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 THEIR MOTION FOR SUMMARY JUDGMENT ON SB 202'S PROVISIONS FOR DROP BOXES AND MOBILE VOTING UNITS

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INTRODUCTION

Plaintiffs' opposition ignores dispositive legal principles and glides over critical undisputed facts. And the factual disputes Plaintiffs raise are not material to the disposition of this case.

Most important, Plaintiffs do not dispute that the drop box and mobile voting facility provisions are facially neutral. Nor do they dispute that "the difference between white and Black turnout remained essentially the same after SB 202[.]" Pls.' [Corrected] Opp. to State Defs.' Mot. Summ. J. 21–22 ("Opp.") [Doc. 835]. And they concede that a single election provides an insufficient basis to evaluate shifts in voting demographics. *Id*. at 22. Yet Plaintiffs wish to transform emergency measures instituted in 2020 under the extraordinary circumstances of the pandemic into the statutory and constitutional baseline by which any further election laws must be judged. But that approach is supported by neither governing law nor relevant facts.

For example, Plaintiffs do not dispute that no drop boxes of any kind were used in Georgia before 2020, nor do they dispute that SB 202 provided the first explicit statutory authority for drop boxes in Georgia. To be sure, Plaintiffs nevertheless claim that drop boxes were already authorized by O.C.G.A. § 21-2-382 (2019). But the fact that not a single county installed a single drop box until the State Election Board ("SEB") issued an emergency rule authorizing drop boxes during the 2020 pandemic election indicates that

the earlier statute's authorization of "additional sites as additional registrar's offices or places of registration for the purpose of receiving absentee ballots"—which do not sound like drop boxes—was seen as applying only to locations *inside* buildings. *Id.* § 21-2-382(a) (2019). Under the undisputed facts, in Georgia, outdoor drop boxes were a 2020 innovation.

While Plaintiffs largely ignore the recent history of the pandemic and the government's response to it, much of Plaintiffs' briefing focuses on irrelevant and decades-old history of discrimination. Yet, as explained in the reply brief on discriminatory intent, the Eleventh Circuit has "rejected the argument that a racist past is evidence of current intent." *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 923 (11th Cir.) ("*LWV I*") (quoting *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1325 (11th Cir. 2021) ("*GBM*")), *reh'g en banc denied*, 81 F.4th 1328 (11th Cir. 2023) ("*LWV II*"). Rather, courts should apply "the presumption of legislative good faith" even in the light of "a finding of past discrimination." *Id.* (quoting *Abbott v. Perez*, 585 U.S. 579, 603 (2018)).

Plaintiffs' reticence about recent history speaks volumes. The history of the pandemic explains why governments promptly implemented measures that prioritized health and safety. Emergency provisions are temporary by nature. And it should be obvious that emergency measures, if they are continued at all, may be modified after the emergency passes to take into

account concerns of security, efficiency, and both actual and perceived election integrity.

To make such interim emergency measures into a new constitutional and statutory baseline against which future permanent laws must be measured "would create a 'one-way ratchet' that would discourage states" from ever increasing, modifying, or streamlining voting procedures--"lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016). And it would discourage robust and creative emergency responses. This Court should not follow that path.

Plaintiffs also overlook that there is no right to vote absentee, so there cannot possibly be a right to vote absentee in any particular way. Moreover, in Georgia, it is undisputed that anyone wishing to cast an absentee ballot without using an indoor drop box need only use a mailbox. There are thousands more mailboxes, which consequently are far closer to many more voters, than there ever were drop boxes. The drop box provisions thus place no cognizable burden on anyone's right to vote.

Like their other arguments, Plaintiffs' arguments under the disability laws place talismanic significance on outdoor drop boxes while ignoring the availability of mail or return by a family member or caregiver as a means of accessing absentee voting without entering a building. Even if Plaintiffs were

correct that requiring persons with disabilities to vote indoors in ADA-compliant facilities amounted to an ADA violation—a dubious and unsupported premise—the mailbox option is a reasonable accommodation that gives persons with disabilities an equal opportunity to vote absentee.

There also is no legal basis to enshrine the emergency use of bus-mounted mobile voting facilities as a permanent and untouchable means of voting. The burden of going to a polling place is an inherent burden of voting if a voter chooses to vote in person. No law requires giving county officials the power to bring the polling place to whatever voters the officials might decide to favor in a particular voting cycle.

Plaintiffs, moreover, suggest no limiting principle for what they view as an expansive right to demand that states provide ever more convenient voting options. But the law is clear that subjecting voters to the usual burdens of voting by setting reasonable and nondiscriminatory rules—such as requiring voters to go to a polling place at limited times, even on a single day, or to find a nearby mailbox—is not an unacceptable burden on voting. States are not required to implement every convenience that some subset of voters or activists may prefer. The Constitution allocates to state legislatures the task of weighing the costs and benefits of election policies and procedures.

Summary judgment is therefore warranted on all claims relating to drop boxes and mobile voting facilities.

ARGUMENT

I. Plaintiffs Have Raised No Triable Issue As to the Legality of SB 202's Drop Box Provisions.

As to their drop box claims: Plaintiffs have advanced no sound distinctions between the drop box provisions of SB 202 and those approved by the Eleventh Circuit in *LWV I*, 66 F.4th at 934–36; *see also League of Women Voters of Fla. Inc. v. Fla. Sec'y of State,* 81 F.4th 1328, 1331–32 (11th Cir. 2023) ("*LWV II*") (op. of Pryor, Grant & Brasher, JJ., respecting denial of reh'g en banc). Plaintiffs point out (at Opp. 21) that *LWV I* addressed the sufficiency of the evidence after a trial, but they can't explain how the legal sufficiency of undisputed evidence at summary judgment differs. Evidence that cannot sustain a judgment also cannot create a triable issue of fact necessary to forestall judgment. The drop box claims should proceed no further—whether under the Voting Rights Act, the Constitution, the ADA or (relatedly) the Rehabilitation Act.

A. As a matter of law, the drop box provisions do not violate the Voting Rights Act.

Although Plaintiffs suggest that voting rights cases impose a higher standard for summary judgment, summary judgment is appropriate where dispositive facts are not in dispute, and where claimants "have failed to meet their burden … under section 2 of the Voting Rights Act." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999). That is the case here, as it was in *GBM*, 992 F.3d at 1317–18 .

Plaintiffs maintain that the "Supreme Court has declined to endorse a dispositive test" in evaluating VRA Section 2 claims. Opp. 2. As the Motion explained, however, the standards are clear enough to apply here. State Defs.' Mot. for Summ. J. on SB 202's Provisions for Drop Boxes and Mobile Voting Units 10–12 ("Mot.") [Doc. 760]. A facially neutral election law that imposes no cognizable burden on voting cannot violate Section 2, especially when any disparate impact is minimal and sound policies support the statute.

Plaintiffs cannot meet the challenge of demonstrating that SB 202's reasonable and nondiscriminatory drop box authority somehow violates the VRA. As the Eleventh Circuit held, "if the rule imposes only 'reasonable, nondiscriminatory restrictions,' then 'a State's important regulatory interests will usually be enough' to justify it." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1280 (11th Cir. 2020) ("*NGP*") (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)); *see also Curling v. Raffensperger*, 50 F.4th 1114, 1124 (11th Cir. 2022). Plaintiffs' task in this case is particularly onerous, as the challenged provisions provide flexibility and opportunity in voting that go far beyond what was available in 1982—and 1982, not 2020, is the baseline year for VRA analysis. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338–39 (2021).

