

**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

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

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants

Civil Action No.
1:21-CV-01229-JPB

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

ASIAN AMERICANS ADVANCING
JUSTICE--ATLANTA, *et al.*,

Plaintiffs

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants

Civil Action No.
1:21-CV-01333-JPB

**PLAINTIFFS' OPPOSITION TO STATE DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT ON
SB 202'S DROP BOX PROVISION**

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Plaintiffs submit this Opposition to State Defendants’ (“Defendants”)¹ Motion for Summary Judgment on SB 202’s drop box provision (ECF 760) and the Intervenor’s Motion for Summary Judgment (ECF 761).

PRELIMINARY STATEMENT

Defendants cannot meet the burden needed to dismiss Plaintiffs’ challenges to SB 202’s drop box provision for (1) discriminatory results under Section 2 of the Voting Rights Act (“VRA”), (2) violations of Title II of the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act of 1973 (“Section 504”), and (3) an undue burden on the right to vote under the First and Fourteenth Amendments.²

Plaintiffs’ claims involve one of the most important and fundamental rights of U.S. citizenship. The law governing these claims requires fact-intensive and nuanced assessments of myriad factual issues that makes summary judgment seldom appropriate. Here, there are numerous disputed issues of material fact that preclude a grant of summary judgment on any of the claims.

¹ References to Defendants herein include Intervenor’s unless otherwise specified.

² This brief is limited to Plaintiffs’ challenges to the drop box provision. Plaintiffs do not address Defendants’ arguments related to SB 202’s mobile voting unit provision, which is addressed only in Plaintiffs’ Opposition to the Motions for Summary Judgment on the Discriminatory Intent Claim.

Section 2 claims require an assessment of the “totality of circumstances” as to whether a challenged law deprived voters of a particular race of an equal opportunity to vote. The Supreme Court has declined to endorse a dispositive test in making that assessment and the Eleventh Circuit has recognized that dismissing a Section 2 claim is “particularly challenging” on summary judgment due to its “fact-driven nature.” Here, the record evidence makes dismissal not merely challenging, but impossible.

Defendants address only allegations on behalf of Black voters, but seek dismissal without ever addressing evidence of a discriminatory impact on Asian American and Pacific Islanders (“AAPI”) and Hispanic voters.³ That is fatal to their motion with respect to Section 2. Plaintiffs have marshalled extensive evidence proving, and certainly raising disputes of material fact, as to whether the drop box provision imposed a significant burden and had a disproportionate impact on Black, AAPI and Hispanic voters. SB 202, rather than simply granting a new right to vote through drop boxes, disproportionately reduced the number of drop boxes in the eight counties that are home to the majority of Georgia’s minority voters. In light of the undisputed evidence of the growing use of absentee voting by these groups, the extensive implementation and use of drop boxes in these dense, urban counties, and

³ Defendants also fail to offer any arguments relating to the impact of SB 202’s drop box provisions as to Native American voters.

disputed facts as to the other relevant guideposts in assessing the “totality of circumstances,” there are numerous material questions of fact as to whether SB 202 deprived minority voters of an equal opportunity to vote.

Likewise, Plaintiffs’ Constitutional claims require the application of a “flexible standard” that balances the burdens imposed by the challenged legislation against the strength of the purported state interest in passing the law. Here, evidence shows that SB 202 significantly burdened voters—outright deterring some from voting—and, furthermore, did so on the basis of pretextual state interests, none of which were in fact served by the challenged legislation. In the face of this evidence, dismissal without trial on these claims is premature and improper.

As to the disability discrimination claims, the Court must conduct a fact-intensive assessment of whether disabled voters have been denied an equal opportunity to access absentee voting by virtue of SB 202’s restrictions. Here again, the evidence highlights the extent to which the drop box provisions of SB 202 impose disproportionate barriers on voters with disabilities and summary judgment is inappropriate in light of multiple heavily contested factual disputes.

FACTUAL BACKGROUND

A. Demographics of Absentee Voting in Georgia

SB 202 was passed during a time of change in the methods of voter participation in Georgia. Prior to 2018, white voters in Georgia used absentee ballots

more than other minority groups. Plaintiffs’ Statement of Additional Material Facts (“SAMF”) ¶ 35 (Anderson Rep. 99; Burden Rep. 11; Fraga Rep. ¶ 51). Ahead of the 2018 election, nonpartisan organizations concentrated on voter registration and turnout among minority voters, with an emphasis on absentee voting. SAMF ¶ 50 (Burden Rep. 9; Burnough Decl. ¶ 12; Cotton Decl. ¶¶ 7-12). In the 2018 general election, Black voters’ use of absentee voting outpaced that of white voters for the first time. SAMF ¶ 36 (Burden Rep. 11, Tbl. 5; Fraga Rep. ¶ 55 & Tbl. 2; Grimmer Rep. ¶ 63 & Fig. 2). Compared to the 4.6% of white voters who voted by absentee ballot in 2018, the percentages of Black, Hispanic and AAPI voters who voted by absentee ballot were 7.1%, 6.3% and 11.5%, respectively. *Id.*

B. Drop Boxes in Georgia Prior to 2020

Defendants admit that drop boxes were not prohibited by any Georgia statute prior to SB 202. SAMF ¶ 287 (Mashburn Dep. 73:16-24; SEB Dep. 74:20-75:5). In fact, Georgia Code Section 21-2-382(a) gave *authority* to boards of elections to establish “additional sites” or “places” for the purpose of receiving absentee ballots, which were not required to be inside of a building. *See* O.C.G.A. § 21-2-382(a) (2019). As Secretary of State Brad Raffensperger’s then-General Counsel Ryan Germany admitted in January 2022:

What most people don’t realize is that before the General Assembly changed the law in SB 202 (after the 2020 election), that Georgia law already authorized counties to utilize drop boxes. None of them had yet,

but I guarantee you that the Democrat-controlled counties would have after facing pressure from liberal groups.

SAMF ¶ 288 (CDR00056863-64). Mr. Mashburn, a Member of the State Election Board (“SEB”), also admitted there have been “arguments that the provision about creating additional registrations [under O.C.G.A. § 21-2-382] might have allowed [drop boxes]” prior to SB 202, but the SEB did not adopt that view. *Id.* ¶ 287 (SEB Dep. 74:20-75:5).

C. 2020 SEB Drop Box Rule

In April 2020, the SEB enacted an emergency rule regulating county discretion to use drop boxes for absentee ballot voting. SAMF ¶ 285 (USA-04333-34; USA-00681:5-86:13). The rule required that drop boxes be located on government property, continuously monitored via security camera, secured and constructed in a way that prevented tampering and removal of ballots, and impermeable to liquid. SAMF ¶ 289 (USA-04333-34). Under the rule, counties could make drop boxes available starting 49 days before Election Day and through the close of polls at 7:00 p.m. on Election Day. *Id.*

During the 2020 election cycle, most drop boxes were located outdoors and were available to voters 24 hours a day, seven days a week until 7 p.m. on Election Day. SAMF ¶ 293 (Sterling Dep. 68:2-11, 69:1-6; Fulton Cnty 52:9-17). Consistent with then existing Georgia Code Section 21-2-382(a), there was no requirement that

the drop boxes be located inside a building. SAMF ¶ 291 (USA-04333-34); *see also* O.C.G.A. § 21-2-382(a) (2019).

In 2020, the overall rate of absentee voting increased dramatically overall, from 5.6% of all votes cast in November 2018 to 26% in November 2020. SAMF ¶¶ 36-37 (Fraga Rep. ¶¶ 55, 58 & Tbl. 2). Absentee voting increased significantly for Black, Hispanic and AAPI voters. (Fraga Rep. Tbl. 2). In 2020, Black voters cast absentee ballots at a rate of 29% compared to 23.9% of white voters. SAMF ¶ 37 (Fraga Rep. ¶ 58 & Tbl. 2; Burden Rep. 11, Tbl. 5; Grimmer Rep. ¶¶ 60, 62 & Fig. 2). Nearly 40% of AAPI voters cast absentee ballots in 2020, compared to just 23.9% of white voters. SAMF ¶ 83 (Lee Rep. 66, Tbl. 2). Hispanic voters increased from an absentee voting rate of 6.3% in November 2018 to 23.2% in November 2020. SAMF ¶¶ 36, 971 (Fraga Rep. ¶ 55, 59 & Tbl. 2).

During the 2020 general election cycle, approximately 300 drop boxes were used in Georgia. SAMF ¶ 318 (Burden Rep. 40-44; Burden Sur-Rebuttal Rep. 7; Fraga Rep. ¶ 143; Grimmer Rep. ¶ 123, n.49; Stephen Fowler, *See Where Georgians Used Drop Boxes in the 2020 Presidential Election*; GPB (Sept. 2, 2022), <https://www.gpb.org/news/2022/09/02/see-where-georgians-used-drop-boxes-in-the-2020-presidential-election> (“GPB Drop Box Spreadsheet”). Of these, 48% (approximately 146 drop boxes) were located in just eight counties, consisting of the seven metro-Atlanta counties (Fulton, DeKalb, Cobb, Gwinnett, Douglas, Clayton,

and Rockdale), along with Chatham County, which contains the city of Savannah (the “Eight Counties”). *Id.* These Eight Counties account for 53.2% of Georgia’s Black population, 69.3% of Georgia’s AAPI population, and 50.6% of Georgia’s Hispanic population, but only 29.1% of Georgia’s white population. SAMF ¶ 319 (Total Population in Georgia by County and by Race, U.S. Census Bureau, https://data.census.gov/table/ACSDT5Y2021.B03002?g=040XX00US13_050XX00US13051,13063,13067,13089,13097,13121,13135,13247&y=2021&d=ACS%205-Year%20Estimates%20Detailed%20Tables&moe=false&tp=false (last visited Jan. 17, 2024) (“Census Bureau Data”). In 2020, approximately 64.65% of all ballots deposited in drop boxes were returned to drop boxes in the Eight Counties home to the majority of the State’s Black, AAPI, and Hispanic voters. SAMF ¶ 296 (GPB Drop Box Spreadsheet).

D. SB 202 Provisions

SB 202 imposed significant new restrictions on the use of drop boxes. While it mandates a minimum of one drop box per county, it limits the maximum number in each county to “the lesser of either one drop box for every 100,000 active registered voters in the county or the number of advance voting locations in the county.” O.C.G.A. § 21-2-382(c)(1) (2021).

SB 202 also requires drop boxes to be located indoors at early voting sites or the registrar’s office, *id.* § 21-2-382(a), available only during early voting days and

hours, ending on the Friday before Election Day, and under constant surveillance by a person, not a security camera. *Id.* § 21-2-382(c)(1). SB 202 further amended Georgia Code Section § 21-2-382(a) to eliminate the reference to an “additional site” for “voting absentee ballots” and replaced “locations” with “buildings.” *Compare id.* § 21-2-382(a) (2019) *with id.* § 21-2-38(a) (2021).

E. Reductions in the Availability of Drop Boxes in Georgia’s 2022 Election

SB 202’s restriction on drop boxes eliminated approximately *one-third* of Georgia’s drop boxes. SAMF ¶ 319 (Burden Rep. 40-44; Burden Sur-Rebuttal 7-8; Fraga Rep. ¶ 143; Grimmer Rep. ¶ 123, n. 49; GPB Drop Box Spreadsheet).

In the Eight Counties home to a majority of the State’s Black, Hispanic and AAPI populations, the approximately 146 drop boxes used (48% of the total number of drop boxes statewide) was reduced to 33—a **77% decrease**. SAMF ¶¶ 319-20 (Burden Rep. 40-44; Burden Sur-Rebuttal Rep. 7-8; GPB Drop Box Spreadsheet; Fraga Sur-rebuttal Rep. ¶¶ 69-70; Grimmer Rep. 110, Tbl. 21; Census Bureau Data). Statewide, SB 202 resulted in approximately 75% of Black registered voters, 77% of AAPI registered voters, and 68% of Hispanic registered voters having fewer drop boxes in their county, as compared to 53.7% of white registered voters. SAMF ¶ 329 (Fraga Rep. ¶¶ 149-50 & Tbl. 15; Burden Rep. 40-44).

