attempted to correct in 2020, but he instead received a letter informing him that his registration had been challenged and he would need to provide proof of eligibility at a BRE hearing. SAMF ¶ 514 (Fulton BRE March 16, 2023 Meeting at 1:48:45-1:52:17). Unlike voters who were able to appear at the hearing and defend their eligibility, registered voters who did not attend were placed in challenged status, meaning that their ability to vote in the next election will be further burdened. SAMF ¶ 514 (Fulton BRE Meeting March 16, 2023 Minutes; Fulton BRE March 16, 2023 Meeting at 2:19:00-2:21:13; Fulton Cnty Dep. 279:15-283:1).

As the examples above demonstrate, the burden on voters is exacerbated by SB 202's requirement that counties set hearings on Section 229 challenges within ten days—regardless of the number of voters challenged—in part because it forces counties to provide notice and schedule a hearing before election officials can research the validity of a challenge. SAMF ¶ 508 (Fulton BRE Meeting March 16, 2023 Minutes; Fulton Cnty Dep. 280:15-281:9).

There is ample evidence demonstrating that SB 202's voter challenge provisions place a significant burden on the right to vote, and Defendants provide

no factual support to the contrary. The severity of the burden imposed by SB 202's voter challenge provisions is a question of fact, *see League of Women Voters of Fla.*, 576 F. Supp. 3d at 1012, over which significant material disputes exist. This alone renders the claim unfit for summary judgment.

Turning to the second step of the *Anderson-Burdick* framework, Defendants hardly attempt to justify SB 202's voter challenge provisions and ignore abundant material facts demonstrating that the law runs counter to their stated goals. The State might have an interest in "maintaining a reliable list of eligible voters," ECF No. 757-1 at 14, but no evidence suggests that private individuals lodging mass challenges to which counties must respond on an accelerated timeline furthers that objective. In fact, the opposite is true—the challenges divert resources from election preparations, including the county's own list maintenance activities. SAMF ¶ 506 (Bailey (10/6/222) Dep. 183:1-19; DeKalb Cnty Dep. 137:6-144:8; Gwinnett Cnty Manifold Dep. 44:22-46:9, 63:3-66:16, 68:2-71:13, 80:11-85:16 (testifying that a mass voter challenge forced staff to work long hours for extended periods of time, leading to potential errors in election administration and contributing to the resignation of two staffers the day before the November election); Gwinnett Cnty Williams Dep. 38:16-39:16 ("[W]e are reassigning staff from other election-related tasks to focus on voter challenges. We are also placing additional resources on the voter challenges to ensure that they are researched and heard within the defined

timeline.”); Fulton Cnty Dep. 160:19-161:17, 173:15-174:10, 278:24-282:7; GC013407, GC013407-10 (Gwinnett BRE September 21, 2022 Meeting Minutes); Gwinnett BRE September 21, 2022 Meeting at 1:09:01-1:57:42).

The State’s own expert, Lynn Bailey, testified that receiving thousands of voter challenges only weeks before an election takes resources and staff time away from critical tasks, such as mailing absentee ballots, administering early voting, training poll workers, and testing equipment. SAMF ¶ 506 (Bailey (10/6/222) Dep. 183:1-19). Handling mass challenges can also require additional budgetary resources for printing and mailing, hiring temporary staff, and overtime hours. SAMF ¶ 506 (DeKalb Cnty Dep. 137:6-144:8; Fulton Cnty Dep. 160:19-161:17, 173:15-174:10, 281:10-282:7).³

Often, mass voter challenges are duplicative of the work already being done in the course of the county’s regular list maintenance activities. SAMF ¶ 506 (Gwinnett Cnty Manifold Dep. 69:24-70:16; GC013407, GC013407-10 (Gwinnett BRE September 21, 2022 Meeting Minutes); Gwinnett BRE September 21, 2022 Meeting at 1:09:01-1:57:42). For example, Gwinnett County election supervisor

³ Some counties developed their own procedures to manage the massive influx of voter challenges that followed the enactment of SB 202 with no training, funding, or additional resources; the State Election Board has not taken any action to implement any administrative rules, produce any trainings, or provide public education about voter challenges after SB 202. SAMF ¶ 502 (Bailey (10/6/222) Dep. 174:20-175:5, 177:7-178:1; SEB Dep. 222:21-223:1, 223:21-224:2, 234:1-235:10).

