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

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, *et al.*, Defendants.	Civil Action No. 1:21-cv-1259 (JPB)

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States." This case presents important questions regarding enforcement of Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301 ("Section 2"), and Section 101 of the Civil Rights Act of 1964, 52 U.S.C. § 10101 ("Section 101"). Congress has vested the Attorney General with authority to enforce these provisions on behalf of the United States. *See* 52 U.S.C. §§ 10101(c), 10308(d). Accordingly, the United States has a substantial interest in ensuring proper interpretation of Section 2 and Section 101.

The United States submits this Statement of Interest for the limited purpose of addressing the allegations necessary to state claims under these provisions.[1]

Plaintiffs' amended complaint states valid claims under both Section 2 and Section 101, and State Defendants and Intervenors cannot rebut the allegations at this stage of the proceedings by relying on state legislative findings. Defendants' motion to dismiss asserts only a superficial Section 2 analysis and misstates causation requirements. Intervenors' motion misapplies *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), and confuses discriminatory purpose with ultimate motive. For these and other reasons, the motions should be denied with respect to the statutory claims. The United States expresses no view on jurisdictional questions or constitutional claims.[2]

[1] The United States has brought independent litigation to enforce Section 2 of the Voting Rights Act with respect to SB 202. *See United States v. Georgia*, No. 1:21-cv-2575 (N.D. Ga. filed June 25, 2021).

[2] Several arguments in this Statement of Interest also apply to motions to dismiss filed in other SB 202 cases before this Court. *See, e.g.*, State Defs.' Mot. to Dismiss, *Asian Ams. Advancing Just.-Atlanta v. Raffensperger*, 1:21-cv-1333 (N.D. Ga. June 11, 2021), ECF No. 41; Intervenors' Mot. to Dismiss, *Asian Ams. Advancing Just.-Atlanta v. Raffensperger*, 1:21-cv-1333 (N.D. Ga. July 12, 2021), ECF No. 54; State Defs.' Mot. to Dismiss, *Sixth Dist. of the AME Church v. Kemp*, 1:21-cv-1284 (N.D. Ga. June 7, 2021), ECF No. 87; Intervenors' Mot. to Dismiss, *Sixth Dist. of the AME Church v. Kemp*, 1:21-cv-1284 (N.D. Ga. July 12, 2021), ECF No. 100.

PROCEDURAL BACKGROUND

On March 25, 2021, the Georgia General Assembly passed Senate Bill 202 (2021) ("SB 202"), a 98-page bill substantially modifying Georgia election law, and Governor Brian Kemp signed the legislation the same day. Three days later, the Georgia State Conference of the NAACP, other civil rights groups, and a state-recognized tribe filed suit against Georgia Secretary of State Brad Raffensperger, in his official capacity, and other officials to enjoin implementation and enforcement of several provisions of SB 202. Compl., ECF No. 1. Plaintiffs allege that SB 202 is "an omnibus voter suppression bill" that violates Section 2 of the Voting Rights Act; Section 101 of the Civil Rights Act of 1964; and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution. Am. Compl. ¶¶ 1, 170-237, ECF No. 35. Plaintiffs seek to enjoin 11 provisions of SB 202, including restrictions on absentee-by-mail voting, out-of-precinct provisional voting, ballot drop boxes, and provision of food or water to citizens waiting in line to cast their vote. Am. Compl. ¶¶ 3, 133-169. In turn, Secretary Raffensperger and other state officials ("State Defendants") and the Republican National Committee and other party organizations ("Intervenors") have moved to dismiss. Intervenors' Mot. to Dismiss, ECF No. 53; Defs.' Mot. to Dismiss, ECF No. 42.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation and quotation marks omitted); *see also Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009) ("accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff"). Consideration of information outside the face of the complaint is limited to "documents incorporated into the complaint by reference[] and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). So long as these materials allow a court to "draw the reasonable inference that the defendant is liable," the motion must be denied. *Iqbal*, 556 U.S. at 678.