As a result, the average distance between a registered voter’s residence and the closest drop box in their county increased from approximately 3.4 miles in

November 2020 to 4.8 miles in November 2022. SAMF ¶ 347 (Fraga Rep. ¶ 156 & Tbl. 15). For the 2022 election, 16.5% of Black registered voters, 21.1% of AAPI registered voters and 15.5% of Hispanic registered voters, compared to 12.4% of white registered voters, resided beyond the average distance to the closest drop box. SAMF ¶ 348 (Fraga Report ¶¶ 158-59 & Tbl. 16; Fraga Dep. 145:22-146:20; 148:13-19; 155:12-23; 156:10-16). SB 202 also caused a disproportionate increase in the travel time experienced by Black citizens of voting age (“CVAs”) to reach a drop box. SAMF ¶¶ 351-52 (Chatman Rep. ¶ 86 & Tbl. 3); *see also* SAMF ¶ 353 (Chatman Rep. ¶¶ 7, 88); SAMF ¶ 358 (Chatman Sur-Rebuttal Rep. ¶ 16).

The rate of absentee voting decreased for all ethnic groups in 2022 compared to the 2020 election cycle, but there was a disproportionate drop in absentee ballot use among Black, Hispanic and AAPI voters in elections after SB 202. SAMF ¶ 378 (Fraga Rep. ¶ 9 & Tbl. 2). The rates of absentee ballot voting between 2020 and November 2022 general elections dropped off 21.7 percentage points for Black voters and 30.6 percentage points for AAPI voters compared to 18.3 percentage points for white voters. *Id.*

ARGUMENT

Summary judgment is appropriate only where the movant proves “there is no genuine dispute as to any material fact.” Fed. R. Civ. P. 56(a). The moving party has the burden of showing the absence of a genuine issue as to any material fact.

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). In determining whether the movant has met this burden, the court must view the evidence and all factual inferences “in the light most favorable to the nonmoving party.” *Johnson v. Clifton*, 74 F.3d 1087, 1090 (11th Cir. 1996). The court may not weigh the evidence or find facts. *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. Of Comm’rs*, 775 F.3d 1336, 1343 (11th Cir. 2017) (internal quotations and citations omitted). Nor may the court make credibility determinations of its own. *Id.* For the non-movant to defeat a motion for summary judgment on factual grounds, “all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citation omitted).

I. THERE IS SIGNIFICANT EVIDENCE THAT SB 202’S DROP BOX PROVISION VIOLATES SECTION 2 OF THE VRA

Section 2(a) of the VRA prohibits any law or practice that “results in a denial or abridgment of the right of any citizen. . .to vote on account of race or color.” 52 U.S.C. § 10301(a). Section 2(b) provides that a violation of Section 2(a) results “if based on the totality of circumstances . . . the political processes . . . are not equally open to . . . citizens protected by subsection (a) in that its members have less opportunity . . . to participate in the political process.” *Id.* § 10301(b). Section 2 does not require plaintiffs impacted by a voting law to show that they have been completely disenfranchised, just that voting has been made meaningfully more

difficult. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 359 (2000) (Souter, J., concurring in part and dissenting in part) (“[A]bridgement necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden.”).

Section 2 claims must be assessed by the “totality of circumstances,” and “**any** circumstance that has a logical bearing on whether voting is ‘equally open’ and affords equal ‘opportunity’ may be considered.” *Brnovich v. Democratic Nat’l Comm.* 141 S. Ct. 2321, 2338 (2021) (emphasis added). The Supreme Court has expressly “decline[d] . . . to announce a test to govern all [Section] 2 claims involving rules, like those at issue here, that specify the time, place, or manner for casting ballots.” *Id.* at 2336. Instead, it offered five “guideposts”, that may be relevant including (1) “the size of the burden imposed by a challenged voting rule,” (2) “the degree to which a voting rule departs” from standard practice in 1982, (3) “[t]he size of any disparities in a rule’s impact on members of different racial or ethnic groups,” (4) “the opportunities provided by a State’s entire system of voting,” and (5) “the strength of the state interests served by a challenged voting rule.” *Id.* at 2336-40. This list of considerations is non-exhaustive, *id.* at 2338, and, “given that section 2 requires courts to consider ‘the totality of circumstances,’ it is axiomatic that no one factor controls.” *Fla. State Conf. of the NAACP v. Lee*, 566 F. Supp. 3d 1262, 1290 (N.D. Fla. 2021) (citation omitted).

Furthermore, “that minority group members suffered discrimination in the past . . . and that effects of that discrimination persist” are relevant considerations in assessing the totality of the circumstances. *Brnovich*, 141 S. Ct. at 2340 (citing *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986)).

A. Summary Judgment Is Seldom Appropriate in Section 2 Cases

The need to assess the “totality of circumstances” makes dismissal on summary judgment here particularly challenging. The Eleventh Circuit has indeed warned “that summary judgment in Section 2 cases ‘presents particular challenges due to the fact-driven nature of the legal tests required by the Supreme Court and [Eleventh Circuit] precedent’ and that ‘[n]ormally, claims brought under [Section 2] of the VRA are resolved pursuant to a bench trial.’” *Ga. State Conf. of the NAACP*, 775 F.3d at 1343, 1348. The present case is no exception. Whether the drop box provision deprives minority voters of an equal opportunity to access Georgia’s political process is a highly fact-intensive inquiry.

Defendants fail to address the claims of AAPI or Hispanic voters, which alone should doom the motion. *See, e.g., Livernois v. Med. Disposables, Inc.*, 837 F.2d 1018, 1023 (11th Cir. 1988) (summary judgment is improper where movant “did not satisfy its burden of informing the district court of the basis of its motion”). In any event, Plaintiffs have marshalled extensive evidence supporting a Section 2 violation

and creating disputes of material fact that, at a minimum, precludes summary judgment on Plaintiffs' claims on behalf of Black, Hispanic and AAPI voters.

B. SB 202's Drop Box Provisions Imposed a Significant Burden and Have a Disproportionate Impact on Minority Voters

Defendants fail to consider the totality of circumstances in applying *Brnovich's* guideposts, instead painting SB 202's restrictions as quotidian "usual burdens of voting" that do not give rise to a Section 2 violation. ECF 760 at 12-13; ECF 761 at 1, 15. Assessing the aggregate burdens and disparate impact imposed on Black, Hispanic and AAPI voters by the drop box provision—particularly in the context of electoral trends between 2020 and 2022—it is clear that SB 202 deprives them of "equal openness" and an "equal opportunity" to vote under Section 2.

1. *SB 202 Caused a Significantly Disproportionate Decrease in Drop Box Access for Minority Voters*

It is undisputed that SB 202 significantly reduced the availability of drop boxes in Georgia's 2022 election by approximately one-third. *See supra* at 8 (citing SAMF ¶¶ 319-20). This reduction was disproportionately in the Eight Counties where the majority of Georgia's Black, AAPI, and Hispanic populations (53.2%, 69.3%, and 50.6%, respectively), but only 29.1% of Georgia's white population, resided. *See supra* at 7 (citing SAMF ¶ 319). The number of drop boxes in these counties fell by a remarkable 77% due to SB 202. *See supra* at 8 (citing SAMF ¶ 320).

Reviewing the statistics on a statewide basis further highlights SB 202's disparate impact. The drop box provision decreased the number of allowable drop boxes in a voter's county for nearly 75% of Black registered voters, 77% of AAPI registered voters, and 68% of Hispanic registered voters, compared to just 53.7% of white voters. *See supra* at 8-9 (citing SAMF ¶ 329).

2. *SB 202 Disproportionately Burdened Minority Voters*

The record evidence shows that SB 202 correlated with increased distance and travel times to drop boxes for a greater percentage of Black, AAPI and Hispanic voters, than for white voters. *See supra* at 9 (citing SAMF ¶¶ 347-48). The reduction in the number of drop boxes increased the average distance between a registered voter's residence and the closest drop box in their county for 16.5% of Black registered voters, 21.1% of AAPI registered voters and 15.5% of Hispanic registered voters, as compared to 12.4% of white registered voters. *Id.*

SB 202 also caused a disproportionate increase in the travel burden experienced by Black CVAs to reach a drop box. *See supra* at 9 (citing SAMF ¶¶ 351-353, 358). In 2020, Black CVAs statewide were 36% more likely than white CVAs to have a round trip to access a drop box location exceeding an hour, or to have no access to a drop box (6.5% of Black CVAs compared to 4.7% of white CVAs), largely because Black CVAs are far more likely to live in a household without a car. SAMF ¶ 353 (Chatman Rep. ¶¶ 7, 88). About 9% of Black CVAs in

Georgia lack a vehicle in the household, compared to about 3% percent of white CVAs in Georgia. SAMF ¶ 355 (Chatman Rep. ¶ 61; BVMF Dep. 102:13-102:19, 107:12-107:21).

In contrast, in 2022, Black CVAs statewide were 146% more likely than white CVAs to have a round trip to access a drop box location exceeding an hour (7.3% compared to 3%). SAMF ¶ 353 (Chatman Rep. ¶¶ 7, 88). In 2020, the median one-way travel time to a ballot drop box via public transportation was 26.43 minutes. SAMF ¶ 356 (Chatman Rep. ¶ 39 & Tbl. 2). In 2022, the median one-way travel time to a ballot drop box via public transportation increased more than 50% to 42.13 minutes. *Id.*

In the densely populated urban counties, where higher shares of the population do not have access to automobiles, drop boxes had been conveniently dispersed through a wide range of neighborhoods. After SB202, in densely populated urban counties—including Fulton, Clayton, and DeKalb counties, as well as in Savannah and smaller cities—the nearest drop box moved much further away. SAMF ¶ 340 (Rodden Rep. 16); SAMF ¶ 355 (Chatman Rep. ¶ 61; BVMF Dep. 102:13-102:19, 107:12-107:21). For example, in Fulton County, the share of Black CVAs whose round-trip to a drop box by public transportation (their *only* option) exceeded one hour rose from 3.8% in 2020 to 13.2% in 2022. SAMF ¶ 358 (Chatman Sur-Rebuttal Rep. ¶ 16).

SB 202's drop box provision not only limits the number of drop boxes Georgians can use, but also moves all drop boxes inside of early voting locations, O.C.G.A. § 21-2-382(a) (2021), eliminates 24-hour access, *id.* § 21-2-382(c)(1) (2021), and prevents access to drop boxes on Saturdays and Sundays without early in-person voting, on Election Day or on the Saturday, Sunday, and Monday immediately preceding Election Day. *See id.* Black voters disproportionately returned absentee ballots in the last four days of the election in 2020, just as they did in all federal general elections since 2014. SAMF ¶ 360 (Burden Rep. 14-20; Burden Sur-Rebuttal Rep. 6). The drop box provision eliminated the availability of drop boxes in those crucial four days, heightening the burden on Black voters. *Id.*; *see also* SAMF ¶ 359 (Burden Rep. 20).

Relatedly, after the implementation of SB 202, AAPI and Hispanic registrants voting absentee were more likely to have their absentee ballots rejected due to receipt after the deadline than white voters. SAMF ¶ 232 (Fraga Rep. ¶ 134 & Tbl. 14). It is likely that some of these AAPI and Hispanic voters who submitted their absentee ballots after the deadline would have timely submitted their ballots via drop box during the final four days of the election cycle if such drop boxes were available, as they had been prior to SB 202. SAMF ¶ 233 (Fraga Rep. ¶ 133).

SB 202's restrictions on the number and accessibility of drop boxes thus directly impacted minority voters, imposed a higher burden on minority voters, and

corresponded with disproportionate decreases in minority absentee voting. SAMF ¶ 348 (Fraga Rep. ¶ 9 & Tbl. 2). The clear inference is that SB 202’s provisions directly impacted voting behavior for minority voters in Georgia, distinguishing SB-202’s effects from merely “disparate inconveniences” that fall short of a Section 2 violation. *Cf. Greater Birmingham Ministries v. Sec’y of State for the State of Alabama*, 992 F.3d 1299, 1329-30 (11th Cir. 2021) (“*GBM*”). At a minimum, the severity of the burden imposed by SB 202 on the ability of minority voters to vote must be adjudicated at trial.

3. *Whether Minority Voters Used Drop Boxes More than White Voters in 2020 Is a Disputed Material Fact*

This record evidence also supports the reasonable inference that Black, Hispanic and AAPI voters are disproportionately impacted by SB 202’s severe restrictions on the number and availability of drop boxes. While individual-level racial data usage of drop boxes is not available (except in one county) because Georgia did not gather such data, the available evidence from the 2020 election cycle is sufficient to conclude that minority voters were more likely to use drop boxes than white voters, raising at a minimum a disputed material fact.⁴

⁴ The case law does not require Plaintiffs to present such data. *See Jenkins v. Red Clay Consol. Sch. Sch. Dist. Bd. Of Educ.*, 4 F.3d 1103, 1134 (3d Cir. 1993) (“[M]inority voters should not be forced to suffer a violation of their rights because of external circumstances that limit the availability of data specific to the challenged district if other evidence supports their claim.”).