Zachary Manifold explained that election staff conducted extensive and time-consuming research in the months before the 2022 election to determine that of the approximately 37,500 voters challenged by activist group VoterGA, most of the challenges were either not properly characterized as Section 230 challenges or were based on inaccurate or outdated information. SAMF ¶¶ 510-11 (GC013407, GC013410 (Gwinnett BRE September 21, 2022 Meeting Minutes); Gwinnett BRE September 21, 2022 Meeting at 1:09:01-1:57:42; Gwinnett Cnty Manifold Dep. 43:17-44:21, 54:21-57:8, 57:22-74:8).⁴

And the record demonstrates that Defendants were aware that baseless mass voter challenges could prove problematic for counties in the future by needlessly forcing election officials to divert resources, undermining Defendants' already tenuous rationale. Def. SMF ¶ 222 (Germany (3/7/23) Dep. 194:3-9). Despite these concerns, the State enacted language in SB 202 that *explicitly encouraged* such mass voter challenges and made it *more difficult* for counties to respond effectively by imposing a ten-day deadline on hearings for Section 229 challenges.

Defendants express concern that prior to SB 202, counties “handled the process inconsistently,” ECF No. 757-1 at 5, but they do not explain how imposing

⁴ On October 3, 2022, the Gwinnett County BRE convened a special meeting to address the VoterGA challenges remaining after the significant research conducted by the Board's staff, and the Board narrowly voted 3-2 to dismiss the remaining 776 challenges upon finding no probable cause to sustain them. SAMF ¶ 512 (GC013500, GC013501-02 (Gwinnett BRE October 3, 2022 Meeting Minutes)).

a tight deadline and failing to provide counties with guidance or standardized processes for handling challenges promotes uniformity.⁵

Finally, Defendants produce no evidence that mass voter challenges have prevented any ineligible individuals from registering or voting. *Cf.* SAMF ¶ 505 (Fulton Cnty Dep. 173:11-14 (testifying that “not one” challenged registrant in Fulton County attempted to vote unlawfully)).

The unequivocal evidence from county election officials forced to divert critical resources to fulfill SB 202’s mandate makes clear that SB 202 does not further any state interest in maintaining an accurate voter list or supporting the obligations of registrars to examine elector qualifications; it only burdens challenged voters and county officials. Defendants’ arguments otherwise create a significant and genuine dispute of material fact.

II. Summary Judgment is Inappropriate as SB 202 Restrictions on Out-of-Precinct Provisional Voting Violate the ADA And Section 504

Defendants erroneously assert that restrictions on out-of-precinct voting do not deny disabled voters an equal opportunity to participate in Georgia’s in-person

⁵ Policies and procedures to handle voter challenges vary across counties in Georgia, and not all counties have adopted written policies. SAMF ¶ 503 (CDR01374686-90 (Gwinnett County voter challenge policy); Fulton Cnty Dep. 165:15-166:24; Forsyth County voter challenge policy; CDR01373466-69 (Athens-Clarke Section 229 voter challenge procedures); CDR01376030-33 (DeKalb voter challenge procedures); Bailey (10/6/222) Dep. 178:17-179:1; CDR01374757-60 (State OEB stressing that each county has discretion as to how to handle a challenged voter arriving at the polls).

voting program. ECF 757-1 at 23-24. Because they do, summary judgment must be denied. SB 202 imposed new limits on voting a provisional ballot for voters who arrive at the wrong polling place on Election Day; now, any voter who arrives at the wrong polling location on Election Day before 5:00 P.M. and cannot get to the correct place in time is disenfranchised. O.C.G.A. § 21-2-418 (2022). This provision imposes significant and disproportionate burdens on disabled voters, who already face barriers to voting related to their disabilities, including mobility limitations and lack of access to transportation and information. SAMF ¶ 590 (Schur ¶¶ 10, 39, 66-71). The out-of-precinct restrictions discriminate against disabled voters, in violation of Title II of the ADA and Section 504.

