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' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION ON DISCRIMINATORY-INTENT CLAIMS

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INTRODUCTION

Plaintiffs' hyperbolic rhetoric about SB 202 was obviously incorrect—and irresponsible—from the outset. Far from being "Jim Crow in the 21st Century," or "part of a broader attempt to disenfranchise Black voters," as Plaintiffs outlandishly claimed, it was clear from the beginning that SB 202 sought to *expand* voter access—by such things as increasing early voting, reducing voting lines, statutorily authorizing dropboxes, and enhancing Georgians' voting experience in many other ways. It was equally clear that SB 202 sought to increase voter confidence and the efficiency of Georgia's elections based on the lessons learned conducting an election in a global pandemic. Yet Plaintiffs persisted in their campaign to undermine these enhancements, likely in the hope that they might uncover some evidence—*any* evidence—to support their rhetoric, even as SB 202 was in effect for the 2022 elections.

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But time and experience have confirmed that Plaintiffs misjudged and ignored the facts with their sky-is-falling, Georgia-is-racist rhetoric. That is perhaps why Plaintiffs delayed seeking a preliminary injunction on their claims that SB 202 was passed for discriminatory reasons: By seeking a preliminary injunction now, rather than proceeding to summary judgment, Plaintiffs can delay this Court's final resolution of these claims, allowing the private Plaintiffs, at least, a few more months to fundraise off them.

But whether the Court addresses the merits of these claims now or in several months, the record is clear that Plaintiffs have *no* likelihood of success on their claims that the five SB 202 provisions they challenge here were enacted with racist, discriminatory intent: (1) the statutory authorization for counties to use dropboxes and the modest limitations on that authority; (2) the limitations on how third parties may provide things of value to voters; (3) updates to the deadline for submitting absentee-ballot applications; (4) limits on when voters may cast provisional ballots; and (5) replacing the subjective signature-match method of confirming a voter's identity with an objective identification requirement for absentee voting. Each of these Challenged Provisions serves important State interests. And, particularly considering the presumption of legislative good faith that governs in this Circuit, Plaintiffs have not identified any evidence remotely suggesting that the General Assembly acted for racist, discriminatory reasons. Plaintiffs have thus failed to carry their burden of demonstrating that they will likely succeed on the merits of their discriminatory intent claims, which in any event are *legally* foreclosed by Supreme Court and Eleventh Circuit decisions.

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Additionally, the Court should deny Plaintiffs' motion because their excessive delay undermines any claim of irreparable injury. In contrast, their requested relief would subject the State and the public to irreparable harm.

Moreover, Plaintiffs' requested relief would undoubtedly harm the State because Plaintiffs ask this Court to rewrite substantial portions of Georgia's election law, which is far beyond this Court's reach.

For all these reasons, the Court should reject Plaintiffs' unfounded and scurrilous charge that, in enacting the Challenged Provisions, the General Assembly acted with racist motives. By denying the motion, the Court can ensure that SB 202's election-enhancement measures remain in place. If Plaintiffs' motion were successful, voters of all races would be forced to vote without dropboxes, likely with longer voting lines, and subject to competing interest groups approaching them with things of value while waiting in line to vote. And counties would be forced to return to inefficient and complicated procedures for verifying the identity of voters, processing absentee-ballot applications for ballots that would never be voted, and for processing out-of-precinct provisional ballots. That is not in any voter's interest.

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BACKGROUND

A. Elections in Georgia Before SB 202

Like many other states, Georgia routinely receives complaints about its electoral system. As relevant here, each Challenged Provision addressed complaints that State officials had received from voters and county officials.

1. The 2020 elections give Georgia voters their first opportunity to use dropboxes.

Before 2020, there was no express statutory or regulatory authorization for the use of dropboxes in Georgia elections. Mashburn 30(b)(6) 74:20–75:2 (Ex. A). However, with the onset of the COVID-19 pandemic, the SEB issued an emergency rule in 2020 permitting counties to use dropboxes to ensure that voters could cast ballots while maintaining social distance. Germany Decl. ¶ 15 (Ex. B). But the SEB rule left it to the county's discretion whether to use dropboxes. *Id.* And, when the State's COVID-19 emergency regulation expired, there was no provision in place to expressly allow counties to use dropboxes. Mashburn 30(b)(6) 74:11–14.

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Through the experience of the 2020 election, the State concluded that dropboxes were a useful way for voters to return absentee ballots. That way, "every voter in the State [has] a place to drop off their ballot, postage free, in an environment that is secure, and that will guarantee that the ballot makes its way into the election officials' hands." Bailey 3/21/23 121:10–15 (Ex. C).

But this experience also showed that certain reforms were needed to ensure that dropboxes allow for secure ballot return and to promote electoral confidence and efficiency. *See, e.g.*, Germany 30(b)(6) 55:19–56:2 (Ex. D); Mashburn 30(b)(6) 75:10–18, 77:13–25, 82:19–83:1, 168:1–169:21. For

instance, it was very time and manpower consuming for county officials to collect ballots daily from numerous dropboxes. Germany Decl. ¶ 76; Eveler 157:3–13 (Ex. E). Also, some voters were wary of dropboxes, perceiving them as susceptible to abuse as they could be placed unattended, and not properly monitored, in remote locations. *See* Germany 30(b)(6) 55:19–56:2; Mashburn 30(b)(6) 168:1–169:21. In fact, many of these voters contacted the Secretary of State or SEB to express their concerns, and some complained of alleged misconduct at the dropboxes. *Id.*

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While there was no evidence of widespread voter fraud using dropboxes, there were troubling instances of counties not properly securing their dropboxes. Mashburn Individual 75:12–13 (Ex. F). For instance, one county left a key in the dropbox, so anyone who passed by could access it. *Id.* 76:12–18. Another county used an unsecured cardboard box as a dropbox. Mashburn 30(b)(6) 82:15–18. Fulton County placed some dropboxes outside without the required video surveillance. Germany Decl. ¶ 66. In another instance, the video surveillance did not produce a clear and usable record for monitoring the dropbox. *Id.* Elsewhere still, DeKalb County was found not to be using the required chain of custody procedures. *Id.* Additionally, following the November 2020 general election and January 2021 runoff election, the SEB and Secretary of State received numerous complaints regarding claims of

unlawful ballot harvesting involving dropboxes.[1] Kidd 118:12–14 (Ex. G).

2. There is growing concern about third-party organizations approaching voters in line with things of value.

Georgia has long recognized the importance of a controlled environment around voting locations. Mashburn 30(b)(6) 104:18–105:7. In recent elections, however, a growing number of organizations began approaching voters in line and offering elaborate items of value, including food, water, phone chargers, items of clothing, and raffle tickets. Eveler 288:5–12. And, as Plaintiffs concede (at 56), these events often involved much more than just handing out water. Rather, they turn into "celebration[s]" around the polling location. *See id.*; *see also* Eveler 144:5–8 (describing this as "chaotic"). As State Election Board ("SEB") member Matt Mashburn explained, these events even included political party representatives handing goods out to voters. Mashburn 30(b)(6) 101:18–102:16, 118:12–17. In other instances, candidates were seen distributing food to voters. *Id.* 185:20–186:7.

These activities led to State and county officials receiving complaints from voters who believed such actions violated election laws or were intended

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[1] Although these concerns were ultimately determined to be unsubstantiated, the system in place nonetheless allowed for such concerns to be raised, which required substantial time to investigate and address. Germany Decl. ¶ 74.

to illegally influence voters. Germany Individual 96:7–98:10, 103:19–23 (Ex. H); Watson 185:20–24 (Ex. I); K. Williams 30:22–31:1 (Ex. J); Eveler 138:9–24; *see also* Adams 227:23–228:6 (Ex. K) (noting that providing "food and drink" "could be construed as an influence"). Voters, advocacy groups, and county officials were also uncertain about whether certain line activities were lawful. Mashburn 30(b)(6) 185:20–186:7; Eveler 137:22–138:24. And county officials were unclear about their responsibility to monitor such activities, or how to restore order as these activities continued to grow. Harvey 146:19–152:23 (Ex. L). Similarly, poll managers were inundated with questions about what constituted acceptable interactions with voters in line. Mashburn Individual 94:22–95:3; Eveler 288:20–289:14 (discussing difficulty of determining motives when third parties approached voters with things of value).

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Answering those questions and investigating complaints added yet another task for election officials, which diverted their attention away from other necessary duties. Eveler 138:9–14, 288:13–289:14; Germany Individual 103:3–5; Sterling 204:13–205:13 (Ex. M). And, as these concerns continued to grow after each election, there was a real concern that conflicts between voters who perceived such activities as illegal could lead to aggression at the polling place. Germany Individual 108:5–11.

3. Increased use of absentee voting reveals inefficiencies in the deadlines for returning absentee-ballot applications.

SB 202 also refined Georgia's rules about the return of absentee-ballot applications. During the COVID-19 pandemic, Georgia experienced a substantial increase in absentee voting in 2020. Germany Decl. ¶ 93. But data show that 2020's high absentee-voting rates were an aberration, rather than a new norm. *Id.* However, the 2020 election highlighted several areas where Georgia's absentee-voting system could be updated.

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Processing absentee-ballot applications is a time-consuming process that places a heavy burden on election officials. *Id.* ¶ 95. Before SB 202, voters could apply for an absentee ballot until the Friday before the election, leaving just four days for the counties to process the application, send the voter a ballot, and for the voter to complete and return the ballot. Bailey 3/21/23 98:8–21, 109:19–110:1; Germany 30(b)(6) 78:1–7.

And those ballots were not usually voted. As former Elections Director Chris Harvey testified, when an absentee-ballot application is received late on the Friday before the election, the ballot almost certainly will not make it into the mail until Monday, and the voter will probably receive it Wednesday or Thursday—after the election is already over. Harvey 179:8–180:7; *see also* Germany Individual 129:22–130:4; Eveler 182: 8–10 ("We would be issuing

ballots on the Friday before the election, knowing that they wouldn't make it to the voter"); Adams 102:5–103:10 (discussing reports of the same issue arising even earlier than the Friday before the election). Thus, even if a voter wished to return the ballot to a dropbox, the election would have already concluded by this point. As the State repeatedly heard in public comments, such a system "set up [voters and election officials] to fail because there's no way to get the ballot back in time ... and so then voters [were] being disenfranchised because their vote was late." Mashburn 30(b)(6) 54:14–55:10; *see also* Eveler 172:21–173:3; Wurtz 79:5–15 (Ex. N).

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Thus, before SB 202, in the final days before the election, county officials were required to spend time reviewing applications and mailing absentee ballots that were almost certain not to be voted. Germany Decl. ¶ 99. And this coincided with the busiest time for early voting. *Id.* ¶ 95. Having to dedicate staff to process absentee-ballot applications that were almost certain not to be voted meant that staff were not available to assist with other early-voting activities, which could lead to slower and longer voting lines. *Id.* ¶ 100.

Similarly, on Election Day, these late applications slowed down voting lines, as many voters who had submitted applications showed up to vote in person, which required county officials to take additional time-consuming steps to cancel each such application before a voter could vote in person. *Id.*

¶ 102; Kidd 192:4–193:5. This imposed a substantial burden on county officials and led to frequent complaints from those officials.

4. Out-of-precinct provisional voting becomes more problematic.

Another recent trend undermining election efficiency in Georgia has been the use of provisional voting. Germany Decl. ¶ 108. Before SB 202, Georgia law permitted voters who arrived at the incorrect precinct to vote a provisional ballot that would count for any races where the voter was eligible to vote. *Id.* This imposed substantial burdens on county officials, and it prevented voters from being able to cast votes in every race.

