

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

IN RE GEORGIA SENATE BILL 202

Master Case No.
1:21-MI-55555-JPB

SIXTH DISTRICT OF THE AFRICAN
METHODIST EPISCOPAL CHURCH, *et*
al.,

Plaintiffs,

v.

BRIAN KEMP, *et al.*,

Defendants

Civil Action No.
1:21-CV-01284-JPB

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

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

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

THE NEW GEORGIA PROJECT, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants

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

GEORGIA STATE CONFERENCE OF
THE NAACP, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants

Civil Action No.
1:21-CV-01259-JPB

THE CONCERNED BLACK CLERGY OF
METROPOLITAN ATLANTA, INC., *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants

Civil Action No.
1:21-CV-01728-JPB

**PLAINTIFFS' OPPOSITION TO STATE & INTERVENOR
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
ON CHANGES IN TIMING**

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INTRODUCTION

For Defendants to succeed on their summary judgment motion on Plaintiffs' ADA, unconstitutional burden on the right to vote, and Section 2 results claims challenging SB 202's changes in timing, several events must occur. First, the Court must apply the incorrect legal standard, ignoring the ADA's focus on equal opportunity or improperly substituting the *Brnovich* "guideposts" for a totality-of-the-circumstances analysis. Second, the Court must overlook Defendants' waiver by failing to contest certain claims at all, including discriminatory methods of administration under the ADA, and constitutional and VRA challenges to the requirement that absentee ballots be distributed no earlier than 20 days closer to election day. Third, the Court would need to disregard ample evidence of disparate impact and burdens, view that evidence in the light most favorable to Defendants rather than nonmovants, and engage in improper weighing of the evidence.

Given the extensive evidentiary record here, whether AME Plaintiffs' members and constituents are excluded from participation in or otherwise discriminated against in Defendants' absentee voting program, and whether such discrimination is due to disability, are questions of fact that are not suitable for summary judgment. *See R.W. v. Bd. of Regents of the Univ. Sys. of Ga.*, 114 F. Supp. 3d 1260, 1285–86 (N.D. Ga. 2015) (denying parties' cross-motions for summary

judgment on ADA claims).¹ Similarly, “[v]oting rights cases are inherently fact-intensive,” *Nipper v. Smith*, 39 F.3d 1494, 1498 (11th Cir. 1994) (en banc), and material issues of disputed fact abound on the Section 2 and undue burden constitutional claims, precluding summary judgment.

Under the correct standard and viewing the extensive evidence creating genuine issues of material fact, denying summary judgment is straightforward here.

ARGUMENT

Summary judgment is granted only “if the movant shows that there is no genuine dispute as to any material fact.” Fed. R. Civ. P. 56(a). To defeat it, Plaintiffs simply must show “sufficient evidence supporting the claimed factual dispute” requires “a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citation omitted). In determining whether the moving party has met its burden, the court views “the evidence and all factual inferences in the light most favorable to the party opposing the motion.” *R.W.*, 114 F. Supp. 3d at 1279. The Court at this stage may “not weigh conflicting evidence or make credibility determinations.” *Alves v. Bd. of Regents of the Univ. Sys. of Ga.*, 804 F.3d 1149, 1159 (11th Cir. 2015).

¹ Plaintiffs also respond to arguments regarding the timing provisions raised by Intervenor in their brief. See ECF 761. References to Defendants also include Intervenor unless otherwise specified.

