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

IN RE GEORGIA SENATE BILL 202	Master Case No.: 1:21-MI-55555-JPB

STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CHANGES IN TIMING

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INTRODUCTION

Faced with the complete lack of evidence of their allegations of massive burdens on the right to vote, Plaintiffs are reduced to throwing anything against the wall to try and identify something that might be a triable issue regarding the changes in election timelines in SB 202. But this Court must now consider the facts that are actually material to the legal claims in this case. Those facts all point in the same direction—that the changes in election calendars made by SB 202 for absentee-by-mail voting and runoff elections do not violate the ADA, Section 504, the U.S. Constitution, or the Voting Rights Act.

Despite Plaintiffs' best efforts to create triable issues of fact, there are none. This Court should grant judgment as a matter of law to State Defendants on the claims related to changes in election process timing.

ARGUMENT

Without the law on their side, Plaintiffs fill their brief with immaterial facts that do not prevent the granting of summary judgment to State Defendants on the timing issues challenged by Plaintiffs. Even in fact-intensive Section 2 cases, summary judgment can be granted to defendants and it is appropriate here. *See Ga. State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1345 (11th Cir. 2015); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005).

I. State Defendants addressed the timeline for completing an absentee ballot.

Plaintiffs repeatedly claim that the different timelines for the *delivery* of absentee ballots was not raised by State Defendants in their motion and thus has been waived.[1] But State Defendants cited to and relied on the Grimmer Report, which considered whether absentee-ballot applications sent during the revised SB 202 timelines were ultimately counted—which must include both sending the application and completing the absentee ballot. [Doc. 758-1, pp. 3–5]. State Defendants then explained that those revised deadlines, which include the time for applying for and returning and absentee ballot, did not violate the law. [Doc. 758-1, pp. 14–15, 20–21, 24–25]. Thus, any challenges to the change in the period for election officials to *mail* absentee ballots to voters (from 49 to 29 days) is necessarily included in those arguments about the deadlines that apply to absentee-ballot applications.

Further, even if those references did not include the 49-to-29-day change, Plaintiffs have not been prejudiced because they have made arguments in response to those changes in their brief. Thus, there has been no waiver of any argument regarding the change in timeline for county election officials to mail absentee ballots.

[1] Waiver is a strange word to use here because if Plaintiffs are correct, it does not mean that the Court must find for Plaintiffs—just that that particular issue would continue to any trial in these matters.

II. State Defendants are entitled to summary judgment on Plaintiffs' ADA and Section 504 claims regarding the election timelines.

To decide State Defendants' motion regarding Plaintiffs' ADA and Section 504 claims, the Court must determine whether Plaintiffs have been denied meaningful access to the voting program in Georgia. *See* [Doc. 615, pp. 12–13]. As discussed below, Plaintiffs cannot show any material fact in dispute regarding their level of access or that they are entitled to judgment as a matter of law.

Plaintiffs present a variety of facts related to the difficulties faced by voters with disabilities. [Doc. 824, pp. 13–15]. And State Defendants do not discount the challenges faced in life by Georgians with disabilities. But these facts are not material to the issues for the Court regarding Plaintiffs' ADA and Section 504 claims because they do not uniquely affect voters with disabilities. For example, the fact that Georgians without IDs could need to copy or photograph records is faced by all voters. Plaintiffs similarly cite alleged increases in absentee-ballot rejections but offer no evidence that any increase was unique to voters with disabilities, because this affects all voters who miss the application deadline. And Plaintiffs rely on absentee-voting rates for voters with disabilities from the unique COVID election in 2020. None of these facts are material to the questions before the Court regarding access to absentee ballots.