First, Black and AAPI voters cast absentee ballots at disproportionately higher rates than white voters in 2020. *See supra* at 6 (citing SAMF ¶¶ 37, 83). *Second*, almost half of all drop boxes in the State (146 out of 305) were located in the Eight Counties where the majority of Georgia's minority voters reside. *See supra* at 6-7 (citing SAMF ¶ 318). In November 2020, 64.65% of ballots deposited in drop boxes were returned to drop boxes in the Eight Counties home to the majority of Georgia's Black, AAPI and Hispanic voters. SAMF ¶ 296 (GPB Drop Box Spreadsheet). Drop boxes were used most where and when minority Georgians voted most, producing the strong inference that minority voters used drop boxes more than white voters.

Douglas County is the only county in Georgia that recorded drop box use by race of voter in the 2020 election cycle. SAMF ¶¶ 334-35 (Burden Rep. 33-34; Kidd Dep. 114:16-116:8). The Douglas County data confirm what can be inferred from statewide evidence: In November 2020, Douglas County Black voters were 4.1 percentage points more likely than other voters to return absentee ballots via drop boxes; in January 2021, these voters were 6.0 percentage points more likely than other voters to return absentee ballots via drop boxes. *Id.*

Defendants' argument that Black voters used drop boxes no more or less frequently than white voters in 2020 and 2022 is based on Dr. Grimmer's interpretation of survey data, not on voting statistics. ECF 760 at 14. His

interpretation of the surveys and the facts relating thereto are contested by Plaintiffs' experts Dr. Burden and Dr. Fraga.⁵ SAMF ¶ 337 (Burden Suppl. Decl. 2-3); *see generally* Ex. 341 (Fraga Suppl. Decl. ¶¶ 3-16). An analysis of the code and data related to the 2020 Cooperative Elections Study (CES) relied on by Dr. Grimmer demonstrates that Black voters in 2020 were 42% more likely to use drop boxes than white voters in 2020. SAMF ¶ 963 (Fraga Suppl. Decl. ¶¶ 3, 5). The difference is approximately 6 percentage points (20.2% for Black voters versus 14.2% for white voters statewide). *Id.* Dr. Grimmer's findings that the CES Study showed that Black voters in 2020 and 2022 used drop boxes less or no more frequently than white voters are based on errors and not statistically significant. SAMF ¶ 964 (Fraga Suppl. Decl. ¶¶ 6-9).

The Court previously found that 34.7% of the State's Black population, spread over 133 counties, saw no change (25.6%) or an increase in drop boxes (9.1%) under SB 202, which appears close to the 33.7% of the Black population, in just three counties, that experienced the largest decrease in drop boxes. *See* 10/11/2023 PI Order [ECF 686] at 33. *But see* Resp. to Defs.' SMF ¶ 323. This comparison masks

⁵ Defendants also rely on an SPIA Survey of voters (not non-voters) who reported no problems voting. ECF 760 at 8-9. That survey does not meet the standard of academic rigor to draw scientifically valid conclusions. Resp. to Defs. SMF ¶ 358 (Pettigrew Dep. 142:16-22). It also does not capture the experience of those that were sufficiently discouraged from voting. Thus, it should not be considered as factual evidence on this motion.

the striking disparity in the relative changes in drop box numbers. For example, for the population seeing an increase, less than 1% had 2 drop boxes, and the remaining 8.3% had access to only a single additional drop box. SAMF ¶ 331 (Burden Rep. 27-28, Tbl. 11). But the 33.7% of the statewide Black population residing in the three most impacted counties saw a decrease of between *18 and 29* drop boxes. SAMF ¶ 322-23, 325 (Burden Rep. 28, Tbl.11; *id.* 41-44; Grimmer Rep. 110, Tbl. 21; Fraga Sur-Rebuttal Rep. ¶¶ 69-70). And 45% of the statewide Black population experienced a decrease of 6 or more drop boxes. SAMF ¶ 321 (Burden Rep. 28, Tbl. 11). Moreover, the relevant comparison is how Black and other minority voters' access to drop boxes compares to white voters' access to drop boxes under SB 202.

4. *Defendants Cannot Argue Away SB 202's Disparate Impact and Burden*

Disregarding this evidence of a disparate impact and burden on minority voters, Defendants argue that no comparisons to voting rules in 2020 should be made because SB 202 was a broad expansion of voters' access to drop boxes.⁶ ECF 760 at 13. As a threshold matter, Plaintiffs have demonstrated that Georgia law permitted the use of drop boxes prior to SB 202. *See supra* at 4-5. Nor is there any basis to

⁶ Prior to SB 202, only about 2.5% of the population of Georgia lived in counties that did not provide a ballot drop box. SAMF ¶ 333 (Chatman Rep. ¶ 66). Thus, Defendants' claim that SB 202 codified a wide expansion of drop boxes falls flat.

disregard the 2020 voting rules as a standard of comparison. To the contrary, SB 202 was passed in the context of increased voting activity of minority voters in the 2020 election (*see supra* at 4), making an analysis of 2020 rules imperative when considering the “totality of circumstances.”

Defendants’ repeated reliance on *League of Women Voters of Fla. Inc. v. Fla. Sec’y of State*, 66 F.4th 905 (11th Cir. 2023) (“*LWV*”)—a case which found that Florida’s drop box restrictions did not violate Section 2—is unavailing. *First*, the *LWV* decision *on the sufficiency of the evidence* was made only *after* a trial on the merits. *Id.* at 920. *Second*, unlike Black Georgia voters (*see supra* at 4), the court in *LWV* found that “Florida black voters relied on vote by mail *less* than Florida white voters.” 66 F.4th at 924-25. Moreover, contrary to *LWV* where there was evidence only from counties with a small minority of Black voters, *see id.* at 933-34; here there is a 77% reduction in drop boxes in the Eight Counties that account for the majority of the State’s minority voters, among other statistics discussed *supra* at 8.

Defendants’ claim that voter turnout and survey results in the 2022 elections show that SB 202, including the drop box provision, had no unequal effect is also disputed.⁷ Specifically, Defendants argue that the difference between white and

⁷ Defendants’ reliance on the total number of votes cast in 2022 is irrelevant because it measures total numbers in a state with a growing population, and not racial

(Footnote continued on next page)

Black turnout remained essentially the same after SB 202, thus, there could be no disparate impact. ECF 760 at 8. The parties’ experts agree, however, that it is almost impossible to determine the influence of a voting law on turnout with data from just one election cycle. SAMF ¶ 32 (Fraga Sur-Rebuttal Rep. ¶¶ 15-18; Burden Sur-Rebuttal Rep. 11; Grimmer Dep. 47:17-49:11). There are also too many other factors that influence turnout in any given election, including countermobilization efforts and the competitive gubernatorial and Senatorial elections on the ballot. SAMF ¶ 31 (Fraga Rep. ¶ 49; Grimmer Rep. ¶ 37; Burden Sur-Rebuttal Rep. 11; Shaw Dep. 131:10-132:1; Lee Sur-Rebuttal Rep. ¶¶ 1-2). Both factors were present in the 2022 election, contributing to an increase in voter turnout. *Id*; *see also* SAMF ¶ 522 (Calhoun Decl. ¶¶ 29-37; Cotton Decl. ¶¶ 26-38; S. Johnson Decl. ¶¶ 25-27). But countermobilization is evidence of the lengths to which the affected community will go to overcome burdens imposed on the right to vote—not a lack of harm. A political system is not “equally open” if Black voters must disproportionately deploy exceptional resources simply to participate.

Moreover, voter turnout cannot be the measure of discriminatory effect because a Section 2 violation does not require that voters be completely

disparities. *See* Resident Population in Georgia from 1960 to 2022 (in millions), Statista, <https://www.statista.com/statistics/206111/resident-population-in-georgia> (last visited Jan. 18, 2024).

disenfranchised. The Eleventh Circuit has long recognized that laws making voting more *difficult*, though not impossible, for minority voters can violate Section 2. *See United States v. Marengo Cnty. Comm’n*, 731 F.2d 1546, 1570 (11th Cir. 1984).

Total turnout also reveals nothing about the relative burdens that minority voters and white voters must overcome to cast a ballot under SB 202, nor does it capture the lived experiences of voters who were adversely impacted by SB 202’s reduction in the number of drop boxes available to Black, Hispanic and AAPI voters.⁸ SAMF ¶ 29 (Burden Sur-Rebuttal Rep. 11-12; Grimmer Dep. 50:3-11; Lee Sur-Rebuttal Rep. ¶ 1). The costs that a voter must incur in order to vote—including the time, resources, and effort needed to overcome administrative requirements—are a crucial factor in determining whether individuals vote. SAMF ¶ 524 (Burden Rep. 22; Clark Rep. 13-14; Grimmer Dep. 129:7-20, 275:10-16). For example, lower political participation among minority voters in Georgia is due, in part, to socioeconomic challenges experienced by minority voters discussed *infra* at 36-37.

⁸ For example, Plaintiff Anjali Enjeti-Sydow decided not to vote using a drop box in the 2022 elections, despite it being her preference, because after SB 202 was passed, the drop box she previously used no longer existed and the next closest drop box was a 30-35 minute drive away. SAMF ¶¶ 725, 728-30 (Enjeti Sydow Dep. 41:8-10, 41:15-42:15, 47:2-3, 46:21-47:11, 72:4-7, 73:4-22, 105:18-106:9)). Ms. Enjeti-Sydow also has a medical issue that limits her mobility, and delivering her daughters’ absentee ballots to the next closest drop box involved making an hour-long round trip “on a day that [she] was in so much pain and did not want to drive, and [she] was in back-to-back meetings for work.” *Id.*

These challenges impact the weight of the costs of voting and one's ability to navigate them. SAMF ¶ 525 (Burden Rep. 23, 25-26; Clark Rep. 14; Grimmer Dep. 275:10-275:23).

Finally, were total turnout relevant for assessing impact, all experts agree that the turnout gap between white voters and minority voters increased from 2020 to 2022. Defendants' expert Dr. Grimmer calculates the following trends from 2020 to 2022: (1) the Black and white voter turn gap increased from 9.9 percentage points to 12 CVAP and CVAP Trend percentage points; (2) the Hispanic and white voter turn gap increased from 28.8 percentage points to 29.6 CVAP or 31.4 CVAP Trend percentage points; and (3) the AAPI and white voter turnout gap increased from 7.2 percentage points to 16 CVAP or 18.4 CVAP Trend percentage points.⁹ SAMF ¶ 966 (Grimmer Rep. 23, Tbl. 2).

Moreover, it is undisputed that there was a disproportionate drop in absentee ballot use among Black, Hispanic and AAPI voters after SB 202. SAMF ¶ 378 (Fraga Rep. ¶ 9 & Tbl. 2). The rates of voting by absentee ballot between 2020 and November 2022 dropped off 21.7 percentage points for Black voters, 18.8 percentage points for Hispanic voters, and 30.6 percentage points for AAPI voters,

⁹ Dr. Grimmer provides the turnout rate using the citizen-voting age population (CVAP) and then extrapolates the size of the group in 2022 (CVAP Trend).

compared to 18.3 percentage points for white voters. *Id.* Only white voters saw higher rates of absentee ballot use in the December 2022 election compared to 2018. SAMF ¶ 382 (Fraga Rep. ¶¶ 61-62).

Defendants’ arguments about how many drop boxes are used and whether voters use drop boxes close to their home highlight disputed facts. ECF 760 at 14-15. Defendants’ expert Dr. Grimmer states voters tended to use only a few drop boxes in each county (*id.* at 14), but agrees that for voters in Fulton County in 2020, a majority of absentee voters used drop boxes other than the seven most-used drop boxes in the county. SAMF ¶ 349 (Grimmer Rep. ¶¶ 134-35 & Tbl. 21). Dr. Grimmer presented statistics based on his analysis of the results of the 2020 Survey of the Performance of the American Electorate (“SPAЕ”) which he claims shows voters selected drop boxes other than the one closest to their home, but Dr. Fraga shows that, according to that survey, 68.8% or more of respondents *did* select a drop box because it was close to their home.¹⁰ SAMF ¶ 344 (Fraga Sur-Rebuttal Rep. ¶ 61 & Tbl. 3).

¹⁰ Dr. Grimmer’s Updated Report does not resolve this factual conflict. Resp. to Defs. SMF ¶ 543.