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Indeed, for each out-of-precinct provisional ballot cast, a group of election officials manually duplicated the provisional ballot onto another ballot. *Id.* This time-consuming process prevented officials from completing the other important tasks that need to be accomplished after the polls close. Manifold 95:11–18 (Ex. O) (processing an out-of-precinct voter takes 15–20 minutes); Kidd 145:13–16 (estimating 5–15 minutes). Thus, county officials requested a "definite answer" from the State as to whether they were required to offer provisional ballots to *any* out-of-precinct voter, or instead only needed to provide a provisional ballot if the voter asked for one. Harvey 188:9–189:25, 199:2–6.

In addition to those burdens, the continued frequent use of provisional ballots led to complaints about the security of the voting process. Again, to process an out-of-precinct provisional ballot, a group of county officials must manually duplicate that ballot to another ballot. Germany Decl. ¶ 108. Having county officials manually completing ballots after the polls close can far too easily be characterized as evidence of fraud. *Id.* ¶ 111.

5. Complaints about subjective signature-match verification increase.

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Finally, Georgia's previous method for confirming the identity of a voter requesting and voting an absentee ballot led to substantial complaints. Before SB 202, county officials were required to undertake a time-consuming and subjective comparison of signatures to confirm a voter's identity. Bailey 3/21/23 123:24–125:21. This required a county official to compare the signature on the application to signatures stored in a separate system containing images of the voter's signatures. *Id.* 124:15–125:3. If it was unclear whether the signatures matched, the county official would then have another official compare the signatures. *Id.* 125:5–13. If that official could not determine whether the signatures matched, a third official would make a final determination. *Id.* 125:13–15.

This process was time-consuming and highly subjective. Germany Decl.

¶¶ 115–16. And the subjective nature also threatened to create the appearance of fraud and undermine voter confidence. Sterling 95:23–96:16; Harvey 185:14–18. These issues were crystalized with the significant increase in absentee voting during the 2020 elections. Germany Decl. ¶ 115.

B. Georgia's General Assembly Responds to Lessons Learned in Recent Elections.

These complaints about election processes were not limited to the 2020 election. Voters also lodged complaints about election processes during and after the 2018 election. And, in each instance, the General Assembly responded by enacting legislation to respond to those complaints through adjustments to the administration of elections.

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1. The 2018 gubernatorial election leads to litigation and a legislative response.

In 2018, Democrats and other interest groups lodged many complaints after the election. And those complaints led to multiple lawsuits alleging, among other claims, that provisional ballots were not properly counted, *Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270, 1275 (N.D. Ga. 2018), absentee ballots were not properly counted, *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1331 (N.D. Ga. 2018); and that there were "'serious and unconstitutional flaws in Georgia's elections process,'" *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1262 (N.D. Ga. 2019).

In response to these concerns about the 2018 election, the General Assembly considered dozens of bills related to elections and held at least ten hearings during the 2019 legislative session. Germany Decl. ¶ 9. During those hearings, Democrats emphasized the importance of enacting legislation to increase voter confidence, noting that "it seems that there's a common theme of public mistrust," and asking, "What are we going to put in place to restore public trust?"[2]

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At the end of the 2019 legislative session, the General Assembly passed an omnibus election update bill, HB 316, which contained 51 separate sections, and was comprised of provisions originally introduced through other bills. Germany Decl. ¶ 10. For instance, HB 316 updated the process for absentee ballots, provisional ballots, and voter-list maintenance driven, at least in part, by the complaints about the 2018 election. In the end, HB 316 was sent to the Governor 32 days after it was introduced.[3] *Id.* ¶ 11.

2. The 2020 elections lead to similar litigation and legislation.

Many similar complaints arose just two years later during the 2020

[2] *See* Johnny Kauffman, *Election Bill Brings Out Angst and Distrust After Georgia's 2018 Midterms*, WABE (Feb. 22, 2019), https://tinyurl.com/4rtskdj5.

[3] Because the Georgia Constitution limits regular legislative sessions to 40 legislative days per year, Ga. Const. art. 3, § 4, para. 1, a bill considered for 32 days spans much of the legislative session.

election. However, that election also presented unique challenges as Georgia confronted the prospect of conducting an election during the worldwide COVID-19 pandemic. Naturally, these new and unique circumstances led to a host of complications and complaints. Aware of these difficulties, the General Assembly paid close attention during the 2020 primary election, about which the House Government Affairs Committee held multiple hearings and issued a report on the pandemic's impact. *Id.* ¶ 20.

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At this same time, Georgia faced an onslaught of litigation leading up to the 2020 general election about how that election would be conducted. These lawsuits were generally filed by left-leaning organizations. *See, e.g.*, *Black Voters Matter Fund v. Raffensperger*, No. 1:20-cv-1489-AT (N.D. Ga., filed Apr. 8, 2020) (absentee ballot processes); *New Ga. Project v. Raffensperger*, No. 1:20-cv-1986-ELR (N.D. Ga., filed May 8, 2020) (absentee ballot processes); *Anderson v. Raffensperger*, No. 1:20-cv-3263-MLB (N.D. Ga., filed Aug. 6, 2020) (long voting lines); *Coal. for Good Governance v. Raffensperger*, No. 1:20-cv-1677-TCB (N.D. Ga., filed Apr. 20, 2020) (election procedures).

And the litigation did not stop after the 2020 general election. Rather, like the supporters of the losing candidate in 2018, supporters of the losing presidential candidate in 2020 filed a series of lawsuits alleging improper counting of absentee ballots, *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG

(N.D. Ga., filed Nov. 13, 2020), seeking inspection of voting machines, *Pearson v. Kemp*, No. 1:20-cv-4809-TCB (N.D. Ga., filed Nov. 25, 2020), alleging wide-ranging violations of the Election Code, *Trump v. Raffensperger*, No. 2020CV343255 (Ga. Super. Ct., Fulton Cnty., filed Dec. 4, 2020), and seeking changes to the verification of absentee ballots, *Ga. Republican Party, Inc. v. Raffensperger*, No. 1:20-cv-05018-ELR (N.D. Ga., filed Dec. 10, 2020).

And, just as it had done after the 2018 elections, the General Assembly used the next legislative session to consider how to respond to the various concerns. Indeed, legislators responded by holding hearings and introducing bills related to election administration. Germany Decl. ¶ 21.

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For instance, Chairman Barry Fleming, appointed to head the House Special Committee on Election Integrity,[4] held the first committee meeting on February 4, 2021, adopting committee rules that included suggestions of a Democratic member. *Id.* ¶ 22. The first bill the committee considered was a bipartisan set of suggestions from the Association of County Commissioners of Georgia (ACCG), which would have limited the timeline for returning absentee-ballot applications. *Id.* ¶ 25. The committee then made additional

[4] In recent years, there have been many such special committees in the General Assembly. Germany Decl. ¶ 23.

changes to that initial bill based on input from Democratic members. *Id.* ¶ 26. At that time, Democratic Rep. Smyre referred to these changes as part of a "good faith effort" to improve election administration in Georgia. *Id.* ¶ 27.

Several weeks later, on February 18, 2021, Chairman Fleming introduced HB 531 and held a hearing to explain the legislation. *Id.* ¶ 28. During that hearing, Chairman Fleming explained that this legislation would, among other things, improve voter confidence following the 2018 and 2020 elections and the difficulties of the COVID-19 pandemic. *Id.* ¶ 29. As Chairman Fleming noted, these "issues did not start in 2020." *Id.* Rather, it just happened that, in 2020, politically "the shoe seemed to be on the other foot." *Id.*

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Thus, HB 531 included provisions for using identification numbers instead of signature matching for the absentee ballot process, ensuring that state and federal runoffs use the same four-week period, providing statutory authorization—for the first time—for dropbox usage, updating rules regarding out-of-precinct provisional ballots, and changing the absentee-ballot request window to align with the bipartisan framework from ACCG. *Id.* ¶ 30.

This legislation, which was introduced at the *beginning* of the legislative session, included the provisions Plaintiffs here now claim (at 16) were added at the last minute.

The next day, the House Committee held a hearing to receive public comments on HB 531. Germany Decl. ¶ 31. To ensure easy access, witnesses were able to participate by Zoom. *Id.* ¶ 33. During that hearing, Chairman Fleming noted that he had agreed with Rep. Smyre to conduct additional hearings, and he explained that updated drafts of legislative proposals would be circulated periodically for consideration. *Id.* ¶ 33. Bearing in mind that Georgia's legislative session lasts only 40 legislative days, *see infra,* note 4, bills and amendments must be circulated and considered quickly.

The committee process continued, with the relevant committees devoting more than 25 hours of committee time to bills related to elections over the next five weeks. *Id.* ¶ 34. In fact, the House Committee alone held four hearings before passing HB 531 on February 24, 2021. *Id.* ¶ 35. And, on the other side of the General Assembly, the Senate held hearings with more than 60 witnesses presenting their views on legislative proposals. *Id.* ¶ 40.

Ultimately, both the House and Senate passed a variety of election bills. *Id.* ¶ 42. During a March 17, 2021 House Committee meeting, the Committee began considering a substitute to SB 202, which included various provisions, including several Democratic proposals. *Id.* ¶ 43. Meanwhile, time was growing short in the 2021 session. *Id.* ¶ 44. Thus, shortly thereafter, the House Committee further amended SB 202 before passing it out of committee.

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Id. ¶ 45. And the relevant Senate committee passed a revised substitute to HB 531 on March 23, 2021. *Id.* ¶ 48.

At this point, there were only three days left in the legislative session and the House and Senate Committees had passed slightly different bills. *Id.* ¶ 49. Ultimately, the House considered a version of SB 202 that was "a combination of measures dealing with elections either already passed by the House or Senate, or measures already considered or passed by the two committees of each House dealing with, obviously, election matters." *Id.* ¶ 51.

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Despite the various election bills introduced, considered, and debated, at the conclusion of the 2021 regular session, SB 202 was the only election bill to pass the entire General Assembly. *Id.* ¶ 52. After nearly two hours of questions and debate, the House voted 100-75 to pass the revised version of SB 202. *Id.* On the Senate side, Senators considered the same legislation, and it was passed by a vote of 34-20. *Id.* ¶ 54. In the end, SB 202's legislative journey was substantially similar to HB 316, which had responded to the 2018 elections. *Id.* ¶ 56.

C. Voter Access Increases in Elections After SB 202.

With SB 202 in place, the 2022 elections confirmed that Georgians can vote easily and securely no matter their race. Indeed, voter turnout has been high in each election since SB 202's enactment. Numerous reports recognize

that Georgia had "the highest turnout in the [South]"[5] and the "13th-highest in the nation."[6] State Defendants' expert Dr. Justin Grimmer, for example, concluded that "Georgia turnout, relative to other states, remained high in the first election after SB 202," and turnout was actually "5.6 percentage points *higher* than the average in other states." Grimmer Rep. ¶¶ 42, 44 (Ex. P) (emphasis added).

Comparing the 2018 and 2022 elections, Plaintiffs suggest (at 34 n.15) that SB 202 caused "the gap between white turnout and Black turnout" to "increase[] markedly." They are incorrect. The 2020 elections, which were held before SB 202, had a gap similar to that in 2022: In 2020, the turnout gap between Black and white voters in the general election was 9.4% and in the runoff was 6.9%. By 2022, the turnout gap remained essentially the same, increasing slightly to 9.7% in the general and decreasing slightly to 6.7% in the runoff. Fraga Sur-Rebuttal Rep. 15 tbl. 1 [Doc. 566-47].

