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' RESPONSE IN OPPOSITION TO AME PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [DOC. 546]

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INTRODUCTION

More than two years after filing their Complaint, AME Plaintiffs seek to enjoin two critical provisions of Georgia's election-integrity law known as SB 202, claiming that they violate Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act. The first challenged provision penalizes the prohibited practice called ballot harvesting, which is when another person, including campaign and political operatives, gather absentee ballots from voters and (supposedly) return them to election officials.[1] Georgia law allows certain authorized people (including family, people who reside together, and caregivers of voters with disabilities) to return ballots, but makes ballot harvesting by unauthorized individuals a felony (instead of a misdemeanor) for a person who knowingly "[a]ccepts an absentee ballot from an elector for delivery or return to the board of registrars except as authorized by subsection (a) of Code Section 21-2-385." O.C.G.A. § 21-2-568(a)(5) (the Ballot-Harvesting Penalty). The second permits voters—for the first time by statute—to use absentee ballot drop boxes to return completed absentee

[1] Political operatives in North Carolina recently plead guilty to violations of North Carolina's ballot harvesting law in a crime that led to an overturned Congressional election in 2018. *See* Ex. 5 to Dep. of Dr. Lorraine Minnite, Gabriella Borter, *North Carolina Republican Operative Charged in Election Fraud Scheme*, Reuters (Feb. 27, 2019, 11:28 AM) (Exhibit G).

ballots, subject to reasonable limitations as determined by the General Assembly. O.C.G.A. § 21-2-382(c) (the Drop Box Provisions). [Doc. 546-1 at 1, 10].

The motion should be denied. Not only do the challenged provisions further the State's compelling interests in ballot security and the integrity of the voting process by protecting against ballot harvesting, but they do so without harming voters with disabilities. They serve these interests by broadly defining who may handle a voter's completed absentee ballot and how those ballots may be returned to be counted. And they work in tandem with other (unchallenged) provisions of Georgia law that predate SB 202. For example, O.C.G.A. § 21-2-568(a)(5) raises the penalty of O.C.G.A. § 21-2-385(a) for ballot harvesting from a misdemeanor to a felony. This, in turn, protects voters with disabilities and voters without disabilities from efforts at ballot harvesting prohibited by Georgia law. Plaintiffs ignore these interests.

They also ignore the fact that SB 202 is the only Georgia law that allows drop boxes at all. The Drop Box Provisions require, in part, authorized absentee ballot drop boxes be placed inside voting locations and accessible during early voting hours. The Provisions were, in part, a response to allegations of improper ballot harvesting that led to multiple investigations and burdensome open records requests to counties, reports of vigilantes

stationed at drop boxes and following election workers who were transporting ballots when drop boxes were temporarily authorized, by emergency authority, for the 2020 election cycle elections. Decl. of C. Ryan Germany ¶¶ 10-18 (June 29, 2023) ("Germany Decl.") (Exhibit A); Dep. Tr. of T. Matthew Mashburn 73:18-78, 81:16-83 (Mar. 7, 2023) ("Mashburn 3/7/23 Dep.") (Exhibit B); Dep. Tr. of T. Matthew Mashburn 72:10-83:15, 173:3-178:1 (Mar. 14, 2023) ("Mashburn 3/14/23 Dep.") (Exhibit C).[2] The location and hours requirements, along with monitoring provisions, further the State's interest in the security and integrity of the vote-by-mail ballot. Neither provision unduly burdens the ability of voters with disabilities to participate in the absentee vote-by-mail program and voters with disabilities remain free to vote in other ways.

Plaintiffs thus fail to establish that these two challenged provisions violate Title II of the ADA or Section 504 of the Rehabilitation Act. Likewise, they fail to establish irreparable harm from either provision, provisions from which they have not sought extraordinary relief for over two years despite the fact that Georgia has conducted multiple elections in that time. Accordingly, Plaintiffs' motion for preliminary injunction should be denied.

[2] Such threats to election workers are only increasing around the country. *See* Tr. of All Things Considered, *Election Workers Are Already Being Threatened. They're Worried About 2024*, NPR (June 20, 2023, 4:39 PM), https://tinyurl.com/yns77es6 (Exhibit H).

BACKGROUND

A. Factual background

Absentee-ballot harvesting has been prohibited in Georgia since at least 2019. Before SB 202, Georgia law allowed only certain authorized individuals—family members or members of the voter's household—to return completed absentee ballots for voters. *See* O.C.G.A. § 21-2-385(a) (2019). If the voter had a disability and needed assistance returning a completed absentee ballot, the voter was also permitted to have a caregiver return the voter's ballot. *Id.* The statute identifies who is permitted to return another voter's ballot to minimize the risk of voter intimidation and fraud. Germany Decl. ¶ 2. Violations of this provision were a misdemeanor. O.C.G.A. § 21-2-598.

To bolster the anti-ballot harvesting provisions of O.C.G.A. § 21-2-385(a), the Georgia legislature passed SB 202, which raised the crime to a felony for knowingly violating those provisions. O.C.G.A. § 21-2-568(a). Plaintiffs only seek injunctive relief regarding the *new* criminal penalties under O.C.G.A. § 21-2-568(a)(5) and not the underlying (and longstanding) prohibitions contained in O.C.G.A. § 21-2-385(a) that were misdemeanors before SB 202.

Before 2020, moreover, Georgia law did not provide for absentee ballot drop boxes for the return of completed absentee ballots. Mashburn 3/7/23 Dep.

