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

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

Plaintiffs,

v.

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

Defendants.

CIVIL ACTION NO. 1:21-CV-01284-JPB

PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENORS' MOTION TO DISMISS

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

Regulations

INTRODUCTION

Plaintiffs are nine non-partisan, nonprofit organizations dedicated to protecting the right to vote for all Georgians, and in particular for historically disenfranchised groups. Intervenors—several organizations affiliated with the Republican Party—move to dismiss some of Plaintiffs' claims, asserting that they are "add[ing] just a few points" to State Defendants' earlier motion to dismiss. Brief ISO Intervenors' Motion to Dismiss, D.E. 100-1 ("Mot.") 1. But each of Intervenors' arguments should be rejected, as they either ignore Plaintiffs' well-pled allegations, prematurely ask the Court to resolve factual disputes in their favor, or misstate the law—or, in many cases, do all three.

First, Intervenors argue that Plaintiffs' undue burden claim does not apply to SB 202's absentee voting provisions because the Constitution only guarantees the right to vote in person on Election Day. Not only are Intervenors wrong on the law, but Plaintiffs plainly allege that SB 202's absentee voting restrictions, by limiting early voting opportunities, impose a *significant* burden on Election Day voting. *Second*, Intervenors discount Plaintiffs' undue burden claim as "legally irrelevant" and relating only to "idiosyncratic burdens on some voters," rather than to "most voters." Mot. 1, 3. This is not true. Plaintiffs allege facts demonstrating that the challenged provisions burden the right to vote of *all* Georgia voters. *Third*,

Intervenors claim that the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), requires dismissal, as a matter of law, of Plaintiffs' discriminatory results claim under Section 2 of the Voting Rights Act. If anything, *Brnovich* makes clear that Plaintiffs have adequately alleged that claim. Intervenors also argue that *Brnovich* requires dismissal of Plaintiffs' discriminatory purpose claim—but *Brnovich* in no way affects that claim, and in any event Plaintiffs have adequately alleged it, too. *Fourth*, Intervenors mischaracterize Plaintiffs' disability claims as constitutional ones. But Plaintiffs' claims are under the Americans with Disabilities Act (and the Rehabilitation Act), not the Constitution, and Plaintiffs allege that the challenged provisions deny individuals with disabilities equal access to the ballot box, in violation of those statutes. *Fifth*, Intervenors' arguments to dismiss Plaintiffs' First Amendment challenge are unavailing, as Plaintiffs allege that SB 202's line relief ban burdens expressive conduct in a public forum and is not narrowly tailored. Accordingly, Intervenors' motion to dismiss should be denied.

ARGUMENT

On a motion to dismiss, the Court must "take the facts from the allegations in the complaint, assuming those allegations to be true." *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1186 (11th Cir. 2004). To prevent dismissal under

Rule 12(b)(6), a plaintiff must allege facts that allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[T]he complaint need only give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests, . . . [and] a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Palm Beach Golf Ctr. Boca, Inc. v. John G. Sarris, D.D.S.*, 781 F.3d 1245, 1260 (11th Cir. 2015). Plaintiffs have adequately alleged their claims.

I. SB 202's Absentee Provisions Burden The Fundamental Right To Vote

Plaintiffs allege that the challenged provisions constitute an undue burden on the fundamental right to vote, as protected by the First and Fourteenth Amendments. In evaluating such claims, courts use the familiar *Anderson-Burdick* framework, weighing the character and magnitude of the burden against the state's justifications for it. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Intervenors argue that Plaintiffs' undue burden claim fails with respect to SB 202's absentee voting provisions "because there is no right to vote absentee." Mot. 3. But this entire argument is based on a faulty—and contested—premise: that

these provisions do not make the ability to vote in person "meaningfully more difficult." *Id*. Plaintiffs, however, plainly allege that they do. By reducing the opportunities that Georgians have to vote outside of Election Day, SB 202 necessarily increases the pressure on polling sites *on* Election Day, leading to longer lines, making the Election Day voting booth more difficult to access, and raising the costs of voting to anyone who votes in person. *See* First Amended Complaint ("FAC") ¶¶ 247, 307-309. Therefore, SB 202's absentee restrictions *directly* burden in-person, Election Day voting. Intervenors' assertion to the contrary is both incorrect and raises a question of fact that cannot be resolved at this stage.