A. The relevant legal standards for Plaintiffs' ADA and Section 504 claims.

The applicable legal standards are straightforward. First, this Court must determine what "program" is at issue. Plaintiffs claim that the only program is the absentee voting program, not the voting program as a whole. [Doc. 824, p. 18]. In so doing, they rely primarily on two out-of-circuit decisions that involved unique considerations.[2] But neither of those cases addresses the scope of the program in Georgia, where significant periods of early, in-person voting are required by statute, in addition to election-day and no-excuse absentee voting. Thus, framing the "program" as voting generally is not the same as framing virtual schooling as an accommodation for education in general. *L.E. v. Superintendent of Cobb Cty. Sch. Dist.*, 55 F.4th 1296, 1303 (11th Cir. 2022). Rather, as other courts in this district have held when considering ADA claims related to absentee ballots, the relevant program is the "state's voting program." *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1221 (N.D. Ala. 2020).

Second, the Court must determine whether Plaintiffs have been "denied meaningful access" to the voting process through the changes in timing. [Doc.

[2] *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 508 (4th Cir. 2016) involved the modification of an *existing* online tool to make it accessible for voters with disabilities; *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 232 (M.D.N.C. 2020) was a COVID-era case relying on *Lamone* and not otherwise considering the relevant program.

615, p. 15] (quoting *Todd v. Carstarphen*, 236 F. Supp. 3d 1311, 1328 (N.D. Ga. 2017)). There is no requirement of "equal access, preferential treatment or accommodations that are aligned with the plaintiff's preferences." [Doc. 615, pp. 15–16] (citing *Medina v. City of Cape Coral*, 72 F. Supp. 3d 1274, 1279 (M.D. Fla. 2014)). There is no requirement of equal access to voting generally or absentee voting specifically. *Id.*; *see also Ganstine v. Sec'y, Fla. Dep't of Corr.*, 502 F. App'x 905, 910 (11th Cir. 2012). The cases cited by Plaintiffs do not alter this analytical process because they are out of circuit and do not address absentee voting. *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 199 (2d Cir. 2014) involved the accessibility of polling *locations*, not absentee balloting, and the citation to *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 589 (1999) just quotes the text of the ADA. Finally, *Am. Council of the Blind of N.Y., Inc. v. City of N.Y.*, 495 F. Supp. 3d 211, 235 (S.D.N.Y. 2020), involved pedestrian crossings at intersections, not voting. As discussed below, Plaintiffs have not brought forward any evidence of a lack of meaningful access.

Third, the Court must determine if Plaintiffs have shown a "causal link between their disabilities and the exclusion, denial of benefits, or discrimination." [Doc. 615, p. 20] (quoting *People First of Ala.*, 491 F. Supp. 3d at 1155). Plaintiffs claim they can demonstrate this link through disparate

impact[3] and/or failure to make a reasonable accommodation. [Doc. 824, p. 19]. But the cases relied on by Plaintiffs do not support these claims. *Democracy N.C.*, 476 F. Supp. 3d at 232 does not discuss a causal link and *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1161 (N.D. Ala. 2020) relied on COVID-era guidance to establish a link. As discussed below, disparate impact cannot be enough to establish a causal link.

The lack of any evidence of a reasonable alternative accommodation also means Plaintiffs cannot prevail at summary judgment. When the proposed accommodation from Plaintiffs eliminates the entirety of a regulation or practice, then it is a "fundamental alteration" of the law and is not a proper accommodation. [Doc. 615, pp. 23–24] (citing *League of Women Voters v. Lee*, 595 F. Supp. 3d 1042, 1158 (N.D. Fla. 2022), *aff'd in part, vacated in part, rev'd in part sub nom. League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905 (11th Cir. 2023) (leaving district court's ADA analysis undisturbed).

Finally, Plaintiffs claim that State Defendants did not address the discriminatory methods of administration, relying on two district court cases, one of which only addressed a motion to dismiss, *La Unión Del Pueblo Entero v. Abbott*, 618 F. Supp. 3d 449, 504 (W.D. Tex. 2022), and the other of which

[3] Plaintiffs criticize State Defendants for not addressing this factor in their motion. But in order to prevail at summary judgment, State Defendants must only demonstrate that one of the required elements of Plaintiffs' case fails.

involved prison administration where a prison did not follow its own procedures, *Lewis v. Cain*, Case No. 3:15-cv-318, 2021 U.S. Dist. LEXIS 63293, at *131 (M.D. La. Mar. 31, 2021). The claims regarding methods of administration raised here would overlap with the other elements of the ADA claims brought by Plaintiffs, and are therefore covered by State Defendants' points as to those elements. *See, e.g., Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 385 (3d Cir. 2005) (noting connection between fundamental alteration defense and discriminatory administration claim). In any case, Plaintiffs have not provided evidence of any dispute about a material issue of fact on these points.