STATUTORY BACKGROUND

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). Section 2(a) prohibits any state or political subdivision from imposing or applying a "voting qualification," a "prerequisite to voting," or a "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 52 U.S.C. § 10301(a);

see also 52 U.S.C. § 10303(f)(2) (applying protections to language minority groups); 52 U.S.C. § 10310(c)(1) (defining "vote" and "voting" to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast"). Section 2(b) provides that a violation "is established if, based on the totality of circumstances, . . . the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Thus, "Section 2 prohibits all forms of voting discrimination," including practices that impair the ability of minority voters to cast a ballot and have it counted on an equal basis with other voters. *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986); *see also Brnovich*, 141 S. Ct. at 2333; *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196-98 (11th Cir. 1999).[3]

[3] Although the Supreme Court has never expressly held that Section 2 creates a private cause of action, the Court has repeatedly found implied causes of action to effectuate the "laudable goal" of the Voting Rights Act. *Allen v. State Bd. of Elections*, 393 U.S. 544, 554-57 (1969) (Section 5); *Morse v. Republican Party of Va.*, 517 U.S. 186, 230-34 (1996) (Section 10). "[T]he existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965," S. Rep. No. 97-417, at 30 (1982), and the Court has acted on this authority in hearing numerous private Section 2 cases, *see Morse*, 517 U.S. at 232; *Tex. Alliance for Retired Ams. v. Hughs*, 489 F. Supp. 3d 667, 689 n.4 (S.D. Tex. 2020).

A violation of Section 2 can "be established by proof of discriminatory results alone." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991); *see also Greater Birmingham Ministries v. Sec'y of State*, 992 F.3d 1299, 1329 (11th Cir. 2021). The essence of a results claim "'is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities' of minority and non-minority voters to elect their preferred representatives.'" *Brnovich*, 141 S. Ct. at 2333 (quoting *Gingles*, 478 U.S. at 47). Although the Supreme Court has not articulated a test for Section 2 claims alleging vote denial or abridgment, these challenges focus on whether voting in a jurisdiction is "equally open," in that it provides an "equal opportunity" for all eligible citizens to participate. *Id.* at 2336-38. Openness denotes elections "without restrictions as to who may participate" or "requiring no special status, identification, or permit for entry or participation," *id.* at 2337 (internal citations and quotation marks omitted), and use of the term "equal opportunity" indicates that this analysis "include[s] consideration of a person's ability to *use* the means that are equally open," *id.* at 2338. Courts must consider the totality of circumstances, considering "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity.'" *Id.* Circumstances to consider include, but are not limited to, (1) "the size of the burden imposed," (2) the extent to which challenged provisions depart from

"standard practice" in 1982 (when Congress last amended Section 2), (3) "the size of any disparities in a rule's impact on members of different racial or ethnic groups," (4) "opportunities provided by a State's entire system of voting," and (5) "the strength of the state interests served by a challenged voting rule." *Id.* at 2338-40. Whether "minority group members suffered discrimination in the past" and whether the "effects of that discrimination persist" are also relevant. *Id.* at 2340.

Section 2 also prohibits practices adopted with a discriminatory purpose. *See Chisom*, 501 U.S. at 394 n.21; *see also Brnovich*, 141 S. Ct. at 2330. A showing of intent "sufficient to constitute a violation of the [F]ourteenth [A]mendment" is also "sufficient to constitute a violation of [S]ection 2." *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046 (Former 5th Cir. 1984). Section 2 purpose claims therefore rely on the assessment of "circumstantial and direct evidence of intent" relevant to constitutional cases. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977); *see also, e.g.*, *Brnovich*, 141 S. Ct. at 2349 (applying *Arlington Heights*); *Veasey v. Abbott*, 830 F.3d 216, 229-30 (5th Cir. 2016) (en banc); *N.C. Conf. of the NAACP v. McCrory*, 831 F.3d 204, 220-21 (4th Cir. 2016). Categories of relevant evidence regarding the purpose of a challenged practice include (1) the impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the

decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by decisionmakers. *See Arlington Heights*, 429 U.S. at 266-68. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

