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 SUPPORTING THEIR MOTION FOR SUMMARY JUDGMENT ON ABSENTEE BALLOT PROVISION CLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulation

Other Authorities

INTRODUCTION

In their Response to State Defendants' Motion for Summary Judgment on Absentee Ballot Provision Claims [Doc. 830] ("Opp."), Plaintiffs abandon their challenge to four provisions of Georgia's Election Integrity bill, SB 202, related to the absentee-by-mail process, while maintaining that five other provisions violate the Voting Rights Act or Americans with Disabilities Act. But their remaining challenges are based on statistics taken out of context, even while they fail to show any impermissible burden on Georgia voters.

Indeed, Plaintiffs do not dispute that, in 2022, Georgia's voting system under SB 202 made voting easier, instilled greater voter confidence in the integrity of elections, eased administrative burdens, and deterred fraud (or at least the widespread allegations seen previously), all while maintaining near record highs for a midterm election and increasing utilization of absentee-by-mail voting.[1] And Georgia's system did all this while the rest of the country saw far greater drops in minority voter participation.

Nor do Plaintiffs dispute that, with absentee-by-mail voting remaining high for all racial groups, under SB 202, Georgia voters experienced far fewer

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[1] State Defs.' Statement of Undisputed Material Facts ("SOF") ¶¶ 204–05, 348–51, 354–56 [Doc. 755]; Shaw 2/24 Rep. ¶¶ 20–22 (Defs.' Ex. LLLL); Shaw 2/14 Rep. ¶¶ 15–16 & tbl. 7, 24–25 (Defs.' Ex. KKKK); Grimmer Rep. ¶¶ 8, 27–28, 41–42, 44–45, 52–54 (Defs.' Ex. DDDD); Ga. Sec'y of State, *Georgia Voters Lead Southeast in Engagement, Turnout* (May 17, 2023) (Defs.' Ex. FFFFF).

rejections of applications and ballots than in 2018, prior to the law's enactment.[2] Nor do they dispute that both Black and white Georgia voters reported that it was easier to vote in 2022 than before, with 99.5% reporting no problems voting; with 97% of Black voters and 96% of white voters rating their experience as either Excellent or Good; and with no Black voters rating their experience as "poor."[3] And other minority groups continued their upward trend of participating in elections in 2022.[4] In short, under the undisputed facts, SB 202 was an unqualified success, without compromising or burdening Georgians' right to vote.

In seeking to undermine these successes, Plaintiffs rely almost exclusively on statistical sleight of hand, long rejected by the courts, to suggest that common-sense voter identification requirements, administrative efficiencies and strengthening penalties against illegal ballot harvesting created impermissible burdens on various racial groups and voters with

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[2] SOF ¶¶ 497, 515, 522; Grimmer Rep. ¶¶ 16, 168, 171–72, 179–80 (Defs.' Ex. DDDD). SOF ¶¶ 497, 515, 522; Grimmer Rep. ¶¶ 16, 168, 171–72, 179–80 (Defs.' Ex. DDDD).

[3] SOF ¶¶ 357–59; Shaw 2/24 Rep. ¶¶ 29–31 (Defs.' Ex. LLLL); Shaw 2/14 Rep. ¶¶ 73–74 (Defs.' Ex. KKKK); Shaw 97:20–98:24 (Defs.' Ex. H); Survey Rsch. Ctr., Sch. of Pub. & Int'l Affs. Univ. of Ga., 2022 Georgia Post-Election Survey 13 (2023) ("SPIA Survey") (Defs.' Ex. YYYY).

[4] State Defs.' Resp. to Pls.' Statement of Undisputed Material Facts ("DRSOF") ¶ 40; Grimmer Rep. ¶ 32 (Defs.' Ex. DDDD) ("Across all racial groups, I find that the turnout rate has increased relative to the 2014 election[.]").

disabilities. Yet the non-partisan Carter Center has opined that SB 202's identification requirements for requesting and submitting absentee ballots made mail-in absentee voting more efficient.[5] And, for the reasons stated in State Defendants' motion, and in the analysis below, summary judgment in favor of Defendants is warranted on all of Plaintiffs' claims related to absentee ballots.

ARGUMENT

Summary judgment is obviously appropriate as to the four absentee ballot-related claims that Plaintiffs are no longer pressing in this proceeding.[6] As to the remaining five claims, summary judgment is also warranted because Plaintiffs have failed to establish a material issue of fact on any of those claims—whether as to SB 202 provisions regulating governmental bodies, or those regulating third parties. Much less have Plaintiffs offered any serious

[5] The Carter Ctr. for Fulton Cnty. Bd. of Elections & Reg. and Performance Rev. Bd., 2022 General Election Observation: Fulton County, Georgia 16 (2022) ("Carter Ctr. Rep.") (Germany 7/27/23 Decl., Ex. 34 (Defs.' Ex. C)).

[6] Of the nine provisions absentee ballot provisions Plaintiffs originally challenged and addressed in State Defendants' Motion for Summary Judgment on Absentee Ballot Provision Claims ("Mot." or "MSJ" [Doc. 763]), Plaintiffs ignored four of those provisions entirely in their response, thus abandoning their claims as to those provisions. The abandoned provisions are: (1) regulations on third parties sending out unsolicited absentee ballot applications; (2) denial of absentee ballots applications for unregistered voters; (3) a requirement for voters to sign the oath on the absentee ballot application with pen and ink; and (4) a requirement for voters to sign an oath on the return envelope of the absentee ballot.

dispute about the legitimacy or strength of the state interests underlying the challenged provisions.

I. Plaintiffs Fail to Present any Material Issue of Fact Regarding the State's Compelling Interests in the Absentee Ballot Provisions at Issue.

As to the State's interests: Throughout their opposition, Plaintiffs downplay and minimize the binding Supreme Court and Eleventh Circuit precedent holding that States have a valid—indeed compelling—interest in protecting the integrity and security of the voting process and preventing fraud. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021) (discussing laws enacted to combat voter fraud); *id.* at 2347 ("preserving the integrity of [a State's] election process" is a "compelling" interest (citation omitted)); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (same); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n.14 (1974) (same); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) (same); *accord Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009) (preventing fraud and promoting voter confidence are a compelling state interests). SB 202 is designed to serve these interests.

Likewise, the Supreme Court has held that States have a valid interest, of "independent significance," in protecting voter confidence in the integrity and legitimacy of the process because "public confidence in the integrity of the electoral process … encourages citizen participation in the democratic

process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). And States have "a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient." *Id.* at 191; *accord Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1320 (11th Cir. 2021) ("*GBM*").

Further, and contrary to Plaintiffs' suggestions (at 55), States do not have to wait until they "sustain some level of damage before the legislature" may "take corrective action." *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (citation omitted). Instead, the State may "respond to *potential* deficiencies in the electoral process with foresight rather than reactively." *Id.* (citation omitted, emphasis added); *see also Brnovich*, 141 S. Ct. at 2348 (same); *Crawford*, 553 U.S. at 194–96 (upholding the State's interest in preventing fraud even though "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history").

Here, Plaintiffs have offered no evidence that the Georgia General Assembly did anything other than that: deciding there were sufficient concerns, even absent direct evidence of widespread fraud, to justify taking action to secure the integrity—and the appearance of integrity—of its election process. SOF ¶¶ 538–39; Germany 10/30/23 Decl. ¶¶ 22–23 (Defs.' Ex. B). And this was reasonable because absentee-by-mail voting has long been considered the most susceptible to fraud and was the source of a large portion of the

complaints from voters and activists from both political parties. SOF ¶ 472; Germany 10/30/23 Decl. ¶¶ 17, 23 (Defs.' Ex. B); Carter Ctr. Rep., *supra* n.5, at 16; U.S. Election Assistance Comm'n, *Election Crimes: An Initial Review and Recommendations for Future Study* 8, 10, 12, 18–19 (Dec. 2006) ("*Election Crimes*") (Defs.' Ex. ZZZZ); Germany 3/7 90:1–11 (Defs.' Ex. HH); Sterling 102:11–18 (Defs.' Ex. VVV).

Instead of addressing these points, Plaintiffs suggest that the Court should not grant summary judgment to State Defendants simply because summary judgment is rare in voting rights cases. Opp. 32. They quote the Eleventh Circuit, *id.*, for the proposition that "[s]ummary judgment is not often granted in voter denial lawsuits." *GBM*, 992 F.3d at 1317. But Plaintiffs omit the next line of *GBM,* which explains that Plaintiffs "are incorrect, however, in implying that a case such as this should never be decided on summary judgment." *Id.* Indeed, the Eleventh Circuit went on to explain that "[i]t is irrefutable that a motion for summary judgment can—and should—be granted when the conditions of Rule 56 are met." *Id.* And it emphasized that it "firmly resist[ed] any inducement to establish a category of claims (e.g., vote denial claims or constitutional challenges to laws affecting voting) that can never succeed on a Rule 56 motion for summary judgment." *Id.* The Eleventh Circuit then proceeded to *affirm* the district court's grant of summary judgment on Alabama's voter identification requirements for in-person *and* absentee-by-

mail voting because, despite both parties' continuing to dispute the relevance of various facts, there were no "genuine disputes about *material* facts." *Id.* (emphasis added). The same is true here and the Court should grant summary judgment.

Finally, as noted below, Plaintiffs ignore the successes of Georgia's 2022 elections and focus on "statistical manipulation" to suggest that Black, AAPI, Latino, and Native American voters saw a dramatic comparative decrease in the use of absentee-by-mail voting following the reforms of SB 202. Opp. 3–14, 42–43.[7] *Brnovich*, 141 S. Ct. at 2344–45. Such sleight of hand with the facts

[7] This consideration requires acknowledgement that "even neutral regulations, no matter how crafted, may well result in some predicable disparities … [b]ut 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." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021) (emphasis added). For this reason, a "meaningful comparison is essential." *Id.* The *Brnovich* Court found the meaningful comparison to be racial disparities in "absolute terms." *Id.* at 2344–45. It considered the district court's findings of fact that "a little over 1%" of minority voters cast ballots outside of their precinct, while the rate for non-minority voters "was around 0.5%." *Id.* The majority looked to the numbers in the aggregate and concluded that the policy "work[s] for 98% or more of voters to whom it applies—minority and non-minority alike[.]" *Id.*

The Court also opined on how the "use of statistics [can be] highly misleading[.]" *Id.* at 2345. For example, "[i]f 99.9% of whites had photo IDs, and 99.7% of blacks did, it could be said that blacks are three times more likely as whites to lack qualifying ID ($0.3 \div 0.1 = 3$), but such a statement would mask the fact that the populations were effectively identical." *Id.* (internal quotation marks omitted) (quoting *Frank v. Walker*, 768 F.3d 744, 752 n.3 (7th Cir. 2014)).

is insufficient to create a genuine issue of material fact under long-standing Supreme Court and Eleventh Circuit case law addressing access to the ballot. As noted in State Defendants' Motion for Summary Judgment (at 10–11), voters of virtually all racial groups continued to use absentee-by-mail voting in higher numbers in 2022 than in previous mid-term elections and did so with unprecedented success.

II. Plaintiffs Fail to Present any Issue of Material Fact Bearing on the Provisions Regulating Government and Third-Party Actors.

Moving on to specific provisions of SB202: Plaintiffs *allege* that the prohibition on State and local officials sending out unsolicited absentee ballot applications disproportionately harms minority voters and was designed to suppress "speech" of those seeking to elect Democratic candidates. However, the undisputed *evidence* refutes their claims. Similarly, while Plaintiffs *allege* that the Ballot Harvesting Penalty discriminates against voters with disabilities, the undisputed *evidence* clearly refutes that contention as well. Indeed, the Ballot Harvesting Penalty does nothing to deny voters with disabilities meaningful access to absentee-by-mail voting because of their disability.

A. Plaintiffs are Unable to Establish that the Prohibition on State and Local Officials Sending Out Unsolicited Absentee Ballot Applications Impairs their Voting or Free Speech Rights.

Plaintiffs first challenge SB 202's prohibition on election officials sending out *unsolicited* absentee ballot applications. (Under SB 202, officials may only send them to a voter in response to a request for an application.) Plaintiffs allege (at 56–62) that this provision denies equal opportunity to participate in the absentee-by-mail process. They claim that those with low English proficiency, specifically AAPI and Latino voters (at 11–12, 16, 38–39), have difficulty navigating the Secretary of State website, and, as a result, have undue difficulty obtaining an application (at 56–57). Of course, there is no challenge to the language in which forms are printed or websites are maintained.[8] And, as explained below, Plaintiffs ignore the reality that absentee ballot applications can be obtained by a phone call to election officials and are still "available online by the Secretary of State and each election superintendent and registrar." O.C.G.A. § 21-2-381(a)(1)(C)(ii); *see also* SOF ¶ 473; Germany 10/30/23 Decl. ¶ 31 (Defs.' Ex. B). Nor is there any plausible

[8] Such a challenge could not succeed, because current federal law does not require Georgia to provide election materials in languages other than English. *Ga. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cty. Bd. of Registration & Elections*, 36 F.4th 1100, 1119 (11th Cir. 2022) (rejecting challenge that SOS-generated absentee ballot applications in 2020 were required to be in Spanish and English).

merit to NGP Plaintiffs' challenge to the prohibition on free speech grounds, Opp. 112–14, for one simple reason: Preventing *government* entities from sending out unsolicited absentee-by-mail applications does not affect *Plaintiffs*' speech. Additionally, Plaintiffs abandon their claims to the third-party regulations over sending unsolicited absentee-by-mail applications.[9] Accordingly, State Defendants are entitled to summary judgment on Plaintiffs' claims challenging the prohibition on election officials sending out unsolicited absentee-by-mail applications.

1. Plaintiffs are unable to prove that prohibiting Election Officials from sending unsolicited absentee ballot applications unduly burdens their right to vote.

As to the alleged burden on the right to vote: Plaintiffs rely exclusively on their claim that language barriers for certain voters somehow make the prohibition on election officials sending *unsolicited* absentee-by-mail applications an impediment to the equal opportunity to participate in the franchise. Opp. 56–57. Indeed, they argue that language issues are so significant that 33% of AAPI voters (at 11–12) and 35% of Latino voters (at 38) need assistance to even complete the application (at 39–41). Yet they offer no evidence that AAPI, Latino, or "other language minority voters" are unable to

[9] Plaintiffs' free-speech claim asserting that the various provisions of SB 202 were designed to target those who sought to elect Democratic candidates fails for the same reasons that their Section 2 and constitutional claims fail, as set out *infra* at Section II.A.2.b.

obtain an application if one is not automatically mailed to them by election officials. Opp. 39–41. Further, after SB 202, AAPI, Latino, Black, Native American, and white voters continued to vote at absentee-by-mail levels consistent with prior elections, and all but AAPI voters (and then only by a small amount)[10] utilized absentee-by-mail voting at *higher* levels that they did in 2018, the last pre-pandemic election. DRSOF ¶ 40; Grimmer Rep. ¶¶ 58–62 (Defs.' Ex. DDDD). Nothing about the prohibition on election officials sending out unsolicited absentee-by-mail applications affected any minority group's equal opportunity to participate in the vote-by-mail process.