B. The absentee ballot application timelines do not violate the ADA or Section 504.

Plaintiffs' entire argument about the time periods for requesting and returning an absentee ballot—to the extent it does not rely on inadmissible hearsay or actions by parties other than State Defendants[4]—boils down to

[4] As referenced in the Response to Plaintiffs' Statement of Additional Material Facts, reports about voters saying they had problems are inadmissible hearsay. *See, e.g.,* [Doc. 807-24 at 109:23–110:3 (ADAPT Dep.)] (relying on hearsay). Significantly, Plaintiffs have not provided evidence from voters saying they had difficulty voting that were unrelated to their own mistakes, decisions by *county* officials, or theorizing by their experts. *See* [Doc. 818-25, ¶¶ 8–9 (Floyd Dec.)] (voter had mistakenly not checked box to receive ballots for the entire cycle automatically and chose not to vote in person); [Doc. 819-5, ¶¶ 6–8 (Green Dec.)] (voter indicated county processed application but did not send ballot); [Doc. 812-15, ¶¶ (Schur Rep.)] (relying on survey data). Plaintiffs also rely

potential disparate impact. In other words, Plaintiffs believe broadly that (1) there will be challenges with absentee-by-mail ballots, (2) voters with disabilities use absentee ballots, therefore (3) there is a lack of meaningful access. But this is not consistent with either SB 202 or the governing law.

As to the former, Georgia's absentee-by-mail program allows voters with disabilities to submit applications 78 days before the first election of an election year and automatically receive absentee ballots throughout the entire election cycle. O.C.G.A. § 21-2-381(a)(1)(G). Plaintiffs argue that "returning a timely absentee ballot application is the only way a voter can participate in the [absentee voting] program," [Doc. 824, p. 23]—but that is precisely the point. Elections must be governed by rules and voters with disabilities must still comply with rules to participate in elections, just as they must be in line before 7:00pm on Election Day if they choose to vote in person.

Under Plaintiffs' approach, however, the ADA and Section 504 preempt the ability of states to place regulations on the voting process—when they have abundant meaningful access for months to apply ahead of the 11-day deadline. *Todd*, 236 F. Supp. 3d at 1328. Plaintiffs rely on potentially challenging situations that are far more related to the vagaries of life, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008), because one can easily imagine

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explicitly on what was admittedly a county mistake in the 2022 elections. [Doc. 824, p. 22 n.6].

situations where individuals are not able to leave their homes during even longer periods than the time previously allowed for requesting an absentee ballot.

Thus, Plaintiffs have not shown any basis for a lack of meaningful access because of the absentee-ballot application timelines in Georgia law.

C. The standardized runoff timeline does not violate the ADA or Section 504.

Plaintiffs claim there are disputes of fact regarding the implementation of a four-week runoff. But the only "barriers" they identify are similar to those faced by other voters, who also need to coordinate schedules and transportation over a nearly month-long period when a runoff occurs.[5] [Doc. 824, pp. 26–27]. And "[d]ifficulty in access a benefit, however, does not by itself establish a lack of meaningful access." *Todd*, 236 F. Supp. 3d at 1329. Plaintiffs' only argument is that, because there is less time for a runoff, there must be a lack of access. But this does not demonstrate a violation of the ADA or Section 504 because there is no denial of access to absentee voting. [Doc. 615, pp. 17–18].

[5] Plaintiffs again rely on Ms. Floyd's declaration about a problem with a *county* delivering a ballot after a voter did not timely request a ballot. *See* [818-25, ¶ 10] (discussion with county official regarding runoff ballot). In any case, State Defendants do not process absentee-ballot applications.