C. The Asserted State Interests Served by the Drop Box Provision Are Pretextual and Not Furthered by the Provision.

“[I]n determining ‘based on the totality of circumstances’ whether a rule goes too far, it is important to consider the reason for the rule.” *Brnovich*, 141 S. Ct. at 2339-40. The asserted interests must be real, not pretextual, and must actually be prevented or furthered by the challenged voting rule. *See Fair Fight Action, Inc. v. Raffensperger*, 593 F. Supp. 3d 1320, 1341-42 (N.D. Ga. 2021).

The stated justifications for the restrictions in SB 202 were: “to address the lack of elector confidence in the election system on all sides of the political spectrum, to reduce the burden on election officials, and to streamline the process of conducting elections in Georgia by promoting uniformity in voting.” SB 202, 2021 Reg. Sess. Section 2 (Ga. 2021), Section 2 ¶ 7. But whether these interests were pretextual and whether the provision in fact furthered the interests are sharply contested.

Lack of Elector Confidence and Voter Fraud: Merely incanting “[c]ombating voter fraud” is not a sufficient “level of specificity. . .to convert that abstraction into a definite interest for a court to weigh.” *N.E. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 632 (6th Cir. 2016). Moreover, precedent does not suggest that courts should refrain from considering the lack of evidence of voter fraud, or of issues with election integrity, in determining the credibility of the proffered justifications. *See Brnovich*, 141 S. Ct. at 2348; *GBM*, 992 F.3d at 1334.

Although Defendants now argue that actual election integrity is one of the State's interests (ECF 760 at 18), they agree that there was no meaningful voter fraud in the 2020 elections generally, or through the use of drop boxes specifically. SAMF ¶ 97 (Germany Dep. 65:2-5; SEB Dep. 127:25-128:21; Bailey Dep. 61:8-11; Watson Dep. 129:7-12; Evans Dep. 54:4-55:9; Harvey Dep. 94:11-15; Bailey Expert Dep. 175:8-12, 206:5-14; Fulton Cnty Dep. 75:13-15, 129:1-3, 272:21-25; Cobb Cnty Dep. 100:8-10); *id.* ¶ 314 (SEB Dep. 83:10-17). State officials admit that the 2020 elections generally and absentee voting specifically were secure. SAMF ¶ 109 (USA-04141, Georgia Final 2020 Presidential Recount Results 12/7/20 Video 3:42; CDR00119748-57; Sterling Dep. 118:16-119:6; Anderson Rep. 107, 111, 130-31; McCloud Dep. 79:12-84:9).

While Defendants argue that the drop box provision was enacted to prevent ballot harvesting (ECF 760 at 18-19), nowhere is it mentioned in SB 202's preamble. *See generally* SB 202, 2021 Reg. Sess. Section 2 (Ga. 2021). Defendants also admit that no ballot harvesting occurred through drop boxes in the 2020 elections. SAMF ¶ 311 (SOS Admission No. 16; Mashburn Dep. 76:6-11, 201:15-201:19).

At best, Defendants offer anecdotal generalities about alleged problems with drop boxes, all without specific findings that would justify the dramatic changes to their availability that SB 202 prescribes. Defendants' claim of inadequate drop box surveillance or unsecured constructions (ECF 760 at 5-6 (citing SEB Dep. 77:18-25,

Germany Decl. ¶ 66)), amount to no more than an unspecified number of “some” instances in “some” counties with inadequate video surveillance (SEB Dep. 77:18-25, Germany Decl. ¶ 66), and an instance in Fulton and Telfair County where an unsecured drop box was used. *See* SEB Dep. 82:13-18; Mashburn Dep. 75:22-5. Nor does the testimony Defendants rely on appear to be based on personal knowledge of these limited occurrences or other record evidence. *See* SEB Dep. 77:18-25, Germany Decl. ¶ 66.

Defendants’ argument that the drop box provision enhances voter confidence because it addresses voter concerns fares no better (ECF 760 at 21), because it is based on testimony that is completely conjectural, and not based on any evidence, data or firsthand knowledge. Resp. to Defs. SMF ¶¶ 317-19. Any interest in voter confidence is, at best, also a pretextual interest where evidence shows Georgia voters were confident that their vote would be counted in the 2020 elections, as in previous elections. SAMF ¶¶ 94-95 (King Rep. 16-18; CDR01357172; CDR01357172-73).

Indeed, any concerns about voter confidence in the 2020 elections stemmed from baseless allegations of voter fraud. It is undisputed that messages from political elites, particularly those of the party a voter supports, can have a dramatic effect on voter confidence. SAMF ¶ 96 (King Rep. 13-14; SEB Dep. 131:25-132:25, 136:7-137:1, 143:10-12). And, here, the record is replete with evidence that the Trump campaign and leaders in the Georgia General Assembly promoted racialized

accusations of voter fraud during the 2020 elections. SAMF ¶ 99 (USA-04279, Trump Call to Frances Watson 12/23/20 Video 1:15; Anderson Rep. 98; Burnough Decl. ¶ 16; AME_002333:12-34:6).

Evidence further shows that, to the extent voters viewed drop boxes as susceptible to abuse, it was because they were unaware of the existing procedures for collecting, placing, and monitoring drop boxes to ensure their security under the SEB rule. SAMF ¶ 306 (SEB Dep. 175:25-176:25; Mashburn Dep. 81:16-23). The drop box provision does nothing to address the actual causes of voters' purported decrease in confidence in drop boxes. And the drastic reduction in drop boxes in the Eight Counties with a majority of the minority population hardly serves to instill confidence in the voters of those counties.

Indeed, unlike in *LWV*, where—after trial—the court found “credible” the law’s justifications, 66 F.4th at 931, this motion does not provide the Court with the opportunity to weigh the credibility of these purported justifications. Further, unlike in *LWV* where there was evidence suggesting the damage or destruction of ballots in drop boxes, *id.* at 928, here, Mr. Mashburn testified that the SEB did not discover any drop box misuse resulting in the improper submission of ballots, or of improper access to the drop boxes. SAMF ¶ 304 (Mashburn Dep. 76:6-11, 77:9-14).

As Mr. Mashburn admits, the record evidence of any alleged problem with drop boxes was the very limited county non-compliance with the SEB rule already

in place. SAMF ¶ 305 (Mashburn Dep. 76:1-5). Those aberrations do not justify SB 202's drastic restrictions. If there were evidence of voter fraud or a threat to voter security through the use of drop boxes, Defendants fail to address, let alone demonstrate, how the drop box provision would prevent it. To the contrary, evidence shows that the drop box provision does very little to enhance ballot security. SAMF ¶ 565 (Kennedy Rep. 42).

Efficiency: Defendants claim that the drop box provision aids election administration efficiency in two ways: First, by placing drop boxes indoors, no additional personnel are needed to monitor the drop boxes or collect ballots, and second, by limiting drop boxes to early voting hours, the state avoids a late influx of ballots that could delay vote counts. ECF 760 at 20. Notwithstanding these purported efficiencies, election officials advocated for the SEB rule—which did not contain these restrictions—to become law. SAMF ¶ 307 (USA-ADAMS-000027.0007-08). Several county election officials testified before the Legislature that their counties used drop boxes with great success and without issues. *See* SAMF ¶ 302 (AME_000207:12-19); *id.* ¶ 297 (Bailey Dep. 47:6-12, 48:10-49:6; AME_000361:1-16). Indeed, many county officials opposed the severe limits on number of drop boxes imposed by the drop box provision. SAMF ¶ 145 (AME_001627:11-19); *id.* ¶ 307 (USA-ADAMS-000027.0007-08; USA-ADAMS-000043.0001-44.0002; AME_001627:11-19; AME_00228:10-229:7). The

Association County Commissions of Georgia (“ACCG”), an association representing county governments in Georgia, informed legislators of its members’ preference that counties have the “flexibility and option to employ” drop boxes, instead. *See* SAMF ¶ 307 (USA-EDWARDS-00000228-31).

County election officials also argued that “[t]he counties who installed [drop boxes] should not have to close them due to a change in the allowed number based on population.” SAMF ¶ 307 (USA-ADAMS-000027.0007). Indeed, having to disassemble and move the numerous existing drop boxes created burdens on election officials. *See id.* Removing existing drop boxes also created voter confusion. *See* SAMF ¶ 713 (Khwaja Decl. ¶ 22). Several election officials also opposed the limitations on the hours and locations of drop boxes. They asked the Legislature to allow drop boxes to be located outdoors and available 24-hours a day until 7:00 p.m. on Election Day. *See, e.g.,* SAMF ¶ 307 (USA-ADAMS-000027.0007-08; AME_000207:19-208:9; AME_000223:14-224:2; USA-EDWARDS-00000228-31). Multiple elections directors testified that putting drop boxes inside makes them “useless.” SAMF ¶ 307 (AME_001627:11-19; AME_000228:10-229:7). The opposition of election officials here also highlights once more the factual distinctions between this case and *LWV*. *Cf. LWV*, 66 F.4th at 929 (discussing statements from election officials justifying restrictions on drop boxes). Further, under SB 202, Georgia is now the most restrictive state in the country regarding the legislative

regulation of drop boxes and limits on counties' ability to manage drop boxes. SAMF ¶ 953 (Fraga Sur-Rebuttal Rep. ¶ 42 & Tbl. 2; Grimmer Dep. 121-15-122:11).

Although Defendants contend that the drop box provision “ensures that no additional personnel [are] needed to monitor drop boxes or to collect ballots,” they do not proffer any information regarding the number of election workers needed to monitor drop boxes or to collect ballots before or after SB 202. ECF 760 at 20. Moreover, Defendants' argument that confining drop box availability to early voting hours avoids a delayed vote count is also without merit because SB 202 separately created processes for early processing and scanning of absentee ballots to address this issue. *See* SB 202, 2021 Reg. Sess. Section 2 (Ga. 2021); O.C.G.A. § 21-2-382 (2021); *id.* § 21-2-386 (2021).

Voter Uniformity: Contrary to Defendants' claims (ECF 760 at 21), county election officials informed legislators that the State's desire for “uniformity” disproportionately *burdened* counties, unlike the SEB rule, which allowed counties to decide how many drop boxes to use in 2020. *See* SAMF ¶ 307 (USA-ADAMS-000027.0007-08; AME_000223:14-24:2; USA-EDWARDS-00000228-31). And limiting the number of drop boxes to 1 per 100,000 active registered voters disadvantages the large percentages of minority voters who reside in the Eight Counties. *See supra* at 13-16. Thus, SB 202 *hinders* uniformity and equal access.

D. The Other *Brnovich* Factors Support Denying Defendants’ Motion

Plaintiffs proffer more than enough evidence for this Court to deny Defendants’ motion, regardless of the remaining *Brnovich* factors— other available means of voting and standard practice in 1982—which should be considered alongside all of the relevant evidence at trial. *See Ga. State Conf. of the NAACP*, 775 F.3d at 1342; *see also Fla. State Conf. of the NAACP*, 566 F. Supp. 3d at 1291 (“Even at trial, failure on some factors is not dispositive.”) (citing *Gingles*, 478 U.S. at 45).

Given that Section 2’s touchstone is “equal openness,” the existence of other available means of voting does not nullify a Section 2 violation unless those options on balance create an otherwise “equally open” political process “as a whole” that makes up for the burdens imposed on the voters who may choose the now less available option. *See Brnovich*, 141 S. Ct. at 2338-39. Defendants’ efforts to highlight other means of voting ignores the numerous interdependent burdens SB 202 imposes on voters (*i.e.*, restrictions related to many aspects of absentee voting, in person voting, and early voting). SB 202 is thus far more encompassing than the relatively discrete provision challenged in *Brnovich*. *See id.* at 2333-34.

Evidence shows 28.6% of Black registered voters and at least 27.0% of AAPI registered voters faced increased barriers due to SB 202’s challenged provisions, compared to just 16.4% of white voters that faced such increased barriers. SAMF ¶¶ 517-20 (Fraga Rep. ¶¶ 176-182 & Tbl. 21). Because, cumulatively, SB 202’s

“panoply of regulations” disproportionately burdens Black, Hispanic and AAPI voters, compared to white voters, *see Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O’Connor, J., concurring in part and concurring in the judgment), the existence of other voting options does not otherwise create an “equally open” political process “as a whole.” *See Brnovich*, 141 S. Ct. at 2339.

Defendants also ignore that shortcomings with the use of mailboxes were one of the reasons for the use of drop boxes in 2020. Drop boxes were used in the 2020 elections partially in response to concerns about delays with the United States Postal Service (“USPS”) and lack of voter confidence in USPS’s performance. SAMF ¶¶ 298-99 (DeKalb Cnty. Dep. 52:4-53:17; Fulton Cnty. Dep. 71:8-24, 75:6-9; Kidd Dep. 33:21-36:4; Burden Sur-Rebuttal Rep. 2). When faced with equally convenient options of a mailbox or drop box, many voters preferred using drop boxes because they provide a certainty that mailboxes do not. SAMF ¶¶ 300-01 (Burden Sur-Rebuttal at 2-3; Kennedy Rep. 15).