73:18-75:5; Mashburn 3/14/23 Dep. 173:6-174:20. In 2020, in response to the COVID-19 pandemic, the Georgia State Election Board (SEB), pursuant to authority granted under emergency authorization, issued an emergency rule authorizing the use of absentee ballot drop boxes to allow voters an additional option to deliver their completed absentee ballots to election officials without having to directly interact with election officials. *See* Ex. 201 to Mashburn 3/14/23 Dep., Ga. State Election Bd., Rule 183-1-14-0.8-.14, Absentee Voting, Secure Absentee Ballot Drop Boxes (Exhibit D). Local counties were permitted, but not required, to use drop boxes. Those that used drop boxes had to place them on county or municipal government property subject to specific security measures. Still, several counties failed to comply with the security requirements. *Id.*; Mashburn 3/7/23 Dep. 81:16-83.

Following the November 2020 general election and January 2021 runoff, the SEB and Georgia Secretary of State (SOS) received numerous complaints of ballot harvesting associated with the emergency drop boxes. Mashburn 3/7/23 Dep. 73:18-77, 81:16-83:9; Dep. Tr. of C. Ryan Germany 209:15-211:3 (Mar. 7, 2023) ("Germany 3/7/23 Dep.") (Exhibit E); Germany Decl. ¶¶ 7, 13. Counties also received these complaints—and some received public records requests for the surveillance video related to the drop boxes. Germany 3/7/23 Dep. 209:10-211:3; Germany Decl. ¶ 16. In many cases, the video's quality was

so poor that it was effectively useless in evaluating the complaints. Germany 3/7/23 Dep. 210; Mashburn 3/7/23 Dep. 77. As a result, public confidence in the safety and security of absentee ballot drop boxes was shaken—even though the SEB and SOS were unable to verify any actual tampering or fraud in their investigations. Mashburn 3/7/23 Dep. 167:2-170:7; Mashburn 3/14/23 Dep. 81-83:15. Following the January 2021 runoff election, the emergency authorization that allowed for drop boxes expired, and drop boxes were no longer authorized by law. Mashburn 3/14/23 Dep. 72:14-73:24.

Shortly after the expiration of that emergency authority, the General Assembly decided that certain aspects of the drop boxes authorized were worth retaining. Accordingly, SB 202 provided that drop boxes would be *required* going forward, with each county required to have at least one drop box and larger counties having additional drop boxes in proportion to the county's population. But the legislature also took steps to protect Georgia voters and the integrity of its elections by responding to the issues it encountered in the 2020 election cycle. Accordingly, SB 202 ensured that drop boxes were only authorized inside the county election office or early voting locations, placed under constant human surveillance, and accessible only during hours of early in-person voting. Mashburn 3/7/23 Dep. 73:18-77; O.C.G.A. § 21-2-382(c). As a result, in the 2022 elections, the SEB and SOS did not receive the complaints

about drop boxes they had received following the 2020 election cycle. Germany Decl. ¶ 21.

Voters with disabilities have access to drop boxes on the same basis as other voters. Both groups make arrangements to access the drop boxes at the early-voting locations or election offices during early voting hours, Monday to Saturday with the possible additional Sundays during the early voting period. O.C.G.A. § 21-2-382(c)(1); *id.* § 21-2-385(d)(1). Voters returning absentee ballots to drop boxes do not have to wait in line with those seeking to vote in person. *See* Dep. Tr. of Georgia ADAPT 108:25-109:2 (Feb. 20, 2023) ("ADAPT 2/20/23 Dep.") (Exhibit F) (acknowledging that drop box voters "didn't have to wait in line"); *id.* at 31:8-17 (recognizing that drop box voters could "go inside and drop [their ballot] off"). And all voters remain able to return their completed absentee ballots in the mail.

B. Procedural background

Not content to let the legislature resolve these matters, Plaintiffs filed their lawsuit on March 29, 2021. [Case No. 21-cv-01284-JPB, Doc. 1]. But they decided they were not so harmed that the challenged provisions needed to be enjoined during the 2022 elections, and the challenged provisions have thus been in effect for over two years after the filing of these complaints, and through multiple elections. More than two years after they started this case,

on the eve of the close of discovery and as the parties were beginning to draft summary-judgment motions, Plaintiffs finally sought *preliminary* injunctive relief. [Doc. 546].

LEGAL STANDARDS

Plaintiffs seeking a preliminary injunction must establish that: "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). Injunctive relief is extraordinary relief never granted as of right and should not be granted lightly. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

ARGUMENT

Plaintiffs fail to carry their burden of showing that the "extraordinary remedy" of a preliminary injunction is appropriate. They cannot show that either the Ballot-Harvesting Penalty or the Drop Box Provisions deny voters with disabilities meaningful access to absentee vote-by-mail under Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. And they do not satisfy any of the other preliminary injunction factors.

Accordingly, Plaintiffs' motion should be denied.

I. Plaintiffs Fail to Show That They Are Likely to Succeed on the Merits.

Plaintiffs' motion is brought exclusively under Title II of the ADA[3] and Section 504 of the Rehabilitation Act,[4] claims which are evaluated under the same standard. *L.E. ex rel. Cavorley v. Superintendent of Cobb Cnty. Sch. Dist.*, 55 F.4th 1296, 1301 n.2 (11th Cir. 2022); [Doc. 546-1 at 10]. To state a Title II claim, "a plaintiff generally must prove (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was 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." *Bircoll v.*

[3] Title II of the ADA provides:

> Subject to the provisions of this subchapter, 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; *see also* 28 C.F.R. § 35.130(a).