D. Plaintiffs do not discuss the causal link to disabilities.

Even if Plaintiffs had established some lack of meaningful access, they would still have had to provide some "causal link between their disabilities" and that lack of access. [Doc. 615, p. 20] (quoting *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1155 (N.D. Ala. 2020)). Yet Plaintiffs only offer two potential bases for a causal link. [Doc. 824, p. 19]. First, they offer a disparate impact theory, which, as explained above, is not supported by evidence because it relies solely on the normal types of burdens that voters with or without disabilities would encounter. Second, they claim that there is a failure to make reasonable modifications. *Id*. As discussed below, the modifications they seek wholly alter the process for absentee voting for *all* voters, meaning that they are not reasonable accommodations. Plaintiffs offer no other potential causal links and this is another reason why judgment as a matter of law should be granted to State Defendants.

E. Modifying the timing of election processes would fundamentally modify the absentee voting program in Georgia.

Plaintiffs seek one very clear type of relief: the return to the prior deadlines for elections in Georgia, including a return to 180-day to four-day request period for absentee ballots and reinstituting nine-week runoffs. *See* [Doc. 824, pp. 21, 26] (noting that Plaintiffs seek to invalidate Sections 25 and 28 of SB 202). This is not seeking a reasonable modification, but rather seeking

to return "to the status quo prior to the passage of S.B. 202." [Doc. 615, p. 21]. Without a proposed reasonable modification, there is no burden on State Defendants to show there is a fundamental alteration of the nature of the program in question. *Merrill*, 467 F. Supp. 3d at 1217.

But even if Plaintiffs' proposed overhaul of absentee voting and runoffs in Georgia were reasonable—and it is not—it would eliminate multiple essential aspects of absentee voting in Georgia. *Schaw v. Habitat for Humanity of Citrus Cty., Inc.*, 938 F. 3d 1259, 1267 (11th Cir. 2019). The legislature made reasonable policy modifications to the existing processes in SB 202 in response to issues encountered during the 2020 election and first-ever nine-week runoff, including voter confusion and late-arriving absentee ballots. [Doc. 755, ¶¶ 186–210]. Plaintiffs have not proposed and cannot propose a system that addresses the legitimate policy concerns of the General Assembly identified from the 2020 election because their only proposal is to go back to the pre-2020 deadlines. Plaintiffs do not propose an exception for voters with disabilities to the relevant deadlines. They instead propose a wholesale elimination of those revised timelines—eliminating the entirety of the decisions of the legislature made in response to policy concerns about election administration. Plaintiffs' proposal would undermine the purpose of bolstering election security and restoring public confidence in election integrity. [Doc. 615, p. 25]. Because the alteration requested is so significant, it is a "fundamental alteration" of the program

rather than a reasonable modification. *See* [Doc. 615, p. 24] (quoting *League of Women Voters*, 595 F. Supp. 3d at 1158).

For all the foregoing reasons, Plaintiffs have not shown there is "significant, probative evidence demonstrating the existence of a triable issue of fact," *Irby v. Bittick*, 44 F.3d 949, 953 (11th Cir. 1995), and State Defendants are entitled to judgment as a matter of law on Plaintiffs' ADA and Section 504 claims regarding changes in election timelines.

III. State Defendants are entitled to summary judgment on the constitutional claims.

Plaintiffs also challenge the various timelines for distributing absentee ballots and the return to a four-week runoff for all elections as unconstitutional burdens on the right to vote. [Doc. 824, p. 28]. But Plaintiffs cannot point to any issue of triable fact and the undisputed evidence demonstrates that any slight burden of the changes in timeline is outweighed by the significant state interests involved.

Initially, Plaintiffs incorrectly claim that State Defendants did not address the shortening of the timeline for election officials to distribute absentee ballots to voters. [Doc. 824, pp. 30–31]. But State Defendants referenced data regarding the completion of absentee-by-mail ballots in their brief, [Doc. 758-1, p. 5], and made legal arguments regarding the total number of completed ballots, [Doc. 758-1, p. 14], that necessarily includes the issuance

and receipt of those ballots. The state interests involved apply equally to all portions of the absentee ballot process. Thus, Plaintiffs are incorrect in claiming that this argument was waived.