"[T]he core" of Section 2 claims "is the requirement that voting be 'equally open,'" considering the State's political process "as a whole." *Id.* at

2338, 2339. Under SB 202, every voter has *equal* access to polling places, mailboxes, and drop boxes, although Plaintiffs would like some counties to be able to provide more drop boxes than are currently allowed. Given the many options available to vote early or on election day, Plaintiffs have not raised a triable issue as to the "equally open" opportunity to vote irrespective of race.

1. The drop box provisions do not impose a cognizable burden on voting given the undisputed and far broader availability of mailboxes for absentee voting.

Plaintiffs fail at the threshold because they are unable to raise a triable issue of fact as to the supposed burden on minority voters. While "[a]ll election laws burden the right to vote," *NGP*, 976 F.3d at 1284 (Lagoa, J., concurring), not all burdens present cognizable burdens under the VRA.

Plaintiffs do not meaningfully dispute that traveling to a polling place—or a mailbox—is one of the "'usual burdens of voting,'" and thus not a cognizable burden under VRA § 2. *Brnovich*, 141 S. Ct. at 2338 (quoting *Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 198 (2008)). Nor do Plaintiffs dispute that there is no separate right to vote absentee, *see McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969), let alone a right to every mechanism that might make absentee voting more convenient, *see Brnovich*, 141 S. Ct. at 2338. Plaintiffs thus have not begun to carry their initial burden.

But they also do not dispute that the State has provided many alternate methods of voting. Instead, Plaintiffs mischaracterize as "barriers" to voting

the need to travel some distance to use a drop box, Opp. 40, 48, but some inconvenience suffered to use a novel means of voting when multiple other means exist is no "barrier." Rather, "any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means." *Brnovich*, 141 S. Ct. at 2339. In addition to normal, election-day polling, Georgia allows for no-excuse absentee voting, O.C.G.A. § 21-2-380(b); 17 mandatory days of early voting with optional Sundays (for a total of up to 19 early voting days), *id.* § 21-2-385(d)(1); drop boxes in every county, *id.* § 21-2-382(c)(1); and weeks of early voting through the mail, *id.* § 21-2-384(a)(2). Georgia laws as a whole "make[] it very easy to vote." *Brnovich*, 141 S. Ct. at 2330.

Nor do Plaintiffs dispute that those means are available equally to voters of all races. They simply want to use the VRA to require the State to add the convenience of unlimited outdoor drop boxes to election-day voting, early voting, indoor drop box voting, and voting by mail. But the law does not require the State to supply mere desired conveniences. *See Brnovich*, 141 S. Ct. at 2338.

Given the undisputed proliferation of mailboxes, *see* State Defs.' Consol. Statement of Material Facts in Support of Mot. Summ. J. ¶ 327 ("SOF") [Doc. 755] (citing Grimmer Rep. ¶ 106 (Defs.' Ex. DDDD); *Atlanta Mailboxes and Post Offices,* Mailboxlocate.com, https://tinyurl.com/2vxcdhxh (last visited May

14, 2024)); Consol. Pls.' Resp. to State Defs.' Consol. Statement of Material Facts ¶ 327 ("PRSOF") [Doc. 807])—the principal option for returning absentee ballots, *see* O.C.G.A. § 21-2-385(a)—SB 202 does not eliminate or meaningfully limit any access to anyone. Where a voter may select among multiple options, as a matter of law there is no interference with the right to vote. *See*, *e.g.*, *NGP*, 976 F.3d at 1281.

Confirming the lack of burden under the VRA is "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982." *Brnovich*, 141 S. Ct. at 2338–39. In 1982, "States typically required all voters to cast their ballots in person on election day," and "allowed only narrow and tightly defined categories of voters to cast absentee ballots." *Id*. Georgia's no-excuse absentee ballot voting, with drop boxes required in every county for the first time, is far more generous than the 1982 standard. Plaintiffs dispute none of this, but just ask the Court to bury it. Opp. 20–21.

Plaintiffs also do not dispute that no drop boxes of any kind were used in Georgia before the emergency rules of 2020. Yet they assert that drop boxes were previously authorized by O.C.G.A. § 21-2-382. *See* Opp. 4–5. Plaintiffs cite Ryan Germany's 2022 email—sent long after SB 202 was enacted—containing draft talking points for the Secretary of State, talking points that defended the SEB's earlier emergency drop box authorization on the ground that local election authorities might have concluded that Georgia law already

authorized drop boxes. *Id.* (quoting Germany email (Pls.' Ex. 198). But Mr. Germany's email raising the possibility made clear that "none of" the local officials "had yet" tried to install drop boxes before the SEB issued its temporary emergency rule. *Id.* at 4 (quoting Pls.' Ex. 198).

The text of former O.C.G.A. § 21-2-382 does not expressly prohibit or authorize drop boxes. The former statute does not mention drop boxes, but authorizes "additional sites as additional registrar's offices or places of registration for the purpose of receiving absentee ballots"; those "additional sites" were authorized only in certain enumerated public buildings or "a location that is used as an election day polling place[.]" O.C.G.A. § 21-2-382(a) (2019). Even if drop boxes qualify as "additional sites as additional registrar's offices or places of registration," the only ambiguity that might have permitted drop boxes to be placed somewhere other than in a building was the authority to put an "additional site" at an "election day polling place." *Id.* "[W]herever practicable," polling places were required to be in "public buildings." *Id.* § 21-2-266(a) (2013). In the setting of a pandemic, however, the practicability proviso in the polling place section might have arguably created ambiguity. Yet it is unsurprising that no county was confident enough to test the existence of drop box authority before the SEB issued its temporary emergency rule. *See* SOF ¶ 299; Ga. State Election Bd., Ga. Comp. R. & Regs. 183-1-14-0.8 to.14 (2020) (Defs.' Ex. VVVV).

But even if the Court were to accept Plaintiffs' interpretation of former § 21-2-382, their argument is based on language that was only added in 2019. Before that, the statute explicitly required that all locations for absentee ballot voting be in a "government building" of one kind or another. *See* O.C.G.A. § 21-2-382(a) (2010). So any potential authority for drop boxes existed for only one year before 2020, long after the 1982 Voting Rights Act baseline, and was never implemented before the SEB's emergency authorization.

Thus, Plaintiffs cannot raise a triable issue of fact that the drop box provisions "actually make[] voting harder for African Americans," *GBM*, 992 F.3d at 1330 (citation and emphasis omitted), or any other racial group, than for anyone else. The drop box provisions actually make voting more convenient and easier when compared with the pre-2020 baseline, and provide permanent access to an additional means of returning ballots while leaving in place the widespread and convenient option of using the mail.

2. On the undisputed facts, the racially neutral drop box provisions create no cognizable disparities in impact on members of different racial groups.

The SB 202 drop box standards are also facially neutral and generally applicable with respect to race and ethnicity. And Plaintiffs do not dispute that the limitations on drop boxes are uniform for all counties regardless of racial composition.