Finally, Defendants rely on *Brnovich*’s suggestion that courts consider the degree to which a voting rule departs from standard practice in 1982. This is but one factor, and its importance, if any, should be assessed at trial with the rest of the evidence. *See Fla. State Conf. of the NAACP*, 566 F. Supp. 3d at 1291.

E. Historical Discrimination In Voting and the Persistent Effects of Socioeconomic Discrimination Further Demonstrate that the

Drop Box Provision Deprives Minority Voters of an Equal Opportunity to Vote

The Court must also consider the facts that “minority group members suffered discrimination in the past” and that “effects of that discrimination persist.” *Brnovich*, 141 S. Ct. at 2340 (quoting *Gingles*, 478 U.S. at 36-37). These factors must be considered under the “totality of the circumstances,” and weigh against granting summary judgment.

1. History of Past Discrimination

It is undisputed that “minority group members have suffered discrimination in the past” in Georgia. *Id.* at 2340. Plaintiffs’ experts describe Georgia’s history of minority disenfranchisement in detail. SAMF ¶ 544 (Anderson Rep. 19-45, 57-63; Tijerina Rep. 19-31; Cobb Rep. 11-50); *id.* ¶¶ 64, 68-69, 85 (Lee Rep. 48, 52, 56, 66, 69). Georgia’s record of racial discrimination in this regard is so well-documented that district courts in the Eleventh Circuit have taken judicial notice of it recently. *See, e.g., Fair Fight Action, Inc.*, 593 F. Supp. 3d at 1342 (judicially noticing fact that “Georgia had a long sad history of racist policies in a number of areas including voting”); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1310 (M.D. Ga. 2018), *aff’d*, 979 F.3d 1282 (11th Cir. 2020) (“Georgia’s history of discrimination ‘has been rehashed so many times that the Court can all but take judicial notice thereof.’”).

2. *Continued Effect of Past Discrimination/Socioeconomic Factors*

Historic discrimination against minorities in areas such as housing, education, and healthcare has led to a lower socioeconomic class for minorities, thus, hindering their ability to participate effectively in the political process. *Brnovich*, 141 S. Ct. at 2325. Centuries of discrimination in Georgia have resulted in minorities having markedly worse educational achievement, health outcomes, and income and wealth. White Georgians are more likely to have a high school diploma than are Black and Hispanic Georgians (91.2% compared to 87.6% and 64.2%, respectively). SAMF ¶¶ 532-33 (Palmer Rep. ¶¶ 30-31; Burden Rep. 23, Tbl. 8). This disparity widens in higher education, as white Georgians are significantly more likely to have a bachelor's degree than are Black and Hispanic Georgians (35.8% compared to 25.1% and 19.0%, respectively). *Id.*

With respect to income disparity, the median annual household income for Black Georgians is two-thirds of that reported by white Georgians, and Black and Hispanic Georgians are twice as likely as white Georgians to earn income below the poverty line as defined by the Census Bureau (20.1% and 21% compared to 9.8%). SAMF ¶ 527 (Burden Rep. 24; Palmer Rep. ¶ 30); *id.* ¶ 529 (Palmer Rep. ¶ 31). Poverty status is a strong indicator of whether a household has access to a personal vehicle. SAMF ¶ 530 (Chatman Rep. ¶ 62). Finally, Black and Hispanic Georgians

are more likely to lack health insurance than white Georgians (13.3% and 31.2%, respectively, compared to 9.7%). SAMF ¶¶ 535-36 (Palmer Rep. ¶¶ 30-31).

AAPI Georgians have also historically been, and continue to be, marginalized politically. SAMF ¶¶ 549, 551, 555 (Chang Rep. 60-61; Lee Rep. 40,). In fact, AAPI Georgians have the shortest history with the right to vote of any other racial group. SAMF ¶¶ 547, 556, 560 (Chang Rep. 15-18; Lee Rep. 36, 40). Approximately 33% of AAPI Georgians—as well as 35% of Hispanic Georgians—are limited English proficient (“LEP”), meaning they speak English “less than ‘very well.’” SAMF ¶ 67 (Palmer Rep. ¶¶ 17-18). This is in stark contrast to white Georgians, only 2% of whom are LEP. SAMF ¶ 538 (Palmer Rep. ¶ 18). LEP voters’ preference for voting absentee, including via drop box, is in part due to the significantly greater access to in-language materials and other assistance when voting absentee, as compared to voting in person. *See* SAMF ¶ 542 (Lee Rep. 54).

As discussed *supra* at 22-24, lower political participation among minority voters in Georgia is due, in part, to socioeconomic challenges experienced by these voters. The costs that a voter must incur to vote are a crucial factor in determining whether individuals vote. SAMF ¶ 524 (Burden Rep. 22; Clark Rep. 13-14; Chatman Rep. ¶ 24; Grimmer Dep. 129:7-20, 275:10-16). Socioeconomic conditions impact the weight of those costs and one’s ability to navigate them. SAMF ¶ 525 (Burden Rep. 23, 25-26; Clark Rep. 14; Grimmer Dep. 275:10-275:23). Thus, based on

socioeconomic disparities and political marginalization, navigating the electoral process, and any hurdles it involves, will, on average, burden Black, AAPI and Hispanic voters more than white voters in Georgia. SB 202 exacerbates this present reality by disrupting practices of using drop boxes that minority voters disproportionately used in 2020. *See* SAMF ¶ 361 (Burden Rep. 16-17, Fig. 4).

II. SB 202’S DROP BOX PROVISION VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

By placing an arbitrary cap on the number of drop boxes a county may use and requiring all drop boxes to be placed indoors, constantly surveilled, and available only during early voting, the drop box provision imposes an undue burden on the right to vote in violation of the First and Fourteenth Amendments. The legal standard for such claims is clear and well-established: courts “apply the flexible standard from *Anderson* and *Burdick*.” *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

The *Anderson-Burdick* standard requires the Court to first consider whether and to what extent a challenged law burdens the right to vote. *See Anderson*, 460 U.S. at 789. The “relevant” burdens are “those imposed on persons who are eligible to vote” but are impacted by the operation of the state law. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (controlling op.); *see also id.* at 199; *id.* at 212-14 (Souter, J., dissenting); *id.* at 239 (Breyer, J., dissenting). Once the Court

determines the character and magnitude of the burden, it must then consider the strength of the state interests and whether they justify the burden. *See Anderson*, 460 U.S. at 789. The standard the State must meet varies depending on the magnitude of the burden that the law imposes: laws imposing severe burdens are subject to strict scrutiny, *Norman v. Reed*, 502 U.S. 279, 289 (1992), whereas burdens that are less severe are subject to a sliding scale under which the Court must “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule,” and in so doing, consider both the “*legitimacy and strength* of each of those interests.” *Anderson*, 460 U.S. at 789 (emphasis added). For any law that burdens voters, even if that burden is less severe, the law must still be justified by state “interest[s] *sufficiently weighty* to justify the limitation.” *Norman*, 502 U.S. at 288-89 (emphasis added).

Defendants argue that the drop box provision does not burden voting in any meaningful way but disregard clear evidence to the contrary. The record reveals several material disputes of fact precluding summary judgment.

A. Plaintiffs Have Ample Evidence of the Burden of the Drop Box Provisions on Voters

More than half of all mail-in ballots were submitted via drop box in several Atlanta area counties in 2020 (SAMF ¶ 295 (Rodden Rep. 15)), and for good reason. In that election, drop boxes were located outside, available 24/7, and often placed where public transportation options were limited. SAMF ¶¶ 293-94 (Sterling Dep.

68:2-11, 69:1-6; Brower Decl. ¶ 9). SB 202's drop box provision rolled back these measures, substantially reducing the number of drop boxes in the 2022 election, and increasing the distance that voters had to travel in order to find a drop box. SAMF ¶¶ 338-39, 356 (Fraga ¶¶ 154, 179 & Tbl. 21, Chatman ¶ 39 & Tbl. 2). This, in turn, dramatically reduced drop box usage in 2022. SAMF ¶ 363 (Fulton Cnty Dep. 66:23-67:5).

Beyond the raw numbers, individual voters have testified about their reliance on drop boxes and the barriers to voting they encountered due to SB 202. Voter Erendira Brumley had to take time off work to vote by drop box because it was only open from 9 to 5; she cannot vote on election day because she is a poll worker. SAMF ¶ 364 (Brumley Dep. 26:14-25, 29:14-20). Voter Jessica Owens attempted to vote by drop box twice but both locations had been closed; she eventually had to drive to a location 25 minutes away on Mother's Day to cast her primary ballot. *Id.* (Owens Dep. 24:13-26:1). Previously, a drop box was just a few minutes away from her home, and she could vote there without rearranging her day to do so. *Id.* (Owens Dep. 26:18-27:10, 37:14-22). The drop box that voter Phil Weltner had typically relied on to vote was closed after SB 202 passed; in 2022, he had to stand in a multi-hour line for the runoff because drop boxes were even less convenient. SAMF ¶ 366 (Weltner Dep. 16:12-21, 24:17-25:5, 26:14-19). Voter Monica Poole was injured and on crutches, thus, was unable to vote in person, and the distance to the nearest

drop box (an hour drive) deterred her from voting. SAMF ¶ 367 (Poole Dep. 25:25-26:11, 32:25-33:21). And voter and poll watcher Sheree Giardino observed voters confused about the location of drop boxes after SB 202. SAMF ¶ 368 (Giardino Dep. 13:17-24, 17:23-18:10).

Defendants fail to meaningfully confront the record evidence. In particular, Defendants assert that, prior to SB 202, “no statute or regulation authorized the use of drop boxes in Georgia elections.” ECF 760 at 9. But Mr. Germany recognized that drop boxes were permitted prior to SB 202. SAMF ¶ 288 (CDR00056863-64). Thus, the record contradicts Defendants’ argument that widespread access to drop boxes would be confined to 2020.

Defendants also suggest that because SB 202 requires each county to have a drop box, it increases voter access as opposed to limiting it. ECF 760 at 7-8. But Defendants fail to offer any evidence that access to drop boxes increased—likely because the ceiling on drop boxes imposed by SB 202 offsets any modest gains from setting a floor in counties that previously offered no drop boxes. SAMF ¶¶ 318-19 (Burden Rep. 40-44).

B. Defendants’ Asserted Interests Are Insufficient to Justify the Burdens Imposed by the Drop Box Provisions

Defendants’ asserted interests have nothing to do with the formula Defendants created to reduce the number of drop boxes per county, nor do Defendants justify the burdens on voters. At a minimum, the evidence raises disputes of material fact.

Defendants argue that the changes to drop box accessibility were necessary because the State received numerous complaints about ballot harvesting (ECF 760 at 18-19), and the perception of unmonitored drop boxes and late ballots. *Id.* at 5-6. But, as discussed *supra* at 28, 30, there was no widespread evidence of ballot harvesting. SAMF ¶ 311 (SOS Admission No. 16; Mashburn Dep. 76:6-11, 201:15-201:19). Testimony from state and county officials consistently supported the conclusion that drop boxes were secure in 2020 (SAMF ¶ 297),¹¹ and surveyed state officials never mentioned voter fraud, stolen ballots, or incidents in which the drop boxes or ballots were damaged to the extent that election results would have been affected. SAMF ¶ 315 (Fraga Rep. ¶ 141). The SEB's investigation into drop box use similarly did not reveal any widespread voter fraud. SAMF ¶ 314 (SEB Dep. 83:10-17; Fraga Rep. ¶ 141).

On the other side of the scale from these baseless complaints is election officials' testimony that drop boxes were extremely popular with voters, something Defendants entirely ignore. Resp. to Defs. SMF ¶ 302 (AME_000207:12-25; AME_000361:1-16); SAMF ¶ 302 (AME_000207:12-19, AME_000228:16-21).

¹¹ *E.g.*, Harvey Dep. 75:4-19, 76:7-16; Sterling Dep. 72:10-17, 155:12-156:20; Gwinnett Cnty Williams Dep. 63:10-20, 66:1-6, 68:16-23; Fulton Cnty Dep. 57:7-59:5, 69:10-20; Bailey Dep. 46:6-12, 48:10-49:6); AME_000361:1-16, Tr. 2/22/21 House EIC Hearing).