A. Plaintiffs have not shown a burden on the right to vote through the changing timelines for applying and issuing absentee ballots.

In their attempt to find evidence supporting any burden on the right to vote, Plaintiffs point to actions of (1) the postal service, (2) actions of county officials, and (3) voters with limited English proficiency.[6] [Doc. 824, p. 32]. But none of these are burdens created by any action of State Defendants because State Defendants do not process absentee ballots. *Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 U.S. App. LEXIS 39969, at *6 (11th Cir. Dec. 20, 2020). In other words, Plaintiffs have only pointed to "the usual burdens of voting." *Curling v. Raffensperger*, 50 F.4th 1114, 1123 (11th Cir. 2022) (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) (plurality op.)). Without any evidence of a severe burden on the right to vote, the state's regulatory interests are sufficient to justify them. *Id.* at 1122.

[6] Plaintiffs incorrectly claim that State Defendants did not cite evidence about more than 90% of absentee ballots cast in 2020 complying with the timelines in SB 202. But State Defendants relied on and cited to Dr. Grimmer's study of this fact in their brief. *See* [Doc. 758-1, p. 5] (citing Statement of Material Fact ¶ 191 (Grimmer Report, ¶ 78)).

B. Plaintiffs have not shown any burdens because of standardizing the length of runoffs.

Nor was it unlawful for Georgia to standardize the length of runoffs. In fact, Georgia has only ever had one nine-week general-election runoff. [Doc. 755, ¶ 194]. In spite of this reality, Plaintiffs claim that the four-week runoff period that was used for all state runoffs is an unconstitutionally severe burden because it creates too great of a risk of voters being unable to participate in runoffs using absentee-by-mail ballots. [Doc. 824, pp. 34–38].

The burdens Plaintiffs identify are (1) a single voter who received an absentee ballot late in one election, (2) claimed burdens on county officials, and (3) a voter who did not apply for an absentee ballot based on her belief she would not receive it back. [Doc. 824, pp. 35–36]. None of these burdens are severe and none are caused by State Defendants. Delays in postal delivery affect all kinds of items unrelated to voting and voters choosing not to attempt to vote certain ways are the types of burdens that individuals face in daily life. *Curling*, 50 F.4th at 1123. None of these burdens rise to the level of a severe burden and Plaintiffs have pointed to no other evidence regarding any triable issue on the level of the burden from returning to a four-week runoff for all elections.

In the end, Plaintiffs wish this Court to find that *risks* standing alone constitute a burden on the right to vote. But government inactivity cannot be

a burden. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (due process); *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 465 (1979) (first amendment); *Fair Fight Action, Inc. v. Raffensperger*, 1:18-CV-5391-SCJ, 2021 WL 9553856, at *8 (N.D. Ga. Mar. 31, 2021), *opinion clarified* 1:18-CV-5391-SCJ, 2021 WL 9553849 (N.D.Ga. Nov. 15, 2021) ("The Court agrees with Defendants that '[t]he law does not impose constitutional liability for governments because they do not exceed their statutory obligations'"). And failing to do more or prevent risks in the election system cannot constitute an actionable burden on the right to vote. *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 393 (W.D. Pa. 2020).

Finally, isolated events and mistakes by county officials do not implicate the *Anderson/Burdick* balancing analysis because they are not violations of the Constitution. *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1201–02 (N.D. Ga. 2022) (*quoting Gamza v. Aguirre*, 619 F.2d 449, 453–54 (5th Cir. 1980)). As a result, Plaintiffs have not shown any actual burdens on the right to vote from the change in runoff timelines.