Plaintiffs downplay the State's interests, but do not address that the unsolicited applications sent in 2020 contributed to administrative difficulties in some counties and numerous duplicate applications created problems for election officials and voters. These issues disappeared in 2022, after SB 202. Mot. 10, 19–22.

Thus, Georgia's interests in establishing this provision clearly satisfy the *Anderson-Burdick* test. *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992); *Crawford*, 553 U.S. at 205 (Scalia, J., concurring) ("[o]rdinary and widespread burdens, such as those

[10] Even so, "[AAPI] voters saw their highest midterm turnout rate in the 2022 midterm election," specifically "a 3.9 percentage point increase relative to 2018[.]" DRSOF ¶ 40; Grimmer Rep. ¶ 32 (Defs.' Ex. DDDD).

requiring 'nominal effort' of everyone, are not severe."). State Defendants are entitled to summary judgment on this claim.

2. Plaintiffs are unable to prove that prohibiting State and local election officials from sending unsolicited absentee-ballot applications burdens their free-speech and association rights.

Contrary to Plaintiffs' claims, moreover, the unsolicited absentee-ballot application provision does not burden their speech at all. Further, because Plaintiffs' claim is really one of discriminatory intent, State Defendants not only did not waive their arguments, but the undisputed facts establish that Plaintiffs' claims fail as a matter of law.

a. Plaintiffs cannot identify any restriction on their speech.

NGP Plaintiffs assert (at 112–14) that SB 202's prohibition on election officials sending *unsolicited* absentee ballot applications constitutes unlawful viewpoint discrimination *against* Plaintiffs. But Plaintiffs are unable to explain how this provision regulates or restricts *their* speech. *See* Mot. at 23–24. Thus, this court must apply rational basis review and, on that basis, uphold the measure in question. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013) (holding that "collecting and delivering the [voter registration] forms are merely conduct," and so "rational basis scrutiny is appropriate"); *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (explaining that "almost all laws[] would pass rational-basis scrutiny");

Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (refusing to apply strict scrutiny when no constitutional guarantee was violated).[11]

Plaintiffs respond (at 113) that it does not matter whether their speech is affected because the prohibition allegedly has the purpose of restricting absentee voting by voters who support Democratic candidates. Even though the provision applies to all voters and has no impact on any voter's ability to obtain an absentee-by-mail application, this claim further ignores longstanding First Amendment doctrine that the free speech clause does not regulate government speech. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) ("Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas."). Plaintiffs still do not have any explanation of how a regulation that does not regulate *them* constitutes viewpoint discrimination.

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[11] If the Court declines to apply rational basis review, the regulations would still survive under the *Anderson-Burdick* test for the reasons given in the State Defendants' prior discussion of the regulations on third-party distribution of unsolicited absentee ballots. *See* Mot. 28–43. That argument is incorporated by reference and is not even addressed by Plaintiffs in their Response.

And Plaintiffs cited authorities do not engage with this fundamental issue. They cite (at 113) *Reed v. Town of Gilbert*, 576 U.S. 155 (2015),[12] but that case dealt with a sign code "governing the manner in which people"—i.e., non-government actors—"may display outdoor signs." *Id.* at 159. But the prohibition on government officials does not prohibit any activity in which Plaintiffs may wish to engage.

Plaintiffs also have failed to explain how the prohibition is retaliatory (i.e., viewpoint based) against any group of voters in Georgia when all voters can still request an application and applications are still "available online by the Secretary of State and each election superintendent and registrar." O.C.G.A. § 21-2-381(a)(1)(C)(ii); *see also* SOF ¶ 473; Germany 10/30/23 Decl. ¶ 31 (Defs.' Ex. B). While Plaintiffs claim the law was to prevent Democratic voters from electing Democratic candidates, after SB 202 the Democratic candidate for United States Senate won the election in 2022.

Moreover, Plaintiffs' assertions that this or other provisions are unlawful because they were enacted for political reasons fail as a matter of law: The Supreme Court has squarely rejected challenges based on partisan motivations, explaining that, "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply

[12] Plaintiffs cite to "*Reed*, 576 U.S. at 154[.]" Opp. 113. No such citation exists.

because partisan interests may have provided one motivation for the votes of individual legislators." *Crawford,* 553 U.S. at 204. Here too, Plaintiffs cannot meet their burden of establishing a material issue of fact.

b. Contrary to Plaintiffs' assertion, State Defendants have not waived their response to NGP's other First Amendment claims.

Taking a different tack, NGP Plaintiffs claim (at 112–13) that State Defendants have waived their defense to their First Amendment challenge to the nine other challenged provisions listed in their complaint and modeled on the same failed argument of "viewpoint discrimination." This claim is inaccurate. NGP Plaintiffs, in Count III of their Second Amended Complaint, assert that the various provisions they challenge (with no specification) were put in place "with the purpose of restricting these voters' [Black voters, young voters, and Democratic voters] ability to cast ballots for their preferred candidates in future elections on the basis of their viewpoint." 2d Am. Compl. ¶ 183 [Doc. 831-2]. It is simply a repackaging of their discriminatory intent claim addressed in another Motion for Summary Judgment [Doc. 759].

Moreover, under binding Eleventh Circuit precedent, it "is settled law that 'when a statute is facially constitutional, a plaintiff cannot bring a free-speech challenge by claiming that the lawmakers who passed it acted with a

constitutionally impermissible purpose.'"[13] *Walt Disney Parks & Resorts U.S., Inc. v. DeSantis*, No. 4:23-CV-163-AW-MJF, 2024 WL 442546, at *3 (N.D. Fla. Jan. 31, 2024) (quoting *In re Hubbard*, 803 F.3d 1298, 1312 (11th Cir. 2015)),

[13] In *Walt Disney*, the district court rejected Disney's First Amendment retaliation claim because Disney "does not argue that the First Amendment (or anything else) would preclude the Legislature from enacting the challenged laws *without* a retaliatory motivation." 2024 WL 442546, at *4; *see also United States v. O'Brien*, 391 U.S. 367, 384 (1968) (noting that "Congress had the undoubted power to enact" the challenged law). Because the law in question was facially constitutional, that is, it *could* have been enacted for legitimate reasons, the court was barred from inquiring into legislative purpose or motive. *Walt Disney*, 2024 WL 442546, at *4; *see also In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015) (holding that a law was facially constitutional because it did "not implicate any constitutionally protected conduct" (quotation marks and citation omitted)). Thus, this Court should address the possibility of viewpoint discrimination or retaliation *only if* it first finds that the provisions in question are *otherwise* unconstitutional. *Hubbard,* 803 F.3d at 1313; *NetChoice, LLC v. Attorney General*, 34 F.4th 1196, 1224 (11th Cir. 2022) ("[C]ourts shouldn't look to a law's legislative history to find an illegitimate motivation for an otherwise constitutional statute."), *cert. granted in part mem. sub nom. Moody v. NetChoice, LLC,* 144 S. Ct. 478 (2023) *and cert. denied mem. sub nom. NetChoice, LLC v. Moody,* 144 S. Ct. 69 (2023) .

Additionally, the Eleventh Circuit has highlighted that, even if there was a legitimate concern about viewpoint discrimination as an improper motive, "we're not aware of—any Supreme Court or Eleventh Circuit decision that relied on legislative history or statements by proponents to characterize as viewpoint-based a law challenged on *free-speech* grounds." *Netchoice*, 34 F.4th at 1225; *cf. Fraternal Ord. of Police Hobart Lodge No. 121, Inc. v. City of Hobart*, 864 F.2d 551, 555 (7th Cir. 1988) ("The political process is not impaired when legislators are merely forbidden to engage in invidious discrimination. It *is* impaired when legislators are forbidden to favor their supporters and disfavor their opponents."). The *Netchoice* court then set aside the viewpoint discrimination claim and examined the various provisions of the statute under normal First Amendment principles as is done here. 34 F.4th at 1226 ("we must proceed on a more nuanced basis to determine what sort of scrutiny each provision—or category of provisions—triggers.").

appeal docketed sub nom. Walt Disney Parks & Resorts U.S., Inc., v. Governor, No. 24-10342 (11th Cir. Feb. 2, 2024). Yet, as noted herein and in the other Motions for Summary Judgment, none of the provisions was enacted for the purpose of limiting any voter the equal opportunity to vote and elect candidates of their choice.

The only other provisions NGP Plaintiffs challenge that are addressed in the present Motion relate to voter identification requirements for requesting and submitting absentee-by-mail ballots. *See* 2d Am. Compl. ¶ 68. As noted below, the undisputed evidence shows that those provisions do not impact any voter's ability to vote or elect candidates of their choice, which is fatal to NGP's novel First Amendment speech claim. *See Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 71 F.4th 894, 904 (11th Cir. 2023) ("then Rule 56 mandated the entry of summary judgment, after adequate time for discovery and upon motion, against [Plaintiffs] if [they] failed to make a showing sufficient to establish the existence of an element essential to [their] case" (cleaned up)).

3. Plaintiffs are unable to create an issue for trial as to whether prohibiting State and local election officials from sending unsolicited absentee ballot applications is racially discriminatory under Section 2 of the Voting Rights Act.

Nor have Plaintiffs met their burden of establishing a material issue of fact on their VRA Section 2 claim. Section 2 prohibits jurisdictions from

"impos[ing] or appl[ying]" any "voting qualification or prerequisite to voting or standard, practice, or procedure … which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 52 U.S.C. § 10301(a), where such burdens "block or seriously hinder voting." *Brnovich*, 141 S. Ct. at 2338. In contrast, "a burden of some sort" or "the usual burdens of voting" do not violate § 2, particularly if the burden was "standard practice when § 2 was amended in 1982[.]" *Id.* at 2338–39 (citation omitted from second quote).

Here, the undisputed facts demonstrate that there are no cognizable burdens or disparities. Indeed, after SB 202, voter participation, including the use of absentee-by-mail voting of Black, white, AAPI, Latino, Native American, and all voters remained near record high especially for a midterm election. DRSOF ¶ 40; Shaw 2/24 Rep. ¶¶ 20–22 (Defs.' Ex. LLLL); Grimmer Rep. ¶¶ 31–35 & tbl. 2 (turnout rates), 58–62 (Defs.' Ex. DDDD). Black voter turnout was nearly at the record turnout from the 2018 midterm. SOF ¶ 354; Shaw 2/24 Rep. ¶¶ 21–22 (Defs.' Ex. LLLL); Shaw 2/14 Rep. ¶¶ 10, 12, 17, 23 (Defs.' Ex. KKKK); Grimmer Rep. ¶¶ 8, 158–64 (Defs.' Ex. DDDD). And even though Black turnout dropped more than white turnout between 2018 and 2022, that was the case across the nation in 2022 and Georgia's drop-off was lower than the national average. SOF ¶¶ 352–53; Fraga Sur-Rebuttal Rep. 15 tbl. 1 (Defs.' Ex. CCCC); Shaw 2/24 Rep. ¶¶ 46–52 (Defs.' Ex. LLLL). While

AAPI and Latino turnout following SB 202 declined slightly more than white turnout, Native American turnout actually *increased* after SB 202. *See* DRSOF ¶ 41; Grimmer Rep. ¶¶ 31–35 & tbl. 2 (Defs.' Ex. DDDD). And all racial groups had an increase in turnout from the 2014 to 2022 general elections, with some racial groups like AAPIs and Native Americans outpacing the increase in white turnout from that period. DRSOF ¶ 41; Grimmer Rep. ¶ 35 (Defs.' Ex. DDDD).

Plaintiffs claim the Court should deny summary judgment because Defendants failed to address SB 202's disparate impact on AAPI, Latino, and Native American voters. Opp. 56. Plaintiffs also claim that the option to obtain an application through the SOS website or through third party organizations does not "create[] an equally open election system" because some groups may have lower English proficiency, as addressed above. *Id.* at 57–28. But there is no evidence to suggest a causal connection between the unsolicited application prohibition and the use of absentee-by-mail voting by any racial group. Indeed, there is no causal connection between *any* SB 202 provision and the use of absentee-by-mail voting, which again demonstrates why Plaintiffs attempted statistical sleight of hand is insufficient to defeat summary judgment.

First, the points that State Defendants made about Black voters and minority voters in general are equally applicable to the other racial groups highlighted by Plaintiffs. State Defendants showed (Mot. 25–28) that the

challenged provision was not racially discriminatory under Section 2 of the Voting Rights Act, which logically encompasses disparities between white voters and *any* other racial group. *See Serendipity at Sea, LLC v. Underwriters at Lloyd's of London Subscribing to Pol'y No. 187581*, 56 F.4th 1280, 1288 (11th Cir. 2023) ("It was apparent throughout [movant's] Motion for Summary Judgment and its Statement of Material Facts that it disputed the testimony in [non-movant's witness's] report."). Indeed, this is set out specifically in Dr. Grimmer's report cited extensively on this issue. *See, e.g.*, SOF ¶¶ 211–12 & 355; Grimmer Rep. ¶¶ 57, 60, 62–63 (Defs.' Ex. DDDD).

And, under Eleventh Circuit precedent, Defendants are entitled to respond to Plaintiffs new arguments in their opposition that AAPI, Latino, and Native American voters suffered distinct impacts from minority voters generally. *See First Specialty Ins. Corp. v. 633 Partners, Ltd.*, 300 F. App'x 777, 788 (11th Cir. 2008) (unpublished) ("We see no basis for treating the references in First Specialty's reply brief to Smith's testimony from the underlying suit as 'new' evidence. As the district court noted, First Specialty referred to this testimony to respond to Appellants' assertion … rather than as a means to make a wholly new argument."); *Lightsey v. Potter*, 268 F. App'x 849, 852 (11th Cir. 2008) (unpublished) ("The district court did not err in considering the declaration attached to the USPS's reply brief. The USPS submitted the declaration in response to Lightsey's challenge to the

authenticity of certain evidence attached to the USPS's motion for summary judgment."); *Everett v. Grady Mem'l Hosp. Corp.*, 703 F. App'x 938, 946–47 (11th Cir. 2017) ("She argues the defendants … waived summary judgment on these claims, though the defendants did address the claims in their reply brief. However, as the District Court recognized, it had the *sua sponte* authority to enter summary judgment as long as Ms. Everett had adequate notice."). As noted here and in the record evidence cited extensively in State Defendants' MSJ (*e.g.*, at 25–28), there is no such distinct impact for these racial groups.

Moreover, Plaintiffs' contentions about the disparate impact of the unsolicited application prohibition on AAPI, Latino, and Native American voters are not only unsupported, but disproven by the record. Dr. Grimmer found that "[i]n the 2022 midterm election, [AAPI] voters cast the largest share of their ballots by mail-in absentee voting[.]" DRSOF ¶ 40; Grimmer Rep. ¶¶ 32, 59, 64 (Defs.' Ex. DDDD); *see also id.* ¶ 64 ("Compared to the 2020 election, I find that the change in mail-in absentee ballot usage among [AAPI] voters is similar to the change in mail-in absentee ballot usage among white voters and the change overall."). Similarly with respect to Latino voters, there was an increase from the pre-COVID baseline in the share of absentee voting. *See id.*; Grimmer Rep. ¶¶ 33, 61 (Defs.' Ex. DDDD). The same also holds true of Native American voters. *Id.*; Grimmer Rep. ¶¶ 32, 58 (Defs.' Ex. DDDD).