Section 101 of the Civil Rights Act of 1964, 52 U.S.C. § 10101, prohibits persons acting under the color of law from denying "the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). In interpreting Section 101, the Eleventh Circuit asks "whether, accepting the error *as true and correct*, the information contained in the error is material to determining the eligibility of the applicant." *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1174-75 (11th Cir. 2008); *see also Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (declining to equate information that "could help to prevent voter fraud" with information "material in determining whether [a] person is qualified to vote"), *aff'd*, 439 F.3d 1285 (11th Cir. 2006).

ARGUMENT

Plaintiffs have lodged serious allegations concerning SB 202. Accepting the allegations as true, the amended complaint states valid claims under Section 2 of the Voting Rights Act and Section 101 of the Civil Rights Act of 1964.

I. Section 2 Claims Are Highly Contextual and Fact-Dependent

Courts addressing Section 2 claims must consider the complete set of provisions alleged to harm minority voters, whether under a results or purpose framework, to avoid "miss[ing] the forest in carefully surveying the many trees." *McCrory*, 831 F.3d at 214; *cf. Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J., concurring) ("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition."). Section 2 results claims may address a combination of challenged practices, *see Gingles*, 478 U.S. at 45 (considering "practices or procedures that tend to enhance the opportunity for discrimination" in a challenge to multimember districts); *Miss. State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400, 409 (5th Cir. 1991), and must consider a jurisdiction's "entire system of voting," *Brnovich*, 141 S. Ct. at 2339. Similarly, purpose challenges may address the intent of provisions that taken in combination will

yield an intended effect. *See, e.g.*, *McCrory*, 831 F.3d at 231. An atomized assessment, Defs.' Mem. 11-25, ECF No. 42-1, is improper.[4]

Under either framework, liability depends on the unique factual circumstances of each case and the totality of the circumstances in the jurisdiction in question. *See White v. Regester*, 412 U.S. 755, 765-70 (1973) (striking down multi-member districts in Texas despite allowing such districts in Indiana in *Whitcomb v. Chavis*, 403 U.S. 124 (1971)); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 243-44 (4th Cir. 2014). Section 2 purpose analysis under *Arlington Heights* looks to circumstances and impact specific to the jurisdiction and the enactment. *See* 429 U.S. at 266. Similarly, the Section 2 results test requires an intensely local inquiry "peculiarly dependent upon the facts of each case" and the jurisdiction's "past and present reality." *Gingles*, 478 U.S. at 79 (internal quotation marks and citations omitted). Only after a "searching practical evaluation," *Gingles*, 478 U.S. at 47, 79, can this Court determine

[4] Intervenors are mistaken when they suggest that plaintiffs' Voting Rights Act claims fail because they do not "plausibly allege that the challenged laws are invalid in all their applications." Intervenors' Mem. 1. That requirement applies only to constitutional claims. A voting standard, practice, or procedure violates Section 2 precisely because it has been "imposed *or applied*" in "a manner which results in a denial or abridgement" of the voting rights of a class of citizens—rather than the entire electorate. 52 U.S.C. § 10301(a) (emphasis added). That being said, although the challenged standard, practice, or procedure is therefore unlawful, an appropriate remedy may retain those portions of invalidated legislation that can be applied in a manner that does not violate the Act. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324-30 (2018); *cf. Perry v. Perez*, 565 U.S. 388, 393-94 (2012).

whether SB 202 interacts with current and lingering effects of discrimination to deny or abridge the right to vote on account of race within the meaning of Section 2. And only after applying the "sensitive inquiry" required by *Arlington Heights*, 429 U.S. at 266, can this Court determine whether legislators enacted SB 202 at least in part because of its impact on minority voters. "[W]idespread use" of a specific rule "is a circumstance that must be taken into account," *Brnovich*, 141 S. Ct. at 2339, but Section 2 still requires a complete assessment of particular provisions enacted under specific circumstances and applied to a local electorate.[5]

