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
UNITED STATES OF AMERICA, Plaintiff v. THE STATE OF GEORGIA, *et al.*, Defendants	Civil Action No. 1:21-CV-2575-JPB
SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, *et al.*, Plaintiffs v. BRIAN KEMP; *et al.*, Defendants	Civil Action No. 1:21-CV-01284-JPB
THE NEW GEORGIA PROJECT, *et al.*, Plaintiffs	Civil Action No. 1:21-CV-01229-JPB

v. BRAD RAFFENSPERGER, *et al.*, Defendants	
GEORGIA STATE CONFERENCE OF THE NAACP*, et al.*, Plaintiffs v. BRAD RAFFENSPERGER, *et al.,* Defendants	Civil Action No. 1:21-CV-01259-JPB
THE CONCERNED BLACK CLERGY OF METROPOLITAN ATLANTA, INC., *et al.*, Plaintiffs v. BRAD RAFFENSPERGER, *et al.,* Defendants	Civil Action No. 1:21-CV-01728-JPB

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION REGARDING INTENTIONAL RACIAL DISCRIMINATION

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Plaintiff United States of America ("United States") and Private Plaintiffs from four cases[1] respectfully submit this reply memorandum in further support of their motion for preliminary injunction, ECF No. 566, and in response to the opposition briefs of State Defendants (the State), ECF No. 601 (State's Br.) and Defendant-Intervenors, ECF No. 600 (Interv. Br.) (collectively, the Defendants).

I. INTRODUCTION

Plaintiffs have demonstrated that they are likely to succeed on their claims that the challenged provisions of Georgia Senate Bill 202 (2021) (SB 202) intentionally discriminate against Black voters in violation of Section 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301, and the Fourteenth and Fifteenth Amendments. Plaintiffs' opening brief demonstrates that the Georgia legislature redesigned the State's voting system as a means to impede Black voting strength because it poses a political threat. Taking away Black voters' "opportunity because [they] were about to exercise it . . . bears the mark of intentional discrimination." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (*LULAC*).

Defendants attempt to convince this Court otherwise by misinterpreting

[1] The Private Plaintiffs are from *Sixth District of the African Methodist Episcopal Church, et al. v. Kemp, et al.*, 1:21-CV-01284; *The New Georgia Project, et al., v. Raffensperger, et al.*, 1:21-CV-01229; *Georgia State Conference of the NAACP, et al. v. Raffensperger, et al.*, 1:21-CV-01259; and *The Concerned Black Clergy of Metropolitan Atlanta, Inc., et al. v. Raffensperger*, et al., 1:21-CV-01728.

applicable law and ignoring relevant facts. Because Defendants' arguments are unpersuasive, this Court should grant Plaintiffs' Motion for Preliminary Injunction.

II. ARGUMENT

A. Defendants Misconstrue and Misstate the Applicable Legal Standard.[2]

1. Discriminatory Purpose Does Not Require Proof of Racial Animus or That Race-Based Intent is the Sole or Primary Purpose, and Can be Proven by Circumstantial Evidence.

Defendants' repeated insistence that Plaintiffs must show that the actions of the Georgia legislature were "racist" fails as a matter of law. *E.g.*, State's Br. 23, 26, 33, 40. Establishing discriminatory intent only requires an intent to disadvantage minority citizens, *for whatever reason*, and not proof of racial *animus*. *See Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 472-73 & n.7 (11th Cir. 1999) ("[I]ll will, enmity, or hostility are not prerequisites of intentional discrimination."); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222-23 (4th Cir. 2016). That reason can include a

[2] Notwithstanding the longstanding consensus that Section 2 encompasses distinct discriminatory purpose and discriminatory results claims, State Defendants contend that the panel decision in *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905 (11th Cir. 2023) (*LWV*), should be read to jettison any statutory prohibition on practices adopted or maintained for a racially discriminatory purpose. State's Br. 24-25. As explained elsewhere by the United States, *see* U.S. 12(c) Opp., ECF No. 573; Pl.s' Prelim. Inj. Br. 31-32, ECF No. 566-1 (PI Br.), such interpretation is foreclosed by Supreme Court and earlier Circuit precedent. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021); *Chisom v. Roemer*, 501 U.S. 380, 394 n.21 (1991); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1553 (11th Cir. 1984).

desire by decision-makers to "entrench themselves" in power. *McCrory*, 831 F.3d at 222;[3] *see also LULAC*, 548 U.S. at 440. That is what the record here shows.

To prove a discriminatory purpose claim under Section 2 or the Constitution, it is enough that the race-based purpose was *a* motivation for the enacted provisions. The evidence need not show "that the challenged action rested solely on racially discriminatory purposes" or that the discriminatory purpose "was the 'dominant' or 'primary' one." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *see also Allen v. Milligan*, 143 S. Ct. 1487, 1514 (2023); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). Here, the record shows that Defendants were motivated to enact the challenged provisions, at least in part, to impede Black voting strength as a means to gain political advantage. *See, e.g.*, PI Br. 4-14.

Contrary to Intervenors' assertions, Interv. Br. 8, discriminatory purpose claims can be proven with circumstantial evidence. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) ("[D]iscriminatory intent need not be proved by direct evidence."). Circumstantial evidence is not only sufficient but is often necessary, as a legislature's

[3] Intervenors spend several pages rejecting the analysis in *McCrory*. Interv. Br. 17-20. In fact, the Eleventh Circuit has cited *McCrory* frequently as a helpful comparator in its voting rights cases. *See, e.g.*, *LWV*, 66 F.4th at 924; *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1324 (11th Cir. 2021) (*GBM*).

"true purpose" will frequently be "cloaked in the guise of propriety," *Lodge v. Buxton*, 639 F.2d 1358, 1363 (5th Cir. 1981), *aff'd sub nom. Rogers*, 458 U.S. 613 (1982); *see also Veasey v. Abbott*, 830 F.3d 216, 235-36 (5th Cir. 2016) (en banc) ("[W]e rarely have legislators announcing an intent to discriminate based on race.").[4]

2. Any Presumption of Legislative Good Faith Is Not Absolute.

Defendants ask this Court to adopt an expansive definition of the "presumption of legislative good faith" that is not supported by *Abbott v. Perez*, 138 S. Ct. 2305 (2018), or *League of Women Voters of Florida Inc. v. Florida Secretary of State*, 66 F.4th 905, 923 (11th Cir. 2023). *E.g.*, State's Br. 26, 31-36; Interv. Br. 5, 12. A presumption of legislative good faith is not absolute and can be overcome by a showing under *Arlington Heights*. 429 U.S. at 265-66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."); *e.g.*, *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d. 1229, 1288-89 (M.D. Fla. 2022), *appeal dismissed*, 2023 WL 2966338 (11th Cir. Jan. 12, 2023) (presumption of good faith overcome

[4] State Defendants criticize Plaintiffs for not showing "a hint of discriminatory purpose in [the] text" of SB 202. State's Br. 30; *see also* Interv. Br. 13 (noting the text of SB 202 is "neutral"). A racially discriminatory purpose need not "be express or appear on the face of the statute" to be actionable. *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Veasey*, 830 F.3d at 235-36. That is the point of the *Arlington Heights* analysis. 429 U.S. at 264-66. By Defendants' logic, even a racially-neutral poll tax with a preamble of "rationales" would not violate Section 2 or the Constitution—despite Congress' clear contrary view. *See* 52 U.S.C. § 10306(a).

where racial considerations motivated the drawing of districts); *McCrory*, 831 F.3d at 221, 233-34 (holding "judicial deference accorded to legislators" overcome where plaintiffs met their burden under *Arlington Heights*). Plaintiffs have made such a showing here.