Intervenors are also wrong on the law: the Constitution protects the fundamental right to vote, not just the right to vote in person on Election Day. Whether these specific absentee voting restrictions burden that right turns not on what type of voting they limit, but on their effect on voters' ability to cast their ballot. *See Anderson*, 460 U.S. at 788. That inquiry depends on local circumstances and the interaction of the restriction with other elements of a state's election laws. *See Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1346 (11th Cir. 2020) (the undue burden test "emphasizes the relevance of context and specific circumstances" and is best "address[ed] with testimony and other direct evidence"). And, here, Plaintiffs allege that SB 202's absentee voting restrictions impose significant burdens not just on the

right to use those methods, but on Georgians' ability to vote at all. *See, e.g.*, FAC ¶ 276. Plaintiffs' FAC is therefore fully consistent with Intervenors' assertion, Mot. 5, that "unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake," *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020).[1]

McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969), also does not support Intervenors' argument. As an initial matter, *McDonald* is of limited relevance because it involved an equal protection claim, not an undue burden claim under *Anderson-Burdick* (and in fact *McDonald* was decided over a decade before the Supreme Court laid out the balancing test in *Anderson*). In *McDonald*, the Court rejected the equal protection challenge—brought by unsentenced inmates otherwise eligible to vote but prohibited under state law from receiving absentee ballots, *id.* at 803-04—because "there is nothing *in the record* to indicate that the [state's] statutory scheme has an impact on [the inmates'] ability to exercise the fundamental right to vote." *Id.* at 807 (emphasis added). On that

[1] While Intervenors discount those allegations on the theory that "the Constitution is not violated 'unless . . . the state has 'in fact absolutely prohibited' the plaintiff from voting,'" Mot. 4 (quoting *Texas Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020)), the Eleventh Circuit has rejected that view. *See Democratic Exec. Comm.*, 915 F.3d at 1318-19 (even "slight" burdens must be justified); *cf. Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) ("A plaintiff need not have the franchise wholly denied to suffer injury.").

evidentiary basis, the Court concluded that the fundamental right to vote was not at issue. *Id.* at 809. Thus, as other courts have held, even if *McDonald* is applicable, it at most stands for the limited and unremarkable proposition that a plaintiff cannot prove an undue burden claim without some evidence that their right to vote is in fact burdened. *See, e.g.*, *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974); *Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975); *Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 122 (D.D.C. 2020).

The Eleventh Circuit motions panel's opinion in *New Georgia Project v. Raffensperger*, 976 F.3d 1278 (11th Cir. 2020), on which Intervenors rely, Mot. 5, holds the same. Considering a challenge to an absentee ballot-receipt deadline, the panel reiterated that challenges to voting access restrictions are subject to the ordinary *Anderson-Burdick* framework. *Id.* at 1280. And when the panel concluded that the election day ballot deadline "did not implicate the right to vote at all," that was not because absentee deadlines *never* affected the right to vote—it was because "the evidence" in that specific case showed that many other avenues sufficed, as a matter of fact, to "mitigate" any meaningful burden. *Id.* at 1281. Here, Plaintiffs have alleged that SB 202's restrictions on absentee voting will result in a meaningful burden on Election Day voting. At the pleading stage, that is sufficient.

II. The Burdens Plaintiffs Allege Are Cognizable Under *Anderson-Burdick*

Intervenors next move to dismiss Plaintiffs' undue burden claim based on the contention that the claim relies only "on idiosyncratic burdens on some voters," which Intervenors contend are "legally irrelevant." Mot. 5. This argument both ignores Plaintiffs' well-pled allegations and misstates the law.

First, Plaintiffs do not assert burdens based only on "the peculiar circumstances of individual voters." Mot. 6. Instead, they specifically allege the ways in which the challenged provisions affect *all* Georgia voters. In particular, Plaintiffs allege that the provisions operate in conjunction with one another to significantly restrict Georgians' ability to vote, first by layering obstacles to absentee and early voting, thereby forcing more voters into long lines on Election Day, and then by imposing further obstacles on in-person, Election Day voting. *See, e.g.*, FAC ¶¶ 247-248, 255-267, 295. As a result, the challenged provisions "raise the cost of voting for every voter, requiring all eligible Georgia voters to expend more resources and incur greater opportunity costs to cast a ballot." *Id.* ¶ 276. It is true that the restrictions impact some voters, particularly those of color and with disabilities, more than others. But the fact that a restriction has a disparate impact does not mean that it does not also impose burdens across the board. Each of SB 202's restrictions must be adequately justified, even if some voters are less restricted than others. *See*

Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (plurality op.) ("However slight [a] burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'").