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Additionally, since SB 202, Georgia saw higher turnout relative to

[5] Jacob Fabina, *Voter Registration in 2022 Highest in 20 Years for Congressional Elections*, U.S. Census Bureau (May 2, 2023), https://tinyurl.com/2023CensusArticle.

[6] Mark Niesse, *Georgia records highest voter turnout in the South*, Atl. J.-Const. (May 23, 2023) (citing figures compiled by University of Florida's U.S. Elections Project).

previous elections. The 2022 midterm election saw "more votes cast than any other midterm," "record breaking midterm Early Voting turnout," and the highest number of votes by mail *ever* cast in a midterm.[7] Similarly, a survey performed by the University of Georgia's School of Public & International Affairs ("SPIA") found that more than 90% of black voters and nearly 85% of other minority voters found voting in 2022 to be either just as easy *or easier* than in previous elections.[8]

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One reason why voting was easy is that lines in 2022 were shorter following many of SB 202's key reforms. The SPIA survey, for example, reported that, in the November 2022 midterm election, more than 95 percent of Georgia voters who voted in person reported waiting in line for fewer than 30 minutes.[9] Secretary of State data show similarly, with the "average wait time on Election Day" varying from "0 minutes to approximately 10 minutes." Shaw Rebuttal Rep. ¶ 38 (Ex. Q). Indeed, the average wait time on Election Day statewide in November 2022 was 2 minutes and 19 seconds, while in December 2022, the average wait time was even shorter—only 1 minute and

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[7] Ga. Sec'y of State, *Georgia Voters Lead Southeast in Engagement, Turnout* (May 17, 2023), https://tinyurl.com/2huchh3h.

[8] M.V. Hood III, 2022, Sch. of Pub. & Int'l Affs. Surv. Rsch. Ctr., U. Ga., 2022 Georgia Post-Election Survey 13 (Jan. 17, 2023), https://tinyurl.com/4kxeb373.

[9] *Id.* at 5.

45 seconds. 2nd Germany Decl. ¶¶ 10–11 (June 15, 2023) (Ex. R); *see also* Manifold 30:13–17 (stating that "we don't have lines nearly as much as they used to have in the past[.]"); Wurtz 59:17 (same).

Another factor contributing to the ease of voting is that after SB 202, voters on Election Day overwhelmingly reported to their assigned precincts. In 2020, when Georgia had the highest turnout in its history, nearly 0.2% of all votes cast were cast by provisional ballot. Grimmer Rep. 53 tbl. 8. Following SB 202, the share of provisional votes cast fell to .07%. And the share of ballots cast provisionally did not just drop for minorities, but for "every racial group." Grimmer Rep. ¶ 67. As the share of provisional ballots cast dropped, moreover, the gap between white provisional votes and the provisional votes of other self-identified racial groups also fell. *Id.* at 53 tbl. 8.

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The goal of easing administrative burdens was also furthered by other provisions of SB 202. Indeed, with SB 202's provision in place for streamlining the identification-verification process for absentee voting, the nonpartisan Carter Center recognized that this change has "streamlined the process" and "made it easier for election officials" to process a record number of absentee-

ballot applications for a midterm election.[10]

The 2022 elections also showed both that SB 202 allowed voters to continue to vote outside of Election Day and that voters took advantage of those opportunities at higher rates than ever before in a midterm election. As discussed above, concerns about COVID-19 led many voters to vote by mail in 2020 who had not done so previously. Thus, although voting by mail was becoming increasingly popular since at least 2014, during the COVID-19 pandemic, absentee voting skyrocketed for all racial groups. Grimmer Rep. 46 fig. 1. By 2022, however, absentee voting levels returned to their pre-2020 trajectory. Consistent with that trajectory, in 2022, voters were slightly more likely to vote by mail than they were in 2018, the last non-pandemic midterm election. *Id.* at 42 tbl. 7.

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Since SB 202's enactment, voters are also increasingly voting early in person. The 2022 midterm election saw the highest share of ballots cast early in person in Georgia's history. *Id.* at 42 tbl. 7. Naturally, as early-in-person and absentee-by-mail voting has increased, the share of votes cast on Election Day has dropped, from around 63% in 2014 to 36% in 2022. *Id.* ¶ 54. This

[10] The Carter Ctr. for Fulton Cnty. Bd. of Elections & Reg. and Performance Rev. Bd., 2022 General Election Observation: Fulton County, Georgia 16 (2022), https://tinyurl.com/346s8tdy (attached to the Germany Decl. at Ex. 34).

change in how Georgians vote, which began before SB 202 and has continued after it, demonstrates that, across racial groups, Georgians like and use the various voting methods available in Georgia.

ARGUMENT

Despite the fury with which Plaintiffs try to impugn the motives of the Georgia legislators who passed SB 202, at the end of the day Plaintiffs have not even begun to carry their burden of showing that the "extraordinary remedy" of a preliminary injunction is appropriate. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Specifically, Plaintiffs fail to satisfy each requirement for obtaining preliminary injunctive relief: (1) they have not shown a substantial likelihood of success on their claim that the Georgia Assembly acted with racist intent; (2) they have not demonstrated any irreparable injury; and (3) they have not shown that any threatened injury outweighs the harm that an injunction would cause the State and the public. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). For all those reasons, the motion should be denied.

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I. Plaintiffs Have Not Demonstrated a Substantial Likelihood of Success on the Merits Because the Claim on Which They Base Their Motion Is Not Legally Cognizable.

A threshold reason Plaintiffs are unlikely to succeed on the merits of their claims is that, although several of the individual Plaintiffs have asserted

claims alleging that the Challenged Provisions impose a discriminatory impact on Black voters, they seek relief here only on a theory of discriminatory *intent*, which is not a cognizable claim under the Voting Rights Act or the Fourteenth and Fifteenth Amendments.

As State Defendants have previously shown at length, it is well established that "[t]he application of an improper legal standard in determining the likelihood of success on the merits is never within the district court's discretion." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 336–38 (5th Cir. Unit B Nov. 1981) (citation omitted). This means the same standard that will ultimately govern at summary judgment or trial governs at the preliminary injunction stage: "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

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Turning to what those standards are, "to establish a violation of either the Equal Protection Clause of the Fourteenth Amendment or the Fifteenth Amendment, Appellants must show that the [challenged] decision or act had a discriminatory purpose *and* effect." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188–89 (11th Cir. 1999) (emphasis added). And, for reasons addressed in prior briefing, *see* [Docs. 549-1, 585], only discriminatory-effects claims are viable under the VRA, *see Allen v. Milligan,* 143 S. Ct. 1487, 1507 (2023) ("[W]e

have reiterated that § 2 turns on the presence of discriminatory effects, not discriminatory intent."); *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 943 (11th Cir. 2023) (*LWV*) ("[A] finding of discriminatory impact is necessary to establish a violation of section 2" and so "discriminatory intent alone will not suffice."), *pet. for reh'g filed* (May 18, 2023).

Here, although the non-DOJ Plaintiffs include disparate-impact claims in their complaints, they do not raise such disparate-impact claims as a basis for their current motion, focusing instead entirely on an alleged discriminatory intent. Where Plaintiffs *do* address discriminatory impact, it is only in support of their discriminatory-intent-only claims, not to support a necessary finding of discriminatory effects.[11] Because both the Fourteenth and Fifteenth Amendments and the Voting Rights Act require a showing of discriminatory effects, Plaintiffs cannot obtain preliminary injunctive relief on their discriminatory-intent claim alone, which is not a cognizable claim. And for that reason alone, their motion for preliminary injunction must be denied.

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[11] And, as explained below, what little evidence Plaintiffs do provide to suggest a discriminatory impact is woefully lacking.

II. Plaintiffs are Also Unable to Demonstrate a Likelihood of Success on the Merits as There is No Evidence That Race was a Motivating Factor Behind Any of the Challenged Provisions.

Beyond seeking relief on claims that are not cognizable, the Court should deny Plaintiffs' motion because they have failed to identify any evidence, let alone *sufficient* evidence, showing that race was a motivating factor for any of the Challenged Provisions. Although Plaintiffs discuss the *Arlington Heights* factors at length, they fail to carry their burden of identifying any evidence showing that these factors weigh in their favor.

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Rather, contrary to Plaintiffs' suggestion, SB 202 was the product of a routine legislative process, the text of the legislation itself confirms it does not have a discriminatory purpose, and there is no basis for suggesting that the General Assembly should have foreseen any discriminatory impacts or considered other alternative measures. That is particularly true considering the Eleventh Circuit's clear instruction that legislative acts—like SB 202's enactment—are presumed to be taken in good faith. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022). Plaintiffs have hardly even tried to overcome that strong presumption. Instead, in claiming that the Georgia Assembly acted out of racism, they have engaged in smear tactics rather than reasoned, evidence-based argument.

A. Plaintiffs have not identified any meaningful irregularity in the legislative process leading to SB 202.

Plaintiffs are wrong to suggest (at 47–50) that the legislative process leading to SB 202 was somehow irregular. As discussed in detail above, the legislative record shows deep consideration of election-related issues throughout 2021. The House Committee held 12 full committee hearings and meetings and four subcommittee hearings during the 2021 session over more than six weeks before the passage of SB 202.[12] Likewise, the Senate Committee held 13 hearing and meetings over the same period.[13] Plaintiffs largely ignore this broader legislative history, opting instead to treat SB 202 as if it arrived in a vacuum. But Plaintiffs themselves recognize (at 16) that both HB 531 and SB 241 "served as templates for SB 202" and "contained significant new changes that later appeared in SB 202." Thus, any discussion of the time spent on SB 202's enactment must also consider time spent on its predecessors, including HB 531 and SB 241.

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To argue against that conclusion, Plaintiffs rely (at 44, 48) on Dr.

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[12] *Hearings & Meetings of H. Special Comm. On Election Integrity*, 2021 Leg., Reg. Sess. (Ga. 2021) [videotape archive available at https://tinyurl.com/y2cc262t].

[13] *Hearings Before the S. Comm. on Ethics*, 2021 Leg., Reg. Sess. (Ga. 2021) [videotape archive available at https://tinyurl.com/3zw27wzm].

Anderson's report for the suggestion that the legislative process was irregular. But Dr. Anderson conceded that she never studied the process of how a bill becomes a law in Georgia, and she does not consider herself an expert on the Georgia legislative process. Anderson Vol. II 203:20–204:1 (Ex. S). Further undermining any value of her report, Dr. Anderson stated that, although she reviewed hearings on SB 202 and concluded that there was "chaos" in the process, she never reviewed hearings of any other election legislation in any other years as a comparison. *Id.* 204:18–205:1. In fact, Dr. Anderson relied solely on the public comments and the meeting notices for her conclusions. *Id.* 247:14–248:16. Further, she based her conclusion that the process was rushed solely on individuals (including many connected with organizations that later challenged SB 202 through litigation) saying it was rushed during the hearings, not as compared to any other bills considered by the General Assembly under "normal" processes. *Id.* 248:17–249:5; *but see* Eveler 48:24–49:18, 50:19–23 (stating that the General Assembly did not depart from normal processes in enacting SB 202).