In the absence of any showing that the locations of polling places or mailboxes are discriminatory—and those locations are chosen by counties and the USPS, not the State Defendants—Plaintiffs have no claim. And they did not purport to make any such showing. Indeed, they do not even claim that the early voting locations chosen by counties for the installation of drop boxes are discriminatory.

Moreover, "§ 2(b) is an equal-treatment requirement, not an equal-outcome command." *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). The *Brnovich* Court cautioned that "the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. The size of any disparity matters." *Brnovich,* 141 S. Ct. at 2339. "[S]mall disparate impacts on members of minority groups" are not enough. *Id.* at 2330. Plaintiffs' efforts to create factual disputes do not invoke any sufficient disparity.

On the most important statistic, that of actual votes cast, the changes made by SB 202 had no meaningful impact on black and white voter turnout. Plaintiffs agree that "the difference between white and Black turnout remained essentially the same after SB 202[.]" Opp. 21–22. Plaintiffs instead present separate data about changes in absentee voting or use of drop boxes in isolation.

That analysis asks the wrong question. Absentee votes are not worth more than in-person votes, and absentee votes cast in a drop box have no higher value than absentee votes that are mailed or returned in person to an election office. That members of some racial groups shift between in-person, mail, and drop box voting at different rates from time to time does not mean anything at all. The shifts show only that Georgia's election system provides all voters with equal access and flexibility.

In any event, the data relating to drop boxes and absentee voting is insufficient to raise a triable issue of discriminatory impact. Plaintiffs concede that they have race-based drop box data only for a single Georgia county because "Douglas County is the only county in Georgia that recorded drop box use by race of voter in the 2020 election cycle." Opp. 18 (citing Consol. Pls.' Statement of Add'l Material Facts ¶¶ 334–35 ("PSOF") [Doc. 807-1]; Burden Rep. 33–34 (Pls.' Ex. 85); Kidd 114:16–116:8 (Pls.' Ex. 63)). But even here the differences were not great. As Plaintiffs acknowledge, in that year, "Douglas County Black voters were 4.1 percentage points more likely than other voters to return absentee ballots via drop boxes; in January 2021, these voters were 6.0 percentage points more likely than other voters to return

absentee ballots via drop boxes." *Id.* (citing PSOF ¶¶ 334–35 [Doc. 807-1]; Burden Rep. 33–34 (Pls.' Ex. 85); Kidd 114:16–116:8 (Pls.' Ex. 63)).[1]

But even more significant evidence of racial disparity than that does not rise to the level of legal significance. The Eleventh Circuit noted that evidence from two of 67 Florida counties, showing a 25% and 48% greater chance of Black voters voting by drop box, was not statistically or legally significant as to deciding what had happened state-wide. *See LWV I*, 66 F.4th at 933. Even more so here: With racial data from only one county of 159, the much smaller disparity falls far short of the *League of Women Voters* standard.

Plaintiffs nevertheless try to make something of the shifting patterns in the use of absentee ballots and drop boxes in the 2022 election. Opp. 9. They claim that SB 202 cut back on drop box access more significantly for minority voters than for white voters, and that there was a greater drop in absentee ballot usage among minority voters. But Plaintiffs acknowledge that the drop

[1] Plaintiffs claim that the State Defendants do not separately respond to the alleged discriminatory impact on Asian American and Pacific Islander ("AAPI") and Hispanic voters. But that makes no difference here because, as Plaintiffs recognize, the asserted impact of SB 202 on Black communities was greater or essentially the same as that on AAPI and Hispanic voters. *See* Opp. 8 ("SB 202 resulted in approximately 75% of Black registered voters, 77% of AAPI registered voters, and 68% of Hispanic registered voters having fewer drop boxes in their county[.]") (citing PSOF ¶ 329 [Doc. 807-1]; Fraga Rep. ¶¶ 149–50 & tbl. 15 (Pls.' Ex. 96); Burden Rep. 40–44 (Pls.' Ex. 85)). State Defendants' arguments addressing the insignificant impact on Black voters is equally valid for the other minority communities. And because the drop box provisions do not burden the right to vote in any cognizable way, racial distinctions are irrelevant.

was not much different between Black and white voters—21.7% versus 18.3%. *Id.* (citing PSOF ¶ 378 [Doc. 807-1]; Fraga Rep. ¶ 9 & tbl. 2 (Pls.' Ex. 96)). And after the pandemic subsided, a substantial shift back towards normal levels of absentee voting was to be expected.

Plaintiffs also argue that voting patterns of various minority and majority groups have shifted over the years, including in relation to absentee ballot use. Opp. 3–4. Before 2018, they note, white voters used absentee ballots more, but various minority groups seem to have started to use them more frequently in 2018, and this trend continued into the pandemic election. But who knows how steady that correlation will hold, or whether it will shift again?

Indeed, as this Court found in denying Plaintiffs' motion for preliminary injunction, the racial margin of absentee voting has already shifted back towards historic patterns. While there was a "4.9% difference between black voters and white voters who used absentee voting in 2020," "in 2018, the difference was only 2.37% (and, in 2022, 1.84%)." Order at 37 n.15 ("PI Order") [Doc. 686-1]. As this Court recognized, "differences of just over two percentage points did not support a finding of disparate impact." *Id.* (citing *LWV I*, 66 F.4th at 935). If disparate impact of that degree were alone sufficient to violate Section 2, the VRA would "dismantle every state's voting apparatus." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

Further, Plaintiffs' argument assumes a relationship between absentee ballot use and drop box availability that they have not demonstrated. Absentee ballots are (and always have been) primarily returned in the US mail or by personal delivery to election offices. And ballots can be mailed either from public or private mailboxes that are widely and readily available. There is no evidence that mailboxes are disproportionately available to one racial group or another. In fact, the provisions of SB 202 made drop boxes available to all Georgians on a more equal basis, as for the first time every county was required to have at least one drop box, and possibly more. *See* PI Order 32–33 (noting that 33.7% of black voters may have had distance to drop boxes increased, but 34.7% of the black population had greater or unchanged access). Plaintiffs do not materially dispute this fact, claiming only that the figures represent a miscount of one county, but not taking issue with the bottom line. *See* PRSOF ¶ 323 [Doc. 807].

Taking a different tack, Plaintiffs give a detailed recitation of the different travel times of various racial groups to drop boxes before and after the passage of SB 202. Opp. 14–16. But that recitation is beside the point and cannot create a triable issue of fact. It is true that, during the pandemic election of 2020, metropolitan Atlanta and more heavily Democratic counties implemented drop boxes more than other counties, some of which had no drop boxes at all. *Id.* at 8–9, 14–15. But although there was variation in deployment

of drop boxes by county, Plaintiffs admit that the nearest drop box was none too close to the average voter in 2020—3.4 miles. *See id.* at 8–9. Plaintiffs' comparative home-to-drop box travel estimates are factually irrelevant because most drop box voters used a drop box other than the one closest to their home. *See* Grimmer Rep. ¶¶ 144–53 (Defs.' Ex. DDDD). And the numbers, both before and after SB 202, are legally irrelevant because of voters' options for returning absentee ballots: Mailboxes were and are much closer.