Second, Intervenors are wrong that particularly severe burdens on parts of the electorate do not implicate the fundamental right to vote. Contrary to Intervenors' suggestion, "Justice Scalia's *Crawford* concurrence does not control," *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1145 n.53 (N.D. Ala. 2020), and a majority of the Supreme Court in *Crawford* rejected the view that a challenger must demonstrate that a voting restriction burdens voters generally in order to trigger scrutiny under *Anderson-Burdick*. Instead, the controlling Supreme Court plurality in *Crawford* made clear that *Anderson-Burdick* applies even when "the severity of a burden that a state law imposes" falls principally upon a "discrete class of voters," such as "a political party" or even "an individual voter." 553 U.S. at 191, 197-98, 202.[2] Pursuant to this rule, courts in this circuit have consistently permitted *Anderson-Burdick* claims against laws that burden different subgroups of voters

[2] The Eleventh Circuit's reliance on Justice Scalia's undue burden analysis in his concurring opinion in *Crawford* was limited to the unremarkable point that courts "have to identify a burden before we can weigh it." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1261 (11th Cir. 2020) (quoting *Crawford,* 553 U.S. at 205 (Scalia, J., concurring in the judgment)). In no way did the *Jacobson* court suggest that burdens must affect every single person in a state, or that particularly severe burdens on large numbers of voters are irrelevant.

differently. *See, e.g.*, *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (voters "who lack photo identification"); *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018) (college students).

The Court must afford Plaintiffs the same opportunity. Plaintiffs have alleged that SB 202 imposes particularly severe burdens on large numbers of voters, including voters of color, voters with disabilities, and other historically disenfranchised groups. *See, e.g.*, FAC ¶¶ 185-93, 255, 278, 286, 291-93, 324-38. Far from having a "legally irrelevant" effect, c*f.* Mot. 5-7, these serious burdens impinge upon the fundamental right to vote, and they cannot survive scrutiny—even if they *were* the only burdens alleged—unless justified by legitimate and "sufficiently weighty" state interests. *Crawford*, 553 U.S. at 191.

III. Plaintiffs Have Adequately Alleged Discriminatory Results And Discriminatory Purpose Claims Under *Brnovich*

On July 1, 2021, the Supreme Court issued its decision in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021). The Court's primary holding relates to discriminatory results claims under Section 2 of the Voting Rights Act ("Section 2"). After considering the post-trial factual record, the Court held that two provisions of Arizona election law did not violate Section 2. In so holding, it set forth certain considerations that may be relevant for assessing discriminatory results claims. *Id.* at 2344. Separately, the Court affirmed the long-standing

approach to assessing discriminatory purpose claims, in connection with holding that one of the laws at issue was not enacted with a discriminatory purpose. *Id*. at 2349.

In their motion to dismiss, Intervenors rely almost exclusively on *Brnovich* to argue that Plaintiffs' discriminatory results and discriminatory purpose claims are insufficient as a matter of law. *See* Mot. 10-16. But Intervenors plainly misconstrue *Brnovich*, offering an interpretation that has no support in the opinion or in the text of Section 2. Moreover, rather than contend with Plaintiffs' numerous, well-pled allegations, Intervenors simply disregard them. But those allegations must be taken as true at this stage—and are more than sufficient to plausibly raise a right to relief.

A. Discriminatory Results

As the *Brnovich* Court confirmed, "Section 2 of the Voting Rights Act provides vital protection against discriminatory voting rules." *Brnovich*, 141 S. Ct. at 2343. It prohibits any such rule that "results in a denial or abridgement of the right . . . to vote . . . on account of race," which occurs when, "based on the totality of circumstances, it is shown that political processes . . . are not equally open to participation" by voters of color. 52 U.S.C. § 10301.

Brnovich was the Court's "first § 2 time, place, or manner case." 141 S. Ct. at 2337. The Court explicitly declined to "announce a test to govern all VRA § 2 claims." *Id.* at 2336. Instead, to inform the "totality of circumstances" analysis, the

Court in *Brnovich* identified "certain guideposts" or "important circumstances." *Id.* at 2336-38. Those guideposts are (1) the size of the burden, (2) deviations from voting procedures in 1982, (3) the disparate impact of the burden, (4) the State's entire system of voting, and (5) the State's interests in the challenged provision. *Id.* at 2338-40. The Court made clear, however, that these guideposts are not exhaustive, that "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered," *id.* at 2338, and that past racial discrimination—and the persistent effects of that discrimination—are relevant to the totality of circumstances analysis, *id.* at 2340.

The Court then examined the post-trial factual record related to two Arizona election rules—one that requires voters to vote in their assigned precinct on Election Day, and one that provides criminal penalties when unauthorized individuals collect absentee ballots—and held that, based on the evidence, these two provisions did not violate Section 2. *Id.* at 2348. In announcing its decision, however, the Court reaffirmed Section 2's important role: "[N]obody disputes[] that § 2 applies to a broad range of voting rules, practices, and procedures; that an 'abridgement' of the right to vote under § 2 does not require outright denial of the right; that § 2 does not demand proof of discriminatory purpose; and that a 'facially neutral' law or practice may violate that provision." *Id.* at 2341.