As noted above, Plaintiffs' proffered statistical "proof," Opp. 42–44 (citing Fraga Rep., tbls. 2, 3 (Pls.' Ex. 96)), of a disparate impact on AAPI absentee voting runs afoul of *Brnovich*'s warning against "statistical manipulation." 141 S. Ct. at 2345. Specifically, Plaintiffs claim the differences in the decline after SB 202 between white and AAPI absentee-ballot requests and voting by absentee ballot, respectively, demonstrates a disparate impact. Not so. First, these comparisons take the 2020 election as the baseline when the 2020 election was atypical because of the unique COVID measures employed. *See* DRSOF 40; Grimmer Rep. ¶ 28 (Defs.' Ex. DDDD); Shaw 2/24 Rep. ¶ 13 (Defs.' Ex. LLLL). The real baseline is the last midterm—the 2018 election. When comparing those numbers, as Dr. Grimmer showed, the changes are minimal. *Id.*; Grimmer Rep. ¶ 59 (Defs.' Ex. DDDD).

Second, even hypothetically assuming that 2020 is the proper comparison, Plaintiffs' claim that there was an 18.9% drop in absentee voting for white voters compared to 30.5% for AAPI voters is just "statistical manipulation." *Brnovich*, 141 S. Ct. at 2345. The correct comparison is not 18.9% to 30.5% but to the respective *percentage decrease*, not *the difference between* the pre-SB 202 and post-SB 202 values.[14] When this is done, it reveals

[14] A simple explanation on calculating a percentage decrease can be found in Will Kenton, *How to Calculate the Percentage Change*, Investopedia (Jan. 23, 2024), https://www.investopedia.com/terms/p/percentage-change.asp.

an 77.07% drop-off for AAPIs and an 76.57% drop-off for whites. *See* DRSOF ¶ 41; Fraga Rep. 23 tbl. 2 (Pls.' Ex. 96); *accord* Grimmer Rep. ¶ 64 (Defs.' Ex. DDDD) (finding similar declines of 76.6% for whites and 76.8% for AAPIs)). This is only a minor difference. So, too, with the Fraga Report's table 2 figures: an 84% drop-off for AAPIs compared to a 87.64% drop-off for whites. *See* DRSOF ¶ 42 (Fraga Rep. 28 tbl. 3 (Pls.' Ex. 96)). Thus, even taking the Plaintiffs preferred comparators—which are obviously not a valid comparison given the uniqueness of holding an election during a once-in-a-lifetime pandemic—there was no disparate impact on AAPI voters because the rates of requests for absentee ballots and voting absentee "declined" (or rather, returned to normal) at similar rates to that of white voters. *See League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 934 (11th Cir.) (holding that differences of 3.89% and 2.21% were "neither of large magnitude nor statistically significant."), *reh'g en banc denied,* 81 F.4th 1328 (11th Cir. 2023). The same is true for Black, Latino, and Native American voters. DRSOF ¶¶ 40–41; Grimmer Rep. ¶¶ 32–33, 59–64 (Defs.' Ex. DDDD).

Even if there were a slight burden, moreover, "[m]ere inconvenience cannot be enough to demonstrate a violation of § 2." *Brnovich*, 141 S. Ct. at 2238. And the Court in *Brnovich* stated that, when assessing a burden, it is proper to consider what was standard practice in 1982, when Section 2 was amended, because those practices were presumptively valid and provided a

baseline for comparison to the new practices or rules. *Id.* (noting that "every voting rule imposes a burden of some sort" hence the need for a "benchmark[]"). The Court then specifically noted that in 1982 "States typically required nearly 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.* at 2339. Given the extreme limits on absentee-by-mail voting in 1982, the *de minimis* burden on absentee voting imposed here is certainly legal under Section 2, especially given the other significant opportunities for voting Georgia provides. After all, the novel practice of State officials' sending out unsolicited absentee ballots was introduced during the 2020 pandemic, with no long precedent in Georgia law or practice. *See* SOF ¶¶ 96–97; Harvey 52:10–15 (Defs.' Ex. PPP); Sterling 52:5–12 (Defs.' Ex. VVV); Germany 3/7 60:20–22 (Defs.' Ex. HH); K. Smith 63:16–23 (Defs.' Ex. W). Thus, there is nothing unduly burdensome in the imposition of SB 202's prohibition on that practice.

Finally, Plaintiffs improperly discount Georgia's legitimate interests in uniformity of election administration and in preventing election fraud and the appearance of such fraud. *See* Opp. 59–62. The mass mailing of absentee applications by the SOS and counties in the 2020 election led to voters' submitting duplicate applications when they were not sure of the status of their initial applications. Mot. 19–22; SOF ¶ 443; Germany 10/30/23 Decl. ¶¶ 47–48, 89 (Defs.' Ex. B); Bailey 10/6 124:23–126:7 (Defs.' Ex. FFF); Eveler

185:2–11 (Defs.' Ex. T); K. Smith 66:13–67:2 (Defs.' Ex. W); Kidd 5/5 188:24–191:5 (Defs.' Ex. Y); Germany 3/7 183:3–9 (Defs.' Ex. HH). It also led to numerous reports of voters showing up to vote in person having forgotten that they had submitted a request for absentee ballot, thus requiring the time-consuming process of cancelling absentee ballots (discussed below) and leading to further complaints of fraud. *Id.* Plaintiffs simply suggest that no change can be made for voter confusion, or in their words, "voter forgetfulness and oversight are not solved by preventing state and local officials from sending absentee ballot applications." Opp. 59–60. Yet the undisputed evidence shows that duplicates fell dramatically in 2022 under SB 202. Mot. 10 (citing SOF ¶ 522; Grimmer Rep. ¶¶ 179–180 (Defs.' Ex. DDDD)). So in that respect the law had its legitimate, intended effect.

Georgia has a compelling interest in preventing such complaints, voter misperception, and the risk of actual fraud, as set out extensively in State Defendants' MSJ at 13–16. *See, e.g.*, *Brnovich*, 141 S. Ct. at 2340 ("One strong and entirely legitimate state interest is the prevention of fraud. … Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome."). Plaintiffs do not dispute this, but maintain, contrary to this litany of controlling precedent, that these interests are insufficient. *See* Opp. 59–62. They are wrong.

Furthermore, Plaintiffs argue that "disputes of fact remain as to whether SB 202's additional restrictions on absentee ballot applications increased administrative efficiencies." Opp. 60. This misses the point. Defendants do not need to prove the provision resulted in increased administrative efficiency, and indeed, the law could survive scrutiny even if it incidentally decreased administrative efficiency. States must be free to take good-faith measures to improve their electoral processes. As the Supreme Court put it in *Brnovich,* "[Plaintiffs'] requirement … would have the potential to invalidate just about any voting rule a State adopts.… Nothing about equal openness and equal opportunity dictates such a high bar for States to pursue their legitimate interests." 141 S. Ct. at 2343. And State Defendants are entitled to summary judgment on this provision.

B. Plaintiffs Fail to Demonstrate a Dispute of Material Fact on the Ballot Harvesting Penalty.

The same is true of Plaintiffs' claims challenging SB 202's Ballot Harvesting Penalty. That provision changed *only* the penalty for violating the otherwise-unchanged (and unchallenged) ballot harvesting rules, which govern who may return another voter's completed ballot. Unchanged by SB 202, Georgia law establishes who may handle a completed absentee-by-mail ballot. However, to protect voters, deter fraud, and protect the integrity of and public confidence in the election system, SB 202 raised the penalty for violating

the ballot harvesting prohibition from a misdemeanor to a felony. SB 202 did not change who may assist a voter with disabilities, and the list of eligible assisters is not challenged here. Plaintiffs' only challenge (at 78–83) is that the provision allegedly discriminates against voters with disabilities, and thus Plaintiffs abandon all other claims. But their few remaining arguments fail to create a material issue of fact.

1. Plaintiffs fail to present any evidence to suggest that the Ballot Harvesting Penalty denies voters with disabilities meaningful access to voting in violation of the ADA or Section 504 of the Rehabilitation Act.

Plaintiffs first assert (at 21–22) that voters with disabilities need assistance at a significantly higher rate than other Georgia voters. They also claim that "uncertainty" on who can assist a disabled voter in returning their completed ballot makes the enhanced Ballot Harvesting Penalty unduly burdensome for those voters and prevents them from having "meaningful access" to absentee-by-mail voting. Opp. 78–83. Yet, under the undisputed facts here, including the numerous options available to voters with disabilities to obtain needed assistance in returning a completed absentee-by-mail ballot, State Defendants are entitled to summary judgment on the Ballot Harvesting Penalty because it does not violate the Americans with Disabilities Act.

a. Under the ADA, the standard is whether voters with disabilities have meaningful access to vote.

To state a claim under Title II of the ADA, "a plaintiff generally must prove (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability." *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1083 (11th Cir. 2007). Plaintiffs cannot prove either the second or third elements. In fact, prior to this litigation, Plaintiffs own expert witness Dr. Lisa Schur praised Georgia as "an early leader[]" in ensuring voting accessibility. DRSOF ¶ 588; Lisa Schur et al., *Accessible Democracy: Reducing Voting Obstacles for People with Disabilities,* 15 Election L.J. 1 (2015) (Schur Dep., Ex. 5 (DRSOF Ex. EE)).

While Plaintiffs and the U.S. DOJ[15] assert that State Defendants misstate the applicable standard, they both admit that the ultimate issue is whether there is meaningful access to vote (or even participate in the absentee-by-mail process). Opp. 63–65, 68–69. Under binding Supreme Court and Eleventh Circuit precedent, an individual with a disability is denied a benefit

[15] The DOJ's arguments and citation of authorities in its Statement of Interest [Doc. 834] track those of Plaintiffs. Thus, the following arguments apply equally to the position of the DOJ.

or excluded from participation in a service or program only when the individual lacks "meaningful access" to the benefit in question. *Alexander v. Choate*, 469 U.S. 287, 301 (1985) ("[A]n otherwise qualified handicapped individual must be provided with meaningful access[.]"); *accord L.E. by & Through Cavorley v. Superintendent Cobb Cnty. Sch. Dist.*, 55 F.4th 1296, 1303 (11th Cir. 2022) (same); *United States v. Bd. of Trs. for Univ. of Ala.*, 908 F.2d 740, 747 (11th Cir. 1990) (same). And on this record Plaintiffs have not created a material issue of fact on meaningful access because the Ballot Harvesting Penalty changes nothing in the underlying law governing who may or may not assist a voter with a disability in returning their absentee ballot. *See* O.C.G.A. § 21-2-568(a)(5) (felony provision), *id.* § 21-2-385(a) (assistance provision).

And, contrary to Plaintiffs' (at 64–65) and DOJ's (Doc. 834 at 7–8) attempts to muddy the waters regarding the meaningful-access standard, the law in this Circuit is clear that meaningful access does not mean access without difficulties or burdens. *See Ganstine v. Sec'y, Fla. Dep't of Corr.*, 502 F. App'x 905, 910 (11th Cir. 2012); *Bircoll*, 480 F.3d at 1086. As another district court in this Circuit has put it, "[d]ifficulty in accessing a benefit … does not by itself establish a lack of meaningful access." *Todd v. Carstarphen*, 236 F. Supp. 3d 1311, 1329 (N.D. Ga. 2017); *see also Choate*, 469 U.S. at 304 ("[t]he [ADA] does not ... guarantee the handicapped equal results....").

Thus, the existence of any slight burdens or difficulties attached to the Ballot Harvesting Penalty—though none are on the record here—would not mean that Plaintiffs lack meaningful access, especially because SB 202 offers voters with disabilities a variety of ways to return their absentee-by-mail ballots. *See Todd*, 236 F. Supp. 3d at 1329; *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 233 (M.D.N.C. 2020) (finding that even though North Carolina law specifically prohibited nursing home staff from assisting a resident with a disability by returning an absentee ballot, because the residents with disabilities could still return the ballot by U.S. mail, there was no violation of Title II of the ADA).[16]

Additionally, when assessing whether a person lacks meaningful access to a public service or activity, the ADA focuses on the program *as a whole* to determine if voters with disabilities have meaningful access to the program. *See Medina v. City of Cape Coral*, 72 F. Supp. 3d 1274, 1279 (M.D. Fla. 2014). The United States claims, [Doc. 834 at 8], that the benefit in question should

[16] Plaintiffs argue (at 67) that alternative means of access are irrelevant, citing *American Council of the Blind of N.Y., Inc. v. City of New York*, 495 F. Supp. 3d 211 (S.D.N.Y. 2020). That case condemned the existence of workarounds as providing meaningful access for blind pedestrians in New York City who "attest[ed] to the harrowing, dangerous, and life-threatening experiences that blind and low-vision pedestrians frequently experience." *Id.* at 234. These types of extreme cases are well outside the minimal burdens that any disabled voter faces in this case.

be defined narrowly as absentee-by-mail voting, which is what State Defendants evaluate in their MSJ (at 51–52)—just as in they did in response to Plaintiffs' Motion for Preliminary Injunction on this issue—and which the Court properly denied. *See* Doc. 615. Rejection of this argument is doubly appropriate given that the benefit or result in question is not the ability to vote in any particular manner, but the result of *having voted*. *See* 28 C.F.R. § 35.130(b)(1)(iii) (requiring the *opportunity* "to obtain the same result").[17]

The caselaw relied on by Plaintiffs does not alter the foregoing analysis. Plaintiffs' reliance (at 64–65) on the Fourth Circuit's decision in *National Federation of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016), is inapposite. There, Maryland's absentee voting laws made it "impossible for voters with various disabilities" to vote absentee, *id.* at 498, which is not the case here. The Eleventh Circuit has made clear that the ADA does not require that a

[17] Even Plaintiffs' citation (at 64) to agency regulations requiring equality of *opportunity* in accessing a benefit, 28 C.F.R. § 35.130(b)(1)(ii), does not change the applicable standard for stating a claim. DOJ's reliance on this regulation to insist that "making it more difficult for people with disabilities than without disabilities to vote can violate the ADA" does not tell the Court anything meaningful about what level of burden would constitute a violation of the ADA assuming there was any application to the Ballot Harvesting Penalty. [Doc. 834 at 7]. After all, determining whether burdens have become so severe as to constitute a violation of the ADA ultimately hinges on the *statutory* meaningful access standard. *See, e.g.*, *Hunsaker v. Contra Costa County*, 149 F.3d 1041, 1043 (9th Cir. 1998) ("[T]hese regulations do not eliminate the need to show a denial of meaningful access under section 12132, as interpreted by the courts, in disparate impact cases. While regulations may impose additional or more specific requirements, they cannot eliminate statutory requirements.").

disabled voter face *no* burden or difficulty in accessing a benefit. *See Bircoll*, 480 F.3d at 1086.

