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

IN RE GEORGIA SENATE BILL 202	Master Case No.: 1:21-MI-55555-JPB

STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON ADDITIONAL PROVISIONS

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INTRODUCTION

Of the various claims addressed in State Defendants' motion, Plaintiffs' opposition addresses only two claims: their fundamental right to vote claim regarding SB 202's voter-challenge clarifications and their claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) regarding the out-of-precinct rule for in-person voting on Election Day.[1] [Doc. 828, p. 1]. Plaintiffs do not make any response to State Defendants' showing that they are entitled to summary judgment on Plaintiffs' constitutional challenges to the out-of-precinct voting rule and the SEB suspension provision, and their claim under the Voting Rights Act to the voter challenge changes, so those claims are abandoned. State Defendants are therefore entitled to judgment as a matter of law on all of those claims.

As to the two remaining claims, Plaintiffs cannot avoid judgment as a matter of law. State Defendants' interest in ensuring that only eligible voters vote far outweighs the slight burden, if any, on the right to vote by the clarification of existing law on voter challenges. And the out-of-precinct rule for in-person voting on Election Day does not deny meaningful access to in-person voting in Georgia for voters with disabilities and therefore does not

[1] In their opposition brief [Doc. 828, p. 1], Plaintiffs also state that their Voting Rights Act claim as to SB 202's out-of-precinct voting provision and the SEB suspension provision are addressed in another brief, [Doc. 822]. This is inconsistent with how this Court directed briefing to take place.

violate either the ADA or the Rehabilitation Act. State Defendants are entitled to summary judgment on these additional provisions of SB 202.

ARGUMENT

Summary judgment is appropriate where there are no disputed issues of material fact. Fed. R. Civ. P. 56(a). Even when hundreds of pages of disputed facts exist, "such disputes do not doom a motion for summary judgment; only genuine disputes of material facts do." *Greater Birmingham Ministries v. Sec'y of Ala.,* 992 F.3d 1299, 1318 (11th Cir. 2021) (affirming grant of summary judgment on plaintiffs' VRA and constitutional challenges to the state's voter identification law based on plaintiffs' failure "to identify any disputes of material fact"). And fact-intensive Section 2 cases are no exception. Where there are no issues of material fact, summary judgment in Section 2 cases can be granted. *See Ga. State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1345 (11th Cir. 2015); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005). Applying these standards here, it is apparent that State Defendants are entitled to summary judgment on all the claims addressed in their motion.

I. State Defendants are entitled to judgment as a matter of law on Plaintiffs' constitutional claims regarding the voter-challenge provisions.

Plaintiffs correctly assert that the *Anderson-Burdick* test is applicable to this Court's analysis of Plaintiffs' constitutional challenge to the voter-

challenge provisions of SB 202. This balancing test requires the Court to "evaluate laws that burden voting rights using the approach of *Anderson* and *Burdick*, which requires us to weigh the burden imposed by the law against the state interests justifying the law." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1261 (11th Cir. 2020). Yet, as the *Jacobson* court recognized, the burden must be identified first before applying the balancing test. *Id.*

There are, however, limits on the powers of federal courts because "States have the power to impose voter qualifications, and to regulate access to the franchise in other ways." *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). Maintaining a reliable list of eligible voters and applying its election laws as written are compelling interests of the state. *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2021 US Dist. LEXIS 261571, at *63-64 (N.D. Ga. Mar. 31, 2021). And, as shown below, Plaintiffs have failed to provide sufficient evidence to create a trial issue on whether the voter-challenge provisions creates any burden on voters.

A. Plaintiffs do not provide evidence of any burden on the right to vote from the voter-challenge provisions.

What Plaintiffs cite as evidence of a burden can be separated into two categories, namely an alleged burden on voters and the burden on county

officials when processing voter challenges. The latter is a *potential* burden on election administration and not a burden on the right to vote.

To the extent that Plaintiffs claim that "[r]esponding to a voter challenge—particularly a mass challenge not based on individualized knowledge" is the burden imposed on the voter's right to vote, as mentioned above, this claim has no basis in law. [Doc. 828, p. 13]. Plaintiffs' claim that "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" [Doc. 828, p. 11] also has no basis in law or in fact, as discussed below.

Plaintiffs' "evidence" that the challenge provisions burden the right to vote are based on speculation as to how the law may have or would have been or will be applied. [Doc. 828, p. 12]. To provide a possible basis for that speculation, Plaintiffs rely on inadmissible hearsay by individual voters [Doc. 828, p. 15] and in many instances, mistakes by county officials such as clerical errors, street name-changes by the city, or "simply bad analysis" in the particular instance of the handling of mass challenges by Fulton County. [Doc. 828, p. 14].