C. The state's regulatory interests and other interests justify the timeline changes.

In any event, the challenged changes are supported by strong state interests. In their motion, State Defendants explained—and Plaintiffs have not

rebutted—that the goals of SB 202 were to provide a definite period of absentee voting and to address the length of time in 2020 that led to voter confusion, in addition to the lengthy runoff election in 2021. [Doc. 758-1, pp. 3–4]. Contrary to Plaintiffs' claim, shortening the relevant timelines directly addressed the confusion voters faced, while also avoiding any diminishment of voter opportunities. *Id.* Plaintiffs then incorrectly attempt to import slight burdens on county election officials into the state-interest portion of their argument, when the state interests clearly relate to *voters* and the county officials they cite have not said they will be unable to comply with the deadlines.[7] Plaintiffs also cannot rebut the reality that many other states use runoffs of the same or shorter length than Georgia.

To avoid summary judgment at this stage of the case, Plaintiffs had to come forward with evidence that showed there was an issue of fact or some basis in law to support their claims. They have shown neither and this Court should grant summary judgment to State Defendants on Plaintiffs' claims on changes in timing as unconstitutional burdens on the right to vote.

[7] In fact, the relative smoothness of the 2022 elections—including a four-week general-election runoff—demonstrates the revised timelines work for election officials.

IV. State Defendants are entitled to summary judgment on the Section 2 claims.

Plaintiffs have also failed to rebut State Defendants' showing that they are entitled to summary judgment on Plaintiffs' Voting Rights Act Section 2 claims. The point of Section 2 is "that the political processes leading to nomination and election (here, the process of voting) must be 'equally open' to minority and non-minority groups alike." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021). While that might include the "ability to *use* the means," "equal openness remains the touchstone." *Id.* at 2338 (emphasis in original). In considering the totality of the circumstances, *Brnovich* provides several guideposts that are unique to vote-denial claims like this case—as opposed to vote-dilution claims about redistricting plans, which do not fit well with vote-denial claims. *See Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1331 (11th Cir. 2021) (noting lack of fit of *Gingles* factors to vote-denial cases). While granting relief to Plaintiffs would require weighing evidence, defendants can and should have summary judgment granted in their favor when the evidence and law do not support Plaintiffs' claims.[8] *Ga. State Conference of the NAACP*, 775 F.3d at 1345; *Johnson*, 405 F.3d at 1234.

[8] In addition, contrary to Plaintiffs' suggestion of waiver, [Doc. 824, p. 40], for all the reasons outlined in Section I above, State Defendants have provided evidence in support of all changes related to the absentee-ballot application and completion process, not merely the application side.

A. Plaintiffs propose new guidelines and guideposts while ignoring the instructions of *Brnovich*.

Rather than following *Brnovich*, Plaintiffs propose that this Court analyze their claims under a mix of factors from both *Gingles* and *Brnovich*, while ignoring several of the *Brnovich* factors. Plaintiffs first consider the history of discrimination (Senate Factor One) and the effects of discrimination (Senate Factor Five). While *Brnovich* explained that these factors from *Gingles* should not be "disregarded," it also explained that their "relevance is much less direct." 141 S. Ct. at 2340. Plaintiffs also ignore several of the *Brnovich* guideposts, failing to consider the degree of departure from 1982 and the opportunities provided by the voting system as a whole. This Court should apply *all* of the *Brnovich* guideposts, while also recognizing the limited utility of the two Senate factors from *Gingles* discussed in *Brnovich*.

B. Past discrimination cannot forever raise questions about state action.

Plaintiffs begin with a discussion of Georgia's admitted history of discrimination against Black voters many decades ago. "But it cannot be that [Georgia's] history bans its legislature from ever enacting otherwise constitutional laws about voting." *Greater Birmingham Ministries*, 992 F.3d at 1325. Plaintiffs' citations to history generally have nothing to do with the timing provisions. Instead, Plaintiffs attempt to take long-past discrimination and several scattered anecdotes about Asian-American voters to claim that

there is a decrease in participation of minority voters. But the lack of connection to the absentee and runoff timing provisions at issue in this motion makes those historical items irrelevant to this Court's consideration.