Intervenors ignore these points and invite this Court to accept an interpretation of *Brnovich* that would effectively render Section 2 inoperable. As an initial matter, they erroneously claim that "Section 2 asks whether, under the totality of circumstances, a voting procedure results in the *denial* of voting rights on account of race or color." Mot. 10 (emphasis added). That is not what the statute asks: it asks whether a voting procedure "results in a denial *or abridgement*" of that right. 52 U.S.C. § 10301(a) (emphasis added). Intervenors also argue that *Brnovich* dictates "several subrules that courts 'must' follow." Mot. 11. That too is incorrect. The word "subrule" never appears in the opinion, and the Court explicitly rejected a didactic approach, stating: "[W]e think it prudent to make clear at the beginning that we decline in these cases to announce a test to govern all VRA § 2 claims." *Brnovich*, 141 S. Ct. at 2336. Finally, and most problematic, the thrust of Intervenors' argument is that *Brnovich* requires this Court to disregard Plaintiffs' well-pled allegations and dismiss their Section 2 results claim as a matter of law. *See.* Mot. 12-16. *Brnovich* offers no support for this result. To the contrary, even just an assessment of *Brnovich*'s non-exclusive guideposts makes clear that, under the totality of circumstances, Plaintiffs have plausibly alleged a claim.[3]

[3] In fact, even though *Brnovich* was decided after Plaintiffs filed their FAC, the *only* totality of circumstances "guidepost" that Plaintiffs did not extensively allege is the

Size of the burden. Plaintiffs allege, with significant detail, how each of SB 202's challenged provisions—individually and cumulatively—will substantially harm Georgia voters of color. *See, e.g.*, FAC ¶¶ 275-298. To begin, such voters already endure disproportionately long lines on Election Day. *See, e.g.*, *id.* ¶¶ 302-309. Yet SB 202 makes this burden even worse. It does this by shortening the time frame for requesting absentee ballots, *id.* ¶ 249; imposing onerous ID requirements for requesting and casting those ballots (requirements that are more difficult for voters of color to meet), *id.* ¶¶ 278-285; and restricting the availability of secure drop boxes, not only by limiting the number of drop boxes, but also by requiring needless in-person surveillance that compounds the harm on voters of color, *id.* ¶¶ 288-290. SB 202 then goes further, also limiting the availability of in-person voting prior to

---

relationship between the challenged provisions and voting rules in Georgia in 1982. *See* 141 S. Ct. at 2336. Consistent with *Brnovich* and other Supreme Court precedent, Plaintiffs need not prove—and certainly need not allege at the pleading stage—that every totality of circumstances factor supports their case. *Id.* at 2348; *see Gingles*, 478 U.S. at 45 (Congress did not intend that "any particular number of factors be proved, or that a majority of them point one way or the other."). And courts have certainly found discriminatory results violations when plaintiffs have established some but not all totality of circumstances factors. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 225 (5th Cir. 2016) (en banc) (affirming district court's finding that Texas photo ID law had discriminatory results based on court's analysis of only some of the totality of circumstances factors). Moreover, Plaintiffs' FAC, in addition to alleging facts consistent with these guideposts, includes numerous allegations regarding how historical and persistent racial discrimination—which *Brnovich* reaffirmed as relevant factors—interact to cause discriminatory impact in voting opportunities. 141 S. Ct. at 2340.

Election Day by eliminating (except in the event of "emergencies" declared by the Governor) the availability of mobile voting units—thus burdening voters of color who are more likely to face difficulty traveling to fixed polling locations due to polling place closures, *id.* ¶¶ 172-177, and lack of access to a private vehicle and public transportation, *id.* ¶ 277—and by reducing advanced voting for federal runoff elections, again burdening voters of color who are more likely to vote early, especially on weekends, *id.* ¶¶ 294-95. But SB 202 does not stop there, as it also targets voters of color on Election Day. Its line relief ban prohibits anyone from offering support to voters waiting in these needlessly long lines. *Id.* ¶¶ 310-315. And its prohibition on in-county provisional ballots means that voters who make it to the ballot box before 5 p.m., but who are in the wrong precinct, will be outright disenfranchised. *Id.* ¶ 291. Yet again, and predictably, this prohibition falls disproportionately on voters of color, who are more likely to be at the wrong precinct due to higher rates of housing instability and in-county moves. *Id.* ¶ 292.

These burdens, which are alleged in detail in Plaintiffs' FAC, are both severe and discriminatory. Intervenors' attempt to dismiss them as "'mere inconveniences' [that] do not implicate section 2 in the first place," Mot. 12, is not only meritless, but also raises an obvious factual dispute that cannot be resolved on a motion to dismiss.