And Plaintiffs' other citations (at 64–65) do not support their recommended stricter standard; in fact they stand for the opposite. *See People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1155 (N.D. Ala. 2020) ("However, mere difficulty in accessing a benefit is not, by itself, a violation of the ADA."); *Democracy N.C.*, 476 F. Supp. 3d at 231–33 ("Plaintiffs submitted no evidence tending to show Plaintiff Hutchins cannot mail his absentee ballot to the county board of elections because he is blind. The court declines to enjoin § 163-231(b)(1) under the ADA/RA."); *Westchester Disabled On the Move, Inc. v. County of Westchester*, 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004) (finding a lack of meaningful access when a county failed "to ensure that disabled individuals are able to vote in person and at their assigned polling places").[18] While

[18] Similarly, Plaintiffs try to misdirect the Court (at 66) as to the requirements of the meaningful access standard by citing other out of Circuit cases to imply that State Defendants have left voters with disabilities with *de minimis* access. But State Defendants have done no such thing. And those non-binding cases also reiterate that meaningful access does not require *identical results* or *fully equal* access. *See Trivette v. Tenn. Dep't of Corr.*, No. 3:20-cv-00276, 2021 WL 10366330, at *11 (M.D. Tenn. May 5, 2021) ("None of that means, of course, that Title II guarantees disabled prisoners fully equal access to every prison service."); *Gustafson v. Bi-State Dev. Agency of Mo.-Ill. Metro. Dist.*, 29 F.4th 406, 412 (8th Cir. 2022) ("Under the meaningful access standard, services "are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons[.]" (quoting *Loye v. County of Dakota*, 625 F.3d 494, 499 (8th Cir. 2010))); *Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 199 (2d Cir. 2014) (explaining that

Plaintiffs and DOJ may wish that the law of this Circuit supported their reframing of the meaningful access standard as a standard effectively requiring no burden on voters with disabilities, but that is not the law.

b. Plaintiffs' regulatory claims are governed by the meaningful-access standard.

In a further sign of desperation, Plaintiffs (at 71–73) cite 28 C.F.R. § 35.130(b)(3)(i)–(ii)'s prohibition on discriminatory methods of administration and 28 C.F.R. § 35.130(b)(8)'s prohibition on discriminatory eligibility criteria as if they are somehow evaluated differently. Yet they are not. These claims cannot and do not alter the *statutory* meaningful access standard. *Hunsaker v. Contra Costa County*, 149 F.3d 1041, 1043 (9th Cir. 1998) ("[T]hese regulations do not eliminate the need to show a denial of meaningful access under section 12132, as interpreted by the courts, in disparate impact cases. While regulations may impose additional or more specific requirements, they cannot eliminate statutory requirements.").

First, the Eleventh Circuit has not recognized a private right of action to enforce either of these regulatory provisions. So Plaintiffs rely (at 72–73) on out of circuit district court opinions to argue for a private right of action for their discriminatory methods of administration and discriminatory eligibility

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meaningful access existed when "those with disabilities are as a practical matter able to access benefits to which they are legally entitled" (quoting *Henrietta D. v. Bloomberg*, 313 F.3d 261, 273 (2d Cir. 2003))).

criteria claims. However, the regulation itself does not contain indicia of creating a private right of action, such as "individual-centric language" but rather focuses on what "a public entity shall" or "shall not" do, showing an intent for government enforcement against regulated entities. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023); 28 C.F.R. § 35.130. And inferring a private right of action from a regulation, rather than from a statute, raises potential separation-of-powers concerns, *see Ziglar v. Abbasi*, 582 U.S. 120, 136–37 (2017) (discussing Congress's role in crafting remedies); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.")

Second, in support of their "methods of administration" and "eligibility criteria" claim, Plaintiffs cite (at 72–73) various district court cases that are inapplicable to assistance in returning an absentee-by-mail ballot. For example, Plaintiffs rely on *Price v. Shibinette*, which involved a complaint about the receipt of rehabilitative services in an integrated as opposed to an institutionalized setting. No. 21-cv-25-PB, 2021 WL 5397864, at *11 (D.N.H. Nov. 18, 2021). The same is true of *Lewis v. Cain*, which involved a claim against a prison's accommodations of disabled inmates. No. 3:15-CV-318, 2021 WL 1219988, at *50 (M.D. La. Mar. 31, 2021), *appeal docketed sub nom. Parker v. Hooper*, No. 23-30825 (5th Cir. Nov. 20, 2023) *and stayed pending appeal,* 95

F.4th 231 (5th Cir. 2024). And the one case they cite that involved absentee ballots applied the statutory meaningful-access standard to determine whether the claim was legally viable. *See La Unión del Pueblo Entero v. Abbott*, 618 F. Supp. 3d 449, 493 (W.D. Tex. 2022) (holding that meaningful access standard would apply on merits after the motion to dismiss stage), *appeal docketed sub nom. Mi Familia Vota v. Abbott*, No. 22-50777 (5th Cir. Aug 31, 2022) *and oral argument held* (11th Cir. July 12, 2023).

Third, even if the Court were inclined to recognize separate causes of action under these provisions, the *statutory* meaningful-access standard would still apply. *See Hunsaker*, 149 F.3d at 1043; *accord Easley by Easley v. Snider*, 36 F.3d 297, 302 (3d Cir. 1994) (applying the statutory meaningful access standard to claims brought under discriminatory methods regulation); *La Unión del Pueblo Entero*, 618 F. Supp. 3d at 493.

Finally, Plaintiffs offer no evidence of how the Ballot Harvesting Penalty creates an eligibility criterion or is itself a discriminatory method of administering the Georgia absentee-by-mail system. In fact, as noted above, there is no basis for such a claim. Plaintiffs cannot meet that standard as it concerns the Ballot Harvesting Penalty, or, as noted below, the voter identification requirements, their reliance on these regulations does not alter the analysis of their claims.

c. Plaintiffs have failed to show that the Ballot Harvesting Penalty denies voters with disabilities meaningful access to absentee voting.

After pages of misdirected argument over straightforward criteria applicable to claims under Title II of the ADA, Plaintiffs still fail to present any evidence that voters with disabilities are denied meaningful access to absentee-by-mail voting because of the Ballot Harvesting Penalty. This is so because there are still multiple ways for voters with disabilities to return their ballot (mail, drop box, return by hand to an elections' office, or obtaining assistance from a variety of authorized individuals). Title II of the ADA requires nothing more. *Democracy N.C.*, 476 F. Supp. 3d at 233 (finding that even though North Carolina law specifically prohibited nursing home staff from assisting a resident with a disability by returning an absentee ballot, because the residents with disabilities could still return the ballot by U.S. mail, there was no violation of Title II of the ADA); *see also Todd*, 236 F. Supp. 3d at 1330 (finding that the unavailability of one method of accessing a benefit did not demonstrate a lack of meaningful access where there were alternative options available to the plaintiff that she did not meaningfully explore).[19]

[19] This point disposes of ADAPT CEO, Zan Thornton's unsubstantiated claim that SB 202's Ballot Harvesting Penalty prevented ADAPT members from voting. ADAPT 2/22 40:5–9 (Defs.' Ex. CC). As they subsequently admitted, these members could have mailed their absentee ballots. *Id.* at 40:24–25 ("Q. Could they have mailed it? A. Possibly."). And the reason why family or

Plaintiffs nevertheless argue at (78–83) that raising the penalty for violating the ballot harvesting rules to a felony does not give voters with disabilities an equal opportunity to vote absentee because the increased penalty has a chilling effect on who may be willing to assist. But Plaintiffs are unable to explain why SB 202's increasing the penalty for an already-illegal act causes confusion or chills legal conduct. They suggest (at 79) that, prior to SB 202, assistors understood their actions to be compliant with the law but post-SB 202 they are now unsure. But the law only changed the *penalty* for violation of the statute—from a misdemeanor to a felony, *see* O.C.G.A. § 21-2-568(a)(5)—not the *substance* of the law regarding caregivers. *See id.* § 21-2-385(a). Thus, Plaintiffs proposed burdens are illusory.

When examined carefully, moreover, Plaintiffs citations to the record merely reinforce this conclusion. They cite (at 79) Devon Orland's Declaration for the bare assertion that GAO fielded complaints from voters with disabilities who were unable to get their chosen assistor to help them vote. But when discussing with some more specificity the issues those voters faced, none of the "burdens" can be traced to SB 202. *See* Orland Decl. ¶ 16 (Defs.' Ex. N) ("We have received reports of people who could not get rides to the polls and people

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caregivers allegedly could not assist these voters was completely unrelated to SB 202 according to Thornton. *Id.* at 40:10–12 ("Q. And why did they -- why were they unable to find a family member or caregiver to assist? A. They were working. Family was working.").

whose staff at their nursing facility refused to help them vote."). Any issues on this front must be a result of individuals not properly understanding the controlling *substantive* law, as Orland implicitly admits, stating that his organization "ha[s] assisted them to understand and comply with the new rules." DRSOF ¶ 681; Orland Decl. ¶ 25 (Defs.' Ex. N).

The same is true of Plaintiffs' other citations on this point. Plaintiffs claim (at 79) that "friends, neighbors, or paid staff" may not qualify as caregivers because the term "caregiver" is not defined in the statute.[20] Yet they have not identified a single incident where a friend, neighbor, nursing home staff, or other residential facility provider was prosecuted, questioned, or prevented from returning an absentee ballot on behalf of a voter with a disability. And, if they were able to lawfully return an absentee ballot on behalf of an absentee voter before SB 202, the increased penalty provides no reason to assume they would be unable to do so now.

[20] Continuing their shotgun approach, Plaintiffs also press a claim (at 81) that the term is so vague that voters with disabilities are confused and unable to be sure they meet the definition. But under any common understanding of the term "caregiver," none of the groups referenced by Plaintiffs are categorically excluded and most individuals within those classifications fall squarely within a common definition of caregiver. Indeed, O.C.G.A. § 21-2-385(a) specifically states that the caregiver of the elector with disabilities may mail or deliver the absentee ballot, "regardless of whether such caregiver resides in such disabled elector's household." Of course, no one within these categories has even been questioned, let alone prosecuted for helping a voter with disabilities return an absentee-by-mail ballot.

This point is also borne out in Plaintiffs reliance (at 80) on the Declaration of Matt Hargroves. He suggests that homeless-shelter staff regularly returned ballots for homeless voters with disabilities under O.C.G.A. § 21-2-385(a) before SB 202 without any issue. Only now, Hargroves claims he is confused by the provision and will not return ballots for homeless voters with disabilities, even though part of his job appears to be assisting disabled individuals. DRSOF ¶ 680; Hargroves Decl. ¶¶ 8–11, 13 (Defs.' Ex. L). But he provides no answer as to why SB 202's making violations of this law a felony—while maintaining the same statutory term "caregiver" that has been the law for years—has contributed to his confusion.

The other declarations on which Plaintiffs rely show only that voters have applied limitations *to themselves* that are *not* based on the law. Empish Thomas, a voter who is blind, puts her own personal limitation on the term caregiver by excluding someone who is clearly a caregiver—her assistant whom she pays to assist her with daily tasks that she cannot complete because of her disability—from the scope of the statute. DRSOF ¶ 680; Thomas Decl. ¶¶ 14–15 (Defs.' Ex. O). She also notes that she prefers to vote in-person, then complains about transportation to an absentee ballot drop box that is available at the same place she would vote in person and during the same voting hours. *Id.* ¶¶ 3, 5, 17. And, though she claims it was difficult to vote in 2022, the hardship she claims she experienced was caused by poll workers, not the

provisions of SB 202—and not State Defendants. *Id.* ¶¶ 24–36. Such testimony does not create a material issue of fact.

The same is true of voter Wendell Halsell, who has disabilities and declined his nephew's assistance in returning his ballot, DRSOF ¶ 668; Halsell Decl. ¶ 5 (Defs.' Ex. AAAAA), even though his nephew is expressly authorized to return ballots under O.C.G.A. § 21-2-385(a). Likewise, Nikolas Papadopoulos claims that this provision of SB 202 would prevent someone from assisting him by opening his mailbox so that he can mail a ballot, DRSOF ¶ 680; Papadopoulous Decl. ¶ 9 (Pls.' Ex. 306), even though the provision does not prevent anyone from assisting a voter with disabilities in this manner.

Similarly, Shannon Mattox recounts the story of a voter with disabilities who lives in a nursing facility and who was concerned that his social worker at the facility—who also assists him in daily tasks—would not qualify as a caregiver. DRSOF ¶ 680; Mattox 5/11/23 Decl. ¶ 21(a) (Pls.' Ex. 303). But, of course, such people are included in the ordinary and plain meaning of the term caregiver. *See Stubbs v. Hall*, 840 S.E.2d 407, 415 (Ga. 2020) ("'we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would'" (quoting *Fed. Deposit Ins. Corp. v. Loudermilk,* 826 S.E.2d 116, 120 (Ga. 2019))). Such obvious misinterpretation and over-reading of the law by voters also cannot create a material issue of fact.

Next, Plaintiffs proffer (at 80) the argument that pre-SB 202, there was an understanding that those who were otherwise qualified as assistors under the Voting Rights Act would not be subject to prosecution, and they claim that this interpretation is no longer in force post-SB 202. But this too misstates the law. When construing a statute, Georgia courts "may look to other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question." *Loudermilk*, 826 S.E.2d at 120 (citation omitted). And here, as part of the relevant background, the Georgia Attorney General (twice) and Georgia Supreme Court have both held that, in federal elections, voters with disabilities are entitled to assistance consistent with Section 208 of the Voting Rights Act, even if Georgia statutory law is more restrictive. *Holton v. Hollingsworth*, 514 S.E.2d 6, 9 (Ga. 1999) (discussing 1984 opinion); 2016 Ga. Op. Att'y Gen. 02 (Ga. A.G.). SB 202 did nothing to challenge the Court's holding in *Hollingsworth*, or the unchanged statutory provision on which it ruled. Nor have Plaintiffs pointed to anything about the ballot harvesting provisions that suggests they were intended to change Georgia law's longstanding understanding of the term caregiver.

As a last desperate gambit, Plaintiffs assert (at 82) that the Ballot Harvesting Penalty discriminates against voters with disabilities because they must devise workarounds to vote absentee. This is incorrect. First, Plaintiffs

have failed to explain how any potential workarounds that voters with disabilities must use are caused by the Ballot Harvesting Penalty, as it did not change the substantive underlying law. Second, the meaningful-access standard does not require that individuals with disabilities face no burdens when accessing a benefit. *Ganstine*, 502 F. App'x at 910. Or, as the Supreme Court has put it, "[t]he [ADA] does not ... guarantee the handicapped equal results[.]" *Choate*, 469 U.S. at 304 (citation omitted). Indeed, Georgia law provides for several possible assistors—the very "workaround" Plaintiffs cite.[21]

Moreover, voters with disabilities have a multitude of ways to return an absentee ballot such that difficulty in one area does not entail lack of meaningful access. *Todd*, 236 F. Supp. 3d at 1330 (finding that the unavailability of one method of accessing a benefit did not demonstrate a lack of meaningful access where there were alternative options available to the plaintiff that she did not meaningfully explore).[22]

For all these reasons, Plaintiffs have failed to establish a material issue

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[21] Plaintiffs again cite (at 82) *American Council of the Blind of N.Y.*, 495 F. Supp. 3d 211 (S.D.N.Y. 2020), to contest the relevance of workarounds. But as explained previously at *supra*, n.16 that case is entirely inapposite.