Further, case law does not require a district court to assign special credence to particular types of evidence or draw only positive inferences from the actions or statements of state officials. *Contra* State's Br. 33-34, 36; Interv. Br. 12. *Abbott* found that the district court improperly placed the burden of proof on the State to show that its 2013 redistricting plan was not tainted by the unlawful intent underlying an earlier plan. 138 S. Ct. at 2325. Both *Abbott* and *LWV* make clear that the presumption of legislative good faith means that "past discrimination" does not "flip[] [plaintiffs'] evidentiary burden on its head." *Id.*; *see LWV*, 66 F.4th at 923. The Supreme Court in *Brnovich v. Democratic National Committee* confirmed that *Abbott*'s discussion of legislative good faith did not change the "familiar approach outlined in *Arlington Heights*." 141 S. Ct. 2321, 2349 (2021). Under this well-settled framework, there is no heightened presumption of legislative good faith, because Plaintiffs already have the burden to show that racial discrimination was a motivating factor behind the challenged provisions. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *GBM*, 992 F.3d at 1324. If that showing is made, the burden shifts "to the

law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228.

B. Plaintiffs Are Likely to Succeed on the Merits.

1. The Evidence Shows That the Legislature Enacted the Challenged Provisions to Entrench Political Power by Targeting Methods of Voting Used by Black Voters.

a. The Sequence of Events Leading Up to the Passage of SB 202 Is Legally Significant.

Defendants appear to agree that the broad context and sequence of events leading up to SB 202 are relevant to the *Arlington Heights* analysis. *E.g.*, State Br. 30; Interv. Br. 6; *see Arlington Heights*, 429 U.S. at 267; *McCrory*, 831 F.3d at 221; *Veasey*, 830 F.3d at 236. Yet, "instead of acknowledging the whole picture," *McCrory*, 831 F.3d at 228, Defendants' briefs portray SB 202 as though its passage was uninfluenced by recent events, the political environment, history, and demographics (except where it purportedly supports their arguments).

In the context of elections in Georgia, *Arlington Heights* requires this Court to consider how racially polarized voting, growing Black political mobilization in 2018 and 2020, close elections, racialized allegations of fraud after the 2020 elections, and well-known differences in how Black and white voters use different voting practices—including that, in 2018, Black voters for the first time voted by mail at a higher rate than white voters—led to SB 202's passage. It further requires this Court

to consider how SB 202's challenged provisions interact together to limit Black voters' power. *See McCrory*, 831 F.3d at 231; *Veasey*, 830 F.3d at 236. Socioeconomic disparities and racially polarized voting in Georgia also help explain how the legislature could achieve partisan ends by implementing voting changes that disproportionately impact Black Georgians. *See* PI Br. 41-44.[5]

b. Plaintiffs Have Established That the Impact of SB 202's Challenged Provisions Bears More Heavily on Black Voters Than White Voters.

Plaintiffs' opening brief presented extensive evidence that the effects of the challenged provisions of SB 202, together and independently, bear more heavily on Black voters in Georgia than white voters. *See, e.g.*, PI Br. 33-44. Defendants do not seriously contest these facts. Instead, Defendants urge this Court to adopt an erroneous legal standard, point to irrelevant facts, mischaracterize the evidence, and present unreliable expert testimony.

i. <u>This Court Should Reject Defendants' Attempts to Conflate the Discriminatory Results and Discriminatory Purpose Analyses.</u>

[5] Contrary to Defendants' contentions, State's Br. 31-32 & n.15, Interv. Br. 5-7, Plaintiffs do not cite to Georgia's history of discrimination to condemn the SB 202 legislature for the State's past actions, but to show how Georgia's recent electoral history provides context for the SB 202 legislature's actions. *See* PI Br. 41-44, 59. *See also Abbott,* 138 S. Ct. at 2325; *Milligan*, 143 S. Ct. at 1506, 1516 ("[H]istory did not stop in 1960."). Nevertheless, Georgia's past instances of official discrimination in voting demonstrate a long pattern of majority-white parties using race to maintain political power in the State. *See Wright v. Sumter Cnty. Bd. of Elections & Reg.*, 979 F.3d 1282, 1307-08 (11th Cir. 2020); *see also* PI Br. 59.

This Court should reject Defendants' attempts to impose the *Brnovich* "guideposts" for analyzing a Section 2 discriminatory results claim onto this discriminatory purpose claim, *e.g.*, State's Br. 40-41, 62-66, which *Brnovich* recognized follows the separate analytical framework described in *Arlington Heights*, *see* 141 S. Ct. at 2349.[6] Proof of disproportionate impact is "not the sole touchstone" of a discriminatory purpose claim. *Davis*, 426 U.S. at 242. Instead, "[s]howing disproportionate impact, even if not overwhelming impact, suffices to establish *one* of the circumstances evidencing discriminatory intent." *McCrory*, 831 F.3d at 231. "[T]he Supreme Court cautioned that it would be rare to find a case involving 'a clear pattern, unexplainable on grounds other than race' and that, '[a]bsent a pattern as stark as that, . . . impact alone is not determinative, and the Court must look to other evidence.'" *GBM*, 992 F.3d 1322 (quoting *Arlington Heights*, 429 U.S. at 266).

Of course, discriminatory impact can be powerful circumstantial evidence of discriminatory intent. *See Davis*, 426 U.S. at 242. And some showing of discriminatory impact is required in a purpose case, whether under Section 2 or the Constitution, "to assure that the district court can impose a meaningful remedy."

[6] State Defendants frame their opposition in terms of the *Brnovich* results guideposts, including the first guidepost ("usual burdens of voting"), *e.g.*, State's Br. 41, 64, 66; fourth guidepost ("opportunities provided by a State's entire system of voting"), *e.g.*, State's Br. 62-63; and fifth guidepost ("strength of the state interests"), State's Br. 40-62; *Brnovich*, 141 S. Ct. at 2338-39.

Garza, 918 F.2d at 771; *see also, e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188-89 (11th Cir. 1999); *Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1467-68 (M.D. Ala. 1988). "This impact may be met by *any evidence* that the challenged system is having significant adverse impact on black persons today." *Dillard*, 686 F. Supp. at 1467-68. Where plaintiffs have shown an intent to discriminate, they need not also offer evidence that would amount to a violation of Section 2's results test. *See McCrory*, 831 F.3d at 231 n.8; *Dillard*, 686 F. Supp. at 1468 n.10; *Brnovich*, 141 S. Ct. at 2349 (recognizing the purpose test is analytically distinct from the Section 2 results test).

ii. Turnout from a Single Election Does Not Reveal Whether SB 202's Challenged Provisions Have a Discriminatory Impact.

Defendants' focus on overall turnout numbers for the 2022 midterm elections is misplaced. State's Br. 18-20, 38; Interv. Br. 16.[7] First, it is almost impossible to isolate the effect of one law on turnout from a single election cycle. Myriad other factors affect turnout, including demographic changes and political competitiveness. PI Ex. 41 (Burden Sur-Rebuttal 11). Indeed, the State's own expert does not purport to attribute any change in turnout to SB 202. Ex. 135 (Grimmer Dep. 47:7-49:11).[8]

[7] State Defendants assert that the 2022 midterm had "record turnout." State's Br. 38, 74. However, as the State's expert acknowledged, the 2018 midterm had higher turnout rates than 2022. *See* State's Ex. P (Grimmer ¶ 8 & p.22 Tbl. 1).