Size of the disparity. The FAC also adequately alleges that these burdens will have a significantly different impact on voters of color as compared to white voters. Plaintiffs put forth detailed allegations of how the challenged provisions will disproportionately affect voters of color, thus rendering voting in Georgia not equally open to those voters. *See, e.g.*, FAC ¶¶ 275-315; *see also Brnovich*, 141 S. Ct. at 2338 ("[E]qual openness remains the touchstone" of results claims).

Intervenors contend that these allegations are insufficient because Plaintiffs (1) do not "quantify 'the size' of any racially disparate impacts," (2) "inflate [numbers] with . . . statistical fallacies," and (3) "allege disparate impacts based on preexisting disparities in employment, wealth, and education—precisely what *Brnovich* deemed insufficient." Mot. 13. None of these arguments is correct. *First*, Intervenors again ignore that this litigation is at the pleading stage. Nothing in *Brnovich*—in which the Court assessed the post-trial *factual record*—requires Plaintiffs to put forth expert evidence to prove their case in their amended complaint. *See also Gingles*, 478 U.S. at 78 (Section 2 results claims are "peculiarly dependent upon the facts of each case" and require "an intensely local appraisal."). *Second*, there is no basis for Intervenors' suggestion that Plaintiffs have "inflated" their allegations. The FAC includes factual, statistical information—with no inflation or inaccurate characterizations—that plausibly suggests a disparate burden. *See, e.g.*,

FAC ¶ 281 ("In Georgia's 'Black Belt,' there are 21 contiguous and predominantly Black rural counties where all State driver's license offices are open two days per week or fewer."); *id.* ¶ 286 ("[W]hile Black voters comprise 30% of Georgia's voting population, these voters account for almost 42% of the request for absentee ballots"); *id.* ¶ 292 ("[T]he population with the most in-county moves is 47% Black, relative to 37% non-Hispanic white, [and] the population with the *least* in-county moves is only 22% Black, compared to 64% non-Hispanic white"). *Third*, Intervenors ignore that *Brnovich* in fact *confirms* that racial disparities in employment, wealth, and education are relevant to the totality of circumstances analysis, as courts should consider "that minority group members suffered discrimination in the past . . . and that effects of that discrimination persist." *Brnovich*, 141 S. Ct. at 2340.

Entire system of voting. Remarkably, Intervenors argue that "Plaintiffs focus on how each provision of SB 202 burdens a particular method of voting, without considering the State's 'entire system.'" Mot. 13. But the opposite is true: the heart of Plaintiffs' claim is that, as a result of the challenged provisions, Georgia's *entire system* burdens voters of color. At each opportunity to vote—absentee, early in-person, and on Election Day—SB 202 disproportionately impacts voters of color. *See, e.g.*, FAC ¶¶ 25, 275-276. And, as described *infra* and as

detailed in Plaintiffs' FAC, the cumulative effect of those burdens is even more severe. Tellingly, Intervenors ask the Court to accept that Georgia makes it easy to vote by citing (1) an opinion describing Georgia election law *before* SB 202, and (2) a press release (*available at* bit.ly/3AD0Adq) regarding a report in which Defendant Secretary of State Raffensperger states "'that liberals have spun their own Big Lie about SB 202.'" *See* Mot. 13. These citations do not refute Plaintiffs' well-pled allegations or resolve any factual dispute in Intervenors' favor.

State interest. There is no documented evidence of any meaningful voter fraud in Georgia. FAC ¶ 285. In the aftermath of the 2020 election, Georgia's election officials confirmed as much, *id.* ¶ 18, and baseless lawsuits alleging the contrary were rejected, *id.* ¶ 224. Intervenors do not contend otherwise. Instead, they claim that Georgia's interest in preventing fraud—even if none has occurred—means that SB 202 does not violate Section 2. Mot. 14. But *Brnovich* does not sweep nearly so far. Plaintiffs do not dispute that the Court may permit Georgia to take prophylactic steps to prevent fraud, but this principle does not give Georgia carte blanche to impose discriminatory and burdensome voting rules, especially ones that do not advance the State's purported interest. If it did, Section 2 would lose all force, as States could simply claim they were acting to prevent fraud to justify any restriction—a result that *Brnovich* plainly rejects. *Brnovich*, 141 S. Ct. at 2341.

As the Court in *Brnovich* acknowledged, "no one suggests that discrimination in voting has been extirpated or that the threat has been eliminated." *Id.* at 2343. Here, Plaintiffs have more than adequately alleged that, considering the totality of circumstances, SB 202 discriminates against voters of color. Intervenors' motion to dismiss Plaintiffs' Section 2 results claim should be rejected.