[22] Plaintiffs attempt (at 85) to distinguish *Todd* on the basis that the court's decision came after multiple evidentiary hearings on whether a specific individual had meaningful access. But unlike *Todd*, which dealt with an individual who had requested and been offered accommodations, 236 F. Supp. 3d at 1316, 1329–36, this is a facial challenge where no Plaintiff has made any accommodations request. Of course, the Court here has a fully developed record on summary judgment that demonstrates there are no issues for trial.

of fact as to whether the Ballot Harvesting Penalty denies meaningful access to voters with disabilities. It does not. State Defendants' motion for summary judgment should be granted because there are no disputes of material fact and Plaintiffs have failed to show a denial of meaningful access under the ADA.

2. Plaintiffs are unable to establish a dispute of material fact that the Ballot Harvesting Penalty denies anyone meaningful access to voting "by reason of" the voter's disability.

In addition to being unable to prove a denial of meaningful access, Plaintiffs are unable to prove that any burden from the Ballot Harvesting Penalty is *because of* the individual's disability. For Plaintiffs to state a valid claim under Title II of the ADA, they must demonstrate not just a lack of meaningful access but also that "the exclusion, denial of benefit, or discrimination was *by reason of the plaintiff's disability*." *Bircoll*, 480 F.3d at 1083 (emphasis added). This showing requires that Plaintiffs "establish a causal link between their disabilities and the exclusion, denial of benefits, or discrimination." *People First*, 491 F. Supp. 3d at 1155.[23] But here, unable to

[23] Significantly, the causation standard differs for claims under Section 504 and the ADA. "[P]laintiffs claiming intentional discrimination under [Section 504] must show that they were discriminated against *solely* by reason of their disability, but the ADA requires only the lesser 'but for' standard of causation." *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008) (cleaned up). This difference is not significant here; however, because Plaintiffs can meet neither standard.

produce any evidence to support this prong of an ADA claim, Plaintiffs instead point to disparate impact and failure to accommodate theories that are inapplicable and thus cannot create a material issue of fact for trial.

a. Plaintiffs fail to show a disparate impact from the Ballot Harvesting Penalty.

As to their disparate impact theory, Plaintiffs do not even attempt to show *how* the Ballot Harvesting Penalty has a disparate impact on voters with disabilities. *See* Opp. 86 (arguing that "several restrictions on absentee voting collectively deny access to voters with disabilities."). Nor do Plaintiffs provide the statistical evidence required in this Circuit for a showing of disparate impact. *See Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1218 (11th Cir. 2008) (requiring comparative statistical analysis between similarly situated non-disabled and disabled individuals); *Hallmark Devs., Inc. v. Fulton County*, 466 F.3d 1276, 1286 (11th Cir. 2006) ("[S]tatistics based on the general population [should] bear a proven relationship to the actual applicant flow." (quoting *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 n.11 (2d Cir.1988) (alteration in original))). Simply stating (at 21–22) that voters with disabilities need assistance in daily living more than voters without disabilities does not create a valid inference of disparate impact.

To establish a disparate impact theory of liability, the Eleventh Circuit requires *statistical evidence* comparing the impact of *the challenged provision*

on voters with disabilities as opposed to those who do not have disabilities. *See Schwarz*, 544 F.3d at 1218 ("Because Gulf Coast has completely failed to present relevant comparative evidence, the district court was right to reject its disparate impact claim."). As noted, Plaintiffs have adduced no such evidence here. And even if Plaintiffs "had[] evidence that one disabled person was adversely affected by a particular employment practice," that "is not sufficient to create a prima facie case of a disparate impact under the ADA." *Smith v. Miami-Dade County*, 21 F. Supp. 3d 1292, 1295 (S.D. Fla. 2014), *aff'd*, 621 F. App'x 955 (11th Cir. 2015); *see also Schwarz*, 544 F.3d at 1218 ("simply showing that a few houses are affected by an ordinance does not come close to establishing disparate impact.").

When providing comparative data, moreover, the proper comparison is between voters with disabilities and non-voters with disabilities who are otherwise similarly situated. *Schwarz,* 544 F.3d at 1217 ("The relevant comparison group to determine a discriminatory effect on the physically disabled is other groups of similar sizes living together. Otherwise, all that has been demonstrated is a discriminatory effect on group living.") (quoting *Gamble v. City of Escondido*, 104 F.3d 300, 306–07 (9th Cir. 1997))). But again, Plaintiffs have provided no such evidence here.

Accordingly, because all that Plaintiffs offer are bald assumptions and inferences based on general statistics about individuals with disabilities

unconnected to the challenged provision, they have failed to show that voters with disabilities were discriminated against *because of* their disability. *Bircoll*, 480 F.3d at 1083. And that is a sufficient reason to grant summary judgment on their claim.

b. Georgia law already provides reasonable accommodation to voters needing assistance returning their absentee-by-mail ballot, and Plaintiffs are unable to create a material issue on this point.

Taking a different tack, DOJ asserts (at 10) that public entities have distinct obligations to both provide meaningful access "*and* make reasonable modifications to avoid discrimination[.]" Yet here, there is no evidence that any voter requested an accommodation not *already* provided by Georgia law for returning an absentee-by-mail ballot. And Plaintiffs have offered no other evidence that any additional accommodation is needed.[24]

[24] DOJ's cited authorities (at 10–11) for the notion that a failure to accommodate is distinct from meaningful access, do not support the Government's view. In *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006) (en banc), the Seventh Circuit explained that failure to accommodate provides a basis for liability "when *necessary* to avoid discrimination *on the basis of* a disability," providing a distinct way to show liability from disparate impact and treatment theories of liability. *Id.* at 751. Notably, the Seventh Circuit never claims nor provides any basis for the notion that a public entity could provide meaningful access *and* still be liable of a failure to accommodate. *See id.* at 751–53.

This reading is also supported by the Government's other cited authority, an unpublished case from the Third Circuit. *See Muhammad v. Ct. Com. Pl. of Allegheny Cnty.*, 483 F. App'x 759 (3d Cir. 2012). There, the court held that a failure to accommodate provided a basis of liability for a blind

To be sure, the Supreme Court has explained that, "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Choate*, 469 U.S. at 301. However, "when an individual already has 'meaningful access' to a benefit to which he or she is entitled, no additional accommodation, 'reasonable' or not, need be provided by the governmental entity." *Medina*, 72 F. Supp. 3d at 1278 (cleaned up). Thus, these are not *distinct* obligations; instead, a failure to accommodate just goes to the obligation to provide meaningful access.

Further, "[m]eaningful access … does not require the governmental entity to provide every *requested* accommodation." *Id.*; *accord Todd*, 236 F. Supp. 3d at 1334 ("a reasonable accommodation need not be perfect or the one most strongly preferred by the plaintiff," but it still "must be 'effective'" (quoting *Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016))). Nor is a qualified individual "entitled to the accommodation of her choice, but only to a reasonable accommodation." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) (quoting *Lewis v. Zilog, Inc.*,

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individual who was not provided a requested assistive device such that "he was excluded from meaningful participation." *Id.* at 763–64. And the plaintiff "bore the initial burden of demonstrating that his requested accommodations were reasonable, i.e., necessary to permit his meaningful participation[.]" *Id.* at 763. Whether something is necessary to permit meaningful participation is of course the same inquiry as whether an individual has meaningful access. *See, e.g.*, *Choate*, 469 U.S. at 301.

908 F. Supp. 931, 948 (N.D. Ga. 1995)); *Medina,* 72 F. Supp. 3d. at 1279 (individuals not entitled "to optimal [accommodation] finely tuned to [their] preferences").

Plaintiffs' reliance (at 71) on a recent case from a district court in Texas does not help them. *See Johnson v. Callanen*, No. SA-22-CV-00409-XR, 2023 WL 4374998 (W.D. Tex. July 6, 2023). There, the court found that voters with disabilities who had alleged that they could not vote in secret as Texas law guarantees for all voters "ha[d] been denied the benefit of voting privately and independently by absentee ballot because of their disabilities." 2023 WL 4374998, at *7. And, because of this finding, they were "entitled to a reasonable accommodation." *Id.* But this case simply demonstrates that individuals with disabilities must lack meaningful access to trigger a public entity's duty to provide a reasonable accommodation. And Plaintiffs haven't provided sufficient evidence to establish a material issue of fact on the question of meaningful access.

In short, Plaintiffs in this *facial* challenge have failed to show that they lack meaningful access such that some additional reasonable accommodation is required. Georgia law already provides them with an opportunity for assistance in returning a completed absentee-by-mail ballot, and the substantive scope of that opportunity is not challenged. Plaintiffs simply do not want people punished for violating the ballot harvesting provisions – even

though that policy would give them no more rights or opportunities than they already have. Their failure to show causation under a failure to accommodate or a disparate impact theory provides independent grounds for the Court to grant summary judgment to State Defendants.

III. Plaintiffs Fail to Create a Disputed Issue of Material Fact on Any of the Challenged Provisions Directly Affecting Voters.

The Court should also grant summary judgment to State Defendants on each of the challenged provisions of SB 202 that directly regulate or affect individual voters. SB 202's voter identification requirements for both requesting and returning absentee-by-mail ballots is a long-standing, reasonable regulation protecting the integrity of elections and does not deny meaningful access for voters with disabilities. Further, SB 202's requirement for voters to provide their birthdate on the absentee-ballot return envelope is not in violation of the Materiality Provision of the Civil Rights Act. There are simply no disputed issues of material fact regarding any of these provisions and State Defendants are entitled to judgment as a matter of law.

A. Plaintiffs fail to establish a disputed issue of material fact related to voter identification requirements associated with the absentee ballot application.

Plaintiffs first claim (at 46–56, 83–87) that requiring voter identification, including a DDS ID number that 97% of all Georgia voters have associated with their voter file (Mot. at 8 (citing SOF ¶¶ 486–87; Sterling 239:8–20 (Defs.' Ex. VVV); Evans 79:6–80:4 (Defs.' Ex. KKK)), somehow denies minority groups

and voters with disabilities equal opportunity and meaningful access to absentee-by-mail voting. Yet the undisputed evidence shows there is no basis for these claims. As noted above, with voter identification, all minority groups continued to utilize absentee-by-mail at high levels, almost all at higher rates than before the pandemic. With the multiple opportunities for voters with disabilities to provide an acceptable form of identification, they are not denied meaningful access. Indeed, the Eleventh Circuit has already upheld similar voter-identification requirements for absentee-by-mail voting. *GBM,* 992 F.3d at 1329–30.

This voter identification process, moreover, was adopted after significant criticism of the prior subjective signature match process. Mot. 16, 56; SOF ¶¶ 431, 472, 524; Germany 10/30/23 Decl. ¶¶ 17–18, 23 (Defs.' Ex. B); Carter Ctr. Rep., *supra* n.5, at 16; *Election Crimes, supra*, at 8, 10, 12, 18–19 (Defs.' Ex. C); Germany 3/7 90:1–11 (Defs.' Ex. HH); Mashburn 3/14 196:20–197:4 (Defs.' Ex. KK); Sterling 95:25–96:16, 102:11–18 (Defs.' Ex. VVV). To make the process more objective, Georgia chose to utilize similar voter-identification requirements applicable to in-person voting and require one of the same forms of identification that Georgia voters have had to provide since 2005, while also allowing for other identification documents for the less than 3% of Georgia voters who might not have a Georgia driver's license or state identification card. Mot. 56–57; O.C.G.A. § 21-2-381(a)(1)(C)(i); O.C.G.A. § 21-2-417(a), (c);

SOF ¶ 484; Mashburn 3/7 60:5–21 (Defs.' Ex. JJ). Indeed, this was of particular benefit to voters with disabilities, whose signatures may not be uniform because of their disability. SOF ¶ 485; ADAPT 2/20 79:20–24, 99:2–10 (Defs.' Ex.CC). And Plaintiffs have failed to create a material issue of fact as to the lawfulness of these requirements.

1. Plaintiffs fail to present any material fact to suggest that voter identification requirements associated with absentee voting unduly burden the right to vote.

Requiring voters to provide identification to verify their eligibility and identity as part of the absentee ballot process—identification requirements that not only match the requirements for in-person voting but allow a wider range of identification options—does not unduly burden the right to vote, as courts have consistently held when evaluating other challenges to voter identification requirements. *See, e.g.*, *Crawford*, 553 U.S. at 202–03 (upholding Indiana's photo ID requirement); *Common Cause/Ga.*, 554 F.3d at 1354 (upholding Georgia's photo identification requirement); *GBM*, 992 F.3d at 1328 (upholding Alabama voter identification requirement for both in-person and absentee-by-mail voting); *Frank v. Walker*, 768 F.3d 744, 745–46 (7th Cir. 2014) (upholding photo ID requirements for absentee voting).

Plaintiffs retort that "[m]ore than 46,000 Georgia voters have been issued a DDS ID but had no DDS ID number associated with their voter file in November 2022; over 70,000 more had an out-of-date or otherwise incorrect

DDS ID reflected in the voter file." Opp. 108. And they assert that the allowance of alternative forms of ID—limited to the case of those who lack a valid ID—does not help these voters. *Id.* at 108–09. Of course, as Plaintiffs themselves admit (at 109), county election officials will seek to correct these problems through the issuance of a provisional ballot or simply by updating a voter's record when the record lacks a DDS ID number. And, because voters have the opportunity to cure any errors—something the Supreme Court has found to be an "adequate remedy"—any burden is effectively mitigated. *Crawford,* 553 U.S. at 197–99; *GBM*, 992 F.3d at 1319.

Moreover, the concern that these measures unduly burden voters in the first place is not supported by the available data. The available statistics show that a higher percentage of Black, white, Latino, and Native American voters voted absentee-by-mail in 2022 than they did in 2018, while AAPI voters continued to vote absentee-by-mail at a rate higher than any of these groups. SOF ¶ 355; Grimmer 102:24–103:5 (Defs.' Ex. OOO); DRSOF ¶ 40; Grimmer Rep. ¶¶ 58–62 (Defs.' Ex. DDDD). Further, turnout in 2022 remained near record highs for a midterm election. SOF ¶¶ 348, 354; Shaw 2/14 Rep. ¶ 10 (p. 6 – summary of findings), ¶¶ 12, 17, 23 (Defs.' Ex. KKKK); Ga. Sec'y of State, *supra*; Grimmer Rep. ¶¶ 8, 158–64 (Defs.' Ex. DDDD); DRSOF ¶ 40; Grimmer Rep. ¶¶ 58–62 (Defs.' Ex. DDDD). Thus, any burdens created by the ID provisions are, at most, minimal.

Plaintiffs further contend (at 110–11) that State Defendants' identified interests are insufficient to support the ID provisions, claiming that these interests are not served by making voters with mismatched DDS ID go through cure procedures. But this is just a way of reframing the minimal burden imposed by the ID provisions—a burden that cannot overcome the compelling state interests in preventing fraud, restoring voter confidence in election integrity, encouraging uniformity, and promoting efficient and orderly election administration. *See, e.g.*, *Crawford*, 553 U.S. at 204 ("The application of the statute to the *vast majority* of Indiana voters is amply justified by the valid interest in protecting 'the integrity and reliability of the electoral process.'" (emphasis added) (quoting *Anderson*, 460 U.S. at 788 n.9)); *Common Cause/Ga.*, 554 F.3d at 1354–55 (same); *GBM*, 992 F.3d at 1320. And this argument is no different in form from the rejected argument in *Crawford* that the burden of obtaining a valid ID outweighed the State's legitimate interests. 553 U.S. at 198; *see also, GBM*, 992 F.3d at 1328 ("In sum, when we weigh the burden on a voter to obtain and present a photo ID against Alabama's interests underlying the voter ID law, we find the law to be a neutral, nondiscriminatory regulation of voting procedure."). In short, there is no material issue of fact as to this provision's lawfulness.