[8] Exhibits attached to this reply brief are offered to rebut facts and arguments raised in Defendants' opposition briefs. *See Insituform Techs., Inc. v. Amerik Supplies, Inc.*,

Second, Defendants ignore their own expert's finding that "the Black turnout rate declined in the 2022 midterm election relative to the 2018 midterm election," State's Ex. P (Grimmer ¶ 33), and instead focus on overall turnout, inappropriately comparing a presidential election year to a mid-term election year, *see* State's Br. 19.

Third, turnout is not the same as impact. *See Veasey*, 830 F.3d at 260-61 ("[W]hile evidence of decreased turnout is relevant, it is not required to prove a Section 2 claim of vote denial or abridgement."); *McCrory*, 831 F.3d at 232. When Black voters succeed in overcoming the disparate burdens placed on them by a discriminatory law, those efforts are not revealed by an analysis of aggregate turnout.[9] PI Exs. 41, 44, 45 (Burden Sur-Rebuttal 11-12; Fraga ¶ 49; Fraga Sur-Rebuttal ¶¶ 12-17, 25-27); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 243 (4th Cir. 2014). In the wake of SB 202, Black voters, organizations, churches, and community groups undertook extraordinary efforts to help voters of color mitigate SB 202's discriminatory effects. *E.g.*, PI Exs. 10, 11, 14

No. 1:08-CV-333, 2010 WL 11493292, at *5 n.3 (N.D. Ga. Feb. 19, 2010); *Giglio Sub. S.n.c. v. Carnival Corp.*, No. 12-21680, 2012 WL 4477504, at *2 (S.D. Fla. Sept. 26, 2012). The numbering of these exhibits continues from the exhibits accompanying Plaintiffs' opening brief (identified herein as "PI Ex.").

[9] Even if the Court were to rely on turnout data in its analysis, the turnout gap between white and Black voters increased markedly between the two most recent midterm elections, from 6.2 percentage points in November 2018 to 9.7 percentage points in November 2022. PI Ex. 45 (Fraga Sur-Rebuttal ¶ 32 Tbl. 1); *see also* State's Ex. P (Grimmer ¶¶ 33-34 & Tbl. 2).

(Calhoun Decl. ¶¶ 29-37 (describing statewide voter outreach efforts in response to SB 202); Cotton Decl. ¶¶ 26-38 (same); Johnson Decl. ¶¶ 25-27 (helping voters obtain ID)). These third-party efforts kept some Black voters from being completely disenfranchised by SB 202. *E.g.*, PI Ex. 12 (Daniel Decl. ¶¶ 11-14 (third-party organization informed voter his absentee ballot was rejected for ID reasons)). Any success of these efforts is not evidence that SB 202 did not cause harm, but rather of the lengths the community will go to overcome burdens imposed on the right to vote. A political system is not "equally open" to all members of the electorate if Black voters must disproportionately deploy exceptional resources simply to participate.[10]

iii. Black Voters Bear the Effects of the Challenged Provisions More Heavily Than White Voters.

Defendants fail to rebut ample evidence that Black voters bear the effects of the challenged provisions of SB 202 more heavily than white voters. *See* State's Br. 62-68; Interv. Br. 15-17.

Voter ID for Absentee Voting. Defendants do not dispute Plaintiffs' evidence that Black voters disproportionately lack Department of Driver Services (DDS)-issued ID. PI Br. 34-36. Disparities in ID possession rates mean ID requirements will

[10] Likewise, that a single Black-preferred statewide candidate won reelection in 2022 (while other Black-preferred candidates did not) can be one circumstance that is relevant in the discriminatory purpose analysis, *see* State's Br. 63, but it is not the sole or most important fact. This is especially true where, as here, the community undertook extraordinary efforts to vote despite SB 202's burdens.

have a disparate impact on Black voters. *See McCrory*, 831 F.3d at 231. Instead, Defendants contend that focusing on disparate rates of DDS ID possession is "misguided" because voters can submit a copy of an alternative ID with their mail ballot application. State's Br. 61, 64. Defendants ignore that Black Georgians are less likely to have access to the resources necessary to navigate the process to obtain DDS ID. *See* PI Exs. 14, 42 (Johnson Decl. ¶¶ 9-13, 20-22, 30; Meredith ¶¶ 45-47). These same factors make it less likely that Black voters have access to a computer, printer, scanner, photocopier, or reliable transportation to a county election office to copy acceptable alternative ID to submit each time they request a mail ballot. PI Br. 42-43.

Second, Defendants suggest that the roughly 243,000 voters with no DDS ID number or an incorrect ID number in their voter registration record are insignificant. *See* State's Br. 64 n.21. Approximately 130,000 (53%) of those voters are Black, even though Black Georgians comprise just 30% of registered voters. PI Br. 34-36.[11] Hundreds of thousands of voters, a majority of whom are Black, are hardly insignificant. If even a fraction of these Black voters is prevented from voting, that number is still several times more than the "11,780 votes" that determined the 2020

[11] Because State election data do not record voters who did not submit or did not cure a mail ballot application because of an ID-related issue, the data cannot show how many voters were unable to cast a ballot in 2022 because of SB 202's new voter ID requirement for mail voters. *See* Ex. 134 (Meredith Surrebuttal ¶¶ 2(a)-(b), 8-19); *see also* PI Br. 19 n.9 (describing cure process).

presidential election in Georgia. PI Br. 11. Given pervasive racially polarized voting in Georgia, such numbers provide ample "incentive" for the legislature to enact a new ID requirement. *See McCrory*, 831 F.3d at 222 (discussing *LULAC*, 548 U.S. 399).

Reduction in Drop Box Availability. Defendants' claim that "Black voters in 2020 and 2022 used drop boxes less frequently than white voters" is unsupported by the data. State's Br. 64.[12] Defense expert Dr. Justin Grimmer relies on two surveys, each containing fewer than 150 total drop box voters in Georgia. Ex. 133 (Burden Supp. Decl. 1-3). For 2022, the dataset he relies on contains only twelve (12) self-reported drop box users in the entire State. *Id.* at 3. These sample sizes are far too small to draw conclusions about Georgia voters as a whole. *Id.* at 2-3.[13]

Furthermore, contrary to State Defendants' assertion, State's Br. 64, Plaintiffs' evidence shows that SB 202's limitation on the number of drop boxes targets those counties with the largest Black populations for the greatest reductions: Fulton (reduction from 37 drop boxes in 2020 to 8 in 2022), DeKalb (33 to 5), and Gwinnett (24 to 6). PI Ex. 40 (Burden 28-29 & Tbl. 11). SB 202 did not simply mandate

[12] On August 21, 2023, State Defendants provided "updated" information from Dr. Grimmer indicating that his analysis no longer suggests that white voters used drop boxes more than Black voters in 2022. *See* Ex. 149 (Email dated Aug. 21, 2023).
[13] An analysis of more than 7,000 drop box ballots in Douglas County—the sole county in Georgia that maintained individual-level data on drop box voters—showed that Black voters were more likely to use drop boxes than white voters in both November 2020 and January 2021. PI Ex. 40 (Burden 33-34, 48-50).