None of this is evidence of a burden on the right to vote. To be sure, Plaintiffs point to instances of voters having to attend hearings "on late notice" [Doc. 828, p. 12] and one voter in particular who would likely have been placed

in pending status but for her attendance at the hearing [Doc. 828, p. 13]. But these instances are based on hearsay and speculation and not admissible evidence.

Similarly, the allegations that Forsyth County sustained "hundreds" of voter challenges within 90 days of the election and that Gwinnett County erroneously upheld challenges [Doc. 828, p. 12] are based on speculation and inadmissible hearsay. To the extent Plaintiffs complain the challenges were erroneously handled, Plaintiffs point again to errors by county officials in applying the law correctly and not a burden on the right to vote. In addition, Plaintiffs also rely on instances in Fulton County of voters not being able to attend hearings which are again, based on inadmissible hearsay. [Doc. 828, p. 13]. Registrars have a duty under Georgia law to ensure that voter rolls are correct and Plaintiffs do not provide any evidence that determining if voters are qualified after finding of probable cause constitutes a severe or even moderate burden on the right to vote. *See* O.C.G.A. §§ 21-2-226, -228.

Plaintiffs attempt to root their opposition to SB 202's challenge provisions in two components of Georgia law. First, Plaintiffs object to the inclusion of a single sentence in O.C.G.A. §§ 21-2-229(a) and 21-2-230(a) which affirms already-existing law that there is no limit on the number of voter challenges that may be brought by a single voter. And second, Plaintiffs

challenge the timeframes included in both sections, asserting that these provisions impermissibly burden the right to vote. [Doc. 828, p. 5].

On the first prong of Plaintiffs' argument that a burden on the right to vote exists, Plaintiffs rely primarily on the mistaken concept that mass voter challenges without individualized evidence are authorized under Georgia law. [Doc. 828, p. 13]. Plaintiffs' argument fails because the contested provision cannot be viewed as a single sentence in a vacuum and must be viewed within the context of the voter-challenge law as a whole. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its policy." *Varsity Carpet Servs. v. Richardson (In re Colortex Indus.)*, 19 F.3d 1371, 1375 (11th Cir. 1994) (citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986)).

In Georgia, the determination of voter eligibility rests solely with county elections officials and arises from their responsibility to determine voter eligibility. O.C.G.A. §§ 21-2-226(a) and 228(a). Georgia law has long permitted voters to challenge the eligibility of other voters either to register to vote (O.C.G.A. § 21-2-229) or to cast a ballot (O.C.G.A. § 21-2-230). Georgia law has never placed a limit on the number of voters a single voter may challenge but requires that the challenges be made on an individualized basis. Voter challenges must be in writing and must "specify distinctly" the grounds for each challenge. O.C.G.A. §§ 21-2-229 and -230 and [Doc. 755, ¶ 405].

Challenges failing on either of these two requirements will not proceed and the voter will likely never realize he or she has even been the subject of a challenge.

Rather, the statute specifically provides that the challenger must prove to the county board of registrars "that the person being challenged is not qualified to remain on the list of electors" under O.C.G.A. § 21-2-229(c), or if the challenge is made to the right of any elector to vote in an election, the county board of registrars is required to "immediately consider such challenge and determine whether *probable cause* exists to sustain such challenge." O.C.G.A. § 21-2-230(b). It is only after the county performs its initial review of each challenge, including a probable-cause determination, that any further inquiry is undertaken that would require action by a voter. But if there is no individualized evidence presented in the challenge, it can (and should) be rejected by county officials as failing to meet the probable-cause requirement. [Doc. 755, ¶ 406 (Germany 3/7 208:18-25)]. Thus, "mass challenge[s] not based on individualized knowledge" [Doc. 828, p.13], are neither contemplated by nor provided for under Georgia law and are not sanctioned by the Secretary's office or by the State. Despite claiming that the "State endorses and encourages "the filing of frivolous challenges," [Doc. 828, p. 5], Plaintiffs provide no evidence in support. To the contrary, the statutory requirement of individualized evidence refutes this claim on its face.

Plaintiffs' argument that something changed after SB 202 is also belied by the reality on the ground. Voters challenging multiple voters dramatically increased after the 2020 election and leading up to the 2021 runoff, predating SB 202. [Doc. 755, ¶ 222]. However, during the 2020 election cycle, mass challenges based on the National Change of Address database, were dismissed for lack of probable cause. [Doc. 755, ¶ 406].