[4] Section 504 of the Rehabilitation Act (29 U.S.C. § 794(a)) provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Miami–Dade Cnty., 480 F.3d 1072, 1083 (11th Cir. 2007). To determine if a person was excluded from a public service or activity, the ADA focuses on the program *as a whole* to determine if voters with disabilities have meaningful access to the program. 28 C.F.R. § 35.150(a). The Supreme Court has explained that, to "assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (footnote omitted, emphasis added).

Courts in this circuit recognize that mere "[d]ifficulty in accessing a benefit," as Plaintiffs' allege, "does not by itself establish a lack of meaningful access." *Todd v. Carstarphen*, 236 F. Supp. 3d 1311, 1329 (N.D. Ga. 2017). Nor are qualified individuals "entitled to the accommodation of her choice, but only to a reasonable accommodation." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) (quoting *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 948 (N.D. Ga. 1995)). Thus, meaningful access does not "require the governmental entity to provide *every* requested accommodation." *Medina v. City of Cape Coral*, 72 F. Supp. 3d 1274, 1278 (M.D. Fla. 2014) (emphasis in original; citations omitted); *accord Todd,* 236 F. Supp. 3d at 1334 ("a reasonable accommodation need not be 'perfect' or the one 'most strongly preferred' by the plaintiff, but it still must be 'effective'" (quoting *Wright v. N.Y. State Dep't of Corrections*, 831 F.3d 64, 72 (2d Cir. 2016)). "Instead, when an

individual already has 'meaningful access' to a benefit to which he or she is entitled, no additional accommodation, 'reasonable' or not, need be provided by the governmental entity." *Medina*, 72 F. Supp. 3d at 1278 (cleaned up). Plaintiffs have not established any likelihood of prevailing under these settled standards.

A. The Ballot-Harvesting Penalty does not violate the ADA or the Rehabilitation Act.

Plaintiffs first claim that, by raising violations of O.C.G.A. § 21-2-385(a) from a misdemeanor to a felony under rules governing illegal intimidation and meddling with the ballots or vote of a voter under O.C.G.A. § 20-2-568(a), the legislature has denied voters with disabilities meaningful access to absentee vote-by-mail. [Doc. 546-1 at 13-14].[5] Under the standards discussed above, Plaintiffs are incorrect.

The felony penalties for violating the ballot return rules do not deny voters with disabilities meaningful access to the absentee vote-by-mail program. What Plaintiffs ignore is that there are multiple ways for voters with disabilities to participate in the absentee vote-by-mail program and to do so on equal footing with other voters. Title II requires nothing more. *Democracy*

[5] Prior to SB 202, violations of O.C.G.A. § 21-2-385(a) were a misdemeanor. O.C.G.A. § 21-2-598. If the Ballot-Harvesting Penalty is enjoined, such violations will still be crimes, but will be misdemeanors again.

N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158, 233 (M.D.N.C. 2020) (finding that even though North Carolina law specifically prohibited nursing home staff from assisting a resident with a disability by returning an absentee ballot, because the residents with disabilities could still return the ballot by U.S. mail, there was no violation of Title II of the ADA). Accordingly, Plaintiffs' Motion for Preliminary Injunction should be denied as to the challenge to the Ballot-Harvesting Penalty.

But Plaintiffs' claims also fail when addressed more granularly. Plaintiffs suggest that "neighbors, friends, or nursing facility staff" may not qualify as caregivers because the term "caregiver" is not defined in the statute. [Doc. 546-1 at 13, 15].[6] They also claim that other residential staff at locations such as psychiatric hospitals, group homes, or other congregate settings may

[6] The circumstances here are fundamentally different than those in *Democracy N.C.* There, North Carolina law specifically prohibited nursing home staff from returning a resident's absentee ballot. Even so, that court found that the limitation, contrary to Plaintiffs' representation, while in violation of Section 208 of the Voting Rights Act, did not violate Title II of the ADA. 476 F. Supp. 3d at 232-33; *see also id.* at 238-39 (enjoining only the assistance and marking provisions, not the ballot return provisions at issue here). Even the more recent case in North Carolina cited by Plaintiffs (at 19) on this same prohibition only addressed the issue under Section 208 and not under Title II of the ADA as is relevant here. *Disability Rts. N.C. v. N.C. State Bd. of Elections,* No. 5:21-CV-361-BO, 2022 WL 2678884, at *1 (E.D.N.C. July 11, 2022).

fall outside of O.C.G.A. § 21-2-385(a). [Doc. 546-7 ¶ 16]. Yet Plaintiffs have not identified a single incident where a friend, neighbor, nursing home staff, or other residential facility provider was prosecuted, questioned, or prevented from returning an absentee ballot on behalf of a voter with a disability.

Their vagueness concerns are also illusory. When construing Georgia law, an undefined term should be given its common meaning. *Stubbs v. Hall,* 840 S.E.2d 407, 415 (Ga. 2020) (". . . we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would"). If further clarification is needed, Georgia courts "may look to other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question." *Fed. Deposit Ins. Corp. v. Loudermilk,* 826 S.E.2d 116, 120 (Ga. 2019). Under any common understanding of the term "caregiver," none of the groups referenced by Plaintiffs are categorically excluded and most individuals within those classifications fall squarely within a common definition of caregiver. Indeed, O.C.G.A. § 21-2-385(a) specifically states that the caregiver of the disabled elector may mail or deliver the absentee ballot, "regardless of whether such caregiver resides in such disabled elector's household." Moreover, the record lacks any instances where any friend, neighbor, or nursing facility staff asked

by a voter with a disability to return his or her ballot was questioned, let alone charged with violating O.C.G.A. § 21-2-385(a) before or after SB 202.