"removing a particular dropbox," State's Br. 64-65; rather, it eliminated roughly 80% of the drop boxes in the counties with the largest Black populations, limited the days and times drop boxes are available, and moved them indoors. *See* PI Br. 37-38. This burden clearly falls more heavily on Black voters. *Id.*

Finally, Defendants do not attempt to counter Plaintiffs' evidence that the elimination of drop boxes during the final four days of voting will have a disproportionate effect on Black voters. Prior to SB 202, Black voters were significantly more likely to return absentee ballots during the final four days of an election, *see* PI Br. 37-38, the period when Defendants themselves argue that a mailed ballot may not be received in time to be counted, State's Br. 8-9.[14]

Line Relief Ban. Defendants' citations to average wait times are irrelevant to the question of whether SB 202's line relief ban has a disparate impact on Black voters. *See* State's Br. 20-21, 51-52. The question is not whether *most* voters wait in long lines, but whether voters in predominantly Black precincts are more likely to wait in long lines. The answer is unambiguously yes. Defendants do not dispute Plaintiffs' evidence that predominantly Black precincts experience longer wait times

[14] The State's claim that there was no "express" statutory authority permitting drop boxes pre-SB 202, State's Br. 4, 72, misleadingly omits that there was no *prohibition* on such use, and that the Secretary of State's office "guaranteed" that some counties would have continued to use them even absent SB 202. PI Ex. 131 (CDR00070695).

than predominantly white precincts, including in the 2022 runoff elections. PI Br. 23, 38-40.[15] In addition, Defendants' experts' comparisons of wait times between 2020 and 2022 are unreliable, as the data they compare are from two separate studies with substantially different methodologies. *See* PI Ex. 41 (Burden Sur-Rebuttal 9).

Plaintiffs have also provided considerable evidence that third-party line relief activities enabled Black voters facing excessive wait times to remain in line to vote. *Compare* PI Br. 23, 38-40, *with LWV*, 66 F.4th at 937. For example, in November 2020, Tamara Scott, who waited for four hours to vote with her autistic child and contemplated leaving, said, "[G]etting that food and water was one of the reasons that I decided to stay in line." PI Ex. 18 (Scott Decl. ¶¶ 6-11). Hope Sims Sutton explained that receiving snacks during early voting for the January 2021 runoff sent the message that she should "keep standing in line to make sure [her] voice was heard in the political process." PI Ex. 19 (Sutton Decl. ¶¶ 5-9); *see also* PI Exs. 10, 11 (Calhoun Decl. ¶ 18; Cotton Decl. ¶ 10).[16]

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[15] Defendants downplay the existence of long lines in the 2022 elections, which received nationwide news coverage. *E.g.*, Neil Vigdor, *Georgia Voters Brace for Long Lines and Wet Weather*, N.Y. Times, Dec. 5, 2022, https://www.nytimes.com/2022/12/04/us/politics/georgia-runoff-election-day-weather.html.

[16] Defendants claim that SB 202's other provisions will reduce future wait times, *see* State's Br. 51, 66-67, but the 2022 election cycle showed that long lines persist in Georgia. Defendants concede that about 10% of all Georgia voters—approximately 400,000 voters—waited more than 30 minutes in line in 2022, State Br. 20, 66, and uncontested data shows that when long lines do occur, for whatever reason, they are

Out-Of-Precinct Provisional (OP) Voting. Defendants do not dispute that Black voters were more likely to cast OP ballots than white voters prior to SB 202. PI Br. 40-41. Defendants claim there has been a decline in the *total* number of provisional votes after SB 202, *see* State's Br. 21, 65-66, but that number includes provisional ballots cast for at least six other reasons and provides no evidence about the impact of SB 202's ban on counting most *OP* ballots. It is inevitable that fewer OP ballots were recorded in 2022, because SB 202 prohibits the counting of *any* OP ballots unless they are cast after 5:00 p.m. PI Ex. 57 (SB 202 § 34). The number of voters who were denied an OP ballot in 2022 and were therefore completely denied a vote is unknown, as there are no records kept of such voters. *See* Ex. 136 (DeKalb 30(b)(6) Dep. Tr. 161:17-162:2). But it is undisputed that Black voters were more likely to cast OP ballots than white voters prior to SB 202 and, thus, are disproportionately impacted by a ban on almost all OP ballots. *See* PI Br. 40-41.

Earlier Deadline for Submitting Mail Ballot Applications. Defendants allege for the first time—and without citation to any empirical evidence—that absentee ballot applications submitted during the week before the election (the period now banned by SB 202) resulted in ballots that "were almost never voted." State's Br. 53. However, the State's own election data prove this false. A majority of days of the

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more likely to occur in predominantly Black precincts. *See* PI Br. 39-40.

now-eliminated request period during the November 2020 election, more than half (52%-59%) of each day's requested absentee ballots were cast and counted. Ex. 133 (Burden Supp. Decl. 4-5 & Tbl. 1). Even on the Friday before Election Day, about one-third of requests resulted in mail ballots that were counted. *Id*.

Moreover, Defendants' discussion of the impact of SB 202's absentee ballot application deadline asks the wrong question. State's Br. 65. The question for purposes of disparate impact is "whether [the challenged provision] bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266. Dr. Grimmer's conclusions are in line with Dr. Fraga's: Black voters' applications were disproportionately likely to be rejected for arriving too late in 2022. *Compare* State's Ex. P (Grimmer ¶ 89), *with* PI Ex. 44 (Fraga ¶¶ 99-100 & Tbl. 7). Dr. Fraga's analysis also shows that a greater percentage of all applications were rejected post-SB 202 for being "too late" than before SB 202, and the increase was greatest for Black voters. PI Ex. 44 (Fraga ¶¶ 99-100 & Tbl. 7).

iv. The Availability of Different Ways to Vote in Georgia Does Not Mean the Challenged Provisions Have No Disparate Impact.

The State's argument that there is no discriminatory impact because there are different ways to vote in Georgia, *see* State Br. 62-63, is an attempt to divert attention from the *Arlington Heights* standard. The plain language of both Section 2 and the Constitution expressly forbids "abridgment" of the right to vote on the basis of race.

See 52 U.S.C. § 10301(a); U.S. Const., amend. XV. Plaintiffs need not prove that the challenged provisions of SB 202 completely deprive Black voters of *all* opportunity to participate in the electoral system. *See, e.g.*, *LWV of N.C.*, 769 F.3d at 243 ("[N]othing in Section 2 requires a showing that voters cannot register or vote under any circumstance."); *McCrory*, 831 F.3d at 230 (rejecting the argument that "the disproportionate impact of the new legislation 'depends on the options remaining' after enactment of the legislation"). Indeed, the challenged provisions work together to burden each of the State's methods of voting: SB 202's absentee by-mail and drop box restrictions erect obstacles to absentee voting, likely pushing more Black voters to vote in-person, where they face longer lines than white voters. The prohibition on handing out food and water makes waiting in line less tolerable, and the elimination of most OP voting forces voters who find themselves in the wrong precinct to travel and wait at another precinct or accept disenfranchisement.

* * *

Individually and cumulatively, the evidence demonstrates that the full set of restrictions imposed by SB 202's challenged provisions disproportionately affect Black voters. In a newly-competitive state marked by stark racial polarization in voting, shaving off a small number of Black votes can have an outsized political impact. *See Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J.,

concurring in part and concurring in the judgment) ("A panoply of regulations, each apparently defensible when considered alone, nevertheless have the combined effect of severely restricting participation . . . ."); *McCrory*, 831 F.3d at 231. Here, SB 202's challenged provisions work in concert to disproportionately burden Black voters more than white voters. *See* PI Br. 33-44.

c. Defendants Ignore the Procedural Departures in the SB 202 Legislative Process.

Defendants' attempt to characterize the legislative process as ordinary distorts the facts and does not tell the whole story. *See* State's Br. 15-18, 27-30; Interv. Br. 9-11. Plaintiffs have shown that the legislative process leading up to SB 202 departed from normal practice in meaningful ways, PI Br. 47-50, which can be "evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267.