B. Discriminatory Purpose

Intervenors told this Court that "[t]heir motion will not repeat arguments in the State's motion, but will raise additional reasons why Plaintiffs have failed to state a claim." D.E. 93 at 2. But Intervenors arguments to dismiss Plaintiffs' discriminatory purpose claim are nearly identical to State Defendants' arguments. *Compare* Mot. 14-16 *with* D.E. 87-1 at 10, 13-25. While Intervenors couch their argument as relating to *Brnovich*, they acknowledge that "*Brnovich* did not alter [the] test" for discriminatory purpose claims. Mot. 14.

That test, as *Brnovich* further affirmed, follows "the familiar approach outlined in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266-68 (1977)."[4] *Brnovich*, 141 S. Ct. at 2349. And under the *Arlington Heights*

[4] The *Arlington Heights* factors are: "(1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators." *Greater Birmingham Ministries v. Sec'y of State of Ala.*,

framework, Plaintiffs have plausibly suggested that SB 202 was enacted with a discriminatory purpose, as Plaintiffs allege each of the *Arlington Heights* factors in detail. *See, e.g.*, FAC ¶¶ 23, 275-319 (disproportionate impact on voters of color that was also known and reasonably foreseeable); *id*. ¶¶ 139-181 (Georgia's history of racially discriminatory voting practices); *id*. ¶¶ 207-218 (events leading to SB 202's passage, including record participation by Black voters); *id*. ¶¶ 219-245 (opaque process leading to the enactment of SB 202); *id*. ¶¶ 227-228 (contemporary statements of legislators); *id*. ¶¶ 223-224 (tenuousness of the stated justifications).

Intervenors ignore these well-pled allegations, and instead ask the Court to dismiss Plaintiffs' discriminatory purpose claim because the General Assembly's formal legislative findings are not facially racist. Mot. 15-16. Intervenors offer no support for this approach, nor is there any. Because a discriminatory motive may hide behind seemingly neutral statements, courts must examine whether the *Arlington Heights* factors support an "*inference* of invidious purpose." 429 U.S. at 270 (emphasis added). Plaintiffs have adequately alleged such an inference here. *See also Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (because claims of intentional discrimination are fact-specific, they are rarely decided pre-trial).

---

992 F.3d 1299, 1321-22 (11th Cir. 2021). Courts in the Eleventh Circuit also consider: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives." *Id*.

IV. Plaintiffs Allege Discrimination Under the ADA

Count V is a claim under the ADA, not the Constitution, so Intervenors' argument that Plaintiffs cannot bring an "as-applied challenge" and do not plead a plausible "facial challenge" entirely misses the mark. Intervenors cite a single out-of-circuit case, *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 951 (E.D. Wis. 1998), to assert that Plaintiffs must show that "'no set of circumstances exist under which the [challenged provision] would be valid,'" Mot. 17, but this portion of *Oconomowoc* concerned a Fourteenth Amendment challenge, not the ADA. In fact, the *Oconomowoc* court found the challenged statute *did* violate the ADA. 23 F. Supp. 2d at 954-55.

Intervenors also incorrectly assert that establishing discrimination under the ADA requires showing that every individual with a disability would be entirely excluded from voting. But "exclusions under Title II need not be absolute: a public entity violates Title II not just when 'a disabled person is completely prevented from enjoying a service, program, or activity.'" *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1216 (N.D. Ala. 2020) (quoting *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001), *appeal dismissed*, No. 20-12184, 2020 WL 5543717 (11th Cir. July 17, 2020). Rather, a violation occurs when "the opportunity to participate in or benefit from the aid, benefit, or services . . . is not equal to that afforded to others."

28 C.F.R. § 351.130(b)(1)(ii). Moreover, public entities must not "impose or apply eligibility criteria that screen out or tend to screen out" people with disabilities from "fully and equally enjoying" the programs, services or activities of state and local governments, 28 C.F.R. § 35.130(b)(8), nor may public entities use "methods of administration that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities," 28 C.F.R. § 35.130(b)(3). Plaintiffs have sufficiently alleged that the challenged provisions of SB 202 discriminate against individuals with disabilities, in violation of these requirements. *See, e.g.*, FAC ¶¶ 13, 14, 24, 25, 29, 30, 182-193, 247, 249-251, 263-267, 274, 277-278, 280-281, 286, 289, 293, 298, 300-301, 320-328, 349-371.

Relying on *Brnovich*, Intervenors contend, with no support, that SB 202 creates only "usual burdens" that are not "prohibitively difficult for disabled persons," and that there are "many ways to cast a ballot." Mot. 17-18. But *Brnovich* concerns the Voting Rights Act; it has no relevance to claims under the ADA. Furthermore, absentee voting, drop box voting, and in-person voting are *each* distinct programs, and *each* option, if made available, must be equally accessible to people with disabilities as for others. *See Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 503-05 (4th Cir. 2016). In any event, Plaintiffs contest that voters with

disabilities have multiple other accessible options, and this factual question cannot be resolved on a motion to dismiss.