2. Plaintiffs fail to present any material fact to suggest that voter identification requirements violate Section 2 of the Voting Rights Act

There is also no evidence that the voter identification requirements "deprive[] minority voters of an equal opportunity to participate in the electoral process and to elect representatives of their choice." *GBM*, 992 F.3d at 1329 (emphasis omitted). Thus, State Defendants should be granted summary judgment on this claim as well.

Advancing Justice-Atlanta Plaintiffs nevertheless object that "Defendants make no arguments addressing Plaintiffs' claim that SB 202's ID requirements disparately impact AAPI, Latinx, or Native American voters." Opp. 46. But the points that State Defendants made about Black voters are equally applicable to the other racial groups highlighted by Plaintiffs. *See supra*, Section II.A(3).[25] With no viable claim that obtaining a valid identification is anything more than a normal inconveniences of daily life, Plaintiffs' claims fail for these groups as well. *See GBM,* 992 F.3d at 1330

[25] For example, 97% of voters have a DDS ID number associated with their voter file. Mot. 8; SOF ¶ 486; Sterling 239:8–20 (Defs.' Ex. VVV); Evans 79:6–80:4 (Defs.' Ex. KKK). Accepting Plaintiffs' claims (at 4) that, for the remaining 3%, Black voters make up 53% and white voters approximately 33% of those who do not have a DDS ID number associated with their voter file, this accounts (collectively) for a total of 86% of those 3% of voters—i.e., 2.58% of voters. This leaves an incredibly small percentage of Georgia voters – just 0.42% (3.00 – 2.58) -- who are neither white nor Black, and who do not have a DDS ID number associated with their voter file. This is not the stuff of a disparate impact claim.

(holding that *inconveniences* do not constitute a denial or abridgement of the right to vote).

Plaintiffs nevertheless claim (at 47) that studies show that SB 202's ID provisions have a disparate impact on AAPI, Black and Latino voters who are less likely to have these forms of ID. Further, they claim that SB 202 led to a 18–22 percent decrease in AAPI turnout and a decrease in AAPI voters' use of ballots in elections post SB-202. But this argument, as noted above, takes the COVID election cycle as the normal baseline and is thus misleading. *See* DRSOF ¶ 37; Grimmer Rep. ¶ 37 & n.8 (citing Stanford-MIT Healthy Elections Project, *The Virus and the Vote: Administering the 2020 Election in a Pandemic* (July 1, 2021), https://tinyurl.com/2p98hn69), ¶ 39 (noting that "the coronavirus was salient and disrupting many Americans' routines") (Defs.' Ex. DDDD). Indeed, Dr. Grimmer's analysis found that, "[c]ompared to the 2020 election . . . the change in mail-in absentee ballot usage among [AAPI] voters is similar to the change in mail-in absentee ballot usage among white voters and the change overall." DRSOF ¶ 40; Grimmer Rep. ¶ 64 (Defs.' Ex. DDDD). As noted above, this observation is also consistent with Plaintiffs' own expert data.

Plaintiffs' argument (at 48–49) that there is a statistically significant disparity between the rejection of AAPI and white voters' absentee ballots because of ID deficiencies likewise suffers from fatal flaws. First, Plaintiffs

illogically allege that pre-SB 202 disparities are evidence of a disparate impact *post*-SB 202, even though there was previously no ID requirement for absentee voting. SOF ¶ 389; Bailey 3/21 123:24–125:25 (Defs.' Ex. GGG). Second, the actual percentage of rejections due to ID issues was quite low for all racial groups (below 1%) and the difference between white and AAPI voters in the November 2022 election was an infinitesimal 0.36%.[26] *See* DRSOF 269–70; Fraga Rep. 57 tbl. 13 (Pls.' Ex. 96). The only way that such a small difference could constitute evidence of a disparate impact would be through the kind of "statistical manipulation" criticized in *Brnovich*, 141 S. Ct. at 2345.

With no evidentiary support for their position, Plaintiffs (at 50–55) recite a litany of supposedly disputed facts. First, they argue (at 50) that the record shows that SB 202 has negatively impacted Black voters because of a decline in Black turnout post SB-202. But the decline in Black turnout in Georgia was

[26] Plaintiffs next allege (at 48–49) that "the existence of alternative methods to verify identity does not diminish the burden on voters of color because these methods also disproportionately impact AAPI, Latinx, Black, and Native American voters." But they produce no statistics showing a statistical disparity, nor any statistics showing a disparate impact based on the purported disparities in access to alternative methods. In short, the potential inconvenience of obtaining a state identification card is inadequate under Section 2 because "the challenged law must have *caused* the denial or abridgement of the right to vote on account of race." *GBM*, 992 F.3d at 1330. And Plaintiffs are attempting to "make the 'unjustified leap from the *disparate inconveniences* that voters face when voting to *the denial or abridgement of the right to vote*.'" *Id.* (quoting *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600–01 (4th Cir. 2016)). Thus, these alleged inconveniences are immaterial and cannot support a claim under Section 2.

consistent with a decline in Black turnout seen nationwide in the 2022 midterm elections and that Georgia's decline was lesser than that seen in other states. DRSOF ¶ 40; Grimmer Rep. ¶¶ 35–51 (Defs.' Ex. DDDD); Shaw 2/24 Rep. ¶¶ 14, 46–52 (Defs.' Ex. LLLL).

Next, Plaintiffs assert (at 51) that AAPI and Latino voter turnout declined post SB-202. But, as explained above, these changes were similar to the changes among white voters. Indeed, AAPI overall turnout *increased* in 2022 over 2018 and AAPI use of absentee-by-mail remained higher than Black, white, and Latino voters. DRSOF ¶ 40; Grimmer Rep. ¶¶ 32, 58–62 (Defs.' Ex. DDDD). Similarly, the claims of disparate impact (at 51–52) from data showing miniscule increases in white absentee ballot usage and decreases in absentee ballot usage among voters of color are insufficient to support an inference of disparate impact. *See supra* Section II.A.3 (analyzing the statistical evidence). And Plaintiffs themselves admit that no inferences can be drawn from these figures because "[t]here are too many other factors that influence turnout in any given election, including countermobilization efforts and the competitive gubernatorial and Senatorial elections on the ballot in 2022." Opp. 51; *see also* DRSOF ¶ 40; Grimmer Rep. ¶ 46 (Defs.' Ex. DDDD) (noting the numerous other factors in Georgia besides SB 202 makes causal claims impossible absent "extremely strong" assumptions); Shaw 2/24 Rep. ¶ 11 (Defs.' Ex. LLLL) (noting the many assumptions needed as well as factors

that must be ignored for a causal finding); Burden 21:4–22:12 (DRSOF Ex. R) (acknowledging that many factors can affect turnout besides changes to election laws).

Still pressing their case, Plaintiffs argue (at 52) that the voter identification requirement is burdensome even though it only impacts a small number of voters because "that small portion of Georgians consists primarily of minority voters[.]" But of course, any of these voters can use any of the alternative forms of ID approved by SB 202. Further, it is undisputed that the Black-white "gap" in rejection rates was smaller under SB 202's voter identification requirement than when Georgia relied on signature matching. DRSOF ¶ 256; Grimmer Rep. ¶ 16 (Defs.' Ex. DDDD). These minimal differences are inadequate to ground a Section 2 claim under binding Eleventh Circuit precent. *See GBM*, 992 F.3d at 1330 (rejecting claim when there was "only a 1% difference between the ID possession rates of white and minority Alabama voters"); *League of Women Voters*, 66 F.4th at 934 (holding that differences of 3.89% and 2.21% were "neither of large magnitude nor statistically significant."). Of course, in 2022 – after SB 202 – the *overall* rejection rate for absentee-by-mail applications resulting from voter identification issues was only 0.09%. DRSOF ¶ 262; Grimmer Rep. ¶ 168, tbl. 26 (Defs.' Ex. DDDD). So Plaintiffs' entire argument on this point is straining at a gnat.

Moreover, Plaintiffs' reliance (at 52) on the plurality opinion in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), is misplaced: That opinion failed to recognize that the parties there were engaging in the same "statistical manipulation" later condemned in *Brnovich* (*i.e.*, measuring racial disparity by reporting the demographics of a tiny subgroup). Its holding is also inconsistent with the law of the Eleventh Circuit. *See GBM*, 992 F.3d at 1329–30; *League of Women Voters*, 66 F.4th at 934.

Plaintiffs' attempts (at 53) to distinguish this case from previous precedent approving identification requirements for in-person voting also misses the mark. As shown above, the record does not show any significant disparate impact on racial minorities, and the statistical disparities pointed to are akin to those previously rejected by the Eleventh Circuit. *See GBM*, 992 F.3d at 1330 (in upholding Alabama's voter identification requirements for both in-person and absentee-by-mail voting, the court noted that "Even though minority voters in Alabama are slightly more likely than white voters not to have compliant IDs, the plain language of Section 2(a) requires more."). There is simply no evidence of a disparate impact on minority voters, and so Plaintiffs cannot prove that the provision "actually makes voting harder for [minority voters]." *Id.* (cleaned up).

And even if there were a slight burden, as the Supreme Court pointed out in *Brnovich,* "[m]ere inconvenience cannot be enough to demonstrate a

violation of § 2." *Brnovich*, 141 S. Ct. at 2238. And the Court there stated that, in assessing a burden, the standard practice in 1982 when Section 2 was amended is a valid consideration, because those practices were presumptively valid and provided a baseline to compare new practices or rules. *Id.* (noting that "every voting rule imposes a burden of some sort" hence the need for a "benchmark[]"). The Court then specifically noted that, in 1982, "States typically required nearly 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.* at 2339. Given the extreme limits on absentee-by-mail voting in 1982, the *de minimis* burden imposed here is certainly lawful under Section 2. Thus, whether there is *anything* burdensome in the imposition of SB 202's identification requirements is very doubtful.

Finally, Plaintiffs attempt (at 54) to dismiss the legitimate State interests that support this provision of SB 202, substituting for that of the Legislature their own judgment as to what would best serve the interests of the State. In short, they claim that SB 202 unreasonably imposed "a different, more onerous alternate identification requirement for requesting an absentee ballot application than submitting the ballot itself." Opp. 54. But this objective form of identity verification is superior to the former signature matching system, which was the subject of significant criticism from groups of all political persuasions. SOF ¶ 431; Germany 10/30/23 Decl. ¶¶ 17–18 (Defs.' Ex.

B); Mashburn 3/14 196:20–197:4 (Defs.' Ex. KK); Sterling 95:25–96:16 (Defs.' Ex. VVV). Indeed, the voter identification verification was much more efficient than signature matching. *Compare* SOF ¶ 432; Sterling 95:25–96:16 (Defs.' Ex. VVV); Bailey 10/6 90:18–91:5 (Defs.' Ex. FFF) (signature match time consuming), *and* SOF ¶ 490; Bailey 3/21 122:14–123:4, 125:22–126:12 (Defs.' Ex. GGG) (3 to 4 minutes with signature match), *with* SOF ¶ 494; Bailey 3/21 126:6–12 (Defs.' Ex. GGG) (1 minute with voter identification). And it resulted in far fewer rejected applications. DRSOF ¶¶ 255–56; Grimmer Rep. ¶¶ 16, 170–71, tbls. 27 & 28 (Defs.' Ex. DDDD).

Not content to challenge the State's interest in orderly administration, Plaintiffs also claim that there simply was no need for measures to restore voter confidence or prevent fraud. But under *Crawford*, there need not be actual fraud for a state to take fraud preventative measures. 553 U.S. at 194–95. And, as to Plaintiffs' claim that voters who voted absentee were confident in their ballot's being counted, that argument ignores the fact that the State received substantial numbers of complaints from voters who believed the absentee voting system was susceptible to fraud. Mot. 7; SOF ¶ 472; Germany 10/30/23 Decl. ¶ 17, 23 (Defs.' Ex. B); Carter Ctr. Rep., *supra* n.5, at 16; *Election Crimes*, *supra,* at 8, 10, 12, 18–19; Germany 3/7 90:1–11 (Defs.' Ex. HH); Sterling 102:11–18 (Defs.' Ex. VVV).

To address these concerns, Plaintiffs may have preferred education and outreach measures. But that does not mean the General Assembly acted unreasonably or unlawfully in seeking to advance important state interests in a different but still "reasonable, non-discriminatory" manner. *Anderson*, 460 U.S. at 788. And the legislature's efforts succeeded: Post-SB 202, voters expressed near uniform satisfaction in their experience. Mot. 10–11; SPIA Survey 13 (Defs.' Ex. YYYY) (finding that post-SB 202 99.5% of voters had no problems voting in the 2022 general election).

In sum, there is no evidence that the challenged identification provisions "deprive[] minority voters of an equal opportunity to participate in the electoral process and to elect representatives of their choice." *GBM*, 992 F.3d at 1329 (emphasis omitted). And Plaintiffs have thus failed to establish a material issue of fact on that question.

3. Plaintiffs fail to present any material issue of fact as to whether voter identification requirements violate the ADA or the Rehabilitation Act.

AME Plaintiffs likewise fail to show that the voter identification requirements deny voters with disabilities meaningful access to Georgia's absentee voting program. *See Choate*, 469 U.S. at 301 ("[A]n otherwise qualified handicapped individual must be provided with meaningful access[.]"); *accord L.E.*, 55 F.4th at 1303 (same). In fact, Plaintiffs cannot identify a single voter with a disability who was unable to vote or even had difficulty voting

because of the voter identification provisions. *See* Opp. 83–85 (resting on generalizations and inferences).[27] Rather, Zan Thorton of ADAPT was clear that voter identification *benefits* voters with disabilities over signature matching. SOF ¶ 485; ADAPT 2/20 79:20–24 (Defs.' Ex. CC).