The nefarious activities Defendants hypothesize as a rationale for the drop box limitations were already prohibited before SB 202. Intimidating voters at drop boxes and following election workers transporting ballots was (and still is) a crime notwithstanding SB 202, *see, e.g.*, 18 U.S.C. § 594, and the same is true of any form of ballot fraud. O.C.G.A. § 21-2-385(a) (2020). Therefore, the stated rationale fails to explain or justify Defendants' formula for determining how many drop boxes may be in a county.

Unable to muster evidence linking the drop box restrictions to vigilantes, Defendants next argue that collecting ballots from more drop boxes imposed significant burdens on election officials. ECF 760 at 4. But there is no evidence that local election officials struggled to keep up with daily ballot collections, and many election officials spoke out against the drop box provisions by highlighting new burdens created by the law. SAMF ¶ 307 (AME 001627:11-19; AME 000297:19-208:9; AME 000203:14-224:2; AME 000228:10-229:7). To the contrary, the record shows that drop boxes *relieve* other burdens on election officials including lines and postal service delays. SAMF ¶ 298 (DeKalb Cnty. Dep. 52:4-53:17; Fulton Cnty. Dep. 71:8-24, 75:6-9; Kidd Dep. 33:21-36:4).

Ultimately, Defendants cannot explain how Georgia furthers its interest in “preserving the integrity of its election process” via its specific drop box formula with anything besides speculation. *Miller v. Brown*, 503 F.3d 360, 370 (4th Cir.

2007) (internal citation and quotation omitted). That is insufficient for summary judgment.

III. SB 202'S DROP BOX PROVISION VIOLATES THE ADA AND SECTION 504 OF THE REHABILITATION ACT

A. Material Facts Preclude Summary Judgment on Plaintiffs' ADA and Section 504 Claims

Summary judgment is not warranted on Plaintiffs'¹² claims that SB 202's drop box provision violates Title II of the ADA and Section 504 because evidence shows these restrictions, both individually and together with SB 202's other restrictions, deprive voters with disabilities of an equal opportunity to access the absentee voting program. Defendants apply the wrong legal standards, and disregard or misconstrue the materiality of key facts. ADA and Section 504 violations stem, at least in part, from three changes in SB 202 (the "Drop Box Restrictions"), which remade a system in which counties typically located drop boxes outdoors with 24-hours-a day accessibility, to: (1) requiring indoor siting at an election office or early voting location (with rare exceptions), (2) limiting their hours of operation to those locations' business hours, and (3) limiting how many drop boxes each county can have. O.C.G.A. § 21-2-382(c)(1) (2021). Plaintiffs have proffered sufficient

¹² AME Plaintiffs are the only Plaintiff group currently pursuing claims under the ADA and Section 504. References to Plaintiffs regarding the ADA and Section 504 claims are specific to the AME Plaintiffs.

evidence to show that the Drop Box Restrictions disparately impact disabled voters because of their disabilities and that Defendants have failed to make the reasonable modifications required to prevent that discrimination. Plaintiffs have also shown that disability is a factor that made a difference in the denial of access, a fact-intensive inquiry inappropriate for summary judgment. Finally, Defendants fail to address why summary judgment is proper on the issue that the Drop Box Restrictions (especially alongside SB 202's other absentee voting restrictions) violate the ADA's "methods of administration" regulation.

B. Under the Correct Legal Standards, Summary Judgment on the ADA Challenge to the Drop Box Restriction Should Be Denied

Applying the correct legal standards, Plaintiffs have presented evidence sufficient to raise a genuine dispute of material fact as to whether the Drop Box Restrictions deny disabled voters an equal opportunity to participate in the absentee voting program in violation of the ADA. Indeed, whether persons with disabilities have been excluded from participation or discriminated against in a program under Title II of the ADA, and whether this exclusion or discrimination is due to disability, are questions of fact that may preclude summary judgment. *R.W. v. Bd. of Regents of the Univ. Sys. of Ga.*, 114 F. Supp. 3d 1260, 1285-86 (N.D. Ga. 2015); *see also Nat'l Fed'n of the Blind, Inc. v. Lamone*, No. 14-CV-1631, 2014 WL 4388342, at *1 n.6 (D. Md. Sept. 4, 2014); 8/18/2023 PI Order [ECF 615] 22.

Title II of the ADA states “no qualified individual with a disability shall, *by reason of such disability, be excluded from participation in or be denied the benefits of* the services, programs, or activities of a public entity, *or be subjected to discrimination* by any such entity.” 42 U.S.C. § 12132 (emphases added).¹³ A prima facie case of a Title II violation is demonstrated by showing: (1) a qualified individual with a disability; (2) was either excluded from participation in or denied the benefits of a public entity’s services, programs, activities, or otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff’s disability. 8/18/2023 PI Order [ECF 615] 12-13. Defendants do not contest that Plaintiffs’ members are qualified individuals with disabilities, nor that Defendants are public entities providing a service, program, or activity. ECF 760 at 25-30. Plaintiffs thus focus on the other elements of a Title II violation.

C. The Facts Demonstrate Denial of Equal Opportunity to Participate in the Absentee Voting Program in Violation of the ADA

The ADA’s regulations require that persons with disabilities must have the “opportunity to participate in or benefit from the aid, benefit, or service” in a way

¹³ Defendants do not contest that they receive federal financial assistance within the meaning of Section 504. Since claims under the ADA and Section 504 are governed by the same standards and can be analyzed together, Plaintiffs focus their discussion on the ADA in this brief. *See* 8/18/2023 PI Order [ECF 615] 12.

that is “*equal* to that afforded others.” 28 C.F.R. § 35.130(b)(1)(ii) (emphasis added); *see also id.* § 35.130(b)(1)(iii). Courts recognize that one way to show that people with disabilities do not have equal opportunities to benefit from a program and thus are excluded from or denied the benefits of that program is to show that they lack meaningful access¹⁴ to that program. *See, e.g., Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 503-04, 506-07 (4th Cir. 2016) (“*NFB*”); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 231-32 (M.D.N.C. 2020); *Westchester Disabled On the Move, Inc. v. Cnty. of Westchester*, 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004). Accessibility of the absentee voting program, not voting in general, is the relevant inquiry.¹⁵

¹⁴ Although some courts in this Circuit have expressed the relevant standard as whether a voting program is “readily accessible,” *see People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1155, 1159-60, 1165 (N.D. Ala. 2020), that language is derived from 28 C.F.R. § 35.150, which deals only with *physical accessibility* of “existing facilities,” *see Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (physical accessibility of wheelchair ramps and bathrooms at a courthouse). Section 35.150(a) includes references that indicate its applicability to physical sites. *See e.g.*, 35.150(a)(2) (reference to “historic property”); 35.150(b)(2) (noting numerous physical sites such as swimming pools). Accordingly, the “readily accessible” standard does not apply to other issues of accessibility. *See NFB*, 813 F.3d at 504 (voting programs).

¹⁵ Defendants apparently do not dispute that absentee voting and in-person voting are separate “services, programs, or activities” for purposes of an ADA analysis, nor can they. ECF 760 at 25, 29 (referring to access to “absentee voting”); *see also NFB*, 813 F.3d at 503-05 (absentee voting relevant program).

The factual record shows that the Drop Box Restrictions exclude, or deny the benefits of, the absentee voting program to people with disabilities. Though close to one-sixth (15.7%) of voters with disabilities used a drop box in 2020, Section 26 restricts the availability of drop boxes in ways that make it harder for many disabled citizens to vote, due to mobility challenges in getting to and going inside an election office to deliver a ballot. SAMF ¶ 641-42 (Schur Rep. ¶ 19). Requiring drop boxes to be inside offices and only available for limited hours means disabled voters are more likely to face barriers than non-disabled voters. SAMF ¶ 643-44 (Schur Rep. ¶ 99). Defendants focus on the details of individual witnesses (ECF 760 at 28-29), but the Drop Box Restrictions burden large numbers of disabled voters. SAMF ¶ 641-43 (Schur Rep. ¶¶ 19, 99).

County election officials report that disabled voters were denied an equal opportunity to access drop boxes. SAMF ¶ 660 (Hall Cnty Dep. 153:2-6; Athens-Clarke Cnty Dep. 124:6-17). Plaintiffs are among those who could not use drop boxes in 2022 or could only do so by incurring additional burdens that voters without disabilities do not face. A Georgia Advocacy Office constituent who had previously been able to drive to a drop box and submit his absentee ballot without leaving his car found in 2022 that he could not use the drop box because it was inside the building; he can walk only about 10 yards and poll workers refused to assist. SAMF ¶ 665 (Orland Decl. ¶ 17). Plaintiff Georgia ADAPT is aware of people who were

not able to use drop boxes in 2022 because they are located inside. SAMF ¶ 667 (Thornton Decl. ¶ 23); *see also id.* ¶ 945-46 (Solomon Dep. 21:22-22:15, 30:16-21, 31:9-24, 45:5-8) (elderly voter with health issues could no longer use a drop box and had to vote in person). Voters who could use drop boxes often had to face significant, painful burdens to do so. Patricia Chicoine had to walk down a long hall, without handrails, and could only reach the drop box by holding onto chairs and taking breaks. SAMF ¶ 664 (Chicoine Decl. ¶¶ 7-9).

Defendants argue that because each of Plaintiffs' witnesses cited in their Preliminary Injunction brief "was able to vote" in some way other than with drop boxes, or by taking on extra burdens to use drop boxes, there is no ADA violation. ECF 760 at 28-29. But, as this Court has determined, exclusion or denial from a voting program need not be absolute to establish an ADA violation,¹⁶ *see* 12/9/2021 MTD Order [ECF 110] 36, and so this argument fails.

The factual record also demonstrates that drop boxes provide voters tangible benefits that are denied to disabled voters who cannot access them, in violation of the ADA. Once a public entity makes a program available to all voters, it must ensure that the program is accessible to both disabled and non-disabled voters. *See People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1158 (N.D. Ala. 2020) (collecting

¹⁶ *See also Democracy N.C.*, 476 F. Supp. 3d at 230-31.

cases). Furthermore, courts should consider the cumulative impacts of various different restrictions on disabled voters’ access to the particular voting program, because the relevant benefit is not “merely the opportunity to vote at some time and in some way,” but rather equal opportunity to fully participate in that program. *Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 198-99 (2d Cir. 2014). Contrary to Defendants’ assertions that “the U.S. mail is also available” where drop boxes are inaccessible (ECF 760 at 27), the State offers, and voters choose, drop boxes precisely because drop boxes allow voters additional benefits, including avoiding the delay and uncertainty inherent in the mail system. *Supra* at 34-35; *see also, e.g.*, SAMF ¶ 668 (Halsell Decl. ¶ 7); SAMF ¶ 662 (Chicoine Decl. ¶¶ 3-5); SAMF ¶¶ 945-46 (Solomon Dep. 21:22-22:15, 30:16-21, 31:9-15). Certainty is especially beneficial to voters in light of the documented instances in which counties have delayed sending out absentee ballots.¹⁷

Defendants imagine “alternative means” for Plaintiffs’ witnesses to return their ballots without using drop boxes (ECF 760 at 28), but having to rely on such “alternative means” to access a program that is available to non-disabled voters

¹⁷ For example, Cobb County failed to issue absentee ballots for the November 2022 general election and the December 2022 runoff election to over one thousand voters with enough time for the voters to be able to complete and mail them back. SAMF ¶ 631 (Consent Order, *Cook v. Cobb Cnty. Bd. of Elections and Registration* (Ga. Super. Ct. Nov. 7, 2022)); (Interlocutory Inj., *Crowell v. Cobb Cnty. Bd. of Elections and Registration* (Ga. Super. Ct. Dec. 2, 2022)).

violates the ADA. *See Am. Council of the Blind of N.Y., Inc. v. City of N.Y.*, 495 F. Supp. 3d 211, 235-36 (S.D.N.Y. 2020) (ADA violation existed even where “many have found workarounds and alternate means” of accessing a program, including “inconvenient and sometimes costly” ones). Further, restrictions that might “dissuade” a voter from using a voting method can render a voting program inaccessible in violation of Title II. *See People First of Ala.*, 491 F. Supp. 3d at 1160, 1165 (curbside restrictions voting and photo ID requirements for absentee voting rendered in-person voting and absentee voting, respectively, inaccessible for some disabled voters because those restrictions “may dissuade” them from using those voting methods).