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Dr. Anderson's conclusions are weakened further by her agreement that the legislative process resulted in several changes to the draft bill—changes that she herself supported. For example, after Rev. Woodall testified about the impact of the photo identification requirements on pretrial detainees in jail,

the legislation was amended to provide them access to photo ID for voting. Anderson 222:12–223:2. And Dr. Anderson agreed that, after hearing testimony about weekend voting, the legislature maintained weekend voting in SB 202 and maintained no-excuse absentee voting. *Id.* 212:4–15, 225:16–20. Thus, Plaintiffs fail in their attempt to rely on expert testimony to show a departure from the routine legislative process in Georgia. Quite the opposite—Dr. Anderson's concessions underscore the reasonableness of the process.

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Nor is there anything in the record to suggest that the General Assembly departed from the normal legislative process. While Plaintiffs claim (at 44–47) that there were departures from the typical process and a "lack of transparency" here, the record demonstrates instead that the legislature gave careful and close consideration to election bills in the 2021 session—with several Democratic members acknowledging the work of sponsors. *See* Germany Decl. ¶¶ 27, 47. And testimony from election officials was not limited, as there were *many* witnesses offered the opportunity to provide comments. *See id.* ¶¶ 33, 40.

Plaintiffs nevertheless continue to spin the history of the legislation by making short shrift (at 50) of "three hearings on SB 202." But Plaintiffs ignore the dozens of hearings and meetings on the same topics over the weeks before final passage. *See id.* ¶¶ 25–46.

Thus, it is Plaintiffs who ignore the "broader context surrounding the passage of legislation," *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016), by painting a one-sided picture that ignores the context of the aftermath of the 2018 and 2020 elections and the extensive work of legislators to address the lack of confidence in the election systems by voters from all political persuasions. Here again, Plaintiffs' claimed "irregularities" utterly fail to support their claim of racism.

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B. Plaintiffs have not identified any evidence suggesting the true purpose of any Challenged Provision was discriminatory.

Nor have Plaintiffs identified any other evidence demonstrating that the Challenged Provisions were enacted with a discriminatory purpose. In fact, Plaintiffs fail from the outset because they look to the wrong place: As the Supreme Court explains, the proper source for determining the purpose of the statute is the statute's text. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."). SB 202 is the document on which all legislators voted and expressed their views, and it is the document that was signed into law. Plaintiffs have not even attempted to show a hint of discriminatory purpose in that text.

Rather, the bill contains legislative findings and statements of purpose that align with the legitimate State interests identified above: "[T]o 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 at 4:79–82 (Ex. T). SB 202 also responded to elector "concern[] about allegations of rampant voter fraud." *Id.* at 4:72. Those statements are far more representative of SB 202's purpose than anything on which Plaintiffs fixate.

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1. For instance, Plaintiffs repeatedly argue (at 4, 41, 59–60) that the Court should impute a discriminatory, racist intent to the Challenged Provisions from Georgia's "history of discrimination." But the record does not support this argument, which is perhaps why Plaintiffs did not attempt to identify facts connecting any specific Challenged Provision to Georgia's history.[14] The law is also not on Plaintiffs' side, as the Supreme Court has held

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[14] Similarly, although their experts discussed Georgia's history extensively, they also failed to make any connection between Georgia's history and any of the Challenged Provisions. Dr. Anderson, for example, spends nearly 200 pages talking about Georgia's history before concluding—without analysis—that "SB 202 is just the latest iteration of a historical pattern" of discrimination in Georgia. Anderson Rep. 191 [Doc. 566-49]. And Dr. Clark spends ten pages arguing that Georgia's past led to worse socioeconomic conditions for Black voters, and that this history now essentially strips Georgia of its sovereign

that "the presumption of legislative good faith [is] not changed by a finding of past discrimination." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Thus, as the Supreme Court further explained, Plaintiffs "cannot rely simply on the past" to challenge contemporary legislative enactments. *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013).

The Eleventh Circuit agrees, explaining that the "historical background" analysis in *Arlington Heights* does "not provid[e] an unlimited look-back to past discrimination," but instead "focus[es] ... on the 'specific sequence of events leading up to the challenged decision.'" *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1325 (11th Cir. 2021) (*GBM*) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)). Thus, Plaintiffs' extended discussion of Georgia's history ignores this authority and invites the Court to take the "danger[ous]" step of "allowing the old, outdated intentions of previous generations to taint [Georgia's] legislative action forevermore on certain topics." *Id.*[15]

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ability to enact election laws. Clark Rep. 2–14 [Doc. 566-51]. Nothing but their *ipse dixit* even attempts to draw ties between SB 202 and the Jim Crow south.

[15] Plaintiffs also cite (at 41–42) the "the disparities between Black and white Georgians on multiple socioeconomic factors" to argue that SB 202 imposes a disparate impact on Black voters. In doing so, Plaintiffs look again to Georgia's "history of discrimination" to argue that the disparities between Black and white voters was caused by Georgia's past actions. They further argue (at 42)

2. Plaintiffs are equally misguided when they ask the Court (at 50–51) to infer a discriminatory, racist intent based on their mischaracterization of statements from legislators and others outside Georgia. Neither the facts nor the law is on Plaintiffs' side.

As to the facts: Plaintiffs' evidence of "contemporaneous statements" (at 50–51) is very thin, consisting largely of one statement by Speaker Ralston and one by Rep. Fleming. Neither shows that these individuals, let alone the entire legislature, had discriminatory intentions. In fact, neither statement references race at all. Plaintiffs simply "perceive[] racial undertones" in the statement. *Id.* But such subjective perceptions provide no legal basis for finding discriminatory purpose.[16] But, as the Eleventh Circuit confirms, "when a court assesses whether a duly enacted statute is tainted by discriminatory

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that these past actions can infect "even a facially neutral election requirement." But the Eleventh Circuit has expressly rejected these arguments, explaining that "evidence of historical discrimination imported through socioeconomic data is no exception" to the rule established in *Greater Birmingham* prohibiting "an unlimited look-back" and thus "cannot support a finding of discriminatory intent." *LWV*, 66 F.4th at 923. That same conclusion applies here, and Plaintiffs cannot point to socioeconomic factors allegedly influenced by past actions as evidence of contemporary discrimination.

[16] Further, Plaintiffs' effort to equate references to "Fulton County" with "Black" are not well taken. Rather, references to issues in Fulton County were simply references to well-documented issues with Fulton County's election administration over many years. *See, e.g.*, Germany Individual 79:19–80:1; Mashburn 30(b)(6) 75:19–21; Fuchs 50:15–18 (Ex. U).

intent, the good faith of the state legislature must be presumed." *League of Women Voters*, 32 F.4th at 1373 (cleaned up). And in any event, a "statement by a single legislator is not fairly read to demonstrate discriminatory intent by the state legislature." *Id.*; *accord LWV*, 66 F.4th at 932.

Even as to a bill sponsor, "[i]t stretches logic to deem a sponsor's 'intent' … as *the* legally dispositive intent of the entire body of the … legislature on that law. *GBM*, 992 F.3d at 1324–25. As the Supreme Court explains, "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907 (2019).

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Those principles apply equally here, particularly as the statements Plaintiffs highlight are race neutral and made by a miniscule number of representatives in a General Assembly made up of 236 members. SB 202 passed the House by a vote of 100 to 74, and it passed the Senate by a vote of 34 to 20. Germany Decl. ¶¶ 52, 54. In this Circuit, the limited race-neutral statements of a few legislators that Plaintiffs muster—even those that came from SB 202's sponsor—are of "little ... significance." *LWV*, 66 F.4th at 932.[17]

[17] Even less relevant is Plaintiffs' passing reference (at 51 n.21) to Rudy Giuliani's comments in hearings months before SB 202's enactment. According to Plaintiffs (*id.*), Mr. Giuliani's statements are "circumstantial evidence of the Legislature's intent." If, as the Eleventh Circuit confirms, statements by

Rather than "racial undertones," the statements merely reflect concerns about absentee voting, which are hardly surprising, given that "[f]raud is a real risk that accompanies mail-in voting[.]" *Brnovich v. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021); *see also* Sterling 102:15–18 (noting that most studies show that the biggest opportunities for illegal voting come through absentee voting.). And these statements suggest at most a *partisan* concern, which under the law cannot be "conflated with racial discrimination." *LWV*, 66 F.4th at 925. Indeed, the full text of Speaker Ralston's statement, which Plaintiffs failed to provide, reflects his concern that sending absentee-ballot applications to all voters "will be extremely devastating to Republicans and conservatives in Georgia."[18]

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3. Finally, Plaintiffs look (at 50) to dicta in *Arlington Heights* for the claim that changing longstanding policy can be evidence of a discriminatory purpose. This argument fails for several reasons, not the least of which is that, taken to its logical conclusion, it would lock into place longstanding election

individual *legislators* have limited probative value, isolated statements by non-legislators must have even less value. Thus, these hearings did not, as Plaintiffs suggest (at 2), "la[y] the groundwork for SB 202." Indeed, Plaintiffs do not even attempt to identify any legislative proposal Mr. Giuliani made that ended up in SB 202.

[18] Mark Niesse, *Ralston says his concern that mail vote hurts GOP is about fraud*, Atl. J.-Const. (Apr. 20, 2020), https://tinyurl.com/fac6r9v2.

procedures that no longer work in contemporary elections. Unsurprisingly, *Arlington Heights* does not go that far. And where, as here, changes to election procedures are supported by compelling state interests, the presumption of legislative good faith requires courts to presume that the changes to election law were brought about to further those state interests and not motivated by any discriminatory purpose—particularly when, as here, Plaintiffs offer nothing to rebut that presumption. *See generally Abbott*, 138 S. Ct. at 2324.

In short, Plaintiffs have utterly failed to show—through the legislative history—that any of the Challenged Provisions was based on racist, discriminatory motives.

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C. Plaintiffs have failed to demonstrate that any disparate impact was foreseeable.

Plaintiffs also fail to show that the Challenged Provisions had a foreseeably disparate impact. In fact, Plaintiffs' entire argument here (at 51–52) relies on statements from witnesses and legislators who *opposed* SB 202. But political statements from a bill's opponents are weak evidence of a bill's motivations or likely consequences. That is why "[t]he Supreme Court has ... repeatedly cautioned ... against placing too much emphasis on the contemporaneous views of a bill's opponents." *Butts v. City of New York*, 779 F.2d 141, 147 (2d Cir. 1985). In one such case, the Supreme Court explained

the perils of relying on such statements of consequences:

> Remarks ... made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight. This is *especially so* with regard to the statements of legislative opponents who in their zeal to defeat a bill understandably tend to overstate its reach.

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24 (1976) (emphasis added) (cleaned up).

The Eleventh Circuit recently applied this same principle in rejecting attempts to place significant weight on statements by legislative opponents. There, the Eleventh Circuit explained that "the concerns expressed by political opponents during the legislative process are not reliable evidence of legislative intent." *LWV*, 66 F.4th at 940. All such statements, whether from legislators or representatives of "lobbying organizations," "are not reliable evidence of legislative intent." *Id.* Were the law otherwise, any legislative detractor could doom a statute simply by interjecting hyperbole into the record.