II. Plaintiffs Have Plausibly Alleged a Section 2 Results Claim

Plaintiffs plausibly allege that the challenged provisions of SB 202 "result in the denial or abridgment of the right to vote . . . on account of . . . race or color, or membership in a language minority group." Am. Compl. ¶ 200. Specifically, Plaintiffs allege that the challenged provisions, taken together, impose a disparate and sizeable burden on minority voters. Am. Compl. ¶¶ 140, 142, 145, 150-151, 155-158, 161, 165, 167, 169, 179, 195, 199. Importantly, Plaintiffs allege that SB 202 both erects barriers to absentee and early voting and bars efforts to reduce the

[5] For this reason, Section 2 claims are generally ill-suited for resolution before trial. *See Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (en banc) (per curiam); *see also Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1348 (11th Cir. 2015) ("Summary judgment in these cases presents particular challenges due to the fact-driven nature of the legal tests."). And they are especially ill-suited for resolution on the pleadings.

discomfort of voters waiting hours in lines prevalent in heavily minority precincts on Election Day. Am. Compl. ¶¶ 134, 152, 166-167. Thus, taking these allegations as true, SB 202 funnels minority voters towards Election Day voting—exacerbating lines and delays at predominantly minority polling places on Election Day—and increases the burdens on minority voters who must wait in those lines to exercise their right to vote. Plaintiffs also allege a causal link between these burdens and social and historical conditions that have or currently produce discrimination. Am. Compl. ¶¶ 195-197. In total, Plaintiffs assert that the challenged provisions shift Georgia's election rules so that the "combination of circumstances" are no longer equally "favorable for a particular activity"—casting a ballot that will be counted. *Brnovich*, 141 S. Ct. at 2338. These allegations state a Section 2 results claim.

State Defendants' assertion that SB 202 imposes no more than "a slight burden," Defs.' Mem. 12, 16-25, rests on three legal errors. First, State Defendants analyze each challenged provision in isolation, failing to recognize the compounding burdens Plaintiffs allege these provisions cumulatively impose. *See Brnovich*, 141 S. Ct. at 2339; *Gingles*, 478 U.S. at 45. Second, State Defendants fail to address the complete allegations. For example, Plaintiffs do not merely allege a disparity in possession of ID needed to request an absentee ballot without access to a photocopier. Defs.' Mem. 12. Plaintiffs also allege that minority

voters "have less access to state offices that issue such IDs." Am. Compl. ¶ 140. These allegations portray burdens that "seriously hinder voting." *Brnovich*, 141 S. Ct. at 2338. *Compare Veasey*, 830 F.3d at 254-56 (significant and disparate burdens), *with Greater Birmingham Ministries*, 992 F.3d at 1320 (ready access to ID). Finally, the State Defendants improperly assert that the complaint's allegations contain "factual error." Defs.' Mem. 17-18 & n.9. Beyond matters subject to judicial notice, factual disputes tied to the merits cannot be addressed at this stage. *See, e.g.*, *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008). Although courts may take judicial notice of the existence of legislative factfinding, judicial notice does not extend to the truth of findings that can "reasonably be questioned." Fed. R. Evid. 201(b)(2); *see also Korematsu v. United States*, 584 F. Supp. 1406, 1414-16 (N.D. Cal. 1984).