As one example, Defendants suggest that because the drop boxes were burdensome for Mr. Wendell Halsell to access, he should have asked his nephew to return his ballot for him instead. ECF 760 at 28. But requiring disabled people to use “workarounds and alternate means” to access a voting program denies those voters an equal opportunity to access that program. *Am. Council of the Blind*, 495 F. Supp. 3d at 235. Non-disabled voters can choose among a number of voting options based on their circumstances and preferences, while voters with disabilities have at least one of those choices—accessing a drop box— withheld.

Defendants argue that because drop boxes were not available in Georgia before the 2020 election, the existence of any drop boxes satisfies the ADA. ECF

760 at 26. However, that is the wrong comparison; rather, the ADA requires comparing disabled individuals' access to the voting program to non-disabled individuals' access to that same program. *See NFB*, 813 F.3d at 506-07 (comparing disabled voters' ability to mark absentee ballots without assistance with the ability of others to do the same); *Alexander v. Choate*, 469 U.S. 287, 301-02 (1985).

Defendants' reliance on *Brnovich*, 141 S. Ct. at 2338-39 (2021), as the standard for assessing meaningful access under the ADA lacks any basis. ECF 760 at 2, 26-27; ECF 761 at 22. *Brnovich* addressed race discrimination claims under Section 2 of the VRA and does not address or have any bearing on ADA claims (which involve a distinct statute with different language and governing standards). *See Brnovich*, 141 S. Ct. at 2336-41. Moreover, minimizing the need for disabled voters to "travel to a polling location" to use a drop box as a "usual burden[] of voting," ECF 760 at 27, misses the point of the ADA entirely—whether such travel is a "usual burden" for non-disabled voters is irrelevant where those burdens disproportionately impact and deny disabled voters an equal opportunity to access the absentee voting program.

Finally, Defendants claim that no denial of access has occurred because "[c]ounties put drop boxes in 'handicapped accessible' locations," and because "voters returning absentee ballots to drop boxes do not have to wait in line with those seeking to vote in person." ECF 760 at 26-27. To the extent Defendants are referring

to the ADA's standards for physical accessibility for buildings, these are governed by a different set of regulations than those underlying Plaintiffs' claims. *See* 28 C.F.R. § 35.149 *et. seq.*; *supra* n.14. The accessibility of absentee voting is not simply a matter of whether buildings where drop boxes are located are ADA compliant, because people with disabilities face additional burdens in traveling inside buildings as compared to non-disabled people. SAMF ¶ 652 (Schur Rep. ¶ 99(a)). Regardless, the record contains facts disputing whether drop boxes have been placed in ADA-compliant locations. SAMF ¶ 651 (Orland Decl. ¶ 26); *see also id.* ¶ 661 (Kidd Dep. 161:10-20). The record also shows that people with disabilities in 2022 were forced to wait in line to access indoor drop boxes, along with those waiting to vote in person, which is particularly burdensome for disabled voters. SAMF ¶ 653 (Thornton Decl. ¶ 21; Schur Rebuttal Rep. ¶ 11); SAMF ¶ 592 (Schur Rep. ¶¶ 80, 81).

In sum, genuine disputes of material fact as to whether the Drop Box Restrictions have denied disabled voters with an equal opportunity to access the absentee voting program in violation of the ADA, preclude summary judgment.

D. Evidence Shows the Exclusion or Denial of Access in Violation of the ADA by Reason of Disability Under Disparate Impact and Failure to Accommodate Theories

In “establish[ing] a causal link between their disabilities and the exclusion, denial of benefits, or discrimination” under the third element of the *prima facie* case,

People First of Ala. 491 F. Supp. 3d at 1155, Plaintiffs need only demonstrate that disability is “*a factor that made a difference in the outcome.*” *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1334 (11th Cir. 1999) (first emphasis added) (internal citation and quotation marks omitted); *see also Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008). This is a factual question inappropriate for summary judgment. *See R.W.*, 114 F. Supp. 3d at 1286.

Plaintiffs can show causation through at least two distinct theories of liability: (1) that the Drop Box Restrictions have a disparate impact on disabled voters, and (2) that Defendants have failed to make reasonable modifications (or accommodations) to avoid discrimination.¹⁸ *See League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1157 (N.D. Fla. 2022), *aff’d in part, rev’d in part on other grounds sub nom LWV*, 66 F.4th 905 (11th Cir. 2023); *NFB*, 813 F.3d at 503 n.5; *Cavorley v. Superintendent of Cobb Cnty. Sch. Dist.*, 55 F.4th 1296, 1303 (11th Cir. 2022).¹⁹ Importantly, under a disparate impact theory, even statutes—such

¹⁸ Regulations implementing Title II of the ADA use the term “reasonable modifications,” 28 C.F.R. § 35.130(b)(7), instead of “reasonable accommodations” as is used in Title I of the ADA related to employment, 42 U.S.C. § 12112(b)(5)(A). Courts have used the terms interchangeably and thus Plaintiffs do as well in reference to their claim that Defendants have violated 28 C.F.R. § 35.130(b)(7).

¹⁹ A Title II violation may be established without showing intentional discrimination or animus under a disparate impact or failure to accommodate theory. *See, e.g., NFB*, 813 F.3d at 510.

as the Drop Box Restrictions—that do not facially address disability can still deprive disabled individuals’ access to a program due to their disabilities. *See Democracy N.C.*, 476 F. Supp. 3d at 232 (finding causal link between exclusion from absentee voting based on nursing home staff assistance restrictions and plaintiff’s disability); *People First of Ala.*, 491 F. Supp. 3d at 1161, 1165 (finding causal link between exclusion from in-person voting and absentee voting based on curbside voting restrictions and photo ID requirements, respectively, and plaintiffs’ disabilities). If a facially neutral practice or policy has a significant enough disparate impact to raise an inference of causation, liability may be found based on disparate impact. *See, e.g., Nicholas v. Fulton Cnty. Sch. Dist.*, No. 20-CV-3688, 2022 WL 2276900, at *19 (N.D. Ga. June 23, 2022); *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016); *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021); *Sosa v. Mass. Dep’t of Corr.*, 80 F.4th 15, 31 (1st Cir. 2023); *see also Berg v. Fla. Dep’t of Lab. & Emp. Sec., Div. of Vocational Rehab.*, 163 F.3d 1251, 1254 (11th Cir. 1998).

The record shows the Drop Box Restrictions deny disabled voters an equal opportunity to access the absentee voting program “by reason of disability” because disability is at least *a factor* that made a difference in denying access. The indoor requirement for drop boxes creates additional burdens directly tied to disability and which disparately impact disabled voters. Those with mobility disabilities face a

significant extra burden in having to get out of their vehicles and go inside an office, and stand in line to deliver their ballots. SAMF ¶ 643 (Schur Rep. ¶ 99); *id.* ¶¶ 665-66 (Orland Decl. ¶ 17). People with compromised immune systems may face risks associated with going inside a public building, and people with visual disabilities may be unable to navigate a building to find the drop box. SAMF ¶ 650 (Schur Rebuttal Rep. ¶ 11). Without disabilities, these voters would not face these additional burdens. *Democracy N.C.*, 476 F. Supp. 3d at 232.

The restriction that drop boxes be limited on a per-county basis, and open only during limited hours, also creates additional burdens for disabled voters, for which disability is a factor. SAMF ¶ 655 (Schur Rep. ¶ 99(a)). 733,000 Georgians aged 18 or older (9.6%) have a “temporary or permanent condition or handicap that makes it difficult to travel outside of the home.” SAMF ¶ 579 (Schur Rep. ¶ 60). Georgians with disabilities have been shown to be four times more likely to live in a zero-vehicle household, less likely to be drivers, and more likely to find travel to be a financial burden. *Id.*; *see also* SAMF ¶ 657 (Chatman Rep. ¶ 3). Voting among individuals who have access to a vehicle they can drive is much more likely compared to those without one. SAMF ¶ 656 (Schur Rep. ¶ 62). Given the transportation barriers people with disabilities disproportionately face, having a smaller number of drop boxes increases the burden in delivering a ballot and eliminates the benefit of drop boxes. SAMF ¶ 655 (Schur Rep. ¶ 99(a)). Disabled

voters are also two to three times more likely to have an increase in travel time to reach drop boxes as compared to people without disabilities. SAMF ¶ 657 (Chatman Rep. ¶ 5). Increases in travel distance to a drop box dissuade voters with disabilities by raising the cost of voting, leading to decreased participation. SAMF ¶ 658 (Schur Rebuttal Rep. ¶¶ 4-5). Accordingly, Plaintiffs show a genuine dispute of factual dispute as to the Drop Box Restrictions' disparate impact.

Furthermore, public entities have an affirmative obligation to “make reasonable modifications in policies, practices, or procedures” when “necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7)(i); *see also Johnson v. Callanen*, No. 22-CV-00409, 2023 WL 4374998, at *6, *11 (W.D. Tex. July 6, 2023) (granting plaintiffs summary judgment on ADA claims challenging visually impaired voters' absentee ballot access).²⁰ A reasonable modification necessary to avoid discrimination on the basis of disability must be provided unless the public entity can “demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7)(i); *see also NFB*, 813 F.3d at 508.

²⁰ The Eleventh Circuit has held that a defendant's obligation to provide a reasonable modification is triggered “when the defendant has ‘enough information to know of both the disability and desire for an accommodation,’” such that the circumstances would “cause a reasonable [defendant] to make appropriate inquiries about the possible need for an accommodation.” *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1226 (11th Cir. 2016) (citations omitted).

Plaintiffs have demonstrated that Defendants have failed to provide any reasonable modification to the Drop Box Restrictions for people with disabilities. Though, as described *supra* at 48-50, they are aware of voters lacking access, counties cannot modify the SB 202 drop box rules as a reasonable modification, *see* SAMF ¶ 648 (Fulton Cnty Dep. 258:25-259:12; Hall Cnty Dep.152:7-16; Columbia Cnty Dep. 156:14-23), and do not know if they are permitted to waive SB 202’s restrictions, *id.* ¶ 648 (Hall Cnty Dep. 110:15-23). Nor have Defendants shown that invalidating the Drop Box Restrictions or otherwise modifying them would fundamentally alter the absentee voting program. SAMF ¶ 647 (Hall Cnty Dep. 69:16-22, 72:6-12; Athens-Clarke Cnty Dep. 114:23-116:11, 121:9-122:21).²¹ In any event, determining whether an accommodation is reasonable or a fundamental alteration of the absentee voting program is “a highly fact-specific inquiry,” 8/18/2023 PI Order [ECF 615] 22, not appropriate for resolution on summary judgment.

²¹ Though the Court found Plaintiffs’ proposed modification at the preliminary injunction phase to “fundamentally alter” the voting program, 8/18/2023 PI Order [ECF 615] 23-25, a factual dispute remains as to the resources and burden associated with drop box security before SB 202. “The findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

E. Defendants Ignore Plaintiffs’ Showing of Exclusion from Absentee Voting by Reason of Disability Based on Discriminatory Methods of Administration

Plaintiffs additionally challenge the Drop Box Restrictions under Title II’s prohibition on “utiliz[ing] criteria or *methods of administration* ... [t]hat *have the effect* of subjecting qualified individuals with disabilities to discrimination on the basis of disability ... [or] [t]hat *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)(i)-(ii) (emphases added); Pls.’ First Am. Compl. [ECF 83] at 12. “Courts have recognized *methods of administration claims as distinct causes of action.*” *Price v. Shibinette*, No. 21-CV-0025, 2021 WL 5397864, at *8 (D.N.H. Nov. 18, 2021) (emphasis added). “The phrase ‘criteria or methods of administration’ refers to official written policies of the public entity and to the actual practices of the public entity.” 28 C.F.R. § Pt. 35, App. B. “This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are *neutral on their face*, but deny individuals with disabilities *an effective opportunity to participate.*” *Id.* (emphases added); *see also, e.g., La Unión del Pueblo Entero v. Abbott*, 618 F. Supp. 3d 449, 490 (W.D. Tex. 2022) (Secretary of State “may not ‘utilize criteria or methods of administration ... [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability’

when issuing directives, distributing election materials, and protecting voting rights” (emphasis added) (second alteration in original) (quoting 28 C.F.R. § 35.130(b)(3))). Methods of administration claims lie where a program’s administration or multiple aspects of a program compound to frustrate its purpose for disabled people. *See, e.g., La Unión del Pueblo Entero*, 618 F. Supp. 3d at 490; *Lewis v. Cain*, No. 15-CV-318, 2021 WL 1219988, at *26-52 (M.D. La. Mar. 31, 2021).