I. SUMMARY JUDGMENT ON AME PLAINTIFFS’ ADA AND SECTION 504 CLAIMS IS NOT WARRANTED.

Summary judgment is improper on AME Plaintiffs’ claims that SB 202’s limits on the time to request and return absentee ballots and to vote in runoff elections violate the disability rights protections enshrined in the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act of 1973 (“Section 504”). Section 25 of SB 202 shortens the time a voter can request an absentee ballot from 180 days to 78 days prior to an election and requires that the application be received 11 days prior to the election instead of four days prior (“Shortened Absentee Ballot Request Provision”). O.C.G.A. § 21-2-381(a)(1)(A). SB 202 also forces all runoffs to take place 28 days after the general or primary election. O.C.G.A. § 21-2-501(a)(1) (“Compressed Runoff Provision”). Within this shortened timeframe, Section 28 drastically reduces the advance voting period from three weeks to one week (“Runoff Provisions”). O.C.G.A. § 21-2-385(d)(1)(B); AME First Am. Compl. ¶ 268, ECF 83, Case No. 1:21-cv-1284-JPB. These provisions (collectively, “Timing Provisions”)—individually and together with SB 202’s other restrictions—deny voters with disabilities an equal opportunity to participate in the absentee voting program, and have disenfranchised some. The substantial evidence of these harms makes summary judgment inappropriate.²

² Defendants moved for summary judgment on other early voting restrictions under

A. Factual Background

Voters with disabilities face a myriad of barriers to voting, including those imposed by SB 202, SAMF ¶ 590 (Lisa Schur Expert Rep. (“Schur”) ¶¶ 10, 39, 66–71), which the Timing Provisions exacerbate, SAMF ¶ 620 (Schur ¶¶ 18, 98).

Voters with Disabilities Disproportionately Rely on Absentee Voting Due to their Disabilities: Voters with disabilities, including older voters, face multiple challenges, including difficulty leaving their homes, lacking accessible transportation, needing assistance with daily activities, and high rates of poverty, social isolation, and stigma. SAMF ¶ 590 (Schur ¶¶ 10, 39, 66–71); SAMF ¶¶ 579–87 (Schur ¶¶ 10, 39, 50, 52–54, 56, 57–64, 66–71, 93, 98). For many disabled voters, absentee voting is the most (or only) accessible means of voting. SAMF ¶¶ 607–08 (Schur ¶¶ 8, 63, 73). As such, voters with disabilities vote absentee by mail significantly more often than the broader population. SAMF ¶ 606 (Schur ¶¶ 8, 12, 73, 74, 98(b), & Tbl. 8); *see also* SAMF ¶ 630 (Gwinnett Cnty Dep. 186:21–87:10). In 2020, for example, 44.7% of Georgians with disabilities voted absentee by mail, compared to 26.7% without disabilities. SAMF ¶ 606 (Schur ¶ 73).

Voters with Disabilities Face Disproportionate Voting Barriers Due to the Timing Provisions Combined with SB 202’s Other Restrictions: Voters with

the ADA and Section 504. ECF 758-1 at 25. No Plaintiffs currently challenge these provisions.

disabilities often need assistance to vote, which means they require more time to find an available and qualified assistor; many people with disabilities also live alone and must rely on non-household members, which makes securing needed assistance in a timely way more challenging, especially given SB 202’s felony punishment for unauthorized assistance. *See* SAMF ¶¶ 672–74 (Schur ¶¶ 7, 54, 94). With SB 202’s new ID requirements, Georgians with disabilities who do not have a government-issued photo ID must make copies of another document to apply for an absentee ballot. SAMF ¶ 617 (Schur ¶¶ 58, 98; Fulton Cnty Dep. 125:8–11). Making these copies is more time consuming for people with disabilities who are less likely to own a printer or copier or who face travel or transportation barriers. SAMF ¶ 617 (Schur ¶¶ 58, 98; Gwinnett Cnty Manifold Dep. 150:1–5, 150:18–51:10). All of these barriers add to the amount of time voters with disabilities need to request and return an absentee ballot, which imposes disproportionate burdens on their access to Georgia’s absentee voting program. SAMF ¶ 620 (Schur ¶¶ 69, 98).

Ballot Rejections Due to Timing Provision: Post-SB 202, the share of absentee ballots rejected due to arriving after the receipt deadline sharply increased. SAMF ¶ 230 (Bernard Fraga Rep. (“Fraga”) ¶¶ 133 & Tbl 14; Justin Grimmer Rep. (“Grimmer”) ¶¶ 101 & Tbl. 17). More specifically, in post-SB 202 elections, the absentee ballot rejection rate rose to 25.9% (in November 2022) and 30.6% (in December 2022), which was approximately three times higher than the pre-SB 202

rate of 9.5% (from November 2020 and January 2021). SAMF ¶ 223 (Fraga ¶¶ 100-01 & Tbl. 7). County officials reported that absentee ballot rejection rates increased in post-SB 202 elections and often the primary reason for rejecting ballots was because of late receipt. SAMF ¶ 224 (Hall Cnty Dep. 51:1–54:23; Hall Cnty Defs. Resp. AME Pls. First Interrog., Interrog. No. 2; Fulton Cnty Defs. Resp. to AME Pls. First Interrog., Interrog. Nos. 2 and 3; Columbia Cnty Dep. 49:18–51:23).