Defendants ignore or misstate the legal bases for AME Plaintiffs' discrimination claims and disregard evidence that will support these claims at trial. Because AME Plaintiffs' claims present questions of fact as to whether persons with disabilities have been excluded from participation in or otherwise discriminated against in the State's in-person voting program, and whether that exclusion or discrimination is due to those voters' disabilities, summary judgment is inappropriate. *See, e.g., R.W. v. Bd. of Regents of the Univ. Sys. of Ga.*, 114 F. Supp. 3d 1260, 1285-86 (N.D. Ga. 2015) (denying parties' cross-motions for summary judgment on ADA claims); *Nat'l Fed'n of the Blind, Inc. v. Lamone*, No. RDB-14-1631, 2014 WL 4388342, at *1 n.6 (D. Md. Sept. 4, 2014) ("NFB"), *aff'd*, *NFB v.*

Lamone, 813 F.3d 494 (4th Cir. 2016); *see also* 8/18/2023 PI Order [ECF 615] at 22 (reasonable modification analysis is “a highly fact-specific inquiry”).⁶

A. Applying the Correct Legal Standards that Defendants Misstate or Omit, Summary Judgment Is Not Warranted

This Court has previously laid out the *prima facie* case for a showing of discrimination under the ADA. ECF 615 at 11-13. Defendants do not contest that AME Plaintiffs’ members or constituents are qualified individuals with disabilities, that the ADA and Section 504 claims should be analyzed together, or that Defendants are public entities that receive federal funding and provide a service, program, or activity. ECF 757-1 at 21-22. AME Plaintiffs therefore focus their opposition on the evidence that voters with disabilities face discrimination due to their disabilities.⁷

First, Defendants erroneously focus their ADA argument on whether Georgia’s voters with disabilities have access to their voting program *as a whole*,⁸

⁶ Plaintiffs also respond to arguments regarding the absentee ballot provisions raised by Intervenor in their brief. ECF 761 at 18-22. References to Defendants also include Intervenor unless otherwise specified.

⁷ Additional context about the legal standards for AME Plaintiffs’ ADA and Section 504 claims and the barriers to voting faced by people with disabilities can be found in Plaintiffs’ Response to Defendants’ Motion for Summary Judgment on Absentee Ballot Provision Claims at Sections IV and V.B.1.

⁸ For this point, Defendants rely on the regulation that applies to physical facilities, 28 C.F.R. § 35.150(a) (ECF 757-1 at 22), but that regulation applies only to **physical accessibility** of “existing facilities,” *see Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (physical accessibility of wheelchair ramps and bathrooms at a courthouse); *see also, e.g.*, 35.150(a)(2) (reference to “historic property”); 35.150(b)(2) (safe harbor provisions listing numerous physical sites such as

rather than on the barriers that the out-of-precinct restrictions impose on their ability to vote *in person* on Election Day, asserting that voters with disabilities may have multiple options to vote in person and absentee. *Id.* at 22-23. As a practical matter, whether disabled voters have other potential ways to vote is irrelevant when they arrive at a polling site on Election Day and are barred from voting entirely because of SB 202's restriction on casting a provisional ballot, since by that time they no longer have the option to vote absentee or early in person.

The proper inquiry is whether Defendants' out-of-precinct provisional ballot restrictions discriminate against voters with disabilities by denying them an equal opportunity to participate in *in-person* voting. *See People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1158-59 (N.D. Ala. 2020). Disabled voters must have the same opportunity to vote on Election Day as nondisabled voters, *see id.* at 1158, whether to have the benefit of all current news and information, to be in community with other voters, or simply because that is when they can get the transportation or help they need to vote (SAMF ¶¶ 591, 673 (Schur ¶¶ 75-77, 94)), and especially because other impediments to voting may give them no other choice. *See infra* Section II.B at 21-24.

swimming pools), not other issues of accessibility like equal opportunity to access a State's voting programs, *see NFB*, 813 F.3d at 504.