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Once the overzealous statements of SB 202's opponents are removed, Plaintiffs are left with only a single exchange, which they cite (at 52 n.23) to suggest that Representative Fleming possibly knew vague "statistics indicating that a significant percentage" of the 3% of Georgians without state-issued identification were persons of color. But that very text chain refutes, rather than supports, Plaintiffs' insinuation. It merely shows that Ryan

Germany informed Representative Fleming that the witnesses making this assertion could not know the "demographics of the 3%" because he did not even know their demographics and that data was "not public." Pls.' Ex. 132 at 4–5 [Doc. 566-134]. But here again, even assuming *arguendo* that Representative Fleming knew those demographics—something Plaintiffs' cursory footnote could not possibly establish—only a "tenuous inferential chain" could allow this Court to conclude that his knowledge was shared widely by other members of the legislature. *LWV*, 66 F.4th at 939. And Plaintiffs, who bear the burden here, are otherwise silent about whether "the *Legislature* sought information about the demographics" that used the challenged provisions. *Id.* (emphasis added; cleaned up). What is clear, however, is that the legislature *did* take steps to ensure that *every Georgian* would be able to obtain and use readily available identification for absentee voting.

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Other facts also refute Plaintiffs' claims that a disparate impact was both foreseeable and foreseen. For example, the 2022 elections in Georgia had record turnout for a midterm, and the *LWV* Court expressed skepticism that a disparate impact that fails to materialize could have been foreseeable. *LWV*, 66 F.4th at 938. Thus, the midterm election's high turnout dispels the fiction that it was foreseeable that SB 202 would have a racially disparate impact. And Plaintiffs have thus failed to show any foreseeable disparate impact.

D. Plaintiffs' arguments about alternative measures do not show discriminatory intent.

In a last-ditch attempt to manufacture discrimination, Plaintiffs argue (at 53–54) that Georgia could have advanced its interests in less discriminatory ways. This argument fails for several reasons, not least of which is that none of the Challenged Provisions had a disparate impact on Black voters.

Moreover, following *Brnovich*, the "less-discriminatory means" consideration has no teeth. There, the Supreme Court squarely held that "Section 2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives." *Brnovich*, 141 S. Ct. at 2345–46. Given this holding, Plaintiffs' alternative-measures argument is dead on arrival.

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In any event, Plaintiffs' argument about less-discriminatory alternatives boils down to policy disagreements with the General Assembly. But the fact that the General Assembly "did not include the alternative options that Plaintiffs would have preferred is not evidence of discriminatory intent." *LWV*, 66 F.4th at 940 (cleaned up); *accord GBM*, 992 F.3d at 1327. Neither the Constitution nor Section 2 of the Voting Rights Act requires the legislature to follow such policy suggestions because "the Constitution charges States, not federal courts, with designing election rules." *Curling v. Raffensperger*, 50

F.4th 1114, 1122 (11th Cir. 2022). Accordingly, "[t]he legislative branch is not hamstrung by judicial review to adopt any amendment that a bill's opponents claim would improve it." *LWV*, 66 F.4th at 940. Plaintiffs simply take on blind faith that the availability of what they consider more palatable options is evidence of racist, discriminatory intent. But the fact that Plaintiffs purport to see racism under every rock does not mean they have actually *shown* racism—which they have not.

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III. Plaintiffs Also Cannot Demonstrate a Likelihood of Success on the Merits Because Each Challenged Provision was Undeniably Enacted and Tailored to Further Important State Interests.

In contrast to Plaintiffs' thin evidence, the record is replete with evidence that the Challenged Provisions were enacted to further important state interests. Indeed, Georgia laws as a whole "make[] it very easy to vote." *Brnovich*, 141 S. Ct. at 2330. For instance, Georgia allows for no-excuse absentee voting, 17 mandatory days of early voting with optional Sundays (for a total of up to 19 early voting days), O.C.G.A. § 21-2-419(d)(1), Election Day voting, one of the most successful automatic voter registration systems at the Department of Driver Services, Sarah Kallis, *New study shows the impacts of Automatic Voter Registration in Georgia*, GPB (June 8, 2023), https://tinyurl.com/3yzuas3p, availability of dropboxes in every county, O.C.G.A. § 21-2-382(c)(1), and a cure process for mistakes on absentee ballots

or absentee-ballot applications, *id.* § 21-2-386(a)(1)(C). And, to the extent Plaintiffs have identified any individual burdens with voting, they have entirely ignored the Supreme Court's recognition that voters must "tolerate the usual burdens of voting" and that "[m]ere inconveniences cannot be enough to demonstrate a violation of [Section] 2." *Id.* at 2338 (cleaned up). That is why the Supreme Court requires an assessment of the "totality of circumstances" surrounding a state's electoral system. *Id.* And that is also why the Eleventh Circuit has repeatedly confirmed that "States—not federal courts—are in charge of setting [the] rules" for the electoral process. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020). Reviewing the "totality of circumstances," Georgia's electoral system is "'equally open'" and "gives everyone an equal 'opportunity' to vote." *Brnovich*, 141 S. Ct. at 2341.[19]

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Indeed, rather than being enacted for a discriminatory, racist purpose, SB 202 was enacted to increase voter access, electoral system efficiency, and

[19] And, contrary to Plaintiffs' suggestion (at 2), the State did not "tak[e] away minority voters' opportunity[.]" (quoting *LULAC v. Perry*, 548 U.S. 399, 440 (2006)). SB 202 did not eliminate a single method of voting. In any event, *LULAC* is inapposite. In that case, the Court reviewed a redistricting decision that artificially divided a cohesive Latino community—and "made fruitless the Latinos' mobilization efforts"—to protect an incumbent of the same race. *LULAC,* 548 U.S. at 440. Georgia did nothing of the sort here, but rather expanded opportunities to vote by adding dropboxes, removing subjective signature-verification requirements, and decreasing line length.

voter confidence across the board. These are entirely legitimate and important state interests. *See id.* at 2340 ("One strong and entirely legitimate state interest is the prevention of fraud"); *id.* at 2345 ("orderly administration tends to decrease voter confusion and increase voter confidence in elections"); *Curling*, 50 F.4th at 1122 (the State has "important regulatory interests in conducting orderly elections") (quotation marks omitted).

To be sure, State Defendants do not have the burden of proving that the Challenged Provisions were enacted for these valid and important reasons. Rather, it is Plaintiffs' burden to demonstrate that "racial discrimination" is the "substantial" or "motivating" factor behind these provisions. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). However, the shortcomings of Plaintiffs' arguments are made manifest by the clarity with which each Challenged Provision furthers important state interests.

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A. SB 202's regulation of dropboxes appropriately responded to legitimate concerns about efficiency and ballot integrity.

As to SB 202's dropbox provision, for example: The 2020 elections demonstrated that dropboxes can be a useful tool for voters to return their absentee ballots. But those elections also demonstrated that guardrails are needed to ensure that dropboxes are used in an efficient and secure way. Accordingly, the General Assembly authorized dropboxes, but with certain

limitations. O.C.G.A. § 21-2-382(c). Despite the record's support for each aspect of SB 202's dropbox provision, Plaintiffs isolate only two portions that they claim were enacted for discriminatory reasons—the location and numerical limits for dropboxes. The record shows otherwise.

1. With respect to location, the legitimacy of SB 202's requirement that dropboxes be placed indoors at certain election-administration locations during business hours is amply supported by the record. These locations are already staffed with county officials or election workers, and thus no additional personnel were needed to monitor these dropboxes or to collect ballots at the end of each day. Germany Decl. ¶ 72. As seen during the 2020 elections, placing dropboxes in other locations required multiple county officials to go out every day and collect ballots. *Id.* ¶ 76. SB 202 responded to those inefficiencies by limiting where dropboxes may be placed.

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And, by requiring dropboxes to be placed indoors and only available during certain hours during early voting, SB 202 ensured that county officials could observe the dropboxes without needing to undertake the additional responsibility of periodically going outside to observe them. *Id.* ¶ 72. Had this rule been in place during 2020, the county would have likely detected much earlier a concerning instance in which a dropbox was left unsecured and the risk of any harm occurring from that incident would have been lower. And, by

limiting dropbox availability to the times when early voting is being conducted, SB 202 ensured that there is sufficient time after early voting, but before Election Day, for the counties to process all ballots returned and to update the voting list accordingly. *Id.* ¶ 73. Through these provisions, SB 202 furthers the State's interest in conducting efficient and orderly elections. *Curling*, 50 F.4th at 1122.

Beyond efficiency, these location rules also enhance voter confidence. At times, dropboxes in 2020 were left unsecured. Germany Decl. ¶ 67. And the State learned that video surveillance is not a sufficient replacement for live observation. *Id.* ¶ 66. Further, dropboxes placed outdoors and unattended 24 hours each day proved to be fertile ground for voter concerns about election security. *Id.* ¶ 68. This confirmed that voters had serious concerns about ballots being left unattended outdoors around the clock. Thus, placing dropboxes indoors and under the surveillance of a live person substantially increases the security of the dropbox itself as well as election officials and voters in response to non-law enforcement groups surveilling dropbox locations and even following election workers who were charged with picking up ballots. Sterling 222:22–223:2; Germany Decl. ¶ 72. SB 202 therefore responded by placing modest limitations on where dropboxes may be placed to ensure that efficiency, voter confidence, and security are increased. This similarly furthers

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an important state interest. *Brnovich*, 141 S. Ct. at 2345.

Plaintiffs' only response is to claim (at 55) that these justifications are pretexts for discriminatory intent—*i.e.*, a manifestation of racism by the General Assembly. But this ignores the context of SB 202. While Plaintiffs wish to use the 2020 emergency authorization as the baseline for comparisons with SB 202, *see* Mot. at 22, 37, 38, SB 202 was the *first time* that dropboxes were expressly authorized and required by statute. Thus, far from "dramatic[ally] cut[ting]" or "reduc[ing]" dropboxes (*id.*), compared to the prior statutory baseline, SB 202 drastically *increased* them from zero to their being required in every county.

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Moreover, Plaintiffs ignore the evidence confirming that the dropbox system in place for 2020 raised serious efficiency and voter confidence issues. And Plaintiffs' pretext argument ignores the Supreme Court's admonition that the State need not "sustain some level of damage before the legislature [can] take corrective action." *Brnovich*, 141 S. Ct. at 2348 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)). Rather, "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Id.*

Moreover, it is not merely the *actual* security of an election that matters—the Supreme Court has established that "public confidence in the

integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). Voter confidence is also critical to efficient election administration: When officials are bombarded with complaints about election security, they must devote time and resources to addressing such concerns. Germany 30(b)(6) 283:10–23, 284:2–11.

Thus, the requirement that dropboxes be placed indoors in certain election-administration locations was a direct response to issues that arose during the 2020 elections, and was an entirely legitimate exercise of the State's authority over its own elections.

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2. The same is true for SB 202's limitation on the number of dropboxes that counties may employ. Here, SB 202 sought to establish greater parity across the counties to ensure relatively similar access to dropboxes. Germany Decl. ¶ 75. During the 2020 elections, counties had the discretion to not use dropboxes. Thus, voters in some counties did not have any access to that means of voting. *Id.* So, SB 202 ensured that *every* county would now have at least one dropbox available for voters. O.C.G.A. § 21-2-382(c).

However, SB 202 also ensured that counties would not add an unmanageable number of dropboxes. And here again, this provision furthers electoral efficiency and voter confidence. *Brnovich*, 141 S. Ct. at 2340, 2345.

For example, without any limitations in place during 2020, election officials were required to spend significant time each day going to various locations to collect ballots. Harvey 124:1–7; Eveler 157:3–13. By limiting the number of dropboxes available, election officials would not be required to devote as much time to collecting ballots, which is important considering the number of tasks election officials are already handling. Germany Decl. ¶ 76.