Intervenors' comparable argument that SB 202 imposes nothing beyond "the usual burdens of voting" fares no better. Intervenors' Mem. 12 (quoting *Brnovich*, 141 S. Ct. at 2338). It is true that Georgians must typically "stand in line" before casting a ballot in person. *Id.* But Intervenors confuse categories of burdens and the magnitudes of those burdens for minority voters. It may be a "usual burden of voting" to wait in line for six minutes, but rules that exacerbate lines of an hour or more for the average minority voter impose a sizeable burden on the right to vote. Am. Compl. ¶¶ 5, 90, 109, 152; *cf. Crawford v. Marion Cnty. Election Bd.*, 553

U.S. 181, 198-199 (2008) (contrasting the "usual burdens of voting" with "a somewhat heavier burden" that the same provision may "place[] on a limited number of persons"). Similarly, the fact that Plaintiffs' claims "involve regulations of mail voting and early voting," Intervenors' Mem. 12-13, does not immunize SB 202 from Voting Rights Act scrutiny. Although it is relevant to the ultimate results inquiry whether a challenged voting rule departs from standard practice in 1982, *see Brnovich*, 141 S. Ct. at 2338-39, Plaintiffs do not challenge a decision not to allow early voting or no-excuse absentee voting. Georgia already permits both. Rather, Plaintiffs argue that SB 202 shapes early and absentee voting in a manner that is not equally open to minority citizens. *Cf. Chisom*, 501 U.S. at 408 (Scalia, J., dissenting) ("If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and § 2 would therefore be violated.").[6]

Intervenors' remaining arguments are inappropriate at the motion to dismiss stage. Plaintiffs have plausibly alleged a sizeable burden on minority voting rights,

[6] *Brnovich* interpreted the text of Section 2, not limitations on Congress's authority to enforce the Reconstruction Amendments. 141 S. Ct. at 2336-38. No "grave constitutional concerns," Intervenors' Mem. 12-13, arise from barring discriminatory regulation of once-uncommon forms of voting. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 529 (2004) (permitting prophylactic legislation in "critical areas such as . . . voting" based on a general legislative record).

something more than "[m]ere inconvenience." *Brnovich*, 141 S. Ct. at 2338. *Brnovich* does not require statistical pleadings, Intervenors' Mem. 13, akin to a full trial record, *see Brnovich*, 141 S. Ct. at 2330, 2344-45. Intervenors also may not introduce facts outside the complaint—let alone a press release issued by Secretary Raffensperger, a Defendant in this matter, Intervenors' Mem. 13-14—in an attempt to counter Plaintiffs' allegations that Georgia's complete system of voting presents difficult and disproportionate burdens to voters of color, particularly after passage of SB 202, Am. Compl. ¶¶ 83-90, 100-109, 134-169. Moreover, in claiming that "Georgia makes it easy to vote," Intervenors' Mem. 13, Intervenors rely on a description of the very practices now constrained by SB 202, *see New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020) ("[D]ozens of drop boxes are available through Election Day in numerous locations, and all jurisdictions have the authority to add them."). Finally, Intervenors assert that SB 202 serves Georgia's strong interest in the prevention of election crimes, without reference to the specific challenged provisions. Intervenors' Mem. 14. Whether these provisions serve those legitimate aims is a factual question, *see Brnovich*, 141 S. Ct. at 2347-48, and Plaintiffs have alleged that "baseless and often racially tinged claims of voter fraud and election irregularities" were mere pretext for restrictions on the right to vote that bear no connection to election integrity concerns, Am.

Compl. ¶¶ 116-117, 132. That allegation cannot be disregarded at the pleading stage.

State Defendants also challenge the requisite causality, Defs.' Mem. 13, 15, 17-18, 20, 22-23, 25, but they misapprehend the nature of the inquiry. Section 2 causality exists when a practice "'interacts with social and historical conditions'" linked to racial discrimination "'to cause an inequality in the opportunities' of minority and non-minority voters." *Brnovich*, 141 S. Ct. at 2333 (quoting *Gingles*, 478 U.S. at 47); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1230 n.31 (11th Cir. 2005) (en banc) (noting that the manner in which "electoral practices interact with social or historical conditions," including "racial biases in society," may establish the required causal link). In other words, Section 2 requires courts to examine whether a jurisdiction's decision to impose a particular voting practice amplifies current or lingering effects of race discrimination. *See Gingles*, 478 U.S. at 44 n.9 (explaining that Section 2 corrects "an active history of discrimination," deals with the "accumulation of discrimination[,]" and prohibits practices that "perpetuate the effects of past purposeful discrimination"); *see also Brnovich*, 141 S. Ct. at 2340 (noting that such factors are relevant). In several instances, State Defendants fail to address the relevant allegations, acknowledging disparities while ignoring allegations that tie those disparities to past and current discrimination. Defs.' Mem. 13-15, 20, 22; *see also* Am. Compl. ¶¶ 80, 103-107, 140, 195-197. State