As for Plaintiffs' disparate impact claims, they suffer similar flaws to those discussed above. *See* Section II.B.2.a. Plaintiffs state (at 83–84) that 80,000 Georgians with disabilities do not have a driver's license or other state issued ID and they face potential obstacles with providing alternative ID. But to make a *prima facie* case of disparate impact, Plaintiffs must do more than simply cite the number of individuals with disabilities who lack photo ID and infer that this shows a disparate impact. *See Schwarz*, 544 F.3d at 1218 (castigating a plaintiff for a similar approach). The Eleventh Circuit requires that Plaintiffs make a *statistical comparison* between voters with disabilities

[27] To get around this fact, Plaintiffs attempt to advance a disparate impact theory, and state that the ID requirements "constitute illegal eligibility criteria[.]" Opp. 73 (relying on 28 C.F.R. § 35.130(b)(8)). The latter claim is easily dispensed with because the Eleventh Circuit has not recognized a private right of action to enforce 28 C.F.R. § 35.130(b)(8), and as discussed *supra* at Section II.B.1.b, it is doubtful such regulation provides a private cause of action at all. Moreover, agency regulations are incapable of altering the *statutory* meaningful access standard. *See Hunsaker*, 149 F.3d at 1043; *accord Easley*, 36 F.3d at 302 (applying the statutory meaningful access standard to claims brought under discriminatory methods regulation). Thus, any claim brought under this regulation would still have to satisfy that standard. But Plaintiffs have not shown that any voters with disabilities have even been burdened by the challenged provision.

who lack ID and similarly situated (lacking a printer, car, etc.) voters without disabilities who lack ID, and then compare them to see if the challenged provision creates a disparate impact. *Id.* (laying out the required statistical comparisons for a valid *prima facie* showing of disparate impact). Plaintiffs do not even attempt to make this showing, instead relying on "bald assumption[s]." *Id.*

And even granting—for the sake of argument—that having a disability is statistically correlated with lacking a car or printer, that still would not show disparate impact. Absent a statistical comparison of the impact on voters with disabilities lacking photo ID and printers and cars, and voters without disabilities lacking such things, "all that has been demonstrated is a discriminatory effect on [voters who lack printers or cars]." *Id.* at 1217 (quoting *Gamble*, 104 F.3d at 306–07). Thus, contrary to Plaintiffs' assertion (at 84) there is no issue of material fact precluding summary judgment on this point.[28]

Plaintiffs' failure to find a single voter affected by these regulations or to make a *prima facie* case of disparate impact is unsurprising given that an objective voter ID system is likely to be less burdensome to voters with

[28] Plaintiffs do not argue for a specific accommodation to the voter identification requirement for absentee-by-mail voting. With the overwhelming majority of Georgia voters having a DDS ID number as part of their voter file and multiple options for those who do not, Georgia's voter identification law provides meaningful access to Georgia's voters with disabilities. *See, e.g.*, *Democracy N.C.*, 476 F. Supp. 3d at 233.

disabilities than the prior subjective signature match system. Again, as Zan Thorton, head of ADAPT testified, replacing the signature match procedure with voter identification *benefits* voters with disabilities. SOF ¶ 485; ADAPT 2/20 79:20–24 (Defs.' Ex. CC).

There being no material issue of fact on these questions, summary judgment should be granted to State Defendants.

B. Plaintiffs fail to establish a disputed issue of material fact regarding voter identification requirements associated with returning a completed absentee ballot.

As with the requirement for voter identification when *requesting* an absentee-by-mail ballot, SB 202's requirement for voters to provide proper identification when *returning* an absentee-by-mail ballot is a reasonable and well-established measure to protect election integrity without denying voters with disabilities meaningful access to absentee-by-mail voting.

1. Plaintiffs fail to create any material issue of fact as to whether voter identification requirements for returning a completed absentee ballot violate VRA Section 2.

Because Plaintiffs' Opposition does not distinguish between the ID requirements for requesting a ballot and those for returning ballots, State Defendants' response (Section III.A.2, *supra*) suffices for both provisions. And, when analyzing rejections due to identification issues for various racial groups in the 2022 general and runoff elections, Dr. Grimmer found that there were no "consistent differences across self-reported racial groups in the rates

returned mail-in absentee ballots are rejected because of identification-related reasons." DRSOF ¶ 209; Grimmer Rep. ¶¶ 165–66 & tbls. 24–25 (Defs.' Ex. DDDD) (noting a .23 percentage point gap between Black and white voters in the general election but a .04 percentage point difference in the runoff). These minimal differences are inadequate to ground a Section 2 claim under binding Eleventh Circuit precedent. *See GBM*, 992 F.3d at 1330 (rejecting claim when there was "only a 1% difference between the ID possession rates of white and minority Alabama voters"); *League of Women Voters*, 66 F.4th at 934 (holding that differences of 3.89% and 2.21% were "neither of large magnitude nor statistically significant").

To the contrary, the undisputed evidence shows that 99.9% of all voters have either a DDS ID or the last four digits of their social security number associated with the voter file, making the return of an absentee-by-mail ballot easy for virtually all Georgia voters regardless of race. Mot. 8–9; SOF ¶¶ 510, 513; Sterling 239:8–20 (Defs.' Ex. VVV) (99.9% have ID or SSN); 9/22/23 PI Hr'g Tr. 193:2–20 (Defs.' Ex. YYY). For the very few without any of those forms of identification, they could still use the same alternate identification used to request their ballot. SOF ¶ 511; Sosebee 74:4–14 (DRSOF Ex. C); Germany 4/13 87:17–89:2 (Defs.' Ex. GG); Germany 10/30/23 Decl. ¶¶ 82, 84 n.1 (Defs.' Ex. B). This, along with the voter's name, date of birth, and signature verifies their identity sufficiently to process their ballot. And very few applications or

ballots were rejected due to a lack of voter identification; 0.02% of absentee ballot applications and 0.46% of returned ballots in the 2022 general election. SOF ¶ 497; Grimmer Rep. ¶¶ 16, 165–68, 171–72 (Defs.' Ex. DDDD). Here again, there is no material issue of disputed fact.

2. Plaintiffs fail to present any material issue of fact as to whether voter identification requirements for returning a completed absentee ballot violate the ADA.

The same is true of Plaintiffs' ADA challenge to this voter ID requirement. Here again, because Plaintiffs' Opposition does not distinguish between the ID requirements for requesting a ballot and those for returning ballots, State Defendants' response above (in Section III.A.3), suffices for both provisions. Further, returning a ballot carries different voter identification requirements because the voter's identity has already been verified and no additional paper is required for those few who do not have either a driver's license or a free voter identification, almost all (99.9% of all registered voters) have the last four digits of their social security number associated with their voter file. Mot. 69–70. And the miniscule number who do not can still use the same form of identification used to request the ballot in the first place. There is simply nothing about the voter identification requirement that denies voters with disabilities meaningful access to absentee-by-mail by reason of their

disability. And State Defendants are entitled to summary judgment on this claim as well. [29]

C. Plaintiffs fail to establish that requiring a voter to list the voter's date of birth on absentee ballot return envelope violates the Materiality Provision of the Civil Rights Act.

Plaintiffs further claim (at 99) that, because the absentee return envelope is not used to determine a voter's qualifications, requiring a voter to list his/her birthdate as part of verifying the voter's identity violates the Materiality Provision. But the Materiality Provision applies only to determining voter qualifications, not to voting mechanics. *See* 52 U.S.C. § 10101(a)(2)(B). And even if the Provision applies here, because the birthdate requirement serves important government interests, confirms a voter's identity, and is required by Georgia law to validly submit an absentee ballot, it is by definition "material." *Id.* [30]

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[29] Plaintiffs claim (at 36, 86) that these provision, when taken together with the provisions on drop boxes and the time period for requesting absentee-by-mail ballots, cumulatively disadvantage minority voters and voters with disabilities. Yet the provisions here have not been shown to impose any significant burden on voters, either individually or in combination with any other provisions. As set out in the motions addressing the drop box provision and the timing for requesting an absentee-by-mail ballot, those provisions, either alone or in combination with any other provision, likewise impose no undue burden on voters. *See* Docs. 758 & 760.

[30] Plaintiffs state that the Eleventh Circuit has settled the question of whether the Materiality Provision provides a private right of action. Opp. 89 n.43. Respectfully, State Defendants believe the Eleventh Circuit erred in that decision. See Mot. 76 n.20. And State Defendants will urge a reconsideration

Nevertheless, Plaintiffs suggest (at 89) that, because on this point the Court previously issued a preliminary injunction in their favor, the Court must rule in their favor again here. But that is not the law. As the Eleventh Circuit has explained, decisions on requests for preliminary relief are made on an "expedited timeframe." *Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205, 1234 n.1 (11th Cir. 2023) (Brasher, J., concurring) (recognizing that motions requesting preliminary injunctive relief are decided on an expedited timeframe where there is less time and resources to assess a legal question). "As more evidence is introduced and arguments are held over the course of the litigation, the District Court may, of course, change its mind and come to a different conclusion than the one it reached at the preliminary injunction hearing." *FTC v. On Point Cap. Partners LLC*, 17 F.4th 1066, 1079 n.9 (11th Cir. 2021). That is indeed the case here, as there have been intervening legal decisions from both the Fifth and Third Circuit construing the Materiality Provision that provide independent legal grounds for the Court to reconsider its prior decision. *See Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 131 (3d Cir. 2024) ("[T]he text tells us the Materiality Provision targets laws that restrict who may vote. It does not preempt state requirements on how qualified voters may cast a valid ballot[.]"); *Vote.org v.*

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of *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), in an appropriate appellate proceeding.

Callanen, 89 F.4th 459, 489 (5th Cir. 2023) (holding that a requirement is material if it "meaningfully, even if quite imperfectly, corresponds to the substantial State interest in assuring that those applying to vote are who they say they are").[31] And in all events, for three reasons, there is no material issue of fact as to the Provision's applicability here.

1. Plaintiffs are unable to establish any injury redressable by State Defendants.

The first is Plaintiffs' lack of standing. In the Court's preliminary injunction order, it correctly found that Plaintiffs' lacked standing against State Defendants because their alleged injuries were neither traceable to nor redressable by State Defendants. Doc. 613 at 14–17. Plaintiffs invited this Court (at 102–106) to reconsider that decision based on speculative and ill-founded accounts of the general authority State Defendants exercise over the elections process in Georgia. But the Court should decline that invitation. It had it right originally when it concluded that Plaintiffs "have not shown that their harms are traceable to State Defendants," and hence "an order directed

[31] Plaintiffs (at 96 n.46) also attempt to dismiss *Callanen* because the case dealt with requirements of voters at registration as opposed to provisions that regulated absentee ballots. But if reasonable regulations to ensure that voters are who they claim to be are permitted at the time of registration—when the Materiality Provision's concerns about disqualification are clearly in play—they should be more easily justified after a determination of qualification has already been made; especially when the requirement is directly related to who is returning an actual ballot.

to State Defendants will not redress Plaintiffs' alleged injuries." [Doc. 613 at 17].

To the contrary, as the Court correctly observed, "Georgia law commits the processing and verification of absentee ballots solely to county officials." *Id.* at 15 (citing O.C.G.A. § 21-2-386). Accordingly, any injury from the application of the birthdate requirement would be traceable to County Defendants and redressable by them. *Id.* at 16. State Defendants, on the other hand, only have general authority "to ensure compliance with judicial orders and to inspect and audit absentee ballot envelopes," and that authority "does not render the rejection of absentee ballots traceable to that office or to other State Defendants." *Id.* at 16 (quoting *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254 (11th Cir. 2020) "('[T]he Secretary's position as "the chief election officer of the state" with "general supervision and administration of the election laws" does not make the order in which candidates appear on the ballot traceable to her.')".

Plaintiffs counter by raising three objections (at 104–06): (1) the Court could order the Secretary of State to order the Counties to eliminate the birthdate requirement from the absentee ballot return envelope; (2) the Court could order the Secretary to only certify election results that count rejected ballots with birthdate errors; and (3) the SEB could instruct the Counties to count the returned ballots with a birthdate error. But each of these proposals

is just a clever repackaging of their previously rejected argument that "the Secretary of State 'can ensure statewide compliance' with an order of this Court and has the power to 'inspect and audit' absentee ballot envelopes." Doc. 613 at 16 (quoting Doc. 595 at 12).

First, Plaintiffs cannot point to any statute that gives State Defendants the authority to alter the required information on the ballot envelopes. *See* O.C.G.A. § 21-2-385. The Secretary's authority over the "form and substance" of the envelopes does not and cannot extend to changing the requirements of state law. O.C.G.A. § 21-2-384; *see also Jacobson*, 974 F.3d at 1255 ("The district court's decision rests on the flawed notion that by declaring the ballot statute unconstitutional, it eliminated the legal effect of the statute in all contexts.").

Second, the Plaintiffs rely (at 104–05) on *Democratic Party of Georgia, Inc. v. Crittenden*, for the proposition that this Court could order the Secretary to refuse to certify ballot counts that exclude ballots with birthdate errors. 347 F. Supp. 3d 1324, 1347 (N.D. Ga. 2018) ("*Crittenden*"). But *Crittenden* was decided before the Eleventh Circuit's *Jacobson* decision and would be decided differently based on that decision's holding that Plaintiffs "cannot rely on the Secretary's general election authority to establish traceability." *Jacobson,* 974 F.3d at 1254. Further, *Crittenden* concerned actions by counties that were not *required* by state law as the birthdate requirement is here. 347 F. Supp. 3d at

1340 (noting that Georgia law did not mandate the rejection of ballots that lacked the electors date of birth).

Third, Plaintiffs suggest (at 105–06) that the mere fact that the SEB has the authority to promulgate rules and train County election officials would permit this Court to order the SEB to give County officials instruction to *violate* State law. But the SEB's authority over County election officials is limited to enforcement of *compliance* with the law. *See* O.C.G.A. § 21-2-33.1(a) (limiting enforcement power to "directing compliance with this chapter"). And the Counties would not be obligated to *violate* State law on account of a conflicting SEB or SOS directive or training materials.

Thus, Plaintiff's standing argument fails because "it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury." *Jacobson*, 974 F.3d at 1254 (emphasis omitted) (quoting *Lewis v. Gov. of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (general authority is insufficient to find traceability)). But an order aimed at State Defendants will not alter the obligations of counties to apply SB 202's birthdate requirement for absentee-ballot applications. Accordingly, Plaintiffs have not identified any way that its members' alleged harm is traceable to State Defendants or redressable by an order against State Defendants, and Plaintiffs thus lack standing to challenge this provision.

2. Plaintiffs fail to establish that the Materiality Provision applies to the absentee-ballot return envelope.

Second, the Materiality Provision simply does not apply to the absentee-ballot return envelope. As Justice Alito explained in *Ritter,* the meaning of "record or paper" "related to [an] application, registration, or other act requisite to voting" attaches to the right to vote per se—not to vote in any particular way—disregarding procedural requirements. *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 & 1826 n.2 (2022) (Alito, J., dissenting from denial of the application for a stay); *accord NAACP Branches*, 97 F.4th at 131. Here, Plaintiffs claim (at 96) that requesting an absentee ballot "is *not* material to qualification, [thus] it is invalid." Yet it is the fact that the absentee-ballot envelope is *not* used to determine a voter's qualifications that makes the Materiality Provision inapplicable here. *NAACP Branches*, 97 F.4th at 132 ("Because the 'in determining' phrase, as explained, makes clear the Materiality Provision applies to determinations that affect a voter's eligibility to cast a ballot, its application necessarily is limited to "record[s] or paper[s]" used in that process." (citing 52 U.S.C. § 10101(a)(2)(B))).

This conclusion is supported by the Third Circuit's finding in *NAACP Branches* that there was no violation of the Materiality Provision when a ballot is rejected due to a voter's failing to follow procedures for casting an absentee-by-mail ballot, there, merely dating the return envelope. That is because "[a]

voter whose ballot is set aside because of [a failure to comply with a procedural requirement for returning a ballot] has previously been determined to be eligible and qualified to vote in the election." *Id.* at 135 (cleaned up). Thus, the rejection was not a determination of "eligibility" to fall within the purview of the Materiality Provision.