Nor can Plaintiffs establish that the Ballot-Harvesting Penalty is facially unlawful. Only voters with disabilities who—because of their disability—require assistance returning their absentee ballot, are entitled to assistance under Section 208 of the VRA. 52 U.S.C. § 10508 ("Any voter *who requires assistance to vote by reason of* blindness, disability, or inability to read or write may be given assistance ..." (emphasis added)).[7] Similarly, under Georgia law, any voter with disabilities may utilize the assistance of a family member, household member, or caregiver to help return a completed absentee ballot, with the addition of a caregiver providing *greater* assistance to voters with disabilities than permitted to other voters. O.C.G.A. § 21-2-385(a).

Further, the circumstances here are fundamentally different from those found in *Carey v. Wisconsin Elections Commission,* 624 F. Supp. 3d 1020 (W.D. Wis. 2022), where the court faced a ruling by the Wisconsin Supreme Court categorically "prohibiting voters from giving their ballot to a third party, and the court identified *no exceptions* for disabled voters." *Id.* at 1028 (emphasis

[7] This, however, is all academic since Plaintiffs do not raise a claim under Section 208 in their motion.

added). By contrast, the Georgia Attorney General (twice) and Georgia Supreme Court have both held that, in federal elections, voters with disabilities are entitled to assistance consistent with Section 208 of the Voting Rights Act, even if Georgia statutory law is more restrictive, something Plaintiffs acknowledge. *Holton v. Hollingsworth,* 270 Ga. 591, 593, 514 S.E.2d 6, 9 (1999); [Doc. 546-1 at 15 n.6 (citing 2016 Ga. Op. Att'y Gen. 02 (2016); 1984 Ga. Op. Att'y Gen. 34 (1984))]. The burden Plaintiffs claim voters with disabilities face under the Ballot-Harvesting Penalty is simply a fiction.

This is also borne out in the declarations submitted with the motion. Matt Hargroves' declaration, for example, suggests that homeless-shelter staff regularly returned ballots for homeless voters with disabilities under O.C.G.A. § 21-2-385(a) before SB 202 without any issue. Only now, Hargroves claims he is confused by the provision and will not return ballots for homeless voters with disabilities even though part of his job appears to be assisting with the care of the voter. [Doc. 546-12 ¶¶ 8-11, 13]. But he provides no answer as to why SB 202's making violations of this law a felony—while maintaining the same statutory term "caregiver" that has been the law for years—has contributed to

his confusion.[8]

The same is true of the other declarations. Empish Thomas, a blind voter, puts her own personal limitation on the term caregiver by excluding someone who is clearly a caregiver—her assistant whom she pays to assist her with daily tasks she cannot complete because of her disability—from the scope of the statute. [Doc. 546-4 ¶¶ 14-15]. She also notes that she prefers to vote in-person, then complains about transportation to an absentee ballot drop box that is available at the same place she would vote in person and during the same voting hours. [Doc. 546-4 ¶¶ 3, 5, 17]. And though she reports difficulty voting in 2022, the hardship she claims she experienced was caused by poll workers, not the provisions of SB 202—and not the State Defendants. [Doc. 546-4 ¶¶ 24-36].

Even with this testimony, the motion fails to explain how a voter with a disability is denied meaningful access to absentee vote-by-mail. Nothing in O.C.G.A. § 21-2-385(a) prevents ADAPT or Hargrove from taking a voter with a disability to a drop box or a U.S. mail receptacle to return an absentee ballot.

[8] Zan Thornton likewise claims that ADAPT will not "touch[]" a ballot for a voter with a disability and will only take a voter to a drop box, but not put the ballot in the box for the voter. [Doc. 546-13 ¶ 23]. Thornton too fails to explain how SB 202's making ballot harvesting a felony without substantively changing what the law criminalizes has changed ADAPT's behavior.

Nothing in the ADA requires that *every* voter be able to use *every* means of returning a ballot in precisely the manner they choose, or that *every* "obstacle" be removed. It only requires voters with a disability to have "meaningful access" to the program. *Medina*, 72 F. Supp. 3d at 1279. Indeed, when it comes to facilities, not every facility must be accessible so long as *some* facility is accessible to a citizen with disabilities. *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001).

None of this, however, is the subject of the requested injunctive relief. Rather, Plaintiffs only seek an injunction against the Ballot-Harvesting Penalty that applies to the entirety of O.C.G.A. § 21-2-385(a), and which serves the State's compelling interest in preventing ballot harvesting. Following the numerous complaints of ballot harvesting following the 2020 election, and to better ensure that voters were not subject to intimidation, or the type of meddling seen in recent elections in North Carolina, the Georgia Assembly chose to increase the penalties for violation of this provision to make it on par with other prohibited conduct that affects the security and integrity of Georgia's elections, thus serving that compelling State interest. Germany Decl. ¶¶ 8, 26. Plaintiffs offer no persuasive basis for concluding that the Ballot-Harvesting Penalty denies meaningful access to absentee voting by mail, especially since the same provision did not apparently do so when the

penalty for violating the ballot return provision was a misdemeanor before SB 202.

In a last effort to manufacture a violation of the ADA as to the Ballot-Harvesting Penalty, Plaintiffs cite *American Council of Blind of Indiana v. Indiana Election Commission,* No. 1:20-cv-03118-JMS-MJD, 2022 WL 702257 (S.D. Ind. Mar. 9, 2022). Doc. 546-1 at 14. The issue there, however, involved the *requirement* for certain voters with disabilities to use what was called the "Traveling Board" when voting by mail, a method that denied them the ability to cast a secret ballot.[9] *Am. Council of Blind,* 2022 WL 702257, at *8. Here, voters with disabilities have the same rights and ability to use absentee vote-by-mail as other voters, either with or without assistance; they are not required to use a system that provides them less access to absentee vote-by-mail. The circumstances in that case are not remotely comparable, and Plaintiffs have failed to demonstrate that the Ballot-Harvesting Penalty violates the ADA or the Rehabilitation Act.