Defendants also erroneously contend that arguments concerning disparate material burden and standing implicate statutory causality requirements. Defs.' Mem. 16-17 (burden); Defs.' Mem. 18, 23, 25 (standing). None of these defenses defeats Plaintiffs' allegations under Section 2.[7]

III. Plaintiffs Have Plausibly Alleged a Section 2 Purpose Claim

Plaintiffs also plausibly allege that the challenged provisions of SB 202 "are intended to, and will have, the effect of disproportionately and adversely affecting the right to vote of Black voters and other voters of color." Am. Compl. ¶ 179; *see also* Am. Compl. ¶¶ 4, 180, 194. Their pleadings address each category of evidence under the *Arlington Heights* framework. *See* Am. Compl. ¶¶ 5, 140, 145, 151-152, 155-158, 161, 165, 167, 169, 179, 186 (foreseeable impact); Am. Compl. ¶¶ 80-91 (background); Am. Compl. ¶¶ 111-116, 181-182 (sequence of events);

[7] Along similar lines, Intervenors' assertion that any burden that interacts with "preexisting disparities" cannot violate Section 2, Intervenors' Mem. 13, has no basis in law. Intervenors also suggest that the socioeconomic disparities that allegedly interact with SB 202 to produce a discriminatory result are "not Georgia's fault." Intervenors' Mem. 13. This ignores allegations of state-sponsored discrimination. Am. Compl. ¶ 80; *see also, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 282-83 (1964) (Douglas, J., concurring) (noting that Georgia "made available to [segregationists] the full coercive power of government"); Disenfranchisement Act of 1908, 1908 Ga. Laws 27-29. In any case, "under the results standard of [S]ection 2, pervasive private discrimination should be considered, because such discrimination can contribute to the inability of [black voters] to assert their political influence and to participate equally in public life." *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1567 n.36 (11th Cir. 1984).

Am. Compl. ¶¶ 117-131, 183 (procedural departures); Am. Compl. ¶¶ 132, 184-185 (contemporaneous statements). These allegations together yield a plausible claim that SB 202 has a discriminatory purpose and effect and therefore violates Section 2. *See McCrory*, 831 F.3d at 223-233; *Veasey*, 830 F.3d at 234-243.

State Defendants argue that SB 202 does not have a discriminatory purpose because "the legislature explained exactly what it was doing in the first pages of the bill." Defs.' Mem. 13. Similarly, Intervenors assert that legislative materials are "the only reliable evidence" before this Court and reflect "sincere beliefs . . . about the existence of fraud or the wisdom of election reforms." Intervenors' Mem. 15. However, resort to state legislative findings cannot rebut the allegations of the complaint at this stage. *See Tellabs, Inc.*, 551 U.S. at 322; *Korematsu*, 584 F. Supp. at 1415 (declining to take "judicial notice of the actual findings of [a federal] Commission"). Indeed, a "smoking gun" in legislative history has never been required to prove intentional discrimination. *See City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1552 (11th Cir. 1987). "Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). Thus, Plaintiffs contend that the "policy behind the use of the voting practices in question is tenuous and pretextual." Am. Compl. ¶ 198. This plausibly alleges that, notwithstanding proclamations of legitimate aims, SB 202 has "a

discriminatory purpose." *Greater Birmingham Ministries*, 992 F.3d at 1321. The presence of additional legislative rationales "would not render nugatory the purpose to discriminate." *Hunter*, 471 U.S. at 232.