Second, Defendants apply the wrong legal standard to AME Plaintiffs' claims that SB 202's out-of-precinct restrictions have a disparate impact on Georgia's disabled voters, denying them an equal opportunity to participate in Georgia's in-person voting program. AME Amended Complaint [ECF 83 in Case No. 1-21-cv-01284-JPB] ("AME Am. Compl.") ¶¶ 354, 358, 367, 370. The regulations implementing the ADA make clear that persons with disabilities must have the "opportunity to participate in or benefit from the aid, benefit, or service" in a way that is "*equal* to that afforded others."⁹ 28 C.F.R. § 35.130(b)(1)(ii) (emphasis added); *see also id.* at § 35.130(b)(1)(iii). One way to show that people with disabilities do not have equal opportunities to benefit from a program and thus are excluded from or denied the benefits of that program is to show that they lack meaningful access to that program.¹⁰ *See, e.g., NFB*, 813 F.3d at 503-04, 506-07;

⁹ Relying on *Democracy N.C. v. N.C. State Board of Elections*, 476 F. Supp. 3d.158, 233 (M.D.N.C. 2020), Defendants mistakenly assert that disabled voters might have multiple options to vote on "equal footing with other voters," thus satisfying the ADA's requirements. ECF 757-1 at 23. Defendants' reference is inapposite; that the *Democracy N.C.* court ruled against a blind plaintiff on one challenged provision because it did not find sufficient evidence to conclude that his inability to use a mailbox was due to his disability, *Democracy N.C.*, 476 F. Supp. 3d. at 233, does not defeat, or even address, the focus of Plaintiffs' claims. It is worth noting, however, that the court in *Democracy N.C.* did find that the plaintiff was denied meaningful access under the ADA by the statute prohibiting him from receiving needed assistance in completing his ballot. *Id.* at 232.

¹⁰ Although some courts in this Circuit have expressed the relevant standard as whether a voting program is "readily accessible," *see People First of Ala.*, 491 F.

People First of Ala., 491 F. Supp. 3d at 1155, 1158-59, 1161; *Westchester Disabled On the Move, Inc. v. Cnty. of Westchester*, 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004).

Plaintiffs need only demonstrate that disability is “***a factor that made a difference in the outcome,***” *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1334 (11th Cir. 1999) (first emphasis added) (quoting *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1077 (11th Cir. 1996)); *see also Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008), which they can do through at least two distinct theories of liability: (1) disparate impact and (2) failure to make reasonable modifications (or accommodations), *see League of Women Voters of Fla. (“LWV”) v. Lee*, 595 F. Supp. 3d 1042, 1157 (N.D. Fla. 2022), *aff’d in part, rev’d in part on other grounds, LWV v. Fla. Sec’y of State*, 66 F.4th 905 (11th Cir. 2023); *NFB*, 813 F.3d at 503 n.5; *L.E. ex rel. Cavorley v. Superintendent of Cobb Cnty. Sch. Dist.*, 55 F.4th 1296, 1303 (11th Cir. 2022).

Under a disparate impact theory, even statutes that do not facially address disability or make distinctions based on disability can still have the effect of depriving disabled individuals’ access to the program due to their disabilities. *See*

Supp. 3d at 1155, 1159-60, 1165, that language is derived from 28 C.F.R. § 35.150, which deals only with physical accessibility of “existing facilities,” *see supra* note 8. The ADA’s meaningful access standard instead requires that public entities “must afford [disabled] persons equal opportunity to ... gain the same benefit” as people without disabilities. *Gustafson v. Bi-State Dev. Agency of Missouri-Illinois Metro. Dist.*, 29 F.4th 406, 412 (8th Cir. 2022) (internal quotations and citations omitted).

People First of Ala., 491 F. Supp. 3d at 1161, 1165 (finding causal link between exclusion from in-person voting and absentee voting based on curbside voting restrictions and photo ID requirements, respectively, and plaintiffs' disabilities). Where, as here, a facially neutral practice or policy has a significant enough disparate impact to raise an inference of causation, liability may be found based on disparate impact. *See, e.g., Nicholas v. Fulton Cnty. Sch. Dist.*, No. 1:20-cv-3688-MLB, 2022 WL 2276900, at *19 (N.D. Ga. June 23, 2022); *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016); *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021); *see also Berg v. Fla. Dep't of Lab. & Emp. Sec., Div. of Vocational Rehab.*, 163 F.3d 1251, 1254 (11th Cir. 1998).