V. The Line Relief Ban Violates The First Amendment

Intervenors move to dismiss Plaintiffs' First Amendment claim by arguing that SB 202's line relief ban restricts conduct, not speech. But encouraging people to participate in the political process, despite the barriers in front of them, is "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988). And just as in *Meyer*, the message to stay in line—which has particularly heavy meaning given the history of voter suppression in Georgia, *see, e.g.*, FAC ¶¶ 152, 154, 178-180—cannot be split apart from Plaintiffs' expressive conduct in providing support to voters in line. *See Meyer*, 486 U.S. at 424 (the First Amendment protects the use of petition circulators despite the availability of "other means to disseminate" ideas because individuals have the "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing").

Conduct is protected under the First Amendment if it is "'inten[ded] to convey a particularized message,'" and, under the circumstances, a "reasonable person would interpret it as *some* sort of message"; observers need not "infer a *specific* message." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir.

2004) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). Here, by providing food, water, and support to anyone forced to wait hours to vote, Plaintiffs engage in expressive conduct, communicating both "the importance of staying in line" and "the importance of voting." FAC ¶ 312. For Plaintiff AME Church, whose conduct is intertwined with "the tenets of the Gospel," this conduct also conveys their message affirming "the dignity of Black voters." *Id.* While Intervenors rely on out-of-circuit cases involving ballot collection to argue that line relief is not communicative, Mot. 19, the Eleventh Circuit has held that "food sharing" in a public setting and in the context of "an issue of concern in the community" is likely to be understood as communicating a message. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1242-43 (11th Cir. 2018).[5]

[5] The Eleventh Circuit's statement in *Food Not Bombs* that "[w]hether food distribution [or sharing] can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge," 901 F.3d at 1241 (second alteration in original), does not bar a facial challenge. As the court explained, whether food sharing is likely to be understood as communicative depends on context, and the ordinance at issue in *Food Not Bombs* broadly regulated the "provision of food" "to the public" under many circumstances. *See id.* at 1238-39, 41. Given that broad scope, a facial challenge would have required the impossible task of determining whether a substantial amount of food sharing—across any number of hypothetical contexts—was communicative. But here, SB 202 regulates conduct in only one context: sharing food or drink with voters waiting in line to vote. SB 202 regulates expressive conduct by its terms, not just as applied, and a facial challenge is thus appropriate.

And the line relief ban regulates a public forum. Streets and sidewalks—including those around polling places—are "quintessential public forums." *Burson v. Freeman*, 504 U.S. 191, 193, 196 (1992) (plurality). Intervenors incorrectly rely on *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), to argue that S.B. 202 regulates a "nonpublic forum[]." But *Mansky* considered speech only "inside a polling place," *id.* at 1882, while S.B. 202 regulates public streets and sidewalks.

The line relief ban is therefore subject to strict scrutiny. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are subject to strict scrutiny . . . ." (internal citation omitted)). But it is not narrowly tailored to serve the state's asserted interest of protecting voters from "improper interference, political pressure, or intimidation." SB 202 § 2(13). To satisfy the narrow-tailoring inquiry, "specific findings" must support the speech restriction. *Burson*, 504 U.S. at 209 n.11; *accord Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015).[6]

[6] The Supreme Court established in *Burson* a "modified 'burden of proof'" requiring a lesser showing to justify some election-related speech restrictions, but that modified burden applies only where the "First Amendment right" at issue "threatens to interfere with the act of voting itself," such as by confusing voters with "overcrowded ballots" or "physically interfer[ing] with electors." *See* 504 U.S. at 209 & n.11. Line relief, however, does not interfere with voting but instead "facilitate[s]" voting by "encourage[ing] [people] to stay in line." FAC ¶¶ 311, 318. But even if *Burson*'s modified form of strict scrutiny applied, the ban would still fail because the General Assembly failed to articulate *any* basis upon which to conclude that sharing food and drink interferes with or intimidates voters.

But the General Assembly cited no evidence showing that sharing food or water interferes with, pressures, or intimidates voters. And prior to SB 202's enactment, the state already had in place a less restrictive means of preventing voter interference. O.C.G.A. § 21-2-414(a) (prohibiting "solicit[ing] votes in any manner or by any means or methods"). Because "separate provision[s]" already "prohibit[] much of th[e] conduct" about which the state claims to be concerned, the additional line relief ban is not narrowly tailored. *McCullen*, 573 U.S. at 490-91.