[9] Georgia's Dominion voting machines include significant disability-access components, allowing blind voters (and other voters with disabilities) to cast a secret ballot without assistance on the same equipment as all other voters and resulting in a ballot that looks the same as all other voters, which is not the case in most states. Germany Decl. ¶ 9.

B. The Drop Box Provisions do not violate the ADA or the Rehabilitation Act.

Plaintiffs next claim that having absentee ballot drop boxes inside and accessible only during early voting hours makes it "difficult or impossible" for voters with disabilities to access the drop boxes. [Doc. 546-1 at 16]. This claim is belied by Plaintiffs' own witnesses.

One such witness is Mr. Wendell Halsell, a 65-year-old male who lost the use of his leg and cannot drive. He voted on Election Day in May 2022 and found the walk to the polling location inside the church (his home precinct) difficult for him. [Doc. 546-14 ¶¶ 2-4]. Mr. Halsell then elected to vote absentee vote-by-mail for the November 2022 general election and to return his ballot through a drop box rather than the U.S. mail. Even though his nephew drove him to the absentee drop box location, Mr. Halsell chose to walk inside by himself without any assistance from his nephew, even though Mr. Halsell experienced a longer walk than he could do alone in May 2022. According to Mr. Halsell, the drop box he accessed was located a distance from the entrance of the building and he needed assistance walking up the exterior ramp and then time to rest while walking to the drop box. He did the same thing in December 2022. [Doc. 546-14 ¶¶ 6-10].

But, to the extent that Mr. Halsell needed an accommodation, Georgia

law provides him the very accommodation that he failed to avail himself of—the ability of his nephew to accompany him and deposit the ballot in the drop box. O.C.G.A. § 21-2-385(a) ("[M]ailing or delivery may be made by the elector's . . . nephew"). And, if Mr. Halsell found that accommodation unsatisfactory, Georgia law also allows him to return his ballot by U.S. mail—a process that would have alleviated the need for him to travel to a drop box, whether inside or outside. The multiple reasonable accommodations for voters with disabilities like Mr. Halsell satisfy Title II. *Democracy N.C.,* 476 F. Supp. 3d at 233. Mr. Halsell's choice to ignore the various alternatives and means of assistance available to him under Georgia law doesn't make SB 202 invalid. *Todd,* 236 F. Supp. 3d at 1334; *Medina,* 72 F. Supp. 3d at 1279.

These same reasonable accommodations were available to Patricia Chicoine, who chose to deliver her ballot to a drop box because she does not "trust the mail." [Doc. 546-5 ¶ 12]. Her distrust of the mail, however, and any anxiety that stems from it, does not create a violation of the ADA. *Todd*, 236 F. Supp. 3d at 1333. Nor can her negative experience using a drop box in October 2021—after a local election official moved the absentee ballot drop box from the library's lobby to the end of a long hallway—be attributed to SB 202. [Doc. 546-5 ¶¶ 7-9]. And, in any event, her distress could have been alleviated had she brought the cane she typically uses for walking. *Id.* ¶ 7.

Plaintiffs' other arguments are equally unpersuasive. For example, they point (Doc. 546-1 at 8) to transportation barriers as a burden for accessing drop boxes available only during early voting hours. But transportation issues are not created "because of disability," and it would be wrong to find a violation of Title II related to the drop boxes on that basis. *See Democracy N.C.,* 476 F. Supp. 3d at 232–33 (finding that plaintiff's potential inability to find a witness for his absentee ballot was due to the lock-down status of his nursing home and not his disability, thus a rule that prohibited nursing home staff to witness a ballot did not violate Title II of the ADA). Moreover, early voting is available for several weeks, including on certain Saturdays and an optional one or two Sundays. O.C.G.A. § 21-2-385(d)(1). And, for voters who struggle to obtain transportation, the U.S. mail is also available.[10] Voters with and without disabilities thus have the same options for participating in absentee vote-by-mail, and the location and hours of drop box availability does not deny voters with disabilities meaningful access to the program.[11]

[10] *See* State of Ga., *Vote by Absentee Ballot*, https://georgia.gov/vote-absentee-ballot (last visited June 25, 2023) (voters can "[m]ail [a] completed ballot," "hand-deliver [an] absentee ballot to [their] county registrar," or "[b]ring [their] ballot to [their] county's drop box").

[11] While Plaintiffs want absentee drop boxes placed outdoors and available 24 hours a day, they do not provide any evidence on how many voters with disabilities either used the absentee ballot drop boxes in 2020/2021 "after

Nor can Plaintiffs find support in the cases they cite. For example, in *Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001), on which Plaintiffs rely, the structural barriers to the courthouse, the only place to attend court proceedings, deprived persons with disabilities of meaningful access. *Id.* at 1080–81. But here, because Georgia provides voters with disabilities multiple ways to return a ballot, *Shotz* is inapposite.