Similarly, State Defendants' barebones rejection of each category of *Arlington Heights* evidence, Defs.' Mem. 12-13, cannot defeat Plaintiffs' claim at the motion to dismiss stage. First, the alleged discriminatory impact of the challenged provisions of SB 202—considered in toto—weighs in favor of a discriminatory purpose because proof of the foreseeability of discriminatory consequences may raise a "strong inference that the adverse effects were desired." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 n.25 (1979); *see also* Am. Compl. ¶¶ 5, 140, 145, 151-152, 155-158, 161, 165, 167, 169, 179, 186.[8] Second, State Defendants and Intervenors mischaracterize Plaintiffs' allegations concerning the historical background of SB 202 and the sequence of events that led to its passage. Those allegations are not limited to the distant past, as State Defendants and Intervenors contend. Defs.' Mem. 12; Intervenors' Mem. 16. To the contrary: While the allegations begin with the flagrant abuses of the Jim Crow era, Am. Compl. ¶¶ 80-82, 196, they then move through recent voting restrictions, Am.

[8] Cases evincing a clear pattern "unexplainable on grounds other than race" "are rare" and support an intent finding based on "impact alone." *Arlington Heights*, 429 U.S. at 266. In the typical scenario, foreseeable disparate impact contributes to a cumulative analysis. *See id.*

Compl. ¶¶ 83-90, before reaching a present-day backlash to unprecedented political success by voters of color, including the election of the State's first African-American Senator, Am. Compl. ¶¶ 2, 4, 91, 95-98, 111-113, 115-116, 181-182; *see also McCrory*, 831 F.3d at 226-27 (noting a "law's purpose cannot be properly understood" without taking into account the context in which the law was passed). Third, contrary to State Defendants' claim, consideration of procedural deviations is not limited to whether legislation ultimately received a majority vote and was signed into law. Defs.' Mem. 12-13.[9] A "legislature need not break its own rules to engage in unusual procedures," *McCrory*, 831 F.3d at 228, and Plaintiffs here have alleged a "rushed and irregular" process. Am. Compl. ¶¶ 117-131, 183. Finally, although Plaintiffs do not allege that statements by the legislature were expressly discriminatory, Defs.' Mem. 12, the need for "pretextual" rationales, Am. Compl. ¶ 132, can be "quite persuasive" evidence of intentional discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). Again, State Defendants' arguments do not defeat an otherwise valid Section 2 intent claim.

Intervenors cannot defeat the Section 2 intent claim simply by recasting racial discrimination as partisan gamesmanship. Intervenors' Mem. 3, 17.

[9] The footnote to *Abbott v. Perez* on which State Defendants rely addressed only a State's interest in implementing enacted legislation. *See* 138 S. Ct. at 2324 n.17.

Although "partisan motives are not the same as racial motives," *Brnovich*, 141 S. Ct. at 2349, "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose." *McCrory*, 831 F.3d at 222.[10] Plaintiffs allege that SB 202 is "a legislative attempt to suppress the vote of Black voters and other voters of color in order to maintain the tenuous hold that the Republican Party has in Georgia." Am. Compl. ¶ 2. By arguing that SB 202 at most aims to secure partisan advantage, Intervenors elide the distinction between intentional discrimination and ultimate motive. *See Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 & n.1 (9th Cir. 1990) (Kozinski, J., concurring in part) (describing how intentional discrimination may include actions that serve non-racial ends). Because Section 2 does not require proof of "racist intent," Intervenors' Mem. 15; *see, e.g.*, *McCrory*, 831 F.3d at 222, Plaintiffs have stated a purpose claim.