Plaintiffs also try to distill ongoing race discrimination from socio-economic differences that, they say, result from historic discrimination and affect travel times to drop boxes. Opp. 36–38. But the VRA "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Frank*, 768 F.3d at 753. Polling places also require travel, but their locations do not become discriminatory merely because less-wealthy minority voters may take longer to get there.[2]

Plaintiffs further complain that the change in drop box locations "disrupt[ed] practices of using drop boxes that minority voters disproportionately used in 2020." Opp. 38 (citing PSOF ¶ 361 [Doc. 807-1]; Burden Rep. 16–17, fig. 4 (Pls.' Ex. 85)). But those "practices" existed only for one election cycle, and the drop box modifications were far less disruptive than

[2] Polling place locations, like drop boxes, are also selected by county officials and not State Defendants.

the original emergency implementation of drop boxes—to which minority voters easily adjusted. By that standard, every change is necessarily disruptive and suspect under the VRA.

Plaintiffs also speculate that minority voters may be disproportionately affected by the unavailability of drop boxes in the last four days before an election because voters in some racial groups may be more prone to wait to cast their absentee ballots until the last minute. *See* Opp. 16. As the Eleventh Circuit has recognized however, "[v]oters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time, whether through absentee or in-person voting." *NGP,* 976 F.3d at 1282. No source of law requires Georgia to provide concessions to those who may be tardy.

In short, any changes in drop box use could be relevant only under the flawed assumption that the emergency and temporary procedures followed during the pandemic provide a valid point of comparison for determining a Section 2 violation. But Plaintiffs identify no authority that requires or allows either a statutory or constitutional analysis of voting changes to be determined based on a change from temporary measures adopted on an emergency basis.

SB 202, moreover, unquestionably *enhanced* access to drop boxes compared to the pre-pandemic baseline: For the first time, express authority for drop boxes became permanent Georgia statutory law. But the General

Assembly also restored some of the efficiency, fairness and balance that had been missing from the variable local implementation of the emergency measures. SB 202's codification of drop box authority leaves all voters with more options than they had before the pandemic. Every county now has at least one drop box, whereas no county had one before 2020, and dozens did not have them during 2020.

Most important, Plaintiffs acknowledge that, even with these shifting usages of absentee ballots and drop boxes, the overall rate of voting among majority and minority groups did not change: "the difference between white and Black turnout remained essentially the same after SB 202[.]" Opp. 21–22. When the overall results are benign, shifts between groups in their preferences for particular voting options simply do not matter. No one has been disenfranchised or had their right to vote abridged. And, for those reasons alone, Plaintiffs have not demonstrated the existence of a material issue of fact as to their VRA claim.

3. Plaintiffs have not raised a triable dispute over whether the provisions serve important State interests in voting fairness, integrity, and efficiency.

Defendants are entitled to summary judgment for the additional reason that the justifications for the drop box provisions "suffice to avoid § 2 liability," especially given what at the very most could be "modest evidence of racially disparate burdens." *Brnovich*, 141 S. Ct. at 2347, 2348.

Georgia's interests in enacting the drop box provisions are not subject to material factual dispute. Plaintiffs do not dispute that the identified interests served are legally sufficient under controlling precedent. *See* Mot. 18, 20. Instead, Plaintiffs claim that the interests are "pretextual" or that the drop box limitations do not sufficiently serve the asserted interests. In so arguing, Plaintiffs essentially repackage the political and policy disputes over SB 202's passage and pass them off as legal argument. Under the governing legal standards, they fall short. Their arguments should be, and were, addressed to the legislature. Plaintiffs, moreover, cannot dispute that "[t]he record … establishes that concerns respecting unmanned drop boxes were valid and were expressed by persons other than [SB 202]'s sponsors." *LWV I*, 66 F.4th at 928. And they cannot escape summary judgment merely by pointing to disputes over the extent of the problems that the legislation sought to solve. It takes far more than differences of opinion to render a presumptively valid legislative act invalid as a pretext for race discrimination.

Security, integrity, and fraud prevention. At the outset, Plaintiffs cannot dispute the controlling precedent on the State's powerful interest in election integrity: "[D]eterring voter fraud is a legitimate policy on which to enact an election law, even in the absence of any record evidence of voter fraud." *LWV I*, 66 F.4th at 925 (cleaned up); *see also GBM*, 992 F.3d at 1320. The best Plaintiffs can do is claim, Opp. 26–28, that a lack of evidence can taint

the justification despite the contrary holdings in *LWV I* and *Brnovich*, 141 S. Ct. at 2348. *See also Crawford*, 553 U.S. at 194–96 (plurality opinion). Plaintiffs rely on a pre-*Brnovich* decision of the Sixth Circuit holding that the interest in combatting fraud must be articulated with some specificity, but neglect to note that the state in that case "did not even offer combatting voter fraud as a relevant interest" in the district court. *Ne. Ohio Coal. for Homeless v. Husted*, 837 F.3d 612, 632–33 (6th Cir. 2016) (cleaned up). Neither preservation nor specificity is lacking here. *See* Mot. 18–19.

Plaintiffs further maintain that there is no evidence of meaningful voter fraud in Georgia. But what they point to does not support that sweeping claim about a crime that is notoriously difficult to detect. Georgia election officials have said that they do not believe that there was "widespread voter fraud" during the 2020 election (*e.g.*, PSOF ¶ 97 [Doc. 807-1] (citing Germany 3/7 65:2–5 (Pls.' Ex. 59)). But they did not and could not say that no fraud occurred, and even the appearance of possible fraud is alone ample reason for concern. And voter concerns about ballot harvesting centered on drop boxes. *See* State Defs.' Resp. to Consol. Pls.' Statements of Add'l Material Facts ¶ 313 ("DRSOF") (9/22/23 Prelim. Inj. Hr'g Tr. 201 (DRSOF Ex. DD)).

Plaintiffs also acknowledge that defense witnesses testified about problems with inadequate video surveillance and with unsecured drop boxes. Opp. 27–28. Plaintiffs pooh-pooh—but don't actually dispute—the evidence

that video surveillance was unreliable and burdensome, that drop boxes were left unsecured, and that various non-ballot materials were deposited into drop boxes. *See* Mot. 4–7, 18–19. There were also reports of vigilantes that intimidated workers at drop box locations (SOF ¶ 303 [Doc. 755]; Germany 6/29/23 Decl. ¶ 18 (Defs.' Ex. D), which Plaintiffs claim are irrelevant because that activity was already illegal, Opp. 42–43 (citing 18 U.S.C. § 594). That, of course, is absurd; the General Assembly was fully entitled to reduce the opportunity for crime.

Plaintiffs want the Court to disregard some of this evidence as not based on "personal knowledge" or "record evidence," apparently expecting Georgia to produce the actual person who examined the unsecured drop box to testify. *Id.* at 28 (citing Mashburn 3/14 77:18–25 (Defs.' Ex. KK); Germany 7/27/23 Decl. ¶ 66 (Defs.' Ex. B)). But election officials, like other executives, necessarily rely on reports that assemble relevant data for their review and assessment, whether or not they have personal knowledge of the underlying facts. Such testimony is expected from the Rule 30(b)(6) witnesses (Germany and Mashburn) at issue here. And similar testimony by election officials was sufficient in *LWV I*. *See* 66 F.4th at 928–29.