D.R. ex rel Courtney R. v. Antelope Valley Union High School District, 746 F. Supp. 2d 1132 (C.D. Cal. 2010) is also readily distinguished. There, the plaintiff student simply asked for an elevator key to access the second floor of the school without having to wait for an escort. *Id.* at 1137-38. Here, however, voters with disabilities are not *required* to use any particular means of returning a ballot and are not *required* to utilize any form of assistance, thus, they are not being denied the ability to vote and return their ballot

hours" or any that were unable to participate in the absentee vote-by-mail program due to the location and hours of the drop boxes in 2022. An injunction removing the limitation of drop boxes indoors during certain hours does not mean drop boxes are placed at the street for drive-by drop off as Plaintiffs seem to intimate. Rather, they do not even say how many drop boxes were placed in a location where a voter could drive up and put a ballot in the drop box or if these were located at places required by O.C.G.A. § 21-2-382(c), which Plaintiffs do not challenge. Even for the unnamed individual who is apparently only able to walk 10 yards before having to stop, the injunction sought does not guarantee him a more convenient drop box or alter the various accommodations already provided under Georgia law that provide him access to absentee vote-by-mail, including using the U.S. mail. [Doc. 546-7 ¶ 17].

independently. Instead, they have the freedom to meaningfully participate with or without a variety of accommodations made available in the statute.

Plaintiffs' reliance on *Civic Association of the Deaf of N.Y.C., Inc. v. Guiliani*, 915 F. Supp. 622 (S.D.N.Y. 1996) is also misplaced. [Doc. 546-1 at 17-18]. There, the city planned to remove all emergency alarm boxes from the street, which left deaf and hearing-impaired citizens with no means of reporting emergencies. In the era before cell phones, only public pay phones—which, for obvious reasons, were not accessible to deaf individuals—were available. The removal of emergency alarm boxes thus would have denied those individuals *any* access or means of reporting an emergency. *Civic Ass'n of the Deaf*, 915 F. Supp. at 635. The stark differences between the circumstances in *Civic Association* and here are self-evident: Georgia provides voters with disabilities meaningful access to absentee vote-by-mail by providing them several means of returning an absentee ballot in addition to in-person voting options. For these reasons, the Drop Box Provisions are also lawful under the ADA and the Rehabilitation Act.

II. Plaintiffs Have Not Shown That They Will Suffer Irreparable Injury.

Plaintiffs also fail to show that they will suffer irreparable harm because they delayed seeking injunctive relief through multiple elections and because

neither of the Challenged Provisions violates the ADA or the Rehabilitation Act.

A. Plaintiffs' delay demonstrates there is no irreparable harm.

Plaintiffs' delay confirms that they will not suffer irreparable injury absent an injunction. As the Eleventh Circuit holds, "[a] delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). Indeed, "the very idea of a *preliminary* injunction is premised on the need for speedy and urgent action to protect a plaintiff's rights before a case can be resolved on its merits." *Id.* (emphasis in original). Plaintiffs' delay of more than two years in filing their motions "necessarily undermines a finding of irreparable harm." *Id.* And, considering that Plaintiffs have the burden of demonstrating irreparable injury, *id.* at 1247, this is fatal to their motion.

Plaintiffs filed their complaints within days of SB 202's March 25, 2021 enactment. Now, more than two years later, they seek supposedly urgent relief. But Plaintiffs immediately face a problem: they decided such relief was not necessary in the 2022 elections. The Court should not countenance this attempt to short-circuit the ordinary litigation process—especially as Plaintiffs' own conduct plainly shows that these provisions can appropriately

govern during an election. Their unnecessary and significant delay is sufficient to deny Plaintiffs' request for preliminary injunctive relief. *Merrill v. Milligan,* 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring); *Coalition for Good Governance v. Kemp,* No. 1:21-cv-2070-JPB, 2021 WL 2826094, at *3 (N.D. Ga. July 7, 2021).

B. The Ballot-Harvesting Penalty does not harm Plaintiffs.

Nor can Plaintiffs show irreparable harm flowing from the Ballot-Harvesting Penalty. They seek to enjoin the Ballot-Harvesting Penalty even though its sole purpose is to increase the penalty for violating rules that have been in place since well before SB 202, while simultaneously not seeking any injunctive relief against the rules themselves. [Doc. 546-1 at 10]. In doing so, they cite no prosecution or penalty for a caregiver or other person allegedly violating O.C.G.A. § 21-2-385(a) involving the return of the ballot of a voter with a disability. Thus, any harm absent an injunction is entirely speculative and contingent on the possibility of some future action of which there is no precedent. As the Supreme Court has repeatedly held, "[i]ssuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent" with "injunctive relief as an extraordinary remedy." *Winter*, 555 U.S. at 22 (emphasis added). Plaintiffs thus cannot satisfy this indispensable requirement for a preliminary injunction.

Further, *even if* Plaintiffs succeeded in showing that they are harmed by O.C.G.A. § 21-2-568(a)(5)'s making violations of O.C.G.A. § 21-2-385(a) *felonies*, they cannot show that an injunction of that section would prevent the harms they allege because—if that section were enjoined—Georgia law would still treat violations of O.C.G.A. § 21-2-385(a) as misdemeanors as was the case prior to the passage of SB 202. O.C.G.A. § 21-2-598 ("Except as otherwise provided by law, any person who violates any provision of this chapter shall be guilty of a misdemeanor."). Nowhere in Plaintiffs' motion do they attempt to show that they would only be willing to violate the anti-ballot harvesting provision if that violation subjected them only to misdemeanor penalties such as imprisonment up to a year. *See* O.C.G.A. § 17-10-3.

Additionally, Plaintiffs do not provide any basis for their contention that they cannot find an authorized person to assist with the return of their ballot, whether by using the U.S. mail, delivering the ballot to an election official, or depositing the ballot in an authorized absentee ballot drop box. They claim that, because there is no definition of the term "caregiver," people suddenly no longer want to help, or Plaintiffs just do not want to ask. [Doc. 546-1 at 14-15]. Yet, while they offer the example of Mr. Halsell and Ms. Thomas choosing to not use available assistance to access a drop box, they cite no example of anyone having been denied needed assistance in returning an absentee ballot

by someone listed in O.C.G.A. § 21-2-385(a).