Though Defendants ignore Plaintiffs’ “methods of administration” claim, the record shows that Defendants’ method of administering the Drop Box Restrictions violates the ADA. The challenged SB 202 restrictions have a “cascading effect that compounds the burden on people with disabilities to cast a ballot.” SAMF ¶ 645 (Schur Rep. ¶ 108); *see also* SAMF ¶ 649 (Schur Rep. ¶ 83(g)). For instance, a disabled voter who cannot get to a drop box may also not have access to an assistor, difficulties magnified given the shortened timeframe to obtain a ballot.

Take Empish Thomas, a blind voter in DeKalb County. She cannot reach drop boxes in her county now that they are available for a shorter window of time, and in fewer locations; she would need to set up two trips via paratransit or pay a driver to reach one. SAMF ¶ 670 (Thomas Decl. ¶¶ 1, 4, 15-19). She also does not have an eligible assistor under SB 202. *Id.* Absentee voting is not accessible to her as a result of SB 202’s multiple new barriers. *Id.*; *see Am. Council of the Blind of N.Y.*, 495 F. Supp. 3d at 235 (“conditioning access [to a public program] upon arduous or costly

‘coping mechanisms’ ... is ‘anathema to the stated purpose’” of the ADA) (citation omitted). Similarly, when a disabled voter does not receive an absentee ballot in time to mail it due to the shortened runoff period or compressed window for voting absentee, they are less able to use a drop box and more likely to be disenfranchised than voters without disabilities facing the same delay. *Cf.* SAMF ¶ 640 (Floyd Decl. ¶¶ 12-15) (disabled voter could not vote in December 2022 runoff).

Therefore, genuine disputes of material fact as to whether Defendants’ method of administering drop boxes, both alone and together with SB 202’s other absentee voting restrictions, violates the ADA, preclude summary judgment on this claim.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants’ motion for summary judgment on SB 202’s drop box provision under Section 2 of the VRA, Title II of the ADA and Section 504 of the Rehabilitation Act, and the First and Fourteenth Amendments to the Constitution.

Respectfully submitted this 19th day of January, 2024.

/s/ Bryan L. Sells

Bryan L. Sells
Georgia Bar No. 635562
The Law Office of Bryan Sells, LLC
PO Box 5493 Atlanta, Georgia 31107
Tel: (404) 480-4212
Email: bryan@bryansellsllaw.com

/s/ Laurence F. Pulgram

Laurence F. Pulgram (pro hac vice)
lpulgram@fenwick.com
Molly Melcher (pro hac vice)
mmelcher@fenwick.com
Armen Nercessian (pro hac vice)
Anercessian@fenwick.com
Ethan Thomas (pro hac vice)
EThomas@fenwick.com
FENWICK & WEST LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 875-2300

Joseph S. Belichick (pro hac vice)
jbelichick@fenwick.com
FENWICK & WEST LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041-2008
Telephone: (650) 988-8500

Catherine McCord (pro hac vice)
cmccord@fenwick.com
FENWICK & WEST LLP
902 Broadway, Suite 14
New York, NY 10010
Telephone: (212) 430-2690

/s/ Vilia Hayes

Vilia Hayes (pro hac vice)
vilia.hayes@hugheshubbar.com
Mana Ameri (pro hac vice)
mana.ameri@hugheshubbard.com
William J. Beausoleil (pro hac vice)
william.beausoleil@hugheshubbardreed.com
Neil Oxford (pro hac vice)
neil.oxford@hugheshubbard.com
Gregory Farrell (pro hac vice)
gregory.farrell@hugheshubbard.com
James Henseler (pro hac vice)
james.henseler@hugheshubbard.com
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004-1482
Telephone: (212) 837-6000
Facsimile: (212) 422-4726

Gerald Weber
Email: wgerryweber@gmail.com
Georgia Bar No. 744878
Law Offices of Gerry Weber, LLC
Post Office Box 5391
Atlanta, Georgia 31107
Telephone: 404.522.0507

Jon Greenbaum (pro hac vice)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (pro hac vice)
erosenberg@lawyerscommittee.org
Julie M. Houk (pro hac vice)
jhouk@lawyerscommittee.org
Jennifer Nwachukwu (pro hac vice)
jnwachukwu@lawyerscommittee.org
Heather Szilagyi (pro hac vice)
hszilagyi@lawyerscommittee.org

LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1500 K Street NW, Suite 900 Washington,
D.C. 20005
Telephone: (202) 662-8600
Facsimile: (202) 783-0857

*Attorneys for Plaintiffs Georgia State
Conference of the NAACP, Georgia
Coalition for the People's Agenda,
Inc., League of Women Voters of
Georgia, Inc., GALEO Latino
Community Development Fund, Inc.,
Common Cause, and Lower Muskogee
Creek Tribe*

/s/ Leah C. Aden

Leah C. Aden (pro hac vice)
laden@naacpldf.org
Alaizah Koorji (pro hac vice)
akoorji@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/ Brian Dimmick (pro hac vice)

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

Caitlin May (Ga. Bar No. 602081)
cmay@acluga.org
Cory Isaacson (Ga. Bar No. 983797)
cisaacson@acluga.org
ACLU FOUNDATION OF
GEORGIA, INC.
P.O. Box 77208
Atlanta, Georgia 30357
Telephone: (678) 981-5295
Facsimile: (770) 303-0060

Sophia Lin Lakin (pro hac vice)
slakin@aclu.org
Davin M. Rosborough (pro hac vice)
drosborough@aclu.org
Jonathan Topaz (pro hac vice)
jtopaz@aclu.org
Dayton Campbell-Harris (pro hac vice)
dcampbell-harris@aclu.org

Casey Smith (pro hac vice)
csmith@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

Debo P. Adegbile (pro hac vice)
debo.adegbile@wilmerhale.com
Alexandra Hiatt (pro hac vice)
alexandra.hiatt@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
Mikayla Foster (pro hac vice)
mikayla.foster@wilmerhale.com
Sofie C. Brooks (pro hac vice)
sofie.brooks@wilmerhale.com
Lucas L. Fortier (pro hac vice)
lucas.fortier@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
Laura Powell (pro hac vice)
laura.powell@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, D.C. 20037
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*

/s/ Kurt Kastorf
Kurt Kastorf (GA Bar No. 315315)
kurt@kastorflaw.com
KASTORF LAW, LLC
1387 Iverson Street, N.E., Suite 100
Atlanta, GA 30307
Telephone: 404-900-0330

Judith Browne Dianis (pro hac vice)

JBrowne@advancementproject.org
Angela Groves (pro hac vice)
AGroves@advancementproject.org
Matthew A. Fogelson (pro hac vice)
MFogelson@advancementproject.org
ADVANCEMENT PROJECT
1220 L Street, N.W., Suite 850
Washington, DC 20005
Telephone: (202) 728-9557

Clifford J. Zatz (pro hac vice)
CZatz@crowell.com
Justin D. Kingsolver (pro hac vice)
JKingsolver@crowell.com
William Tucker (pro hac vice)
WTucker@crowell.com
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: (202) 624-2500

Jordan Ludwig (pro hac vice)
JLudwig@crowell.com
CROWELL & MORING LLP
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
Telephone: (213) 443-5524

*Attorneys for Plaintiffs The Concerned
Black Clergy of Metropolitan Atlanta,
Inc., The Justice Initiative, Inc.,
Metropolitan Atlanta Baptist Ministers
Union, Inc., First Congregational
Church, United Church of Christ
Incorporated, and Georgia Latino
Alliance for Human Rights, Inc.*

/s/ Pichaya Poy Winichakul
Pichaya Poy Winichakul (Bar 246858)

poy.winichakul@splcenter.org
Bradley E. Heard (Bar 342209)
bradley.heard@splcenter.org
Matletha N. Bennette (pro hac vice)
matletha.bennette@splcenter.org
SOUTHERN POVERTY LAW
CENTER
150 E. Ponce de Leon Ave., Suite 340
Decatur, Georgia 30031-1287
Telephone: (404) 521-6700
Facsimile: (404) 221-5857

Jess Unger (pro hac vice)
jess.unger@splcenter.org
Sabrina S. Khan (pro hac vice)
sabrina.khan@splcenter.org
SOUTHERN POVERTY
LAW CENTER
1101 17th Street NW, Suite 705
Washington, DC 20036
Telephone: (202) 728-9557

/s/ Adam Sieff

Adam S. Sieff (pro hac vice)
adamsieff@dwt.com
Brittni Hamilton (pro hac vice)
brittnihamilton@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

Matthew Jedreski (pro hac vice)
mjedreski@dwt.com
Grace Thompson (pro hac vice)
gracethompson@dwt.com
Danielle Eun Kim (pro hac vice)
daniellekim@dwt.com

Kate Kennedy
katekennedy@dwt.com
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, Washington 98104-1610
Telephone: (206) 622-3150
Facsimile: (206) 757-7700

David M. Gossett (pro hac vice)
davidgossett@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

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

/s/ Meredyth L. Yoon

Meredyth L. Yoon (GA Bar No.
204566)
myoon@advancingjustice-atlanta.org
Laura Murchie (pro hac vice)
lmurchie@advancingjustice-atlanta.org
ASIAN AMERICANS ADVANCING
JUSTICE-ATLANTA
5680 Oakbrook Parkway, Suite 148
Norcross, Georgia 30093
(404) 585 8446 (Telephone)
(404) 890 5690 (Facsimile)

/s/ Eileen Ma

Eileen Ma (pro hac vice)
eileenm@advancingjustice-alc.org

Kimberly Leung (pro hac vice)
kimberlyl@advancingjustice-alc.org
ASIAN AMERICANS ADVANCING
JUSTICE-ASIAN LAW CAUCUS
55 Columbus Avenue
San Francisco, CA 94111
(415) 896 1701 (Telephone)
(415) 896 1702 (Facsimile)

/s/ Niyati Shah

Niyati Shah (pro hac vice)
nshah@advancingjustice-aajc.org
Terry Ao Minnis (pro hac vice)
tminnis@advancingjustice-aajc.org
Noah Baron (pro hac vice)
nbaron@advancingjustice-aajc.org
ASIAN AMERICANS ADVANCING
JUSTICE-AAJC
1620 L Street, NW, Suite 1050
Washington, DC 20036
(202) 815 1098 (Telephone)
(202) 296 2318 (Facsimile)

/s/ R. Adam Lauridsen

Leo L. Lam (pro hac vice)
llam@keker.com
R. Adam Lauridsen (pro hac vice)
alauridsen@keker.com
Connie P. Sung (pro hac vice)
csung@keker.com
Candice Mai Khanh Nguyen (pro hac
vice)
cnguyen@keker.com
Luis G. Hoyos (pro hac vice)
lhoyos@keker.com
Rylee Kercher Olm (pro hac vice)
rolm@keker.com
Niharika Sachdeva (pro hac vice)
nsachdeva@keker.com

Elizabeth Heckmann (pro hac vice)
eheckmann@keker.com
KEKER, VAN NEST AND PETERS
LLP
633 Battery Street
San Francisco, CA 94111-1809
(415) 391 5400 (Telephone)
(415) 397 7188 (Facsimile)

*Attorneys for Plaintiffs Asian
Americans Advancing Justice—Atlanta,
Steven J. Paik, Nora Aquino, Angelina
Thuy Uddullah, and Anjali Enjeti-
Sydow*

/s/ Uzoma N. Nkwonta

Uzoma N. Nkwonta*
Jacob D. Shelly*
Melinda K. Johnson*
Tina Meng Morrison*
Marcos Mocine-McQueen*
Samuel T. Ward-Packard*
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW
Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4490
unkwonta@elias.law
jshelly@elias.law
mjohnson@elias.law
tmengmorrison@elias.law
mmcqueen@elias.law
swardpackard@elias.law
*Admitted pro hac vice

Halsey G. Knapp, Jr.
Georgia Bar No. 425320
Joyce Gist Lewis

Georgia Bar No. 296261
Adam M. Sparks
Georgia Bar No. 341578
KREVOLIN & HORST, LLC
1201 W. Peachtree St., NW
One Atlantic Center, Suite 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
hknapp@khlawfirm.com
jlewis@khlwafirm.com
sparks@khlawfirm.com

*Attorneys for Plaintiffs New Georgia
Project, Black Voters Matter Fund,
Rise, Inc., Elbert Solomon, Fannie
Marie Jackson Gibbs, and Jauan
Durbin*

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), the undersigned hereby certifies that the foregoing Plaintiffs' Opposition to State Defendants' Motion for Summary Judgment on SB 202's Drop Box Provision was prepared in Times New Roman 14-point font and type selection approved by the Court in Local Rule 5.1(C). The undersigned further certifies that on January 19, 2024, the forgoing was filed with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record in this case.

/s/ Vilia Hayes
Vilia Hayes