Finally, SB 202's line relief ban is facially unconstitutional because it burdens "a substantial amount of protected free speech, judged in relation to [any] plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Indeed, given the electioneering restrictions already in place, SB 202's additional restriction on line relief independently reaches *only* conduct *not* intended to solicit votes, and its substantial burdens on protected activity therefore far exceed any legitimate application it might have. Intervenors' reliance on *Hodge v. Talkin*, 799 F.3d 1145 (D.C. Cir. 2015), is misplaced. Mot. 21. As *Hodge* concerned speech in a "nonpublic forum[]," 799 F.3d at 1150, it is irrelevant to the ban at issue here.

CONCLUSION

For all of these reasons, Intervenors' motion to dismiss should be denied in its entirety.

Respectfully submitted, this 26th day of July 2021.

/s/ *Nancy G. Abudu*
Nancy G. Abudu (Bar 001471)
nancy.abudu@splcenter.org
Pichaya Poy Winichakul (Bar 246858)
poy.winichakul@splcenter.org
SOUTHERN POVERTY LAW CENTER
P.O. Box 1287
Decatur, Georgia 30031-1287
Telephone: (404) 521-6700
Facsimile: (404) 221-5857

/s/ *Sean J. Young*
Sean J. Young (Bar 790399)
syoung@acluga.org
Rahul Garabadu (Bar 553777)
rgarabadu@acluga.org
ACLU FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, Georgia 30357
Telephone: (678) 981-5295
Facsimile: (770) 303-0060

/s/ *Adam S. Sieff*
Adam S. Sieff (pro hac vice)
adamsieff@dwt.com
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, 24th Floor
Los Angeles, California 90017-2566
Telephone: (213) 633-6800
Facsimile: (213) 633-6899

David M. Gossett (pro hac vice)
davidgossett@dwt.com
Courtney T. DeThomas (pro hac vice)
courtneydethomas@dwt.com
DAVIS WRIGHT TREMAINE LLP
1301 K Street NW, Suite 500
Washington, D.C. 20005-7048
Telephone: (202) 973-4288
Facsimile: (202) 973-4499

Kate Kennedy (pro hac vice)
katekennedy@dwt.com
Matthew Jedreski (pro hac vice)
mjedreski@dwt.com
Grace Thompson (pro hac vice)

/s/ *Sophia Lin Lakin*
Sophia Lin Lakin (pro hac vice)
slakin@aclu.org
Theresa J. Lee (pro hac vice)
tlee@aclu.org
Dale E. Ho (pro hac vice)
dho@aclu.org
Ihaab Syed (pro hac vice)
isyed@aclu.org
ACLU FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 519-7836
Facsimile: (212) 549-2539

Susan P. Mizner (pro hac vice)
smizner@aclu.org
ACLU FOUNDATION, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0781

Brian Dimmick (pro hac vice)
bdimmick@aclu.org

gracethompson@dwt.com
Jordan Harris (pro hac vice)
jordanharris@dwt.com
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, Washington 98104-1610
Telephone: (206) 622-3150
Facsimile: (206) 757-7700

Attorneys for Plaintiffs Georgia Muslim Voter Project, Women Watch Afrika, Latino Community Fund Georgia, and The Arc of the United States

ACLU FOUNDATION, INC.
915 15th Street NW
Washington, D.C. 20005
Telephone: (202) 731-2395

/s/ *Leah C. Aden*
Leah C. Aden (pro hac vice)
laden@naacpldf.org
John S. Cusick (pro hac vice)
jcusick@naacpldf.org
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, New York 10006
Telephone: (212) 965-2200
Facsimile: (212) 226-7592

/s/ *Debo P. Adegbile*
Debo P. Adegbile (pro hac vice)
debo.adegbile@wilmerhale.com
Ilya Feldsherov (pro hac vice)
ilya.feldsherov@wilmerhale.com
WILMER CUTLER PICKERING HALE AND DORR LLP
250 Greenwich Street
New York, New York 10007
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

George P. Varghese (pro hac vice)
george.varghese@wilmerhale.com
Stephanie Lin (pro hac vice)
stephanie.lin@wilmerhale.com
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
Telephone: (617) 526-6000

Facsimile: (617) 526-5000

Tania Faransso (pro hac vice)
tania.faransso@wilmerhale.com
Webb Lyons (pro hac vice)
webb.lyons@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Nana Wilberforce (pro hac vice)
nana.wilberforce@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue, Suite 2400
Los Angeles, California 90071
Telephone: (213) 443-5300
Facsimile: (213) 443-5400

Attorneys for Plaintiffs Sixth District of the African Methodist Episcopal Church, Delta Sigma Theta Sorority, Georgia ADAPT, Georgia Advocacy Office, and Southern Christian Leadership Conference

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a point size of 14.

Dated: July 26, 2021

/s/ *Rahul Garabadu*
Rahul Garabadu

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2021, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Dated: July 26, 2021

/s/ *Rahul Garabadu*
Rahul Garabadu

Counsel for Plaintiffs