In any event, as explained above, the Ballot-Harvesting Penalty does not violate the ADA or the Rehabilitation Act, so Plaintiffs are not harmed by it. Plaintiffs have not offered any evidence that, before SB 202, any voter with a disability was disenfranchised or faced any burden in finding qualified assistance in returning a completed absentee ballot under O.C.G.A. § 21-2-385(a) despite the then-present misdemeanor penalties. Indeed, witness Hargroves never had any issue, before SB 202, returning absentee ballots for voters with disabilities staying at the homeless shelter where he works. [Doc. 546-12 ¶¶ 8, 11]. The Ballot-Harvesting Penalty does not change what is permitted. There is simply no evidence of irreparable harm.

C. The Drop Box Provisions do not harm Plaintiffs.

Nor do the provisions requiring drop boxes be indoors and accessible only during early voting hours cause irreparable harm. As explained above, those provisions do not violate either the ADA or the Rehabilitation Act, and therefore Plaintiffs' reliance on cases finding violations of those laws to be irreparable harms are inapposite. But even looking beyond the legality of the Drop Box Provisions, Plaintiffs have still failed to establish any harm. Each witness offering testimony was able to vote and, if they chose, to use a drop box. As Plaintiffs' own expert, Dr. Lisa Schur notes, every form of voting

inherently creates burdens on voters with disabilities [Doc. 546-3 ¶¶ 72, 75, 83], but—as addressed in detail above—there is no evidence that the location and hours of accessibility of absentee ballot drop boxes *denies* voters with disabilities meaningful access to absentee vote-by-mail or even limits that access. Indeed, those who experienced trouble personally accessing a drop box declined alternative means of returning their ballot or assistance clearly available under the statute.

For example, Mr. Halsell discussed how it took so long for him to walk to the drop box for both the November and December 2022 elections. *See* [Doc. 546-14 ¶¶ 7-10]. However, he failed to explain why he did not have his nephew, who drove him to the drop box, return the ballot for him, which is expressly permitted under Georgia law. *Id.* Similar deficiencies plague allegations of harm from Ms. Wiley, who claims the front room at her polling location where the drop box was located was too narrow for her son to use due to his powered wheelchair (an issue not fairly attributable to State Defendants). [Doc. 546-25 ¶ 7]. Of course, Georgia's absentee vote-by-mail allows voters with disabilities to use drop boxes, but also allows them to use authorized individuals to return their ballot (as Ms. Wiley did for her son) or to send the ballot through the USPS—an option similarly available to every voter. Plaintiffs simply fail to show that the provisions challenged, either individually or in combination,

make access to absentee vote-by-mail so burdensome that it would reasonably be viewed to "dissuade[] [voters with disabilities] from attempting to vote at all." [Doc. 546-1 at 22].

Because Plaintiffs failed to show that either of the challenged provisions subjects them to irreparable harm, they cannot obtain an injunction.

III. The Balance of Equities and the Public Interest Weigh Heavily Against an Injunction Especially at this Late Date.

Plaintiffs also fail to carry their burden on the other equitable factors.

First, Plaintiffs' requested relief would require the Court to act as the Georgia legislature. While Plaintiffs claim that implementing their requested modifications would not create a burden on the State, they are not only incorrect but fail to consider the State's interests. Initially, as the court in *Democracy N.C.* noted:

> While the court does not comment upon the efficacy or wisdom of each request, it is not the court's role to rewrite North Carolina's election law.

476 F. Supp. 3d at 218. "[T]he federal Constitution provides States–not federal judges–the ability to choose among many permissible options when designing elections" so "federal courts don't lightly tamper with election regulations." *Id.* (quoting *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020)). Yet that is precisely what Plaintiffs want the Court to do: rewrite or blue-pencil Georgia's

election law, allowing unfettered violations of the ballot return provisions and eliminating the very protections the legislature deemed necessary to justify the new absentee ballot drop box provisions. For a federal court, such statutory rewriting would be wildly inappropriate. *See One Georgia, Inc. v. Carr*, 599 F. Supp. 3d 1320, 1337 (N.D. Ga. 2022).

Second, Georgia would be irreparably harmed if it were unable to enforce its statutes. As the Eleventh Circuit has held, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (cleaned up). By enjoining the challenged provisions, the Court would impair the State's ability to safeguard the integrity of the election and address confusion, suspicion, and loss of confidence in Georgia's election processes. *See Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 261, 266 (D. Ariz. 2020) (granting state's motion to intervene because the statute at issue was "meant to safeguard the integrity of the election process," an interest that "cuts to the core of the State's role in effectuating the democratic process"); Mashburn 3/7/23 Dep. 167:2-170:7; Germany Decl. ¶¶ 27-33.

States, moreover, have a valid interest in protecting the integrity and security of the voting process. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021) (discussing laws enacted to combat voter fraud); *id.* at 2347

("preserving the integrity of [a State's] election process" is a "compelling" interest (citation omitted)); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (same); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) ("It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal."); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (stating that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society"); *accord Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009). And here, protecting voters with disabilities and voters in general from ballot-harvesting efforts is both a compelling State interest and served by the ballot return provision and associated criminal penalties at issue here. Germany Decl. ¶¶ 8, 18, 21, 26. Under Plaintiffs' requested relief, voters with disabilities could become a target for the fraudulent and intimidating behaviors that Georgia law is designed to prevent—for the benefit of both the voter with a disability herself and the integrity of Georgia's election system.