Second, to the extent that Plaintiffs criticize the timeframe for addressing the challenges, Plaintiffs' claims that these provisions "burden voters and election officials" is simply incorrect. [Doc. 828, p. 10]. The undisputed testimony in this case establishes that counties were handling the challenges inconsistently, with some placing limits on the number of challenges and others refusing to hear the challenges altogether. [Doc. 755, ¶ 223]. Thus, the burden of any "mass" challenge is on county officials, not on the voters themselves or on the right to vote. And obviously, Plaintiffs lack standing to assert the interests of county officials.

Finally, the remaining evidence of a burden also relates to the actions of county officials, which is not relevant to determining whether there is a burden on the right to vote—because the operation of county offices is the administration of the election, not a relevant data point for a burden on the right to vote. *Common Cause/Georgia*, 554 F.3d at 1352.

B. The state's interest more than justifies any minor burden.

Because the burden on the right to vote is non-existent or minimal and only arises after individualized evidence and a probable-cause determination, the State's regulatory interests are more than sufficient to justify the law. *Curling v. Raffensperger*, 50 F.4th 1114, 1122 (11th Cir. 2022). Further, Georgia's voter challenge law is recognized as "one way in which voter rolls may be scrutinized close to an election." *Fair Fight Inc. v. True the Vote,* __ F. Supp. 3d __, No. 2:20-CV-00302-SCJ, 2024 U.S. Dist. LEXIS 22, at *6 (N.D. Ga. Jan. 2, 2024). And where, as here, "the statute has a 'plainly legitimate sweep,'" Plaintiffs' challenge must fail. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (finding that "protecting the integrity and reliability of the electoral process" was sufficient justification for the challenged law). Maintaining a reliable list of eligible voters is a compelling state interest. *Fair Fight Action v. Raffensberger,* No. 1:18-CV-5391-SCJ, 2021 U.S. Dist. LEXIS 261571, at *64-*64 (N.D. Ga. Mar. 31, 2021).

Plaintiffs' claim that requiring county officials to timely respond to voter challenges does not advance any state interest is false. [Doc. 828, p. 16]. The undisputed testimony is that, while some counties were setting arbitrary limits on the number of challenges that could be filed, others were ignoring the challenges altogether. [Doc. 755, ¶223]. Leaving the status of voters in limbo indefinitely undermines the state's compelling interest in maintaining an

accurate list of voters. Plaintiffs list testimony by various current and former county officials concerning their efforts in processing voter challenges, but this evidence does not help the Court. The cited testimony concerned speculation about possible future challenges or staffing and workflow concerns, while much of it is based on hearsay generally and statements contained in meeting minutes. [Doc. 828, pp. 17-18]. Thus, none of this "evidence" has anything to do with any burden of any voter's right to vote and cannot overcome summary judgment.

In short, the state's regulatory and compelling state interests are more than sufficient to justify any slight burden placed on voters by the voter-challenge provisions. There is no dispute of material fact on this issue. State Defendants are therefore entitled to judgment as a matter of law.

II. Georgia law provides meaningful access to in-person voting to voters with disabilities and the out-of-precinct provisions do not violate the ADA or the RA.

Nor have Plaintiffs provided evidence sufficient to establish a trial issue material to their ADA or Rehabilitation Act (RA) claims. As a threshold matter, State Defendants do not contest that Plaintiffs' constituents are qualified individuals with disabilities or that voting is a public activity within the meaning of the ADA and the RA. But State Defendants strongly oppose Plaintiffs' claim that voters with disabilities lack meaningful access to voting in-person in Georgia because of the law on out-of-precinct voting.

Meaningful access under the ADA does not guarantee equal access, preferential treatment, or an absence of difficulty accessing a benefit. *Medina v. City of Cape Coral,* 72 F. Supp. 3d 1274, 1279 (M.D. Fla 2014). Plaintiffs' suggestion that the ADA requires equal access was correctly rejected by this Court in earlier rulings. [Doc. 615 p. 16]. Rather, the ADA entitles persons with disabilities to "'reasonable accommodations, not to optimal ones finely tuned to their preferences.'" *Id.* Also, the unavailability of the preferred method of participation does not establish lack of meaningful access. *Todd v. Carstarphan,* 236 F. Supp. 3d 1311, 1330 (N.D. Ga. 2017). If "reasonable accommodations" are "offered or [are] already in place the [ADA] claims must fail." *Medina,* 72 F. Supp. 3d at 1280. Summary judgment is warranted on access claims where, as here, there is no genuine issue of material fact on the issue of whether Plaintiffs' constituents are afforded meaningful access to voting in person in Georgia. *Id.*

A. The correct legal standard is to review the voting opportunities as a whole.

Plaintiffs do not provide any authority from the Eleventh Circuit which limits the scope of this Court's review of the ADA and the RA claims in this case to less than the State's voting program as a whole.[2] When considering all

[2] One case on which Plaintiffs rely heavily, *Natl. Fed. for the Blind v. Lamone,* 813 F.3d 494, 504 (4th Cir. 2016) actually cautions against viewing the voting

the methods of voting including absentee voting, mail in voting, advance in person voting, and Election Day voting, voters with disabilities have meaningful access to voting in Georgia.