Defendants instead focus on whether a requested accommodation is reasonable (ECF 757-1 at 22-23), but they have failed to meet their affirmative obligation to make reasonable modifications to their in-person voting program to avoid disability discrimination, unless they can show that doing so would fundamentally alter the nature of their program. 28 C.F.R. § 35.130(b)(7).¹¹ Defendants dismiss the significant burden that the out-of-precinct restrictions place on voters with disabilities as only a mere “difficulty” or not their

¹¹ Title II of the ADA uses the term “reasonable modifications,” 28 C.F.R. § 35.130(b)(7), instead of “reasonable accommodations” as is used in Title I of the ADA related to employment, 42 U.S.C. § 12112(b)(5)(A). Courts have used the terms interchangeably and thus AME Plaintiffs do as well in reference to their claim that Defendants have violated 28 C.F.R. § 35.130(b)(7).

preferred accommodation, citing *Todd v. Carstarphen*. ECF 757-1 at 22-23 (citing 236 F. Supp. 3d 1311, 1329 (N.D. Ga. 2017)). Defendants miss the point; *Todd* demonstrates the fact-intensive inquiry necessary to determine denial of meaningful access. *Id.* at 1316, 1329-36.

Moreover, unlike the plaintiff in *Todd*, AME Plaintiffs' members and constituents have not been offered, let alone refused, any reasonable accommodations. *Id.* at 1333-36. As discussed below, *infra* Section II.B. at 24-26, Defendants have not suggested *any* modification that would be effective in preventing the discriminatory effects of the out-of-precinct voting restrictions, and offer no evidence as to how any proposed modification would fundamentally alter the in-person voting program. In any case, determining whether an accommodation is reasonable or would fundamentally alter the program is "a highly fact-specific inquiry." ECF 615 at 22; *see also NFB*, 813 F.3d at 508; *Disability Advocs., Inc. v. Paterson*, 598 F. Supp. 2d 289, 335 (E.D.N.Y. 2009).

Lastly, Defendants do not address AME Plaintiffs' claims that Defendants violate Title II's prohibitions on utilizing discriminatory methods of administration (28 C.F.R. § 35.130(b)(3)(i)-(ii); *see* AME Am. Compl. ¶¶ 320-23, 355, 358, 368, 370) and discriminatory eligibility criteria (28 C.F.R. § 35.130(b)(8); *see* AME Am. Compl. ¶¶ 321, 353, 358, 366, 370), which also present questions of fact.

Applying the correct legal standards to AME Plaintiffs' ADA and Section 504 claims, summary judgment is inappropriate.

B. SB 202's Restrictions on Out-of-Precinct Voting Discriminate on the Basis of Disability

The ADA does not require complete exclusion for an ADA claim to be successful. *See* 12/9/2021 MTD Order [ECF 110] at 36. But complete exclusion—disenfranchisement—may in fact be the inevitable result for disabled voters who arrive at the wrong polling place on Election Day and are denied a provisional ballot.

According to unrebutted expert testimony by Plaintiffs' expert, Dr. Lisa Schur, the out-of-precinct restrictions:

... make it harder for a citizen to vote if they show up at the wrong polling place. If the polling place location has been changed, people with disabilities are less likely to be aware of this given their lower rates of Internet access. Also, for those people with disabilities who arrive at the wrong polling place, the cost of getting to the correct polling place is likely to be high given the transportation difficulties many of them face and their lower likelihood of having a car they can drive.