The Drop Box Provisions also restore public confidence in elections. Even without the ability to verify that fraud occurred with drop boxes under emergency authorization in 2020, the SEB and SOS received numerous complaints of ballot harvesting associated with outside drop boxes. Mashburn 3/7/23 Dep. 82:4-83:14. The video surveillance was often inadequate to properly determine what occurred, creating more suspicion among the public.

Germany Decl. ¶¶ 11, 14, 17; Mashburn 3/7/23 Dep. 73:18-78, 81-83:17. But SB 202's drop box provisions alleviated these concerns in the 2022 elections. Germany Decl. ¶ 21; Mashburn 3/7/23 Dep. 83:18-21.

As the Supreme Court has explained, moreover, states do not have to wait until they "sustain some level of damage before the legislature" may "take corrective action." *Burson v. Freeman,* 504 U.S. 191, 209 (1992) (citation omitted). Instead, the State may "respond to *potential* deficiencies in the electoral process with foresight rather than reactively." *Id.* (citation omitted, emphasis added); *see also Brnovich*, 141 S. Ct. at 2348 (a State need not wait to "sustain some level of damage before the legislature [can] take corrective action" (citation omitted)).

Here, leaving absentee ballot drop boxes outside with only questionable video surveillance subjects counties and the State to allegations of ballot harvesting and tampering that must be investigated. Germany Decl. ¶ 15. The reasonable security measures regarding drop boxes in SB 202 do not deny voters with disabilities meaningful access to absentee vote-by-mail or to drop boxes specifically. Yet, to have the Court rewrite Georgia law on where absentee drop boxes can be located, the hours they are to be accessible, with the corresponding security monitoring protocols does not weigh in favor of the

relief Plaintiffs seek. [12] Not only does this Court lack the authority to take a pen to Georgia's laws, *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) (rejecting the writ-of-erasure fallacy), but it would be wrong to do so here. "Only in an exceptional circumstance will a statute not be rationally related to a legitimate government interest and be found unconstitutional under rational basis scrutiny." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001) (footnote omitted). This is not such an "exceptional" case.

Third, beyond such state interests, the injunction would also harm the public. To the extent Plaintiffs would be willing to violate the prohibition on ballot-harvesting if it subjected them only to a misdemeanor, then enjoining the felony penalties for improper ballot return would potentially subject Georgia voters, those with and without disabilities, to the interference or intimidation the provision combats. It is precisely such conduct found recently in a neighboring state along with allegations of ballot harvesting in the 2020 election cycle that led the Georgia Assembly to increase the penalty for violations of the ballot-harvesting provision to put it on par with other conduct

[12] Plaintiffs do not challenge the provision requiring constant human surveillance of absentee ballot drop boxes. This provision would then require any county offering outside drop boxes to provide the additional expense and logistics of 24-hour personal security for the drop boxes at potentially significant expense. Germany Decl. ¶ 30.

affecting the security and integrity of Georgia's elections. Germany Decl. ¶ 8.

Regarding the Drop Box Provisions, the public confidence would again be tested with the inevitable claims of ballot tampering or ballot harvesting seen in the 2020 elections. The SEB and SOS would again have to investigate such claims, claims that did not arise under Georgia's current statutory scheme of allowing absentee drop boxes only indoors during early voting hours.

Fourth, to enjoin the location and hours provisions of O.C.G.A. § 21-2-382(c) would either eliminate all drop boxes (because drop boxes continue to be available after the 2020 emergency authorization only because SB 202 specifically provided for them with the additional safeguards) or create hardship for Georgia counties—given that human security personnel would be required to monitor the boxes 24 hours a day in an outdoor location. Further, just *permitting* drop boxes to be outside does not mean that all counties would do so or place them for drive-up or areas that satisfy every voter with a disability. *See*, *e.g.*, *People First of Ala. v. Merrill,* 491 F. Supp. 3d 1076, 1138 (N.D. Ala. 2020) (noting that enjoining a ban on curbside voting would not mean that all counties would necessarily provide curbside voting).

Fifth, with the 2024 elections less than a year away, the relief Plaintiffs seek would cause confusion and unduly burden the State. As noted above, an injunction against the Ballot-Harvesting Penalty would suggest that the State

cannot vigorously prosecute unlawful behavior that impacts the integrity and security of the election, including protecting the very voters Plaintiffs represent from intimidation. Additionally, the confusion that would result and steps the State would have to go through to put drop boxes outdoors is more than a mere physical relocation; it involves significant coordination and resources to provide the security required to protect against tampering and ballot-harvesting. Accordingly, the Court should avoid the requested last-minute and confusing changes to Georgia's elections processes. *Purcell*, 549 U.S. at 5. Rather, the Court should address these claims through the upcoming dispositive motions and, if necessary, a trial on the merits.

In sum, any supposed harm suffered by Plaintiffs is substantially less than the harm to the public and the State. When balanced against the identified harms to the State and the public, Plaintiffs' purported harms pale in comparison. For this reason, too, an injunction is inappropriate.

CONCLUSION

Plaintiffs have fallen far short of their burden to clearly demonstrate each of the required elements for a preliminary injunction. Plaintiffs' questionable case on the merits, their inexplicable delay, lack of irreparable harm, and the balance of interests militate strongly against an injunction. The Court should thus deny Plaintiffs' belated motion for preliminary injunction.

Respectfully submitted this 29th day of June, 2023.

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CERTIFICATE OF COMPLIANCE

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

/s/Gene C. Schaerr
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