Additionally, this provision enhances voter confidence. During 2020, concerns were raised about political influences on the selection of dropbox locations. Germany Decl. ¶ 78. Moreover, the rapid proliferation of dropboxes as the election cycle progressed in 2020 fueled concerns about how such voting methods were being used. *Id.* SB 202 responded to these concerns by ensuring that dropboxes could be distributed more evenly throughout the county. O.C.G.A. § 21-2-382(c). Indeed, by setting rules for the number of dropboxes used in each county, SB 202 promotes equal access for voters, regardless of where they live. Bailey 3/21/23 150:1–7; Sterling 163:7–12.

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Here again, Plaintiffs' only response (at 55) is to accuse the State of relying on pretextual justifications. But this again ignores the facts and the law, as these modest limitations on dropbox locations serve important interests while also ensuring that every Georgia voter may return a ballot to a dropbox. And it is beyond question that the State has a legitimate interest in providing

its citizens equal access to various means of voting, including dropboxes. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). SB 202 served that interest by (a) requiring each county to use dropboxes and (b) tying the number of dropboxes to the number of voters—all to ensure adequate availability in each county. O.C.G.A. § 21-2-382(c).

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Thus, contrary to Plaintiffs' suggestion (at 55), this case is not at all like *McCrory*, where the Fourth Circuit held that a challenged law had a discriminatory intent where it was *explicitly* justified by race. 831 F.3d at 226. There are no such facts here. To the contrary, this provision of SB 202 struck a fair and legitimate balance between voter concerns and voter opportunities to use a relatively new means of voting. Mashburn Individual 82:19–24; Sterling 81:2–13. Plaintiffs' knee-jerk claim of racist motivation has no basis.

B. SB 202's regulation of handing things of value to voters in line appropriately responded to many complaints and legitimate concerns about election integrity and efficiency.

In another effort to increase efficiency and respond to voter complaints and concerns about election integrity, SB 202 imposed modest restrictions on where third parties could hand things of value to voters. Rather than banning this growing practice entirely, SB 202 imposed bright-line rules to ensure that

voters had the discretion whether to interact with these organizations. In doing so, the General Assembly turned to existing rules governing polling locations, where Georgia law already prohibited certain activity within 150 feet of a polling location, or within 25 feet of the voting line, should the line extend more than 150 feet from the polling location. O.C.G.A. § 21-2-414(a). The General Assembly updated these rules to also prohibit providing voters anything of value in these same areas. *Id.*

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A bright-line rule is important in this area because it gives county officials clear guidance and serves the State's interest in "protecting voters from confusion and undue influence" during the voting process, and in "preserving the integrity of the election process." *Citizens for Police Accountability Pol. Comm. v. Browning*, 572 F.3d 1213, 1219 (11th Cir. 2009); *accord Brnovich*, 141 S. Ct. at 2340 ("Ensuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest."). SB 202 "help[ed] ensure a more efficient and secure voting process" by protecting voters from undue pressure and influence. Bailey 3/21/23 127:16–20, 128:2–129:2.

With respect to efficiency, county officials were spending an increasing amount of time in recent elections addressing various organizations' "line-warming" activities. And many county officials were unclear about what rules

applied to such organizations. Germany Decl. ¶¶ 83, 85. While it was already unlawful to provide something of value for the "purpose of … voting," O.C.G.A. § 21-2-570, officials were unclear if handing things of value to voters crossed that line. To seek guidance on this, county officials turned to the Secretary of State's office. Germany Decl. ¶ 85. But that required the county and State officials to divert time and attention away from conducting the election to trying to discern what practices are permissible around the voting line. *Id.* ¶ 91. Moreover, county officials were spending significant time trying to monitor what was happening in the voting line. Eveler 143:19–22; Sosebee Depo. 148:15–24 (Ex. V).

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And county officials were not alone in having questions about these practices. Voters were equally confused about why they were being approached by third-party organizations trying to hand them things of value. Germany Decl. ¶ 85. In fact, many voters found those actions concerning as they appeared to the voter like illegal campaigning or attempts at vote buying. *Id.* And the events became distracting, as Plaintiffs even acknowledge (at 5) that these organizations not only sought to hand water to voters, but also to stage "celebrations" with "food" and "music" around the polling locations. Thus, SB 202 established a bright-line rule about permissible activities to increase the efficiency of the electoral process.

SB 202's regulation of line-warming activities also increases voter confidence by ensuring that elections are conducted without undue influence. After all, a voter's perception of the intention of individuals approaching them or those around them with offers of gifts will vary. What is, to one voter, a kind gesture without partisan aims, may to another appear to be an effort to sway their vote. The subjectivity of intent, and the difficulty of policing such interactions, underscores the importance of a bright-line rule requiring third-party organizations to remain several feet away from voters in the area leading up to the polls. Sterling 204:6–206:13.

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Plaintiffs' response (at 38–40) is to claim that these limitations were enacted to ensure that Black voters faced a more difficult voting experience in line. Not so. If the General Assembly were trying to force Black voters to have more difficult voting experiences in line, SB 202 would not, for example, have gone to great lengths to *reduce* lines. Yet SB 202 is filled with provisions designed to reduce line length at polling locations, such as adding required days of early voting, requiring counties to track line length at polling locations, and requiring a precinct with more than 2,000 electors that experiences a long line to "reduce [its] size" or "provide additional voting equipment or poll workers, or both, before the next general election." O.C.G.A. § 21-2-263. In fact, data from the 2022 elections show that substantial lines are largely non-

existent in Georgia elections following SB 202, with the average wait time on Election Day statewide in November 2022 being just 2 minutes and 19 seconds, while in December 2022, the average wait time was even shorter—only 1 minute and 45 seconds. 2nd Germany Decl. ¶¶ 10–11.

Moreover, if the General Assembly were trying to undermine voter experiences, SB 202 would not have authorized polling locations to place water outside for voters. O.C.G.A. § 21-2-414(e). And it certainly would not have provided that, in certain circumstances, third-party organizations may stand just 25 feet (i.e., approximately 10–15 steps) away from a long voting line to hand out things of value to voters or the general public. O.C.G.A. § 21-2-414(a). Indeed, with SB 202 in place, groups have continued to offer food and water outside of the protected zone leading up to the polls, and SB 202 does not stop them from doing so. N. Williams 211:20–24 (Ex. W).

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Thus, it is clear from this provision, as well as the "totality of [the] circumstances," *Brnovich*, 141 S. Ct. at 2338, that the General Assembly sought to increase efficiency and voter confidence by updating the existing rules governing the areas around polling locations to prohibit the increasingly aggressive practice of approaching voters to hand them things of value.

Especially in the face of such obviously legitimate reasons underlying this "line-warming" provision, Plaintiffs have not begun to meet their burden

of establishing that this provision was motivated by prejudice against Black voters. And once again, that claim is simply a smear, not a reasoned argument.

C. SB 202 legitimately responded to concerns about absentee-ballot deadlines.

To further increase efficiency and voter confidence, SB 202 included important changes to the deadlines for submitting absentee-ballot applications. Previously, the deadline was the Friday before Election Day. This was extraordinarily inefficient, which is likely why so many other States, including many where Democrats control the legislatures and governorships, require that absentee-ballot applications be submitted much earlier.[20]

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Indeed, before SB 202, county officials were required to devote time to processing absentee-ballot applications in circumstances where the resulting ballots were almost never voted. Germany Decl. ¶ 99; Eveler 182:8–10. In itself, that is a poor use of resources. But it is particularly inefficient when this processing was required during the busiest week of early voting. Germany Decl. ¶ 95. Rather than processing applications for ballots that will never be voted, county officials should be devoting their efforts to managing early

[20] *See* Ariz. Rev. Stat. Ann. § 16-542(E) (11 days preceding election); Ind. Code Ann. § 3-11-4-3(a)(4) (12 days); Iowa Code § 53.2(1)(b) (15 days); Mo. Ann. Stat. § 115.279(4) (second Wednesday before election); Neb. Rev. Stat. Ann. § 32-941 (second Friday before election); 17 R.I. Gen. Laws Ann. § 17-20-2.1(c) (21 days).

voting, processing absentee ballots, and preparing for Election Day. *Id.* ¶ 96. Thus, an earlier deadline ensures that "the voter has a better opportunity of ... voting their ballot and getting it back to [the State] by close of polls on Election Day." Bailey 3/21/23 104:3–105:1. And, in those rare instances when a ballot does not make it to the voter on time—because, for example, it was lost in the mail—that voter still has a week of early in-person voting before Election Day. Sterling 195:11–196:9; Mashburn 30(b)(6) 54:14–55:10.

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But the inefficiencies of the prior absentee-voting system continued into Election Day. If a voter had submitted an absentee-ballot application, he or she could not vote in-person (early or on Election Day) until the application and/or resulting ballot was cancelled. Germany Decl. ¶ 101. This not only slowed down the voting line, it also increased concerns about the integrity of the process, as the State received complaints that voters thought they observed other voters casting ballots after being informed that they had already voted. *Id.* ¶¶ 102–104.

In response, SB 202 now protects the ability of voters to cast an absentee ballot while avoiding unnecessary use of limited resources—by expanding the time between the absentee-ballot application deadline and Election Day. Sosebee 89:3–4 (SB 202's deadlines have "been very beneficial to our office because it allows us time to put focus on advanced voting."). Any modest

burden imposed by requiring voters to submit their applications in time for them to be processed is outweighed by the State's interest in orderly election administration and ensuring that voters have adequate time to submit their absentee ballots. *See Curling*, 50 F.4th at 1122.

Once again, Plaintiffs' unsupported and insulting contention that this provision was motivated by racism rather than legitimate concerns about election integrity and administration is far off the mark.

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D. SB 202's regulation of out-of-precinct provisional ballots legitimately responded to the risk that such ballots create disenfranchisement and substantial burdens on election administration.

The increased use of out-of-precinct provisional ballots also contributed to inefficiencies on Election Day and decreased voter confidence. Although the State could have responded by prohibiting out-of-precinct provisional voting altogether, *Brnovich*, 141 S. Ct. at 2350, the State responded instead by seeking to balance the State's interest in voters casting ballots at the correct precinct with the chance that some voters might be unable to do so.

At the outset, though, there can be no dispute that the State has an interest in voters casting ballots at the correct precinct. The Supreme Court has held precisely that: "[P]recinct-based voting furthers important state interests." *Id.* at 2345. For instance, "[i]t helps to distribute voters more

evenly among polling places and thus reduces wait times." *Id.* Additionally, "precinct-based voting helps to ensure that each voter receives a ballot that lists only the candidates and public questions on which he or she can vote, and this orderly administration tends to decrease voter confusion and increase voter confidence in elections." *Id.* Thus, SB 202's limitation on provisional voting certainly furthers this important interest. It also promotes efficiency and voter confidence.

1. It is undisputed, for example, that processing provisional ballots is time-consuming and susceptible to allegations of fraud. Bailey 10/6/22 135:6–136:14 (Ex. X); Harvey 196:24–197:20. The process for casting and processing a single out-of-precinct voter takes approximately ten minutes, and even longer if there's a long line of out-of-precinct voters. Bailey 138:17–140:2. And the burdens on election administration are particularly acute on the back end, when election officials must manually duplicate the provisional ballot by copying the vote onto a regular ballot. Harvey 196:15–197:20.