The sheer quantity of election bills and the rushed speed at which they progressed during the 2021 legislative session—as noted by several legislators and county election officials—shows that SB 202's legislative process did not comport with the General Assembly's norms. *See e.g.*, PI Br. 15-18; PI Ex. 1 (Burnough Decl. ¶¶ 29-30); Exs. 140, 141 (Adams Dep. 42:10-43:4; Bailey Dep. 105:9-106:6).

Likewise, the legislative process for the election bills that together became SB 202 ("predecessor bills") was rife with procedural departures. For example, Chairman Barry Fleming frequently introduced substitute bills for HB 531 during hearings on

the bill; those substitute bills, which often contained significant new provisions, were not made available in a timely manner to Black and other Democratic committee members, making it difficult for these legislators to meaningfully engage in the process. PI Ex. 1 (Burnough Decl. ¶¶ 34-38). In addition, only a handful of election officials testified during the hearings on HB 531, and those officials were selected by the proponents of the bill because they were deemed the "good ones." *See* PI Br. 48.

Similarly, despite Senator Michael Dugan's acknowledgment that SB 241 would be the most significant election reform since Georgia's photo ID requirement in 2005, SB 241's legislative process was rushed and non-transparent, with the sweeping bill passing after just three hearings. *See* PI Exs. 4, 5 (Harrell Decl. ¶¶ 11-13, Jones Decl. ¶¶ 18-19); Ex. 147 (AME_000609:19-AME_000609:25). No election official testified during SB 241's committee hearings. *See* PI Ex. 5 (Jones Decl. ¶ 18). SB 241 narrowly passed the Senate, and Lieutenant Governor Geoff Duncan (serving as president of the Senate) refused to preside over the debate because SB 241 made "it harder for people to vote." PI Ex. 117 (Lt. Gov. Geoff Duncan, *GOP 2.0* 112 (2021)). If HB 531 and SB 241 should count as part of the legislative process for SB 202, State's Br. 27, their deviations from legislative norms should also be considered.

Defendants' comparisons between SB 202 and HB 316 (2019) are inapt. *See* State's Br. 13, 18. First, Defendants only compare SB 202 to one other piece of

legislation and provide no evidence that HB 316 represented normal legislative procedure. *See id*. Second, the two bills followed substantially different procedural paths. When HB 316 was passed, the legislative landscape was quite different. There were not around 100 election bills introduced in the same legislative session as HB 316. *See* Ga. Gen. Assemb., *Legislation Search, 2019-2020 Reg. Sess.*, https://www.legis.ga.gov/search?k=&s=27&t=21&p=1; PI Br. 48. No special committee, like the Election Integrity Committee (EIC) in 2021, was created to consider election bills in 2019; HB 316 was considered by committees that routinely govern election legislation. *See* PI Ex. 3 (Nguyen Decl. ¶ 38). Substantively, HB 316 was only 39 pages long (compared with SB 202's 90 pages) and did not impose stricter requirements on methods of voting. *See* Ex. 144 (HB 316).

Finally, Defendants incorrectly imply that SB 202 had some level of bipartisan support, based only on the limited input of the nonpartisan Association of County Commissioners of Georgia (ACCG) and out-of-context statements of Democratic legislators regarding procedural matters. *See* State's Br. 15-16. The ACCG's Deputy Director of Governmental Affairs admitted that only some counties supported his proposed 10-day absentee ballot request deadline. *See* Ex. 146 (SOS0003186:4-SOS0003187:4). In fact, several county election officials noted to the legislature they opposed a 10- or 11-day deadline. *See* PI Br. 26, 49; PI Exs. 126, 30 (USA-Adams-

000026.0001-000027.0016; Adams Dep. 146:13-147:10). And these bills received zero votes from Black or other Democratic legislators. *See* PI Br. 16-18, 50; PI Ex. 1 (Burnough Decl. ¶¶ 42, 50); Ex. 145 (USA-04065 (Senate Floor Vote for SB 241)). Democratic legislators asked multiple times for the process to slow down so that enough consideration could be given to this magnitude of a change. *See*, *e.g.*, State's Ex. B at Ex. 5 (SOS0003080:2-SOS0003083:3). Instead, they were effectively shut out of the process. *See, e.g.*, PI Br. 15-16, 47-48 (describing private meetings between Republican members of the EIC but not Democratic members (all of whom are Black)); PI Exs. 1, 5 (Burnough Decl. ¶¶ 36-38, 46, 49; Jones Decl. ¶¶ 19-21).

d. SB 202's Legislative History, Including Contemporaneous Statements by Decisionmakers, Is Evidence of an Intent to Make the Political Process Less Open to Black Voters.

Defendants do not engage with Plaintiffs' main argument that a primary motivation for SB 202 was to protect the majority party in the legislature by impairing Black voting strength. In the words of the former Lieutenant Governor, the supporters of SB 202 "got scared" following the outcome of the 2020 election cycle and became "too focused on making voting more difficult." PI Ex. 117 (Lt. Gov. Geoff Duncan, *GOP 2.0* 112). Targeting minority voters to achieve partisan ends violates Section 2 and the Constitution. *LULAC*, 548 U.S. at 440; *see also LWV*, 66 F.4th at 924; *McCrory*, 831 F.3d at 222 ("[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a

predictable manner, constitutes discriminatory purpose."). *See infra* II.B.1.f.

Individual statements by SB 202's supporters reinforce this point. *See* PI Br. 15, 32-33, 50-51 & n.21. While statements from a single legislator are not dispositive of the intent of the whole, *see GBM*, 992 F.3d at 1324; State's Br. 34, statements from select legislators can be highly probative of discriminatory intent, especially where those legislators played an outsized role in the legislation, *see, e.g.*, *Hunter*, 471 U.S. at 229; *Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1552 (11th Cir. 1987); *Veasey*, 830 F.3d at 236-37; *Busbee v. Smith*, 549 F. Supp. 494, 500, 509 (D.D.C. 1982) (three-judge court). Likewise, contrary to Defendants' assertions, statements need not directly talk about race to be indicative of racially discriminatory intent. *See* State's Br. 33-35; Interv. Br. 10-12. Coded language and statements with discriminatory inferences are clearly relevant under *Arlington Heights*, because legislators rarely say on the record "that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982); *see also Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

Take, for example, then-Speaker David Ralston saying that sending unsolicited absentee applications would "drive up turnout" and therefore be detrimental to his party in the November 2020 election, PI Br. 8-9, and Chairman Barry Fleming's

impugning of absentee voting as "always suspect" and "shady." PI Br. 15. These statements—made in an environment of enduring racially polarized elections, recent Black voter mobilization around absentee voting, and Black voters' resulting electoral successes—betray an intent to preserve political power by limiting Black absentee voting. This is not partisanship "conflated with racial discrimination," *LWV*, 66 F.4th at 925; *see* State's Br. 35, but instead evidence of legislators understanding that lower turnout and lower absentee turnout, particularly among Black voters, helps the majority party achieve electoral success, *see infra* II.B.1.f. Speaker Ralston's fears came to pass when Black voters turned out in historic numbers in the 2020 election, resulting in his party losing both U.S. Senate seats and the presidential contest. Targeting the ways that Black voters had mobilized and participated was the obvious next step for the Speaker and his legislature in order to limit Black voters' growing political participation.

The statements of non-legislator witnesses are likewise relevant. *Contra* State's Br. 34 n.17; Interv. Br. 9-10. The "views and associated lobbying efforts" of non-legislators can "be circumstantial evidence of the Legislature's intent." Order on Carver Dep. 5-6, ECF No. 544; *see also I.L. v. Alabama*, 739 F.3d 1273, 1287 (11th Cir. 2014); *Fla. State Conf. of Branches & Youth Units of the NAACP v. Lee*, 568 F. Supp. 3d 1301, 1305 (S.D. Fla. 2021). These include the numerous racialized

statements made by witnesses invited by the legislature to testify in the December 2020 hearings—the same hearings where several election law changes that were ultimately incorporated into SB 202 were initially proposed. *See* PI Br. 11-14. Here, those who played a primary role in lobbying for the challenged provisions "translate[d] their grassroots effort into official action." *Stout by Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1008 (11th Cir. 2018).

e. Defendants' *Post-Hoc* and Tenuous Justifications for SB 202 Should Be Rejected.