Plaintiffs nevertheless argue (at 91–92) that the Materiality Provision encompasses every record or paper connected to voting and that the broad definition of "vote" in another section of the Act means the provision covers the ballot return envelope. But the Third Circuit rejected this argument based on the principle of statutory construction that every word and clause in a statute must be given effect. *NAACP Branches,* 97 F.4th at 131 (citing *Polselli v. IRS*, 598 U.S. 432, 441 (2023)). Specifically, the court pointed to Congress's choice to employ the phrase "if such error or omission is not material *in determining* whether such individual is qualified," 52 U.S.C. § 10101(a)(2)(B) (emphasis added). *Id.* The "in determining" clause reveals that the Materiality Provision encompasses only errors or omissions pertaining to the ascertainment of the *qualifications* of voters. *Id.* ("[I]t is only in that context that 'officials are prohibited from using' a mistake to deny ballot access unless it is 'material "in determining" whether' the applicant indeed is qualified to vote.").

The Third Circuit also rejected a broad interpretation of the papers or records "requisite to voting." The court explained that the "in determining"

phrase necessarily limits "records or papers" to documents used in the voter qualification process. *Id.* at 132. Also "Congress further signaled its focus on qualification determinations by referring to acts like "application" and "registration." *Id.* Additionally, the broad statutory definition of vote, which Plaintiffs rely on (at 91–92) does not sweep so broadly because violations of "the Materiality Provision must be understood as denying an individual the opportunity to access the ballot in the first instance [at qualification]—not as denying the right to cast a defective ballot." *NAACP Branches*, 97 F.4th at 134; *see also Schwier*, 340 F.3d at 1294 (The Materiality Provision "forbids the practice of *disqualifying potential voters* for their failure to provide information irrelevant to determining their eligibility to vote." (emphasis added)).

This last point explains the error that the Pennsylvania Supreme Court made in *Ball v. Chapman*, where it held that invalidating a ballot based on non-compliance with a birthdate requirement denied the right to vote. 289 A.3d 1, 25 (Pa. 2023). That holding conflated the right to vote with "the right to have a ballot counted that is defective under state law." *NAACP Branches*, 97 F.4th at 133.[32] The latter has never been recognized as part of the right to

[32] The Third Circuit also observed: "Is that right 'denied' when a ballot is not counted because the voter failed to follow the rules, neutrally applied, for casting a valid ballot? We doubt it is." *NAACP Branches*, 97 F.4th at 133. This further explains why rejection of a non-compliant ballot under State law does not deny the right to vote.

vote, nor could it be, given that the Supreme Court in *Brnovich* reiterated longstanding precedent that "[c]asting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." 141 S. Ct. at 2338.

This distinction is borne out by the history surrounding the enactment of the Materiality Provision. The provision was passed in the 1960s to remedy "campaigns to subvert minorities' access to the polls," in which states would reject "applications to register for irrelevant mistakes . . . that resulted in outright *vote denial*—many Black citizens never had a chance to cast their ballot." *NAACP Branches*, 97 F.4th at 134 (emphasis in original). Thus, the Materiality Provision protects "ballot box access," but does not extend to "the mechanics of the vote-casting process." *Id.*

Plaintiffs cite several authorities to the contrary, but they have been subsequently called into question.[33] The Third Circuit overruled *Pennsylvania State Conference of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601 (W.D. Pa. Nov. 21, 2023), *rev'd and remanded sub nom. Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, 97 F.4th 120 (3d Cir. 2024). And Plaintiffs neglected to mention that *La Unión*

[33] Plaintiffs cite (at 91, 93–94) *League of Women Voters of Arkansas v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640 (W.D. Ark. Nov. 15, 2021). That case rests on an erroneous conclusion that the Materiality Provision applies to absentee ballot procedures, a reading rejected in *NAACP Branches*.

del Pueblo Entero v. Abbott, No. 5:21-cv-0844-XR, 2023 WL 8263348 (W.D. Tex. Nov. 29, 2023), *appeal docketed sub nom. United States v. Paxton,* No. 23-50885 (5th Cir. Dec. 5, 2023), has been stayed by the Fifth Circuit because "Appellants are likely to succeed on the merits," while noting that states may apply at least as much scrutiny to absentee voting as they do to in-person voting. *See* Order at 7, *United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023), ECF No. 80-1 (granting stay pending appeal).

Likewise distinguishable are the pre-SB 202 decisions of *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018) and *Crittenden*, 347 F. Supp. 3d 1324 (following *Martin*) because state law did *not* impose the requirement under evaluation in those cases. *See Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (distinguishing *Martin* because under the facts there "the county's decision [pre-SB 202] was inconsistent with state law" and finding that because state law required certain information on a valid form of identification for voting it was necessarily material). Here, as in *Thomsen,* "*Martin* isn't instructive," 574 F. Supp. 3d at 636, because the birthdate requirement is *uniformly required* by state law as a requisite to voting. *See* O.C.G.A. § 21-2-385(a). Moreover, to the extent that *Martin* and *Crittenden* are not distinguishable, they fall into the same erroneous readings of the Materiality Provision—extending it to the mechanics of voting—that has been correctly rejected by the Third Circuit. *See NAACP Branches*, 97 F.4th

at 135 ("[T]he Materiality Provision does not reach something as distinct from 'registration' as the casting of a mail ballot at the end of the voting process. The text does not allow it.").

Accordingly, the Materiality Provision does not apply to SB 202's birthdate requirement on the absentee ballot return envelope. And, as there is no material issue of fact relevant to that conclusion, State Defendants are entitled to summary judgment on that basis as well.

3. Even if the Materiality Provision were to apply to the absentee-ballot return envelope, Plaintiffs fail to present any material fact to suggest that the requirement is immaterial under that Provision.

Alternatively, should the Court find that the Materiality Provision applies to the absentee-return envelope, because Georgia law requires a voter to write his/her birthdate on the envelope, it is material as a necessary requirement to casting an absentee ballot. *See Thomsen*, 574 F. Supp. 3d at 636 (holding that the voter ID required under Wisconsin law was a material qualification because the law required it). As such, the birthdate requirement does not run afoul of the Materiality Provision.[34]

[34] Plaintiffs allege (at 98) that "thousands of ballots were not counted" due to birthdate errors, but Plaintiffs ignore that the Declarations that they rely on acknowledge that many voters successfully cured mistakes. *See* DRSOF ¶¶ 209–211; Grimmer Rep. ¶¶ 165–66 & tbls. 24 & 25 (Defs.' Ex. DDDD); Pulgram Decl ¶¶ 30–32 (Pls.' Ex. 308) (detailing that 646 voters in Cobb County submitted cure affidavits). In fact, Dr. Grimmer tallied a total of 1,145 absentee ballots rejected for identification issues, including birthdate errors, a

Indeed, a person's birthdate is hardly trivial; it is directly related to determining the identity of the person returning the absentee ballot. Mot. 75. Recall that the Materiality Provision only encompasses immaterial requirements "in determining whether such individual is qualified under State law to vote[.]" 52 U.S.C. § 10101(a)(2)(B). "The phrase 'qualified under State law' is defined in § 10101(e): the words 'qualified under State law' shall mean qualified according to the laws, customs, or usages of the State." *Thomsen*, 574 F. Supp. 3d at 636. Thus, a voter who fails to write their birthdate on the envelope of the absentee ballot as *required by* SB 202, fails to comply with a *material* requirement of qualification. *Id.*; *accord Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020) (ruling that election officials "may reject applications and ballots that do not clearly indicate the required information required by [state law] without offending 52 U.S.C. § 10101(a)(2)(B)").

The Plaintiffs claim this argument engages in "circular reasoning," and would render the Materiality Provision meaningless. Opp. 95. Not so, as the birthdate requirement here is directly related to serving compelling state interests—namely, ensuring the person returning the ballot is the voter to

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number representing just 0.46% of all returned mail-in absentee ballots. DRSOF ¶ 209; Grimmer Rep. ¶¶ 165–66 & tbls. 24 & 25 (Defs.' Ex. DDDD). This shows the Provision does not impose any real burden.

whom the ballot was issued. SOF ¶ 512; Germany 10/30/23 Decl. ¶¶ 81, 84–85 (Defs.' Ex. B); *Callanen*, 89 F.4th at 489 (requirement is material if it "meaningfully, even if quite imperfectly, corresponds to the substantial State interest in assuring that those applying to vote are who they say they are"). Indeed, the bar for materiality is low, requiring only "some measure of 'fit.'" *Callanen*, 89 F.4th at 485 (citation omitted). And States have "considerable discretion in deciding what is an adequate level of effectiveness" to justify a measure as material. *Id.*

Indeed, the U.S. Supreme Court has long recognized that election codes may properly contain provisions that "govern[] … the voting process itself[.]" *Anderson*, 460 U.S. at 788; *see also Burdick*, 504 U.S. at 433 ("[C]onstitutional law, compels the conclusion that government must play an active role in structuring elections."). This principle certainly applies to absentee-by-mail ballots. And it requires that the court "must give weight to a state legislature's judgment when it has created 'evenhanded restrictions that protect the integrity and reliability of the electoral process.'" *Callanen*, 89 F.4th at 489 (quoting *Crawford*, 553 U.S. at 189–90). The birthdate requirement certainly meets that description.

Plaintiffs' claim that a State's legitimate interests are irrelevant to materiality is therefore without merit. Opp. 97–98. Indeed, it is hard to see how even Georgia's judicially approved photo ID requirements for in person

voters would be material under Plaintiffs' proposal that "voter identity is not voter qualification." *Id.* at 97; *see GBM,* 992 F.3d at 1337 (upholding similar ID requirements for voting absentee-by-mail). Nor must Georgia, as Plaintiffs suggest (at 98), have identified actual fraud that was prevented in the past due to the birthdate requirement to justify its continued use. Indeed, the Supreme Court has explicitly held otherwise, upholding Indiana's ID requirements even though "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford*, 553 U.S. at 194.

Additionally, Plaintiffs cite (at 99) *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008), for the proposition that errors are material when "accepting the error *as true and correct*, the information contained in the error is material to determining the eligibility of the applicant." But that proposition only supports the materiality of the birthdate requirement here because the voter must provide basic identifying information, including the voter's date of birth, on the absentee-ballot return envelope to confirm the voter's identity and ensure the person returning the ballot is the person to whom the ballot was issued. SOF ¶ 512; Germany 10/30/23 Decl. ¶¶ 81, 84–85 (Defs.' Ex. B). Every voter has his/her date of birth associated with their voter file. DRSOF ¶ 206; Germany 10/30/23 Decl. ¶ 83

(Defs.' Ex. B).[35] And so, if a voter-provided birthdate does not match the one in the voter file, then "accepting the error as true" means that the voter is not who she claims to be. Accordingly, the birthdate requirement is material because it "corresponds to the substantial State interest in assuring that those applying to vote are who they say they are." *Callanen*, 89 F.4th at 489.

Plaintiffs nevertheless claim (at 97) that County officials do not really need the birthdate to verify a voter's identity because the other required identification forms on an absentee ballot are sufficient.[36] But that is simply inaccurate. Mot. 82–83. Additionally, the Eleventh Circuit has explained that

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[35] Plaintiffs seek to dismiss (at 97) Ryan Germany's testimony on the basis that he is an attorney for the Secretary of State, but this role included "providing legal advice and guidance to all divisions of the Secretary of State's Office, including the Elections Division." DRSOF ¶ 206; Germany Decl. 10/30/23 ¶ 1 (Defs.' Ex. B). Germany also interacted regularly with County officials as part of his job and worked with the Georgia General Assembly on election legislation including SB 202. *Id.*; Germany Decl. 10/30/23 ¶¶ 1–2 (Defs.' Ex. B). It cannot be disputed that his testimony is relevant.

[36] Plaintiffs argue (at 97) that it is disputed whether County officials use birthdates to verify identity but none of their citations support that proposition. *See* DRSOF ¶ 206; State Resp. to NGP Interrog. #1 (Pls.' Ex. 326) (affirming that the requirement is used to verify identity); K. Smith 213:2–13 (DRSOF Ex. F) (affirming that eligibility is determined at registration); Manifold 116:24–117:1 (Defs.' Ex. MM) ("Q: So to confirm, the date of birth requirement is to verify the identity of the voter? A: Correct."); Sosebee 77:21–23 (DRSOF Ex. C) (answering whether birthdate needed to verify identity "I'm going to say yes because you want to make sure you're issuing a ballot to the correct person"); *see also* SOF ¶ 519; Bailey 10/6 196:16–197:15 (Defs.' Ex. FFF); K. Williams 47:21–48:21 (Defs.' Ex. LL); Manifold 112:22–113:2, 116:24–117:1 (Defs.' Ex. MM); Wurtz 47:13–48:8 (Defs.' Ex. NN).

the Materiality Provision "does not establish a least-restrictive-alternative test[.]" *Browning*, 522 F.3d at 1175. And the Fifth Circuit has explained that courts "must give weight to a state legislature's judgment when it has created 'evenhanded restrictions that protect the integrity and reliability of the electoral process.'" *Callanen*, 89 F.4th at 489 (quoting *Crawford*, 553 U.S. at 189–90). With these principles in mind, Georgia's interests in affirming the identity of voters, maintaining election integrity, and deterring fraud through the birthdate requirement, *see* SOF ¶ 514; Germany 10/30/23 Decl. ¶¶ 81, 84–86 (Defs.' Ex. B), are more than sufficient for this provision to pass muster under the Materiality Provision. *See Callanen*, 89 F.4th at 489 (upholding signature requirement due to Texas's interest in "voter integrity").

CONCLUSION

The various provisions of SB 202 related to absentee-by-mail voting in Georgia serve multiple important state interests. Moreover, the results of the 2022 elections show that Georgia voters of all races, and Georgia voters with disabilities, found it easier and less confusing to vote after SB 202's passage. After years of discovery and thousands of pages of deposition transcripts and documents, Plaintiffs have been unable to marshal any evidence upon which it could be concluded that the provisions addressed herein, namely the unsolicited absentee ballot application provisions and voter identification

requirements, unduly burden the rights of any voters, including burdening those rights on the basis of race.

Further, voters with disabilities have multiple means of participating in Georgia's elections, including the absentee-by-mail voting process. The Ballot Harvesting Penalty and voter identification requirements do not deny them meaningful access to vote in Georgia. Further, the birthdate requirement for the absentee-ballot return envelope does not violate the Materiality Provision, even if the Provision applies here at all.

Accordingly, State Defendants' Motion for Summary Judgment should be granted in its entirety.

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Respectfully submitted,

Christopher M. Carr
Attorney General
Georgia Bar No. 112505
Bryan K. Webb
Deputy Attorney General
Georgia Bar No. 743580
Russell D. Willard
Senior Assistant Attorney General
Georgia Bar No. 760280
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334

/s/ Gene C. Schaerr
Gene C. Schaerr*
Special Assistant Attorney General
Erik S. Jaffe*
H. Christopher Bartolomucci*
Donald M. Falk*

Brian J. Field*
Edward H. Trent*
Cristina Martinez Squiers*
Nicholas P. Miller*
Annika Boone Barkdull*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com
**Admitted pro hac vice*

Bryan P. Tyson
Special Assistant Attorney General
Georgia Bar No. 515411
btyson@taylorenglish.com
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@taylorenglish.com.
Diane Festin LaRoss
Georgia Bar No. 430830
dlaross@taylorenglish.com
Taylor English Duma LLP
1600 Parkwood Circle
Suite 200
Atlanta, Georgia 30339
(678) 336-7249

Counsel for State Defendants

CERTIFICATE OF COMPLIANCE

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

/s/Gene C. Schaerr
Gene C. Schaerr