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The increased time election officials must devote to out-of-precinct voting takes them away from other necessary duties, and may lead to delays in releasing election results, which "could lead to a decrease in voter confidence." Evans 168:9–10 (Ex. Y); *see also* Bailey 3/21/23 157:18–158:1; Harvey 197:18–20. And again, protecting voter confidence is a vital state interest. *See*

Crawford, 553 U.S. at 197.

But this time-consuming process is also susceptible to allegations of fraud—which, of course, the State has an interest and duty to prevent. *See Brnovich*, 141 S. Ct. at 2340. After the polls close, candidates, their supporters, and the public are intently watching as the electoral results are announced. Recent elections show that this is also a time when allegations of electoral misdeeds are common. Germany Decl.¶ 112. This is not a time for election officials to be manually completing a large number of ballots. Harvey 197:11–17. The public can easily misunderstand that process and raise significant complaints. Germany Individual 164:21–165:8. And the State has a powerful interest in avoiding the appearance of impropriety that such a process creates.

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2. In addition to being time-consuming, out-of-precinct provisional ballots partially disenfranchise voters: When a voter casts an out-of-precinct provisional ballot, they are unable to vote for many "down-ballot" races—potentially including even members of Congress. Bailey 3/21/23 43:1–23, 134:7–10, 135:7–136:16. This effectively disenfranchises them from the selection of at least some of their representatives. *Id.* 132:14–23; Mashburn Individual 88:7–20; Evans 88:7–16. The State has an important interest in protecting against that disenfranchisement, especially because voters may not fully understand that they are forfeiting their ability to vote for down-ballot

races. Harvey 190:1–192:7, 196:15–23. Thus, SB 202's regulation of out-of-precinct provisional ballots serves the State's legitimate interest in preventing voter disenfranchisement and promoting orderly and efficient elections. *See Curling*, 50 F.4th at 1122.

3. Nor are the costs of out-of-precinct voting borne exclusively by the voters who appear at the wrong precinct: Out-of-precinct voting imposes substantial burdens on election administration. If voters simply arrive at *any* polling place on Election Day, election officials cannot predict how many voters will appear at any given precinct. That prevents them from knowing how many supplies and poll workers they will need to manage the crowds of voters they may face. Mashburn Individual 89:8–90:8; Evans 87:15–88:3. Indeed, in past elections, officials have had to send state troopers to the polls with more provisional ballots because of unanticipated floods of out-of-precinct voters. Harvey 198:7–18. Out-of-precinct voters can also increase the line length for other voters who arrived at their proper polling place. Germany Individual 164:17; Mashburn 30(b)(6) 87:11–16.

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In the face of such stark facts, the State's interest in orderly elections plainly outweighs the minimal burden of requiring voters to look up and report to the correct polling place. Thus, there was and is ample justification for SB 202's modest limits on the circumstances when provisional ballots may be cast.

Plaintiffs nevertheless argue (at 41, 43) that these limitations harm Black voters because Plaintiffs contend that they are more likely to cast out-of-precinct ballots than are white voters and are less likely to have a vehicle to travel to another polling place. But SB 202 "still protect[s] the person who innocently shows up at the wrong precinct" and allows their out-of-precinct provisional ballot to count if they arrive at the incorrect polling place between 5 and 7 pm. Mashburn 30(b)(6) 87:17–88:2; *see also* Kidd 151:4–7 (noting that out-of-precinct provisional voting is most common with "individuals like college students"). However, the State thus struck an appropriate balance by providing that, in certain circumstances, voters who are unable to get to their correct polling location on Election Day can still vote, while also curbing the increase in out-of-precinct voting. Adams 185:3–15 (agreeing that this provision of SB 202 "struck an adequate balance").

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Plaintiffs have offered no sound basis by which this Court could attribute that judgment to racism rather than a legitimate desire by the General Assembly to improve the voting experience for all Georgians.

E. SB 202's replacement of subjective signature-matching with objective criteria was likewise grounded in sound election administration.

Finally, another provision of SB 202 addressed complaints about the previous signature-matching method of confirming the identity of voters who

apply for absentee ballots. O.C.G.A. § 21-2-381(a)(1)(C). By replacing signature-matching with objective criteria, this provision serves the State's interests in orderly and efficient election administration, preventing fraud, and increasing voter confidence. *See Brnovich*, 141 S. Ct. at 2340, 2345; *Curling*, 50 F.4th at 1122. And it does so while providing alternative means of establishing identity that are available to *any* voter. O.C.G.A. § 21-2-417.

As to enhanced efficiency: Verification of absentee-ballot applications based on government identification "makes it a quick and seamless process to verify the eligibility and validity of a ballot." Bailey 3/21/23 122:17–123:4; *see also id.* 110:22–111:15, 114:5–16; Sterling 95:23–96:16; Eveler 200:20–201:5. Before SB 202, counties were "always being challenged" about "how do we train people on signature verification." Eveler 200:20–201:5. The efficiency gap between the two methods is substantial: While the signature-match process took three to four minutes per voter, objective identification verification takes less than one minute. Bailey 3/21/23 125:22–126:12.

Indeed, as Secretary Raffensperger explained, SB 202's objective identification requirement is "simple, it's fast, and it's secure." Germany Individual 87:13–18, 88:3–13. By relying on objective information, available to *any* voter, that individuals other than the voter are unlikely to know, SB 202 serves the State's legitimate interests in increasing efficiency and reducing

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the risk of an appearance of fraud. *See Brnovich*, 141 S. Ct. at 2340, 2345; *Curling*, 50 F.4th at 1122; *Crawford*, 553 U.S. at 197.

Plaintiffs' suggestion (at 3, 34) that a higher percent of Black voters lack State-issued identification is misguided, as SB 202 does not require voters to use State-issued identification. Rather, the General Assembly took pains to ensure that *every* voter would be able to cast an absentee ballot by allowing for many alternative forms of identification, including such documents as utility bills, bank statements, paychecks, and other government documents that include their name and address. O.C.G.A. § 21-2-417.

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Rather than engage these facts, Plaintiffs persist in complaining (at 43) that this requirement might still be burdensome if someone does not have a printer, scanner, or photocopier. But voters who do not have such devices can bring their identification to the county office and have a copy made there. Smith 74:7–20 (Ex. Z). Elsewhere, Plaintiffs wonder (at 20) why voters may use the last four digits of their Social Security Number (i.e., "SSN4") to verify their identity for ballots but not when applying for an absentee ballot. But this is another step taken to increase efficiency. While applications may be submitted electronically, ballots must be physically returned, and the General Assembly sought to reduce the amount of additional paper that would accompany ballots. Germany Decl. ¶ 127. The General Assembly thus

determined that the SSN4 would be acceptable for ballots because the voter's identity would have just been confirmed through the application process. *Id.*

In any event, these are precisely the types of individualized complaints that do not support a claim that a particular voting system is discriminatory or otherwise unlawful. As Justice Scalia confirmed, a voting system should not be invalidated due simply to "the peculiar circumstances of individual voters." *Crawford*, 553 U.S. at 206 (Scalia, J., concurring); *accord Brnovich*, 141 S. Ct. at 2339 ("where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means"); *New Ga. Project*, 976 F.3d at 1281 (noting "numerous avenues" to vote in Georgia).

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Rather, a plaintiff must demonstrate that the challenged laws, when considered alongside the state's "entire system of voting," create a voting system that is not "equally open" to people of all races. *Brnovich*, 141 S. Ct. at 2339, 2341. Plaintiffs have not come close to doing so here. And for that reason, their knee-jerk claims of racism once again fall flat.

F. The record further confirms that the Challenged Provisions do not impose a burden on the right to vote.

The lack of a discriminatory intent is further underscored by the lack of any real burden imposed by the Challenged Provisions. Contrary to Plaintiffs'

suggestion (at 33–41), these provisions do not "bear more heavily on Black voters[.]" Rather, there are many voting "opportunities provided by [Georgia's] entire system of voting," which this court "must consider … when assessing the burden imposed by a challenged provision." *Brnovich*, 141 S. Ct. at 2339. Where, as here, "a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means." *Id.*

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However, even assuming Plaintiffs were correct that the Challenged Provisions impose a burden, any such burden on voters is slight, irrespective of race. And State Defendants do not share Plaintiffs' pessimistic view that any Black voters affected by SB 202's modest changes will be unable to comply with the updated requirements. *See, e.g.*, [Doc. 566-1 at 38] (arguing against "disrupt[ing] the voting habits" of Black voters). Rather, as the 2022 elections showed, Black voters were able to vote with minimal interruption. Indeed, although Plaintiffs focus (at 2) on the "success of Black-preferred statewide candidates" in 2020, they overlook the fact that, during the 2022 elections, voters again elected Senator Warnock. As discussed below, it is thus clear that none of the Challenged Provisions imposes a burden on voting, by racial group or otherwise.

1. Regarding SB 202's identification requirement for absentee voting,

nearly every voter already has a DDS ID.[21] And, as Plaintiffs recognize (at 42 n.19), those who do not have a DDS ID may to obtain a free state ID. Yet, even if that does not work, the remaining voters (if there are any) may use a host of other forms of identification to vote by absentee ballot. O.C.G.A. § 21-2-386(a)(1)(D). Thus, there can be no serious argument that this identification requirement imposes a meaningful burden. In any event, providing identification is one of the usual burdens of voting. *Brnovich*, 141 S. Ct. at 2344.

2. SB 202's dropbox provision also does not disparately impact Black voters, particularly considering that Black voters in 2020 and 2022 used dropboxes less frequently than white voters. Grimmer Rep. ¶ 149; Grimmer 184:14–24 (Ex. AA) ("[I]n 2022, White voters continued to be more likely to use drop boxes than Black voters."). Moreover, the fact that several counties have fewer dropboxes now than they had in 2020 is not evidence of any burden on Black voters. In Georgia, "voters tend to return their ballots to a few drop boxes within each county, while many other drop boxes receive a smaller share

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[21] By Plaintiffs' own data, only about 3.5% of all voters lack DDS ID or have an incorrect DDS ID in the voter file. *See* Meredith Rep. ¶ 2(g) [Doc. 566-44] (identifying roughly 243,000 such voters); Ga. Sec'y of State, *Georgia Active Voters*, https://sos.ga.gov/georgia-active-voters-report (identifying 7,004,034 active voters).

of ballots returned via drop box." Grimmer Rep. ¶ 14. And only *some* voters returned their ballots to the drop box nearest their house. Grimmer Rep. 122 tbl. 22. It is thus not enough to merely speculate that removing a particular dropbox will disparately impact Black voters.

3. Plaintiffs also have no evidence to support their claim that Black voters will be unable to return absentee-ballot applications within SB 202's updated timeline. As Dr. Grimmer explains in ¶ 90 of his report, Dr. Fraga's table 7—the sole data on which Plaintiffs rely (at 38)—does not actually show that 30.6% of ballots were rejected for being too late. *Id.* In 2022, 99.75% of absentee-ballot applications arrived *before* SB 202's deadline, and of the thousands of absentee-ballot applications submitted in 2022, only 706 were rejected for arriving late. Grimmer Rep. ¶¶ 89–90. Of these, 0.27% of Black applications arrived after SB 202's deadline, compared with 0.25% of White applications. *Id.* This policy, which works for almost everyone "to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open." *Brnovich*, 141 S. Ct. at 2345.