Unrebutted expert evidence found that the Shortened Absentee Ballot Request Provision would cause some people with disabilities, who disproportionately vote by mail, to miss the deadlines, SAMF ¶ 622 (Schur ¶ 98(c)(iii)), and, on top of the additional voting barriers they face, would make it harder for people with disabilities to vote. SAMF ¶ 623 (Schur ¶ 98).

B. Defendants Misstate and Omit Elements of the Legal Standard to Establish a Violation of the ADA and Section 504.

This Court has previously laid out the prima facie case for discrimination under the ADA. ECF 615 at 12–13. Defendants do not contest that AME Plaintiffs' members or constituents are qualified individuals with disabilities, that ADA and Section 504 claims should be analyzed together, or that Defendants are public entities that receive federal funding and provide a service, program, or activity. ECF 758-1 at 21–25. AME Plaintiffs therefore focus their opposition on their evidence that voters with disabilities face discrimination by reason of their disabilities. In

several ways, Defendants’ motion misapplies the law and ignores AME Plaintiffs’ claims of discrimination.³

Applying the proper legal standards for AME Plaintiffs’ claims of discrimination under Title II of the ADA and Section 504, Defendants’ motion must be denied. First, Defendants apply the wrong legal standard to AME Plaintiffs’ claims that SB 202’s Timing Provisions have a disparate impact on Georgia’s disabled voters, denying them an equal opportunity to participate in Georgia’s absentee voting program. The ADA’s implementing regulations make clear that persons with disabilities must have the “opportunity to participate in or benefit from the aid, benefit, or service” in a way that is “equal to that afforded others.” 28 C.F.R. § 35.130(b)(1)(ii); *see also id.* at § 35.130(b)(1)(iii). Courts recognize that one way to show that people with disabilities do not have equal opportunities to benefit from a program and thus are excluded from or denied the benefits of that program is to show that they lack meaningful access to it.⁴ *See, e.g., Nat’l Fed’n of the Blind v.*

³ Additional context about the legal standards for AME Plaintiffs’ ADA and Section 504 claims and barriers to voting faced by people with disabilities can be found in §§IV and V.B.1 of Plaintiffs’ Response to Defendants’ Summary Judgment Motion on Absentee Ballot Provisions.

⁴ Although some courts in this Circuit have expressed the relevant standard as whether a voting program is “readily accessible,” *see People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1155, 1159–60, 1165 (N.D. Ala. 2020), that language is derived from 28 C.F.R. § 35.150, which deals only with **physical accessibility** of “existing facilities,” *see Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (physical accessibility of wheelchair ramps and bathrooms at a courthouse). Indeed,

Lamone (“NFB”), 813 F.3d 494, 503–04, 506–07 (4th Cir. 2016); *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1155, 1158–59, 1161 (N.D. Ala. 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 231–32 (M.D.N.C. 2020); *Westchester Disabled On the Move, Inc. v. Cnty. of Westchester*, 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004).