C. Extent of limited English proficiency is not a basis to find a lack of equal openness.

Plaintiffs next argue—without any citation to a case that has used this analysis—that limited English proficiency is a barrier to voting. But the Voting Rights Act only requires a single county in Georgia to provide anything other than English-language ballots. *See Ga. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cty. Bd. of Registration & Elections*, 36 F.4th 1100, 1109 (11th Cir. 2022) (noting that Gwinnett County is only covered county in Georgia for Spanish-language resources). While offering ballots in other languages is a policy decision for the legislature and election officials, the fact that Georgia *complies* with existing law on multilingual ballots cannot become the basis for finding that other election statutes are *illegal*.

D. Disparate impact is not the measure of a Section 2 violation and the burden on voters is small.

Plaintiffs attempt to tie their various arguments together by making the logical leap that, because there has been some discrimination in the past, and voters of color use absentee ballots at higher rates (not in raw numbers), therefore, the burden of changing timelines must be more significant on voters

of color. But in doing so, they walk right into what *Brnovich* says cannot be done.

Brnovich specifically found that a disparate-impact model was not how equal openness should be measured in Section 2 cases. 141 S. Ct. at 2341–43. But Plaintiffs plow ahead using that model, claiming that, because voters of color use absentee ballots at a higher rate, changing the timelines will have a greater impact on them, which renders the system not equally open. [Doc. 824, pp. 46–47]. But that approach is foreclosed by *Brnovich*. *See* 141 S. Ct. at 2341–43.

Plaintiffs also engage in selective use of statistics to obscure the fact that nearly every voter in Georgia who utilized absentee and early voting after 2022 was able to do so without difficulty. As State Defendants explained in their opening brief, more than 90% of voters were already requesting and successfully completing absentee ballot applications and ballots on the timelines set by SB 202. [Doc. 755, ¶ 191]. For runoffs, voter turnout has increased and more voters used weekend voting during the shortened timeline than in the January 2021 runoff. [Doc. 755, ¶¶ 197–204]. Further, any decreases in Black voter turnout in Georgia have been lower than other surrounding states. *Id.* at ¶ 206. Plaintiffs are left citing only the need for translation assistance, when those same voters have been given three weeks

of early voting and plenty of time for reviewing sample ballots that are widely available prior to an election.

Thus, despite Plaintiffs' attempts to turn small statistical differences into something supporting a Section 2 violation, the actual data show the burden on voters with the altered timelines is small and any disparate impact cannot support a finding of lack of equal openness.

E. The state's interests are well served by the timelines in SB 202.

As explained previously, the changes in timelines for absentee-by-mail voting and runoffs were in direct response to the problems encountered in the 2020 elections. The only evidence Plaintiffs can muster in response is disagreement among county election officials about the very timelines those officials successfully implemented in the 2022 elections.

F. Plaintiffs ignore the state of the law in 1982 and the overall opportunities in the system.

Plaintiffs, moreover, ignore the fact that Georgia's voting system today is far more open today than in 1982. As State Defendants explained, runoffs are longer than in 1982, early voting goes for three weeks with mandatory weekend voting, and all Georgia voters can request an absentee-by-mail ballot for any reason—unlike the excuse-only absentee-by-mail voting before the early 2000s. [Doc. 755, ¶¶ 188–89], [Doc. 758-1, pp. 10–12]. Further, Georgia maintains automatic voter registration among other opportunities to register.

[Doc. 755, ¶ 364]. This expansion of voting and wide-ranging opportunities shows the equal openness of Georgia's election system.

G. The changed timelines do not violate the VRA.

Plaintiffs also have not brought the Court material factual issues that remain to be tried regarding their Section 2 claims. The undisputed, material facts demonstrate that Georgia's absentee-by-mail voting and runoffs are equally open to all voters and used by all voters successfully in nearly all cases. Plaintiffs have not provided sufficient evidence or argument to avoid summary judgment and this Court should grant summary judgment to State Defendants on their Section 2 claims regarding changes in timing.

CONCLUSION

Georgia elections are equally open to all eligible voters and it is easy to vote in Georgia. Despite their rhetoric, Plaintiffs must come forward with evidence at this stage of the case and they have not presented this court with triable issues of fact or argument that precludes summary judgment. This Court should grant summary judgment to State Defendants on all claims related to the changes in the timing of elections made by SB 202.

Respectfully submitted this 14th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

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

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