Plaintiffs also do not acknowledge the known problems with absentee ballots and drop boxes in places outside Georgia. Mot. 19 nn.4–5. These included threats to election workers who collect ballots from drop boxes. *Id.*

As the Supreme Court has made clear, fraud in other states helps justify measures taken to combat election fraud. *See Crawford*, 553 U.S. at 194–96 (plurality opinion).

Even without this evidence, the self-evident potential for misuse of unattended absentee ballot drop boxes was ample justification to end their use once the emergency conditions of the pandemic were past. Indeed, the Supreme Court recognized that absentee voting presented an especially high potential for fraud. *See Brnovich*, 141 S. Ct. at 2347–48.

Although Plaintiffs claim (despite *LWV I* and *Brnovich*) that Georgia has no right to combat voter fraud on this record, they do not meaningfully dispute that SB 202 in fact tightened security requirements and practices for drop boxes once the emergency conditions of the pandemic were over. Plaintiffs suggest that States are not entitled to improve ballot security without making some unspecified showing of necessity. But that is not the law. *See LWV I*, 66 F.4th at 929 (noting interest in ballot security supporting drop box regulation).

As the Supreme Court recently held, "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S. Ct. at 2348. The security improvements over the pandemic drop box regime reflect exactly that approach.

Efficiency. Plaintiffs also do not meaningfully take issue with the obvious efficiencies resulting from placing drop boxes in locations where they could be monitored, secured, and collected from, without requiring elections personnel to leave their posts. *See* Mot. 20. Unable to argue with the logic or the cited facts, Plaintiffs offer differences of opinion, pointing to the political opposition offered to some of SB 202's drop box requirements by some county election officials who preferred to operate their drop box programs without state statutory limits. *See* Opp. 30–32. But, as the Seventh Circuit has put it, the fact "[t]hat some local clerks may disagree with the state's approach does not permit them to enlist a federal court to override the state's judgment about how public employees' time should be allocated." *Luft*, 963 F.3d at 674. Partisan political opposition to an election law does not create a triable issue of fact over whether efficiency concerns were a pretext for race discrimination. *See Brnovich*, 141 S. Ct. at 2349 ("partisan motives are not the same as racial motives").

Voter confidence. Plaintiffs further claim that Georgia's concerns with voter confidence were unfounded because (Plaintiffs say without real support) voters' concerns were based on misunderstandings. *See* Opp. 28–30. But voter confidence is necessarily based on perceptions, and legislators are entirely within their rights to remove sources of misunderstanding by providing clear election rules and practices. Remarkably, Plaintiffs ask the

Court to disregard as "hearsay" the testimony of high-ranking Georgia elections officials about which voter concerns percolated up to them. *Id.* at 28 (citing PRSOF ¶¶ 317–19 [Doc. 807]). Yet government officials are entitled to testify to the voter concerns that reached them without identifying individual voters who expressed those concerns. *See LWV I*, 66 F.4th at 928–29 (relying on similar testimony by government officials). Enhancing voter confidence is a legitimate interest here as it was in *GBM*, 992 F.3d at 1320.

Uniform access. On this point, too, Plaintiffs do not really dispute that SB 202 makes state-wide voter access to drop boxes more uniform than it was under the emergency pandemic authority. Instead, they again redefine the legitimate state interest by referring to partisan disputes raised by some local elections officials who wanted unlimited ability to place drop boxes however and wherever they wanted. *See* Opp. 32; *but see LWV I*, 66 F.4th at 928 (noting legitimate interest in state-wide uniformity in drop box program). Plaintiffs do not dispute that each county in Georgia is now required to maintain at least one drop box, so that no counties are left behind. Nor do they dispute that the population-driven authorization for additional drop boxes is race-neutral and leads to the same number of drop boxes in proportion to population throughout the state. Plaintiffs just prefer a regime where certain counties have many more drop boxes per capita than others, which was the case under the emergency authority in 2020. But Plaintiffs' complaints simply confirm that

SB 202's drop box rules effectively and evenhandedly serve Georgia's powerful interest in state-wide uniformity.

4. Plaintiffs have not raised a triable issue under Section 2's "results test."

Because there is no cognizable burden on the right to vote and because the actual results of the changes to drop boxes undeniably reduced or eliminated complaints about drop box administration, the drop box provisions also pass muster under the VRA's "results test." *Brnovich*, 141 S. Ct. at 2346. On this point too, Plaintiffs fail to raise a triable issue of burden for the reasons explained above: They have made no showing that changes in drop box distribution after the pandemic actually *caused* a race-based deprivation of the right to vote. *See GBM*, 992 F.3d at 1330. Rather, from all appearances, voters of every race used the mail in record numbers for a non-pandemic year, in part shifting away from drop box use, as total absentee voting decreased while the pandemic subsided. Grimmer Rep. ¶¶ 8–14 (Defs.' Ex. DDDD). Plaintiffs admit that overall voting proportions did not change much over the relevant period, *see* Opp. 21–22; among minority groups there was only a greater shift toward using absentee voting in 2020 and away from using absentee voting in 2022. And, to the extent the higher spikes in absentee usage by minority groups fell more quickly than the lesser spike for white voters, Plaintiffs do not even try to exclude obvious confounding factors like cultural variation in degrees of concern about pandemic risks, and the simple (if incomplete)

reversion to normal social practices in 2022. And Plaintiffs do not dispute the reduction in complaints about drop boxes except to repeat the remarkable assertion that the responsible state election officials cannot testify about that topic. *See* PRSOF ¶ 322 [Doc. 807]; *but see LWV I*, 66 F.4th at 928–29. That quibble is not enough to send this issue to trial.

B. The drop box provisions do not violate the Constitution.

As to these provisions' constitutionality: Plaintiffs present neither evidence nor legal authority that defeats State Defendants' showing that the undisputed facts also satisfy the *Anderson-Burdick* test for the constitutionality of voting provisions under the First and Fourteenth Amendments. *See* Mot. 22–25. Under *Anderson-Burdick*, unless a State's rule imposes a "severe burden[]" on the right to vote rather than "reasonable, nondiscriminatory restrictions," "a State's important regulatory interests will usually be enough" to justify it. *Timmons*, 520 U.S. at 358 (cleaned up). A rational connection to a legitimate state end is enough. *See McDonald*, 394 U.S. at 809. And establishing sufficient interests to justify non-severe burdens imposes no "evidentiary burden on the state." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009).

For the reasons explained above, Plaintiffs do not come close to establishing a severe burden on the right to vote here, where the only burdens are minimal to nonexistent, and fall well within the ordinary burdens of voting.

Such burdens are surely far short of the "significant increase over the usual burdens of voting" that would be needed to sustain a claim. *Curling*, 50 F.4th at 1123 (quotation marks and citation omitted).

Plaintiffs nonetheless separate out race-based rates of absentee voting and argue that a disproportionate reduction in absentee voting reflects unconstitutional harm *even if* voters have available and have used ample alternative means to vote. *See* Opp. 14–16. As noted above (at pp. 12–16), the fluctuations in use of absentee voting are inconclusive at best, particularly given the sharp, pandemic-driven increase of 2020. Plaintiffs also present stories from voters who recount, not difficulties in voting *per se*, but inconveniences in using drop boxes in particular—rather than mailboxes or early in-person voting—as a method of voting absentee, Opp. 40–41. But these are essentially complaints about the locations of drop boxes in 2022 compared to the drop box locations during the 2020 emergency. And the comparison to the anomalous emergency measures in 2020 shows only that there is no more emergency. Plaintiffs are silent about the comparison to elections before 2020, when there were no drop boxes at all.