SAMF ¶ 692 (Schur ¶ 22).¹² Dr. Schur's findings are supported by statistical evidence showing the disproportionate barriers to travel and accessing the Internet

¹² According to county officials, a voter's polling place may change even if their precinct remains the same—from one election to another and even more than once. SAMF ¶¶ 393, 685, 686 (Fulton Cnty. Dep. 197:10-98:13, 199:2-200:1; Cobb Cnty. Dep. 152:7-11); *see also* SAMF ¶ 480 (Fulton Cnty. Dep. 184:3-15 (polling places might need to be relocated due to emergencies such as disease or power outages). Moreover, voter confusion and mistakes increase when precinct boundaries change. SAMF ¶ 687 (Pettigrew at 41). Thus, a disabled voter who has barriers to Internet access and/or transportation could conceivably and reasonably assume that the place

Georgians with disabilities face. SAMF ¶¶ 582-83, 579, 634, 656 (Schur ¶¶ 56-57 (lack of Internet access), ¶¶ 60-63 (transportation barriers), ¶ 103 (barriers to scheduling paratransit)).¹³ In sum, Dr. Schur concluded that the restrictions on out-of-precinct voting “will cause some Georgians with disabilities to be disenfranchised and a further substantial number to face significant difficulties in voting that they would not otherwise face but for SB 202.” SAMF ¶ 692 (Schur ¶ 102).

For example, Georgia ADAPT had to take one 93-year-old woman who used a wheelchair to three polling places because her polling place had changed. No one else could drive her because she needed assistance getting from inside her house to the van. SAMF ¶ 694 (Thornton Decl. ¶ 16). Georgia ADAPT is also aware of a blind voter who was unable to vote because they could not cast a provisional ballot when they arrived at the wrong precinct before 5:00 P.M. on Election Day; the individual did not get “good directions or supports” to get to the correct polling place. SAMF ¶ 693 (ADAPT Vol. II Dep. 39:3-40:4); *see also* SAMF ¶ 877 (GCPA

they previously voted remained the same, without a feasible way to confirm this information or correct the mistake if they arrive at the wrong polling location on Election Day.

¹³ Georgians with disabilities are four times more likely to live in zero-vehicle households (16.3% compared to 3.7%), significantly less likely to be drivers (61.6% compared to 91.9%), and more likely to be financially burdened by travel (58.3% compared to 42.9%) than Georgians without disabilities. SAMF ¶ 579 (Schur ¶ 60). Over 13 percent of Georgians with disabilities need assistance to access the Internet (SAMF ¶ 585 (Schur ¶ 52)) and over 150,000 citizens with disabilities who are eligible to vote in Georgia live in homes without Internet access. SAMF ¶ 582 (Schur ¶ 56).

Battles Dep. 55-57) (a group of senior citizens was almost prevented from voting due to out-of-precinct restrictions). Jessica Mathis, a disabled voter from Chatham County, faces extreme transportation barriers due to her disabilities; if, after arranging for paratransit to vote, her polling place had been incorrect, it would likely have been impossible for her to get to the right location in time to cast a ballot, nor could she have endured waiting in line twice. SAMF ¶¶ 602, 605 (Mathis Decl. ¶¶ 1, 2, 5, 7-8).

Compounding the specific burdens the out-of-precinct restrictions place on disabled voters, those voters also face myriad barriers to voting both in-person and absentee due to their disabilities, which limit their voting options and may leave them with no choice but to vote in person on Election Day. These barriers include challenges with mobility (including difficulty with waiting in line at polling places), needing assistance in daily activities often from non-family members or paid caregivers, as well as significant burdens in accessing transportation and information which directly impact their ability to access other voting options. SAMF ¶¶ 579, 590, 656 (Schur ¶¶ 10, 39, 66-71). Voters with disabilities may be unable to use drop boxes, may have no lawfully authorized assistor available to return an absentee ballot, or may not receive an absentee ballot in time, which could very likely be the reason why a disabled voter has no choice but to vote at a polling place on Election Day. SAMF ¶¶ 600, 615, 616, 670, 695 (Chicoine Decl. ¶¶ 10-12; Mattox 5/11/23

Decl. ¶ 21; Thomas Decl. ¶¶ 1, 4, 5, 7-12, 15-19, 38). Disenfranchisement should not be the consequence.