IV. Plaintiffs Have Plausibly Alleged a Section 101 Claim

Plaintiffs also plausibly allege that SB 202 violates Section 101 by requiring rejection of absentee ballot materials that contain an error or omission that is not material to a voter's qualifications. Am. Compl. ¶ 237. Specifically, Plaintiffs

[10] *See also, e.g.*, *Veasey*, 830 F.3d at 241 n.30 ("[A]cting to preserve legislative power in a partisan manner can also be impermissibly discriminatory."); *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1531 (7th Cir. 1990) (Posner, J.) ("Discrimination may be instrumental to a goal not itself discriminatory.").

allege that SB 202 requires voters to print their date of birth on absentee ballot applications and absentee ballot envelopes, Am. Compl. ¶¶ 137, 235-236, and requires counties to reject these materials if they lack a date of birth that matches registration records, Am. Compl. ¶ 138. Plaintiffs also allege that date of birth is not "material to determining the eligibility of an absentee voter." Am. Compl. ¶ 137. This states a plausible claim under Section 101 of the Civil Rights Act of 1964. *See Fla. State Conf. of NAACP*, 522 F.3d at 1174-75.

State Defendants present two defenses, neither of which defeats the Section 101 claim at this stage. First, they argue that the provision of SB 202 that requires notice and an opportunity to cure if an election official is "unable to identify a voter" means there is no vote denial. Defs.' Mem. 13. To be sure, a voter who cures his or her ballot has not been denied the right to vote. But the existence of cure procedures does not change the fact that if date of birth information remains erroneous or omitted, SB 202 requires rejection of a voter's ballot or ballot application. Am. Compl. ¶ 137-138. Those voters *have* been denied the right to vote.[11]

[11] This notice and opportunity to cure reinforces that election officials are able to "identify a voter" without a date of birth and that the date of birth is not material. Otherwise how would they know to which person they needed to provide the notice and opportunity?

State Defendants also contend that date of birth may be material, "for example, when two voters share the same name and address." Defs.' Mem. 13 n.4. This factual assertion contradicts the provisional findings of two judges of this court with respect to ballot envelopes. *See Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018); *Dem. Pty. of Ga. v. Crittenden*, 347 F. Supp. 3d 1324, 1339-41 (N.D. Ga. 2018). More fundamentally, the State Defendants' assertion is not subject to judicial notice and therefore may not be considered at this stage of litigation. *See* Fed. R. Evid. 201(b)(1)-(2) (limiting judicial notice to facts "generally known" and those that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questions").[12]

CONCLUSION

Plaintiffs have pleaded serious allegations against SB 202, sufficient to state claims under Section 2 of the Voting Rights Act, as well as Section 101 of the Civil Rights Act of 1964. For the reasons set out above, State Defendants' motion to dismiss and Intervenors' motion to dismiss should be denied with respect to these claims.

[12] Nor is printing the correct date of birth on absentee ballot applications and envelopes material for purposes of Section 101 simply because state law requires it. Materiality turns on whether an error or omission concerns "whether such individual is qualified under State law to vote," 52 U.S.C. § 10101(a)(2)(B), not mere compliance with state procedural requirements, *see, e.g.*, *Fla. State Conf. of NAACP*, 522 F.3d at 1174-75 (addressing potential preemption of state law).

Date: July 26, 2021

PAMELA S. KARLAN
Principal Deputy Assistant
Attorney General
Civil Rights Division

/s/ Daniel J. Freeman
T. CHRISTIAN HERREN, JR.
JOHN A. RUSS IV
JASMYN G. RICHARDSON
DANIEL J. FREEMAN
ERNEST A. MCFARLAND
ELIZABETH M. RYAN
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
4 Constitution Square
150 M Street NE, Room 8.923
Washington, D.C. 20530
Phone: (800) 253-3931
Fax: (202) 307-3961
daniel.freeman@usdoj.gov

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(D)

Pursuant to Local Rule 7.1(D), I further certify that the foregoing document was prepared in Times New Roman 14-point font in compliance with Local Rule 5.1(C).

/s/ Daniel J. Freeman
Daniel J. Freeman
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530
(202) 305-4355
daniel.freeman@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2021, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

/s/ Daniel J. Freeman
Daniel J. Freeman
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530
(202) 305-4355
daniel.freeman@usdoj.gov