But for all Plaintiffs' complaints about drop box locations, they do not dispute the fundamental and dispositive flaw in their claims. Because there is no constitutional right to vote absentee, *McDonald*, 394 U.S. at 807–08, there certainly is no constitutional right to a *particular method* of returning an

absentee ballot. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (no right to vote in a particular manner). Plaintiffs advance no legal basis to find such a right. Nor do they explain how a court could manufacture a constitutional right to make permanent any emergency voting practice that happens to be preferred in modestly "higher numbers by members of certain identifiable segments of the voting public." *Ohio Democratic Party*, 834 F.3d at 630. No "constitutional ratchet" operates here to lock in emergency voting practices forever. *Luft*, 963 F.3d at 670.

Instead of squarely disputing these points, Plaintiffs recycle their attacks on the interests served by the drop box provisions. Opp. 41–44. Those interests, discussed above, amply meet the "flexible standard" applicable here. *Common Cause/Ga.*, 554 F.3d at 1352–53. Plaintiffs again ask the Court to find issues of disputed fact as if the conflicting views of a statute's opponents during and after the legislative process can present a triable question of illegal discrimination. There is no burden on the right to vote—or at most a vanishingly small burden on certain voters' preference to use a method of absentee voting that was unknown in Georgia before the pandemic-spawned emergency measure, but is now permanently permitted. Thus, the State's burden is light. The race-neutral, population-driven limits on drop boxes, along with the safety and security measures to keep drop boxes inside voting centers or government offices, must be sustained so long as they bear "some

rational relationship to a legitimate state end." *McDonald*, 394 U.S. at 809. They "will be set aside only if no grounds can be conceived to justify them." *Id.* And Georgia need not prove either that "fraud existed" or that the drop box provisions constitute an "effective remedy." *Common Cause/Ga.*, 554 F.3d at 1353.

As explained above (at pp. 19–26), the limits on this new alternate method of returning absentee ballots are amply related to the interests they serve. And Plaintiffs present no evidence that the details of the statutory drop box authorization were "based on reasons totally unrelated to the pursuit of" the stated legitimate "goal." *McDonald*, 394 U.S. at 809. The drop box provisions impose neutral and uniform standards state-wide.

This, then, is not the "exceptional circumstance" where a statute is not "rationally related to a legitimate government interest." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001). The State Defendants are entitled to summary judgment on the constitutional claims as well.

C. These provisions do not violate the ADA or Rehabilitation Act.

Plaintiffs' arguments under the disability laws likewise rest on the insupportable premise that those laws require Georgia (and thus every State) to allow voters to cast ballots outdoors at locations in addition to the ubiquitous mailboxes of the U.S. Postal Service. No person can do this, regardless of disability, so even under the "equal opportunity" standard the United States

seeks to superimpose on the statutory standard of "reasonable accommodation," *see* U.S. Statement of Int. 3 [Doc. 834], Plaintiffs' disability discrimination claim is a nonstarter. Because SB 202's drop box provisions increase voting access for all, including persons with disabilities, and because absentee voting—including, as it happens, outdoor ballot return—is equally accessible to voters with and without disabilities—the drop box provisions do not violate Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act.

Plaintiffs do not dispute that ADA and Rehabilitation Act claims share a common legal standard (and thus we refer to those claims collectively as ADA claims). And they do not dispute that a plaintiff ordinarily must show that, "by reason of … disability," persons with disabilities were excluded from participation in, or denied the benefits of, a program, or otherwise discriminated against by a public entity. *Compare* Mot. 25 *with* Opp. 45. The United States further maintains that most of the case law applying this undisputed standard does not apply because that law addresses physical facilities. *See* U.S. Statement of Int. 6–7.[3] But drop boxes undeniably are physical facilities, and Plaintiffs' ADA arguments about drop boxes are entirely about physical access. The United States nonetheless asks the Court to apply

[3] Indeed, most of DOJ's Statement of Interest regarding the ADA claims has no bearing on this motion.

an "equal opportunity" standard applied to absentee voting as a whole. *Id.* But whether the Court uses the "meaningful access" language used by most courts, or the "equal opportunity" language the United States favors, the semantic differences don't affect the result: persons with disabilities have an equal opportunity to vote absentee (which is all that really matters), and even to vote absentee without entering a building.

1. Georgia's absentee voting system reasonably accommodates voters with disabilities and provides them with equal opportunities to vote.

Plaintiffs claim three aspects of the drop box provisions violate the disability laws: (1) the need for voters with disabilities (and all other voters) to go inside at "an election office or early voting location" in order to use a drop box; (2) limiting the "hours of operation" for drop boxes "to those locations' business hours," and (3) the limit on "how many drop boxes each county can have." Opp. 44.

But Plaintiffs fail to acknowledge that these limits have always existed under standard Georgia voting laws. On Plaintiffs' theory, Georgia has always violated the ADA because all voters who do not vote by mail vote (1) inside, (2) at certain hours, and (3) in limited locations. But those limits apply to everyone whether or not a voter has a disability. Voting will always involve some level of effort and even inconvenience for everyone, whether or not they have a disability. As this Court has recognized, mere "[d]ifficulty in accessing

a [voting] benefit … does not by itself establish a lack of meaningful access." AME PI Order at 15 [Doc. 615].

Plaintiffs again maintain that the emergency pandemic provisions have become the new permanent baseline for compliance with the disability laws, setting a standard from which there can be no retreat or modification. Plaintiffs claim that voters with disabilities have more difficulty finding transportation, so that increasing the distance to the nearest drop box discriminates on the basis of disability. But they cannot dispute that transportation issues are not created by the State "because of … disability." Travel to a polling location is the quintessential "usual burden[] of voting." *Brnovich*, 141 S. Ct. at 2338 (citation omitted). And in 2020, for the average voter, the nearest drop box was more than three miles away, Opp. 8–9, a long way for a person with a disability who has transportation issues—and much farther than the average mailbox. Plaintiffs' logic would lead to the conclusion that the ADA requires that outdoor drop boxes must be placed close enough to the residence of each person with a disability to remove any transportation challenges—though each person's mail box would meet this potential standard. Plaintiffs suggest no limiting principle.

Another implication of Plaintiffs' unsupported argument is that the ADA requires States to make it possible to cast an absentee ballot without leaving one's vehicle, even though there is no evidence that drop boxes allowed that

with any regularity, or even as often as mailboxes. Plaintiffs provide evidence that one voter with a disability was able to use a drop box without leaving his car, Opp. 48 (citing PSOF ¶ 665 [Doc. 807-1]; Orland Decl. ¶ 17 (Pls.' Ex. 305)), but they do not dispute the evidence that mailboxes are often accessible from a vehicle (SOF ¶ 338 [Doc. 755] (citing Burden 146:12–20 (Defs.' Ex. HHH))), that there is no evidence apart from the one anecdote that drop boxes *were* accessible from vehicles (*e.g.*, SOF ¶ 347 [Doc. 755] (citing Schur 75:16–25 (Defs.' Ex. UUU))); *see also* DRSOF ¶ 665 (citing Schur 75:16–25 (DRSOF Ex. X)), and that there was no requirement that drop boxes be accessible from vehicles (SOF ¶ 549 [Doc. 755] (citing K. Williams 30(b)(6) 65:19–25 (Defs.' Ex. LL))).