It is irrelevant that voters with disabilities have the same right to vote in person as other registered voters, and the fact that disabled voters may use accessible voting machines is likewise irrelevant to individuals who are denied the opportunity to cast a ballot altogether. *See* ECF 757-1 at 23. Plaintiffs have presented sufficient evidence that the out-of-precinct restrictions deny Georgia voters with disabilities an equal opportunity to participate in the State's in-person voting program to defeat Defendants' motion on this provision.

Defendants focus only on whether a requested accommodation is reasonable, *id.* at 22-23, but have not suggested any modification that would be effective in preventing the discriminatory effects of the out-of-precinct voting restrictions, and offer no evidence as to how any proposed modification would fundamentally alter the in-person voting program. *See* 28 C.F.R. § 35.130(b)(7); *see also, e.g.*, SAMF ¶ 697 (Hall Cnty Dep. 65:10-16; Cobb Cnty Dep. 153:19-23; Fulton Cnty Dep. Dep. 196:1-9; Kidd Dep. 156:14-57:8; SOS Dep. 285:21-88:14). Indeed, government officials admit that no such accommodations to SB 202's out-of-precinct restrictions are available to avoid discrimination against disabled voters.¹⁴ *See, e.g.*, SAMF ¶

¹⁴ Even if the Court were to consider relief short of rescinding the S.B. 202 restrictions, Defendants would be hard-pressed to argue that it is not reasonable to

696 (Hall Cnty Dep.151:7-12; Cobb Cnty Dep. 104:3-8, 153:9-18; SOS Dep. 211:4-12:15).

Moreover, State officials admit that the flexible rules pre-SB 202 were intended for people who would not be able to travel to the correct polling place safely and in time to vote, and to help and offer “compassion” for people who would otherwise be disenfranchised. SAMF ¶ 688 (SEB Dep. 90:2-13; Mashburn Dep. 85:19-86:7; *see also* SAMF ¶ 691 (Adams Dep. 181:23-83:1). County election officials acknowledge that the prior rules regarding out-of-precinct provisional ballots were not burdensome, and favored leaving them in place, or allowing exceptions to prevent disenfranchisement. SAMF ¶¶ 392, 394, 690 (Adams Survey at USA-ADAMS-000027.00013; Bailey Dep. 10/06/2022 138:1-4; Kidd Dep. 155:13-17; Cobb Cnty Dep. 103:8-04:8; Adams Dep. 181:5-82:13; Kidd Dep. 152:4-54:5, 154:25-55:12).

Despite the obvious benefits of the pre-SB 202 out-of-precinct provisional ballot rules for disabled and other voters, the State did not conduct any studies on the effects of limiting such voting or on which voters would be most likely to vote out-of-precinct on Election Day. SAMF ¶ 689 (SEB Dep. 179:6-13). Nor did the “balance” struck, to allow provisional ballots only from 5-7 P.M., which presumes

allow voters with disabilities who arrive at the wrong precinct before 5 P.M. on Election Day to execute the same sworn statement that S.B. 202 allows for all voters after 5 P.M.

people can drive to their correct polling place in only two hours or less, consider the effect on people who rely on public transportation. SAMF ¶ 691 (Adams Dep. 187:6-88:6); *see supra* note 13 (Georgians with disabilities face disproportionate transportation difficulties compared to their nondisabled counterparts); *see also* SAMF ¶ 962 (Minnite 25) (poor and elderly are less likely to have a car or a license).

For these reasons, there are genuine disputes of material fact as to whether Defendants have met their affirmative obligation to provide reasonable accommodations to prevent discrimination against voters with disabilities in violation of the ADA, which precludes summary judgment.

CONCLUSION

Plaintiffs respectfully request that this Court deny Defendants' Motion for Summary Judgment on Additional Provisions.

Respectfully submitted this 19th day of January, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Plaintiffs' Opposition to State Defendants' Motion for Summary Judgment on Jurisdiction, has been prepared in Times New Roman 14, a font and type selection approved by the Court in L.R. 5.1(C). I further certify that on January 19, 2024, the forgoing was filed with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record in this case.

/s/ Heather Szilagyi _____
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