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4. The same issues undermine Plaintiffs' attempts to show that the prohibition on out-of-precinct voting imposes a disparate impact on Black voters. The mere fact that someone may have voted by provisional ballot previously does not demonstrate that they will need to do so again in the

future. Here again, State Defendants have confidence in voters' abilities to vote in the correct precinct, which the Supreme Court has already concluded is a "quintessential example[] of the usual burdens of voting" that impose "unremarkable burdens." *Id.* at 2344.

In any event, the data also refute any claim that the new out-of-precinct rules impose a disparate impact on voters. Of the last five elections, 2018 had the highest share of overall votes classified as provisional *for any reason*. That year, 0.22% of all votes were provisional. Grimmer Rep. 53 tbl. 8. And in those elections, less than 1% of Black and white voters alike cast a provisional ballot. *Id.* Because out-of-precinct provisional ballots are only a subset of provisional ballots overall, the share of out-of-precinct provisional ballots—the relevant inquiry here—is necessarily lower. Grimmer 250:23–251:1. In *Brnovich*, the Supreme Court held that Arizona's more restrictive out-of-precinct policy did not violate Section 2 even though out-of-precinct votes were cast at higher rates than they are in Georgia. *Brnovich*, 141 S. Ct. at 2345, 2350. The new out-of-precinct rules accordingly do not disparately impact Black voters.

5. Finally, Plaintiffs cannot show any disparate impact on Black voters from SB 202's restrictions on where third-party organizations may hand out things of value to voters. Fewer than 10% of all Georgia voters waited more than 30 minutes in the 2022 elections. 2d Germany Decl. ¶ 13. Further, if any

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large precinct in 2022 experienced lines on Election Day of an hour or more, those precincts will need to split, hire more poll workers, or obtain more equipment in subsequent elections. O.C.G.A. § 21-2-263(b). SB 202's express efforts to address issues with long lines shows that SB 202 was designed to improve Georgia's elections, not harm voters based on their race.

Moreover, "even if the evidence established that black voters were more likely to wait in lines at the polls," Plaintiffs have not shown that, "by restricting the ability of third parties to hand out water bottles and snacks, the solicitation provision makes it harder for voters waiting in line to cast their ballots," or, put differently, "that a bottle of water will convince them to stay in line." *LWV*, 66 F.4th at 937. To be sure, Plaintiffs claim that "[s]everal" unidentified "voters" told one group that they would not have remained in line but for their "encouragement and support." Pls.' Ex. 10 ¶ 18.[22] But Plaintiffs make no attempt to explain exactly what activities motivated those voters to remain in line. Nor do Plaintiffs show that those voters would have left the line if they had to get their water from an unmanned table provided by the county or if they had to walk 25 feet to a third-party group.

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[22] Plaintiffs also cite (at 40) Exhibit 11 for this point, but that exhibit does not say that anyone stayed in line because of a third-party's line-warming activities.

In sum, Plaintiffs have failed to show that the Challenged Provisions impose a disparate impact on voters because of their race or that they result in Georgia elections being less open. And for that reason, too, their claims that SB 202 was motivated by racism are misplaced.

IV. Plaintiffs Have Failed to Show Irreparable Harm Absent an Injunction.

Another clear reason to deny Plaintiffs' motion is that Plaintiffs fail to carry their burden of demonstrating that they will face irreparable injury absent an injunction. This is reason enough to deny Plaintiffs' motion, as "[a] showing of irreparable injury is the *sine qua non* of injunctive relief." *Siegel*, 234 F.3d at 1175–76 (cleaned up). Where, as here, there is "no showing of irreparable injury," "[a] court need not address the other elements of a preliminary injunction[.]" *Romanick v. Mitchell*, No. 2:21-cv-0065-SCJ, 2021 WL 5034369, at *5 (N.D. Ga. July 13, 2021) (cleaned up).

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In fact, despite filing a 65-page motion, Plaintiffs could muster just over one page (at 61–62) to support their suggestion that an injunction is needed to avoid irreparable harm. And even that lone page fails: Plaintiffs rely (at 61) only on the bald statement that Black voters face "actual and imminent" irreparable harm because "in many ways [it] has already occurred." As the Eleventh Circuit confirms, such "self-serving assertions unsupported by

concrete facts are insufficient to establish irreparable harms." *LeTele Television, C.A. v. Telemundo Commc'ns Grp., LLC*, No. 15-11792, 2016 WL 6471201, *5 (11th Cir. May 26, 2016). And, from that isolated and unsupported statement, Plaintiffs ask the Court (at 62) to simply *assume* other injuries, guessing that it is "likely" there will be more harms because SB 202 might "discourage[] future participation by voters." But such rank speculation also will not do. *Siegel*, 234 F.3d at 1176–77.

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In the end, Plaintiffs have offered no evidence to support their suggestion that the Challenged Provisions will impair anyone's ability to vote or otherwise cause any harm. And they certainly have not offered any evidence showing that there is an "actual and imminent" threat of such irreparable harm. Even if Plaintiffs were correct that SB 202 was enacted for racist, discriminatory purposes (it wasn't), Plaintiffs have not even attempted to show that this intent has had any discriminatory effects. Given that no voter has a constitutional right to a particular method of voting, *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969), it speaks volumes that Plaintiffs are unable to identify voters unable to vote because of the Challenged Provisions.

Plaintiffs' own dilatory actions further undercut any claim of irreparable injury. SB 202 was enacted in March 2021. According to Plaintiffs, it was enacted at that time for racist, discriminatory reasons. And, based on their

inflammatory rhetoric at the time, Plaintiffs apparently already knew that SB 202 was supposedly discriminatory. Yet they waited more than two years to seek preliminary injunctive relief. In fact, despite their believing that SB 202 was intended to discriminate against voters, Plaintiffs did not see fit to seek preliminary injunctive relief before the 2022 elections, despite the parties having negotiated a date for such motions. [Doc. 84 at 2]. Instead, Plaintiffs allowed a law they believed was discriminatory to be used in the 2022 elections without taking any action.

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Such "lack of diligence undermines any claim that [Plaintiffs] face imminent irreparable harm in the absence of injunctive relief." *Romanick*, 2021 WL 5034369, at *5; *accord Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). Here, Plaintiffs have marshalled very little evidence through discovery to support their theory, and thus they cannot seriously argue that they waited because of a need to develop supporting evidence, which never materialized. Their lack of diligence cuts strongly against their claim of irreparable injury.

V. Plaintiffs Ignore the Substantial Harm an Injunction Would Cause the State and the Public.

In contrast to Plaintiffs' failure to show any irreparable injury, the requested injunction *would* substantially injure the State and the public. 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). Thus, there is no dispute that the injunction Plaintiffs seek would irreparably harm the State. The only question is whether that harm is outweighed by Plaintiffs' "actual and imminent" risk of irreparable injury absent an injunction. *Siegel*, 234 F.3d at 1176. Because Plaintiffs have identified no such irreparable injury, the scales tip entirely in State Defendants' favor, and the Court should not grant an injunction that causes the State irreparable harm.

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But the State's harm is particularly great here, where Plaintiffs do not merely ask the Court to enjoin a duly enacted law. Rather, Plaintiffs ask the Court to rewrite the law. For instance, Plaintiffs ask the Court (at 65) to redline SB 202's dropbox provision to eliminate specific aspects of how the General Assembly determined dropboxes should be used in Georgia. But the Court's role is not to supplant the legislature. *New Ga. Project*, 976 F.3d at 1284; *see also Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1285 (11th Cir. 2019) (Tjoflat, J., dissenting) (criticizing district court for rewriting Georgia's election code in a preliminary injunction). Indeed, there were serious concerns raised during the 2020 elections about the number and location of

dropboxes. Plaintiffs offer no reason to suggest that the General Assembly would have enacted legislation authorizing dropboxes at all, were those dropboxes permitted outside and in any location. And a preliminary injunction is not the place for Plaintiffs to try to achieve legislative goals they could not achieve through the legislative process. Rather, if Plaintiffs are successful, the only lawful remedy would be enjoining the dropbox provision entirely, which would leave Georgia voters without any statutory authority for dropboxes. Germany Decl. ¶ 62. Since neither Plaintiffs nor State Defendants seek such relief, the Court should not grant it. Nor should the Court legislate as Plaintiffs request.

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Similarly, Plaintiffs ask the Court (at 65) to effectively write new legislation authorizing voters who request an absentee ballot to confirm their identity using the last four digits of their SSN4. This was not the law before SB 202, and it is not the law now. Plaintiffs offer no authority showing that this Court may use an injunction to enact a new voter-identification law, and this Court should resist such an outlandish request.

But the State is not alone in facing harm from Plaintiffs' motion. The public also faces harm. Indeed, granting Plaintiffs' requested relief would subject voters to each harm the Challenged Provisions address. For instance, enjoining these provisions would send polling places back to "the same

situation … as before, where we had lots more activity out in the line," which would require "more workers" to be "out there … watching the line." Eveler 144:15–20. And "[t]here would be more questions, complaints, and that sort of thing[.]" *Id.* at 145:7–9. And more staff would be needed to ensure there is not any campaigning going on with passing out [goods][.]" Sosebee 148:15–24.

Moreover, voters would face significant confusion as they encounter yet another change in the election rules. Over the past several election cycles, one set of rules applied before 2020, a new set of rules was put in place during 2020 to address the COVID-19 pandemic, and then a new set of rules was put in place through SB 202, which allowed the 2022 elections to work seamlessly. Germany Decl. ¶ 129. To accomplish this, the State and counties have created and disseminated a host of training materials that address, among other things, the Challenged Provisions. *Id.* ¶ 131. Now, after the public has experience voting under these updated rules, and county officials and volunteers have been training on these new rules, Plaintiffs want to pull the rug out from under everyone and impose rules temporarily that either harmed voters or never existed in Georgia. This would require extensive reworking of training materials and forms at the same time as the 2023 municipal and special elections are taking place and preparations are underway for the 2024 presidential preference and general primaries. *Id.* ¶ 134.

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That is precisely what the Supreme Court's *Purcell* doctrine prohibits. There are many elections taking place in 2023, and the State is already taking steps to prepare for the upcoming 2024 elections. [Doc. 578 at 32–33]. The State and county election officials are also in the midst of implementing a new voter registration system, which is a large lift and crucial to smooth elections in 2024. Germany Decl. ¶ 134. As this Court already concluded, *Purcell* confirms that a court should not issue an injunction changing election rules "when an election is imminent." *Coal. for Good Governance v. Kemp*, No. 1:21-cv-02070-JPB, 2021 WL 2826094, at *3 (N.D. Ga. July 7, 2021), *subsequent determination,* 558 F. Supp. 3d 1370 (N.D. Ga. 2021). That too is sufficient reason to deny Plaintiffs' motion.

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CONCLUSION

It was clear when Plaintiffs filed their complaints that SB 202 was not based on racist, discriminatory motives. Rather, the General Assembly sought to update Georgia's electoral systems with lessons learned from the 2018 and 2020 elections. This fact has now been confirmed by the 2022 elections, which involved a record number of midterm voters, short lines, and an overwhelmingly positive voting experience for voters of all races. Plaintiffs' unsupported charge of racism—irresponsible as it was at the beginning—has only become more outlandish in light of subsequent events.

For that and the other reasons explained above, Plaintiffs have not come close to carrying their burden of demonstrating that the Court should preliminarily enjoin the Challenged Provisions. Doing so would impose substantial harm on the State, counties, and the public. The Court should thus deny Plaintiffs' motion and allow the State's election officials to turn their attention to conducting the 2023 elections and preparing for the 2024 elections.

Respectfully submitted this 27th day of July, 2023.

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