Plaintiffs also argue that keeping drop boxes inside and available only during limited hours presents risks to immunocompromised voters. *See* Opp. 56 (citing PSOF ¶ 650 [Doc. 8007-1]; Schur Rebuttal Rep. ¶ 11 (Pls.' Ex. 112)). And that would indicate that the ADA requires some form of outdoor voting. But even if that is true, mailboxes also provide that accommodation.

Indeed, Plaintiffs provide no answer apart from irrational preference why mailboxes do not provide sufficient opportunity to vote outside, 24/7, and closer to one's home that most polling places. Access to the mail comes not only through public mailboxes on street corners, but also through private mailboxes at almost every house and apartment in Georgia. Indeed, Plaintiffs' own

expert acknowledged that "voting by mail is often the most accessible—or only accessible—means of voting for" persons with disabilities. PSOF ¶ 608 [Doc. 807-1] (citing Schur Rep. ¶ 8 (Pls. Ex. 111)); *see also*, *e.g.*, *id.* ¶ 598 (citing Green Decl. ¶ 3 (Pls.' Ex. 280)) (witness with disability votes by mail because of mobility issues); *id.* ¶ 274 (witness with disability "has regularly voted absentee by mail since about 2007" (citing Lockette Dep. 16:5–17:2 (Pls.' Ex. 64)).

Plaintiffs dismiss the utility and efficacy of mail-in voting by asserting "the delay and uncertainty inherent in the mail system." Opp. 50. Yet they do not dispute the Postal Service's success at delivering ballots. *See* Grimmer Rep. ¶ 115 (Defs.' Ex. DDDD). Instead, the only factual basis they advance for the inadequacy of the mail is a single anecdote about *Cobb County's* delay in *sending out* absentee ballots to a "thousand voters," leaving not "enough time for the voters to be able to complete and mail them back." Opp. 50 n.17. But the cited consent order makes clear that the problem with mailing resulted from "administrative errors" by Cobb County officials, not some problem with the mail. Consent Order at 1, *Cook v. Cobb Cnty. Bd. of Elections & Registration* (Pls.' Ex. 339). And the cited interlocutory injunction shows that, again, Cobb County officials mailed absentee ballots several days late, despite recording timely mailing in their voter records. Interlocutory Inj. at 3–4,

Crowell v. Cobb Cnty. Bd. of Elections & Registration (Pls.' Ex. 340). In short, the problem there was with Cobb County, not with the mail.

More generally, Plaintiffs' effort to manufacture a right to unlimited outdoor drop boxes under the ADA thus fails at the threshold. They have not shown that anyone who could vote at a 2020 drop box was excluded from voting by mail, and they have presented no evidence that using a mailbox is more difficult than using a drop box. Accordingly, Plaintiffs stray beside the point in arguing that complete exclusion is not necessary to show a violation, and that the presence of workarounds does not preclude a finding of unlawful exclusion. *See* Opp. 50–51.

The bottom line is that, in Georgia, absentee voting has always been accessed primarily by mail—which is why it is frequently called "absentee-by-mail." And voting by mail is not a workaround, but a means of voting absentee that is equally accessible to voters with and without disabilities. Voting by mail may not be some voters' "accommodation of … choice," but it is undeniably the "reasonable accommodation" to which they are entitled by law. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) (quoting *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 948 (N.D. Ga. 1995)). Because the mail gives persons with disabilities both "meaningful access" to absentee voting, and an equal opportunity to vote absentee, "no additional accommodation, 'reasonable' or not, need be provided[.]" *Medina v. City of*

Cape Coral, 72 F. Supp. 3d 1274, 1278 (M.D. Fla. 2014) (quotation marks and citation omitted).

2. Neither the use of ADA-compliant polling places nor the possibility that some voters will use statutorily authorized assistance turns the drop box provisions into ADA violations.

Plaintiffs also attempt to use the State's own efforts to comply with the ADA as ammunition for claiming an ADA violation: It is not enough, they say, that polling places containing drop boxes are ADA-compliant and -accessible because it is more difficult for some people with disabilities to navigate inside buildings—just as it is more difficult for some people with disabilities to navigate anywhere. *See* Opp. 55–57. But under that view, no accommodation is ever sufficient if a crafty lawyer can dream up something better. And all in-person voting in indoor polling places would necessarily violate the ADA. The Court should not join Plaintiffs on that romp into absurdity. Indeed, "federal courts" in election procedure cases "must resist the temptation to step into the role of elected representatives, weighing the costs and benefits of various procedures[.]" *Curling*, 50 F.4th at 1126.

Nor should the Court approve Plaintiffs' attack on a statutorily recognized reasonable accommodation—the ability to receive assistance in casting a vote—as somehow discriminatory because, Plaintiffs claim, the State is required to make it possible for all voters with disabilities to vote *without assistance* using any existing method of voting. *See* Opp. 50–51. That, too, is

absurd. Federal law provides that voters with disabilities are entitled to assistance, *see* 52 U.S.C. § 10508, yet Plaintiffs twist any situation in which that required assistance is needed into a *per se* ADA violation.

But that is not the legal standard. Programs such as voting, or absentee voting, need only be readily and reasonably accessible and provide equal opportunity to persons with disabilities to use the program, not to use every aspect of every alternate means that their disabilities may make more difficult. Reasonable accommodation is all the law requires. The program need not be changed so dramatically that every inherent impediment of any disability is made to disappear altogether.

Plaintiffs further maintain that every aspect of a voting program, not just the program as a whole, must be equally accessible to voters with disabilities. *See* Opp. 49–50 (citing *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1158 (N.D. Ala. 2020)). But their cited authority does not go nearly so far. The *People First* district court *rejected* a facial challenge to Alabama's ban on curbside voting, holding that it would be an acceptable limitation outside the exigencies of a pandemic. 491 F. Supp. 3d at 1156–1157. And the circumstances of the case were dispositively different. The curbside voting at issue was a form of in-person election-day voting rather than absentee voting, and potential exclusion from in-person voting was the issue. *See id.* at 1159–

60. Notably, no state statute addressed curbside voting, but only an order from the executive branch. *See id.* at 1162.

Squarely relevant here, the *People First* court found a violation only in the context of the ongoing pandemic, and only because of the perceived risk of infection both from normal in-person voting and from the Alabama absentee voting system requirement that an absentee voter secure the signatures of two witnesses and take other actions that could lead to exposure to the virus. *See id.* at 1152–53, 1159–62. The district court took particular pains to "emphasize[] that its decision does not undermine the validity of the Challenged Provisions outside of the COVID-19 pandemic." *Id.* at 1093. But the pandemic is now over, and with it the justification for extraordinary accommodations like those in *People First* and those sought here.