Defendants rely on *post hoc* and tenuous rationalizations to argue that race was not a motivating factor behind SB 202. *See* State's Br. 40-62; Interv. Br. 13-16.

1. *Post hoc* rationalizations offer no evidence as to the actual purpose of the legislature—the heart of the matter in a discriminatory purpose case. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."); *Singleton v. Merrill*, 582 F. Supp. 3d 924, 944 (N.D. Ala. 2022), *aff'd sub nom. Allen v. Milligan*, 143 S. Ct. 1487 (2023).

Defendants fail to present evidence establishing that many of the justifications they proffer were in fact considered by the SB 202 legislature. State Defendants' proffered justifications are supported almost exclusively by paragraphs 65-128 of the declaration of Ryan Germany, *see* State's Br. 40-62, a non-legislator who has

conceded that he did not know the actual legislative rationale for various provisions of SB 202, *see, e.g.*, Ex. 138 (Germany Dep. 159:10-21 (noting he could not speak to the legislature's rationales), 174:16-22 (same)). These paragraphs of Mr. Germany's declaration do not include any citations to the legislative record or other evidence that these rationales were actually considered by the legislature, let alone that they were the sole motivation. *See* State's Ex. B (Germany Decl. ¶¶ 65-128). Such conjecture is irrelevant to the discriminatory purpose analysis and should not be credited by this Court. *Cf. Singleton*, 582 F. Supp. 3d at 944.

2. Furthermore, the tenuousness between the rationales offered in support of SB 202 and the challenged provisions reinforces the conclusion that those rationales are pretext to target Black voters. *See* PI Br. 18-26, 54-58.

Defendants' arguments that SB 202's challenged provisions serve Georgia's interests in preventing fraud and increasing voter confidence, *see, e.g.*, State's Br. 45-47, 57, 60; Interv. Br. 13, are pretextual, as evidenced by the lack of evidence of widespread fraud in 2020, and the Secretary of State's repeated assurances to the legislature that the election was secure, *see* PI Br. 10-11; PI Ex. 117 (Lt. Gov. Geoff Duncan, *GOP 2.0* 110). States' legitimate interest in preventing voter fraud is not a blank check to enact restrictions that bear more heavily on minority voters in order to serve partisan ends. *See infra* II.B.1.f. Throughout late 2020 and early 2021, the

Secretary of State's office confirmed to the legislature numerous times that widespread voter fraud did not exist in the 2020 election. *See* PI Br. 10-11. The evidence of an "appearance" of fraud, *see, e.g.*, State's Br. 12, 57, 60-61, that before the legislature at the time was based on racialized stereotypes about fraud and criminality in the Black community, *see* PI Br. 44-47, 56, or misunderstandings about Georgia election procedures, *e.g.*, Ex. 139 (Mashburn Dep. 175:25-178:1); PI Ex. 7 (Parent Decl. ¶ 23). Defendants admit there were no substantiated incidents of fraud involving Georgia's drop boxes, State's Br. 5-6 & n.1, and Georgia law pre-SB 202 already prohibited ballot harvesting and campaigning at polling places, *see* PI Br. 22 & n.11. The "perception" of intimidation and undue influence outside polling places, State's Br. 48-53, was directed at line relief efforts in areas with significant Black populations. PI Br. 56-57. At least one prominent allegation of intimidation was advanced by an accuser who the State's own witness described as "full-on racist." *See* Ex. 139 (Mashburn Dep. 161:7-164:4). That some county election officials *encouraged* line relief efforts in their counties belies Defendants' characterizations of these efforts. *E.g.*, PI Exs. 35, 10 (Kidd Dep.131:2-135:10; Calhoun Decl. ¶ 18). Moreover, Defendants provide no evidence of the reliability of any voter complaints allegedly received by the State, nor evidence that these complaints were before the legislature. *See, e.g.*, State's Br. 47, 54, 59-60; State's Ex. B (Germany Decl. ¶¶ 18-

19, 68, 80, 104) (failing to include the complaints themselves, details about the complaints, or evidence they were known by the legislature).

State Defendants also claim that limiting the number of drop boxes permitted in each county furthers the State's interest in "uniformity in voting." State's Br. 31. Yet, they fail to explain how systematically decreasing the number of drop boxes available in counties with high Black populations creates "uniformity." *See* PI. Br. 37; PI Ex. 40 (Burden 26-29).

Defendants point to no evidence that an 11-day absentee ballot request deadline was required to meet the State's interests, instead of the less discriminatory alternative of a 7- or 8-day deadline that was requested by county election officials. *See* PI Br. 49, 57; *see also* State's Ex. H (Germany Dep. 130:10-20). In fact, county election officials spoke in opposition to many provisions in SB 202, HB 531, and SB 241, including the 11-day deadline. *See* PI Br. 48-50; *cf. LWV*, 66 F.4th at 919.

The record also lends no support for State Defendants' *post-hoc* justifications regarding why SB 202 did not allow voters to verify their identity using the last four digits of their Social Security number (SSN4) on an absentee ballot application. State's Br. 61-62. To the contrary, during the 2021 legislative session, legislators admitted SSN4 would be sufficient to verify a voter's identity and had committed to including this provision for absentee ballot applications but failed to do so. *See* PI Ex.

83 (AME 001042:4-13); *see also* Ex. 139 (Mashburn Dep. 171:20-172:10).

State Defendants make the completely counterintuitive claim that eliminating OP provisional voting helps ensure that voters will not be disenfranchised. State's Br. 57-58. In fact, where previously several thousand voters had their ballots counted for statewide offices when they cast OP provisional ballots, under SB 202 most OP voters are denied this opportunity unless they have the time and resources to travel to another polling location. *See* PI Br. 41. The legislature's main justification for limiting OP ballots was based on wildly inaccurate data. *See* PI Br. 57-58. Defendants provide no evidence that any election official testified that processing OP ballots was a burden. S*ee* State's Br. 10-11; State's Ex. B (Germany Decl. ¶¶ 108-114). Georgia has counted OP ballots for almost two decades without incident. *See* PI Br. 24.[17] It was not until Black voters began exercising their political power in large enough numbers that the legislature decided to target these means of voting, which were used

[17] Defendants cite *Brnovich*, 141 S. Ct. at 2345, 2350, for the proposition that Georgia could have banned counting all OP ballots. *E.g.*, State's Br. 55. The facts surrounding SB 202 are fundamentally different than the facts in *Brnovich*. Arizona had never permitted OP voting, while Georgia had allowed it for almost two decades. *See* PI Br. 24. Further, the share of OP votes cast in Georgia was not consistently "diminishing," 141 S. Ct. at 2344, but remained relatively steady from 2016-2020. *See* PI Br. 24-25. In addition, unlike in *Brnovich*, SB 202's near-ban on counting OP ballots was coupled with a host of other restrictions targeting practices used disproportionately by Black voters. *See McCrory*, 831 F.3d at 232 ("The sheer number of restrictive provisions in [the challenged law] distinguishes this case from others.").

disproportionately by Black voters. *See* PI Br. 24, 40-41; *McCrory*, 831 F.3d at 232.

f. Evidence Under the Remaining *Arlington Heights* Factors Demonstrates That an Intent to Disenfranchise Black Voters Motivated SB 202's Challenged Provisions.