But even if the Court were to consider only the availability of *in-person* voting in Georgia, voters with disabilities are not denied meaningful access to in-person voting. In-person voting is conducted for three full weeks before Election Day for all voters in Georgia. And during advance voting, voters can vote at any location in their county. In addition, at all times during advance voting and from 9:30 to 4:30 on Election Day, voters with disabilities can go to the front of the line and vote on the next available voting machine. O.C.G.A. §§ 21-2-385.1, -409.1.

Plaintiffs' claim for disparate treatment is based on the claims of their expert that persons with disabilities are more likely to have less access to the internet to check for precinct changes and are less likely to have access to transportation to the correct precinct in the even they arrive at the incorrect precinct. [Doc. 828, p. 27]. While State Defendants do not make light of the difficulties faced by voters with disabilities, their difficulties are the same as other voters who have limited access to the internet and have limited access to transportation and wait until Election Day to vote and end up at the wrong

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program in too granular a fashion when analyzing claims under the ADA and the RA.

precinct. Thus, these difficulties are not unique to voters with disabilities and the law does not treat them differently based upon their disability. In fact, the out-of-precinct voting rule does not apply to all voters with disabilities but rather, only to the limited subset of voters who go to the wrong precinct before 5pm on Election Day. Again, the ADA and the RA do not guarantee the absence of difficulties, just meaningful access. *Todd,* 236 F. Supp. 3d at 1330. And Plaintiffs have failed to provide sufficient evidence to create a trial issue on that question.

B. Plaintiffs' proposed accommodation is not reasonable.

Moreover, the reasons for the changes made by SB 202 to the out-of-precinct voting rules are well established and are not challenged by Plaintiffs. Beginning with the 2018 election, there was an increase in the number of provisional ballots cast. [Doc 755, ¶ 216]. Processing provisional ballots cast in the wrong precinct requires county elections officials to manually duplicate the ballots for each voter's eligible races which is time consuming and impedes their ability to complete carry out other important tasks. [Doc. 755, ¶ 217]. Processing out-of-precinct provisional ballots slows voting on Election Day and increases concerns about the potential for voter fraud. [Doc. 755, ¶ 218]. Duplication of each provisional ballot took between 15 and 20 minutes. [Doc. 755, ¶ 386]. And voters viewing the ballot duplication process lodged

complaints based on the mistaken belief that officials were meddling with the election. [Doc. 755, ¶ 387].

However, rather than completely banning out-of-precinct ballots like many other states, Georgia provided a process of directing voters to the correct precinct until 5pm on Election Day and then permitting them to vote out-of-precinct after 5pm if they could not get to their correct precinct in time. [Doc. 755, ¶ 219]. This is more access than in many states, because fewer than half of the states count out of precinct provisional ballots. [Doc. 755, ¶ 220].

In light of this reality, Plaintiffs are not really asking for an accommodation—they are asking for a complete change in the law to their preferred policy. Plaintiffs ask the Court to do away with the out-of-precinct voting rules in SB 202 in their entirety and return to the pre-SB 202 processes. [Doc. 828, p. 19]. But to eliminate those out-of-precinct voting rules would upend Election Day voting for all voters and return to the problems of lines at the polls caused by the additional time required to process provisional ballots during voting and afterwards, cause voter concerns with election meddling to resurface, and ultimately interfere with the smooth administration of elections.

Plaintiffs' proposed accommodation is not a reasonable one because it would affect every out-of-precinct voter. Plaintiffs have meaningful access to voting given all the forms of voting available in Georgia and the State is not

required to guarantee the preferred method to establish meaningful access. *Todd,* 236 F. Supp. 3d at 1330.

In short, there is no issue of material fact as to the lawfulness of the challenged provision under the ADA and the RA. State Defendants are entitled to judgment as a matter of law.

CONCLUSION

Plaintiffs have not presented evidence sufficient to create an issue of material fact. State Defendants' motion for summary judgment on additional provisions should be granted.

Respectfully submitted this 14th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing brief was prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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