In any event, despite Plaintiffs' (and the United States') insistence that *Brnovich's* usual burdens analysis does not apply here (Opp. 52; U.S. Statement of Int. 6 n.6), that burden analysis makes perfect sense in the ADA context. While reasonable accommodations can and should relieve those usual burdens for voters with disabilities, the ADA does not require the elimination of every usual burden of voting. Georgia has alleviated—indeed, eliminated—the travel burden with its allowance for absentee mail-in balloting. And, for those who wish to vote in person but cannot travel on election day, early voting is available for several weeks, including on certain Saturdays and an optional

one or two Sundays. O.C.G.A. § 21-2-385(d)(1). As one court recently observed, there is no ADA violation even as to a voter who is blind and has a disability who cannot travel to the polls, or have someone else deliver his ballot, so long as he can mail his ballot just as most absentee voters without disabilities do. *See Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 232–33 (M.D.N.C. 2020).

In arguing that requiring voters with disabilities to rely on "work arounds" or some sort of "assistance" to vote violates disability statutes, Plaintiffs rely on another district court decision involving traffic signals for pedestrian crossings, a context far removed from absentee voting. *See* Opp. 51 (citing *Am. Council of Blind of N.Y., Inc. v. City of New York*, 495 F. Supp. 3d 211, 235 (S.D.N.Y. 2020)). Contrary to Plaintiffs' retelling, that court did not hold that persons with disabilities could never be required to use a workaround or alternate means. Rather, the district court held, an ADA violation occurred only when persons with disabilities were required to use "*inconvenient* and sometimes *costly* workarounds," or "*arduous* or *costly* 'coping mechanisms.'" *Am. Council of Blind,* 495 F. Supp. 3d at 235 (emphasis added). There is nothing inconvenient, arduous, or costly about using a mailbox to return an absentee ballot, as voters with and without disabilities have done for decades.

3. The method-of-administration claim adds nothing here.

Recognizing the weakness of their position, Plaintiffs try to repackage their ADA arguments by claiming that the drop box provisions also amount to a "method of administration" that somehow discriminates against persons with disabilities. Opp. 59–61. Again, they premise their claims of violation on the failure to allow outdoor voting 24/7 in unlimited locations—in *addition* to the current and widespread availability of mailboxes. But their factual predicate seems to be the story of one voter who apparently (in Plaintiffs' telling) was entirely disenfranchised before the advent of drop boxes in 2020 (*see* Opp. 60)—except that Plaintiffs are mum on why she could not simply drop her ballot in the mail.

Plaintiffs' ADA method-of-administration claim (Opp. 59–61) also fails for the same reason as their other ADA claims, and adds nothing material to their claims of disparate impact and failure to accommodate. This twist on the ADA claim seems to target the administration of the absentee ballot program in Georgia. But Georgia offers multiple routes for returning absentee ballots, including a large network of postal and mailboxes, which do not exclude anyone. Adding drop boxes in each county in ADA-compliant buildings does not somehow harm voters with disabilities. Nothing about the drop box provisions excludes or discriminates against voters with disabilities, who face the same drop-box limits as anyone else, and voters with disabilities retain full,

traditional, outdoor access to mailboxes should they wish to vote absentee without going inside. Plaintiffs have advanced nothing about the "method of administration" of the absentee ballot option that raises a triable issue precluding summary judgment.

II. Plaintiffs Have Raised No Triable Issue of Fact As to the Legality of the Mobile Facility Provision.

Plaintiffs' threadbare treatment, *see* Opp. 1 n.2, of the mobile facility provision, moreover, effectively concedes that the provision complies with the laws under which they challenge it. And they have abandoned their claim that the mobile facility provision discriminates against voters with disabilities. *See* Order granting AME Pls.' Mot. to Amend [Doc. 792]; *see also*, *e.g.*, PRSOF ¶ 334 [Doc. 807]. Their arguments here address the mobile facility provisions only from the point of view of discriminatory intent rather than impact—points that are addressed in State Defendants' reply in support of their motion for summary judgment on discriminatory intent.

As pertinent and dispositive here, however, Plaintiffs have not raised, and cannot raise, any triable issue as to discriminatory impact. The need for voters to rely on stationary polling places or mailboxes is the most obvious and "usual burden[] of voting." *Brnovich*, 141 S. Ct. at 2338 (citation omitted). Plaintiffs do not dispute that bus-mounted mobile facilities were never used in Georgia until 2020, and they provide no evidence to dispute their own expert's testimony that such facilities were never used anywhere else before 2010. *See*

SOF ¶ 340 [Doc. 755] (citing Kennedy Rep. 39 (Defs.' Ex. FFFF)). Their complete failure to address impact disposes of both Plaintiffs' VRA claim and their constitutional claims, since both of these claims require a disparate, discriminatory impact on voting rights. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick*, 504 U.S. at 433–34; *LWV I*, 66 F.4th at 942–43; *GBM*, 992 F.3d at 1328.

Plaintiffs also do not dispute that the prior provision authorizing temporary voting facilities was understood to be a measure to be used in emergencies when a polling place was rendered unavailable. *See* Mot. 32. Plaintiffs' sole evidence is that the only county to use converted buses as mobile voting facilities in 2020 has a large minority population. Plaintiffs say that Fulton County used mobile facilities "to great effect," (Pls.' Opp. to State & Intervenor Defs.' Mot. Summ. J. Discrim. Intent 33 ("Discrim. Intent Opp.") [Doc. 822]), but do not say what "great effect" means or provide evidence quantifying that effect. *See* PSOF ¶ 476 [Doc. 807-1] (citing N. Williams 30(b)(6) 177:5–18 (Pls.' Ex. 21)).

But removing the option to use bus-mounted mobile voting facilities other than in a declared emergency does not impose a burden on the right to vote that is cognizable under the VRA or the Constitution. The clarification of mobile facility authority imposes no burden beyond the usual burden of going to the polling place or mailbox, rather than having the polling place come to

you. Preference for a particular means of voting does not transform that means into a right. And the multiple ample alternative means for early and absentee voting further foreclose any contention that the right to vote is burdened by the absence of bus-mounted polling places.

Having imposed no cognizable burden, and thus having no discriminatory impact, the mobile facility provisions need no justification to pass muster under the Voting Rights Act or the Constitution. Nevertheless, Plaintiffs try but fail to raise a material issue over the legitimate state interests served by limiting the use of roving, bus-mounted voting facilities to emergencies declared by the governor. Discrim. Intent Opp. 57–58. The implication of Plaintiffs' argument is that States are required to allow local election officials to move polling places to wherever the officials deem politically desirable or wherever some group of politically connected voters may want them. Limiting that option to situations of declared emergency undeniably limits any opportunity for abuse. And since only those counties subject to a declared emergency can use bus-mounted mobile voting facilities, in the absence of such an emergency, no county will be able to deploy them for purely political advantages—a uniform result.

CONCLUSION

The undisputed material facts make clear that SB 202's drop box and mobile facility provisions do not burden anyone's right to vote. Plaintiffs simply prefer more extensive access to two novel means of voting, atop the many *other* nondiscriminatory options available to Georgia voters. But no law requires the State to fulfill Plaintiffs' wish list.

For all these reasons, summary judgment should be granted, and all claims addressing drop boxes and mobile voting units dismissed.

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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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