Cumulatively, the facts in this case demonstrate that SB 202 was enacted "because of," not merely "in spite of," its effect on Black voters, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); PI Br. 27-61; that the legislature targeted Black voters precisely because Black voters overwhelmingly vote against the majority party in the legislature, PI Br. 60; and that the harm to Black voters was foreseeable, *see* PI Br. 17, 51-52.

1. Defendants ignore that using race to achieve partisan ends violates Section 2 and the Constitution. *See* State's Br. 35; Interv. Br. 14. In Georgia, race can be a reliable predictor of voting preference precisely because voting is so highly polarized in the State. *See* PI Br. 60; PI Exs. 1, 5 (Burnough Decl. ¶ 15; Jones Decl. ¶ 12). Georgia's stark racial polarization in voting allows the legislative majority to achieve its ends most easily by fashioning voting changes, even small changes, that impact Black voters disproportionately. Indeed, when a legislative majority acts to achieve partisan ends by targeting voters by race because those voters are unlikely to vote for the majority party, that "constitute[s] racial discrimination." *McCrory*, 831 F.3d at 233; *see also LULAC*, 548 U.S. at 427-28, 440; *Hunter*, 471 U.S. at 233.

2. Second, considerable record evidence demonstrates that SB 202's disparate

effects were foreseeable. *Contra* State's Br. 36-38; *see* PI Br. 51-52; PI Exs. 1, 5 (Burnough Decl. ¶ 30 ("[W]e [legislators], alongside many organizations that represent voters of color, continued to point out the disparate impact posed by many of the bills."); Jones Decl. ¶ 26 (". . . I knew the disproportionate harm both bills posed to African-American voters and that the bills' disparate impact was the ultimate intent of the bill.")). The legislative record makes clear that evidence of the foreseeable impact of the challenged provisions was provided by several nonpartisan county election officials, *see* PI Br. 48-50, and members of the public, *see* PI Br. 17, 52 (collecting cites); PI Exs. 1, 5 (Burnough Decl. ¶¶ 39, 47; Jones Decl. ¶ 18); not just "legislative opponents," State's Br. 36-37.

Defendants also criticize Plaintiffs for lacking evidence about whether the legislature affirmatively considered demographic information, State's Br. 38, ignoring that Plaintiffs were denied legislative discovery of just this type of evidence. Order on Leg. Disc., ECF No. 539. The State cannot use the assertion of legislative privilege "as both a sword and a shield." *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1126 (D. Neb. 2012). Nevertheless, legislators are familiar with the demographics of their supporters and opponents, as well as with the different methods of voting preferred by different groups of voters. *See* PI Br. 7; PI Exs. 1, 5 (Burnough Decl. ¶¶ 15-16; Jones Decl. ¶¶ 12, 20). Finally, Defendants assert that the foreseeable

"disparate impact . . . fail[ed] to materialize." State's Br. 38. Plaintiffs' evidence demonstrates otherwise. *See* PI Br. 34-44; *supra* II.B.1.b.

2. Defendants Fail to Meet Their Burden to Prove that the Challenged Provisions Would Have Been Passed Absent a Racially Discriminatory Purpose.

Because Plaintiffs are likely to prove that racial discrimination was a motivating factor behind the challenged provisions, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228; *see also Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Although Defendants do not explicitly address their burden shifting, they dedicate large portions of their oppositions to potential justifications for SB 202. *See* State's Br. 40-62; Interv. Br. 13-15. However, the standard is not whether *any potential* objective reason exists to justify the law; at this step, "courts must scrutinize the legislature's *actual* nonracial motivations to determine whether they *alone* can justify the legislature's choices." *McCrory*, 831 F.3d at 221 (emphasis added); *see, e.g.*, *Stanley v. City of Dalton*, 219 F.3d 1280, 1293 (11th Cir. 2000); *DeKalb Cnty. v. U.S. Dep't of Labor*, 812 F.3d 1015, 1021 (11th Cir. 2016) ("It is not enough that the evidence prove[s] that the [employer] *could* have in retrospect made its employment decision on legitimate grounds.").

As set forth in Section II.B.1.e, *supra*, Defendants' alleged justifications are *post hoc*, tenuous, or pretextual. Under a fair reading of the facts, the Georgia

legislature would not have imposed the new burdens on absentee voting, including dramatically limiting drop boxes, had Black voters not begun to use absentee voting disproportionately starting in 2018 and used it to achieve historic electoral successes in 2020. The legislature would not have prohibited line relief activities if such activities had not encouraged Black voters to stay in long lines to vote. And the legislature would not have prohibited counting most OP ballots but for its desire to shave off Black votes. The record shows the Georgia legislature would not have made these changes if these provisions did not make voting more difficult for Black voters.

C. Plaintiffs Are Entitled to Injunctive Relief.

1. Irreparable Harm Has Already Occurred and Will Continue to Occur If the Challenged Provisions are Not Enjoined.

Defendants ignore abundant evidence of harms that occurred during the 2022 elections. *Compare* State's Br. 63-69 *and* Interv. Br. 15-17, *with* PI Br. 34-44. This includes, but is not limited to, the testimony of several Black voters who were disenfranchised by SB 202. For example, Helen Lockette's absentee ballots for the 2022 elections did not count because her voter registration file contained an incorrect driver's license number. PI Exs. 16, 43 (Lockette Decl. ¶¶ 13-15; Meredith Supp. Decl. ¶ 5). Donald Jumper and Sebastian Mason were disenfranchised in the December 2022 runoff election because they mistakenly appeared to vote at the wrong precinct before 5:00 p.m. and did not have time to travel to and wait in line

again at their assigned precincts. PI Exs. 15, 17 (Jumper Decl. ¶¶ 4-8; Mason Decl. ¶¶ 4-8). "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law." *LWV of N.C.*, 769 F.3d at 247; *see also* Order on Prelim. Inj. 31, ECF No. 613.

Abridging the right to vote, and not just outright denial, is itself an irreparable injury. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1272 (11th Cir. 2020); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1320 (N.D. Ga. 2022). In addition, where Congress has provided for governmental enforcement of a statute through injunctive relief—as with the Voting Rights Act, 52 U.S.C. § 10308(d)—irreparable harm is presumed. *See Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984); *United States v. Berks Cnty., Penn.*, 277 F. Supp. 2d 570, 578 (E.D. Pa. 2003). SB 202's challenged provisions disproportionately harm Black voters, and that injury will continue in 2024 if the challenged provisions are not enjoined.

a. Plaintiffs' Timing of Filing the Motion Does Not Prevent Finding Irreparable Harm.

Defendants' arguments that Plaintiffs unreasonably delayed in filing this Motion are unfounded and disregard the unique nature of voting rights cases. *See* State's Br. 69-70; Interv. Br. 20-23.

1. Plaintiffs timely filed this Motion to remedy harms in advance of the 2024

election cycle. Injury in voting cases is cyclical and recurring, as voters' rights are violated anew each time an election is held. *See League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1223 (N.D. Fla. 2018); *LWV of N.C.*, 769 F.3d at 247. The only cases State Defendants cite in support of their undue-delay argument are trademark cases, which are factually distinct because the harm of trademark violations compounds daily. *See* State's Br. 70 (citing *Wreal, LLC v. Amazon.com*, Inc., 840 F.3d 1244, 1248 (11th Cir. 2016); *Romanick v. Mitchell*, No. 2:21-CV-0065, 2021 WL 5034369, at *5 (N.D. Ga. July 13, 2021)). Plaintiffs have litigated this case expeditiously. When the prospect of a trial this year became unlikely, *see* Revised Sched. Order, ECF Nos. 400; Order Mot. to Extend Disc., ECF No. 496, Plaintiffs filed their motion about two months later. "Had Plaintiffs filed their motion[] earlier, their prospective harms would not have been imminent, but had they filed any later, their relief may have been barred by *Purcell* [*v. Gonzalez*, 549 U.S. 1 (2006)]." Order on Line Relief Prelim. Inj. 33-34, ECF 614. Without a trial date, preliminary injunction is the only means to prevent irreparable harm during the 2024 elections.

2. That Plaintiffs did not move for an injunction before the 2022 election does not weigh against a finding of harm. As in many voting cases seeking prospective relief, Plaintiffs needed substantial data in the control of Defendants to prosecute their claims, some of which Defendants refused to produce until ordered to do so by

this Court and which took considerable time to analyze. *See Ga. Coalition for the People's Agenda v. Kemp*, 347 F. Supp. 3d 1251, 1268 (N.D. Ga. 2018); *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 560-61 (6th Cir. 2014). Plaintiffs' Motion relies on substantial information not available to them until late 2022 and early 2023, including documents and deposition testimony. *Cf. Wreal*, 840 F.3d at 1248-49 (denying PI motion that relied solely on evidence plaintiff had when complaint was filed). Plaintiffs here promptly filed this motion only four weeks after the Court denied their motion on legislative discovery, Order, ECF No. 539, and only two weeks after the close of all discovery, *see* Order, ECF No. 496; *e.g.*, *LWV of N.C.*, 769 F.3d 224 (PI filed after discovery was conducted). Plaintiffs' timing of this Motion is reasonable in light of the nature of the claim, necessary discovery, and imminent harm that accompanies violations of the right to vote.

2. Any Burden to the State in Granting an Injunction is Outweighed by SB 202's Burden on Voters and the Public Interest in Protecting the Right to Vote.

Defendants have failed to show a substantial risk of harm, confusion, or disruption in the upcoming 2024 elections if Plaintiffs' injunction is granted. *See, e.g.*, *Jacksonville Branch of NAACP*, 635 F. Supp. 3d. at 1300-01.

Defendants do not present any evidence that implementing an injunction at this time would result in voter confusion or administrative challenges beyond those ordinarily experienced due to regular changes in election procedures. *See* State's Br.

72-73; Interv. Br. 25-26. The State acknowledges it regularly changes election laws between election cycles. *See* State's Br. 73 (describing changes in election laws in 2020 and 2022). "Administrative convenience" cannot justify a set of procedures that impinge upon a fundamental right. *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *LWV of N.C.*, 769 F.3d at 244 ("Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote."). Nor can Defendants' unsupported claims of public confusion. *See Jacksonville Branch of NAACP*, 635 F. Supp. 3d. at 1301. Under Defendants' theory, a court could never enjoin an election law because it would change policies from one election to the next, thereby completely defeating Congress' intent when it authorized lawsuits to prevent racial discrimination in voting.

To the contrary, State and county election officials have testified that there is sufficient time before the 2024 elections to implement the necessary changes without causing significant voter confusion or administrative burden. As to the ID requirements for absentee ballot applications, a preliminary injunction would merely require Georgia to utilize the same ID requirements currently used for returning absentee ballots. *See* PI Ex. 27 (SOS 30(b)(6) Dep. 276:25-278:2). That system imposes no hardship on the State. *See, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1339-40 (N.D. Ga. 2018). Based on the Defendants' own testimony, the Secretary of

State's office could complete changes to the absentee ballot applications in 2023 and still meet all printing deadlines. *See* Ex. 137 (SOS 30(b)(6) Dep. 289:6-291:23).

As to drop boxes, line relief, OP ballots, and the absentee ballot request period, a preliminary injunction will simply require Georgia to continue using an election system *the State itself* developed and used successfully in the years preceding the enactment of SB 202. State Defendants would have a minimal role if the Court ordered changes to these provisions. Exs. 142, 148 (Evans Dep. 226:15-229:1; SEB 30(b)(6) Dep. 149:19-25). County election officials have stated that an injunction returning to the previous rules for these provisions could be implemented quickly and without significant administrative burden or voter confusion. *See, e.g.*, Exs. 143, 136 (Kidd Dep. 156:15-20 (reverting to pre-SB 202 OP ballot rules would not cause voter confusion), *id.* at 121:13-122:13 (reverting to pre-SB 202 drop box rules); DeKalb Cnty. 30(b)(6) Dep. 169:22-170:14 (noting that only poll worker training would be necessary to return to previous OP ballot rules)).

Neither the State nor the public has a legitimate interest in enforcing an intentionally discriminatory statute. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019); *United States v. Metro. Dade Cnty.*, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993); *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986). As the Plaintiffs are likely to show that Section 2 and

constitutional violations exist, delaying a remedy would only increase the voter confusion, burdens, and costs Defendants argue would result from granting a preliminary injunction. *See NAACP-Greensboro Branch v. Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516, 526 (M.D.N.C. 2012).

D. *Purcell* Does Not Preclude the Requested Relief.

Plaintiffs filed this motion nearly 10 months before the next scheduled federal election in March 2024. *Purcell* does not apply where, as here, the next federal election is not imminent and Georgia's "election machinery" for that election is not "already in progress." *Reynolds*, 377 U.S. at 585; *see also Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *2 (11th Cir. Nov. 7, 2022) (noting that applying *Purcell* even "five months prior to the elections" would unreasonably "extend the 'eve of an election' farther than we have before."); *cf. Purcell*, 549 U.S. at 4-5 (weeks before an election); *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) (less than four months before voting began).[18] As this Court has found, and as set forth above,

[18] Intervenors erroneously apply the test from Justice Kavanaugh's concurrence in the stay order in *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring), *stay vacated sub nom. Allen v. Milligan*, 143 S. Ct. 2607 (2023). Interv. Br. 23-26. In staying the initial preliminary injunction in *Milligan*, the Supreme Court was concerned with "Alabama's congressional districts be[ing] completely redrawn within a few short weeks" of the primary elections. *Milligan*, 142 S. Ct. at 879. We are not "in the period close to an election" such that this analysis applies, and this case does not involve the complex process of redrawing district lines statewide. *Id*. at

arguments that we are too close in time to the 2024 elections are unfounded. *See* Order, ECF 614 at 36-39.

E. This Court Has the Power to Fashion Equitable Relief in the Interests of Justice.

Finally, this Court is not limited to striking the challenged provisions of SB 202 altogether, *see* State's Br. 72, but instead has the power to fashion whatever remedy the interests of justice so require. *See, e.g.*, *Martin*, 341 F. Supp. 3d at 1341-42 (creating new procedures for an absentee ballot cure process); *Salazar v. Buono*, 559 U.S. 700, 722 (2010). This Court also has the power to grant relief on some, rather than all, of the challenged provisions. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985). Likewise, if this Court determines relief is not appropriate for the March 2024 presidential primary elections, this Court has the power to grant relief for the May 2024 primary and November 2024 general elections. *E.g.*, *Martin*, 341 F. Supp. 3d at 1339-40 (entering relief in October of an election year).

III. CONCLUSION

The totality of relevant facts demonstrates that the challenged provisions of SB 202 were enacted "because of," not merely "in spite of," their racially disparate impacts. *Feeney*, 442 U.S. at 279. Accordingly, Plaintiffs respectfully request that their Motion for a Preliminary Injunction be granted.

880; *see* Order, ECF No. 614 at 37-39.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(D)

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

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2023, 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.

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