Exclusion or denial from a voting program need not be absolute to establish an ADA violation. See ECF 110 at 36. The ADA requires more than “merely the opportunity to vote at some time and in some way.” *Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 199 (2d Cir. 2014); see also 42 U.S.C. § 12132, 12101(b)(1); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589 (1999). Moreover, restrictions that might “dissuade” a voter can render a voting program inaccessible in violation of Title II. See *People First of Ala.*, 491 F. Supp. 3d at 1160, 1165 (restrictions on curbside voting and photo ID requirements for absentee voting during a pandemic rendered in-person voting and absentee voting, respectively,

Section 35.150(a) includes references that indicate its applicability to physical sites. See, e.g., 35.150(a)(2) (reference to “historic property”); 35.150(b)(2) (safe harbor provisions listing numerous physical sites such as swimming pools). Accordingly, the “readily accessible” standard does not apply to other issues of accessibility. See *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 504 (4th Cir. 2016) (voting programs). The ADA’s meaningful access standard instead requires that public entities “must afford [disabled] persons equal opportunity to . . . gain the same benefit” as people without disabilities. *Gustafson v. Bi-State Dev. Agency of Missouri-Illinois Metro. Dist.*, 29 F.4th 406, 412 (8th Cir. 2022) (quotations and citations omitted).

inaccessible to disabled voters because those restrictions “may dissuade” them). Access is also not meaningful if Plaintiffs have to rely on “workarounds and alternate means” to access the program. *Am. Council of the Blind of N.Y., Inc. v. City of N.Y.*, 495 F. Supp. 3d 211, 235-36 (S.D.N.Y. 2020) (no meaningful access to City’s street crossings where blind pedestrians had to rely on “workarounds and alternate means” to cross streets, including by relying on strangers or crossing streets on their own despite risking their safety).

Second, Defendants focus their argument on whether voters with disabilities have access to their voting program “as a whole,” erroneously relying on the wrong regulation, one that addresses only *physical accessibility* of “existing facilities.” 28 C.F.R. § 35.150(a); ECF 758-1 at 21–22; *see also supra* n.4. Courts view absentee and in-person voting as separate programs, rather than looking at access to all forms of voting together. *NFB*, 813 F.3d at 503–05 (absentee voting relevant program); *Democracy N.C.*, 476 F. Supp. 3d at 231–33 (same); *cf. L.E. ex rel. Cavorley v. Superintendent of Cobb Cnty. Sch. Dist.*, 55 F.4th 1296, 1302–03 (11th Cir. 2022). The proper inquiry here is whether the Timing Provisions deny voters with disabilities an equal opportunity to participate in the *absentee* voting program.

Third, Plaintiffs must show “a causal link between their disabilities and the exclusion, denial of benefits, or discrimination,” *People First of Ala.*, 491 F. Supp. 3d at 1155, but they need only show that disability is “*a factor that made a difference*

in the outcome,” *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1334 (11th Cir. 1999) (first emphasis added) (quoting *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1077 (11th Cir. 1996)); *see also Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008); *Democracy N.C.*, 476 F. Supp. 3d at 232.

AME Plaintiffs show causation through at least two theories of liability: (1) SB 202’s Timing Provisions have a disparate impact on disabled voters, and (2) Defendants failed to make reasonable modifications (or accommodations) to avoid discrimination.⁵ *See League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1157 (N.D. Fla. 2022), *aff’d in part, vacated in part, rev’d in part sub nom. League of Women Voters of Fla. Inc. v. Fla. Sec’y of State*, 66 F.4th 905 (11th Cir. 2023); *NFB*, 813 F.3d at 503 n.5; *L.E. ex rel. Cavorley*, 55 F.4th at 1303.

Defendants do not address whether SB 202’s Timing Provisions have a disparate impact on Georgia disabled voters. Even statutes that do not facially make distinctions based on disability can have the effect of denying disabled individuals’ access to the program due to their disabilities. *See Democracy N.C.*, 476 F. Supp. 3d at 232 (finding causal link between exclusion from absentee voting based on nursing facility staff assistance restrictions and plaintiff’s disability); *People First of Ala.*,

⁵ Title II of the ADA uses the term “reasonable modifications,” 28 C.F.R. § 35.130(b)(7), instead of “reasonable accommodations” as is used in Title I of the ADA related to employment, 42 U.S.C. § 12112(b)(5)(A). Courts have used the terms interchangeably and thus AME Plaintiffs do as well.

491 F. Supp. 3d at 1161, 1165 (finding causal link between exclusion from in-person voting and absentee voting based on curbside voting restrictions and photo ID requirements, respectively, and plaintiffs' disabilities).

Instead, Defendants focus on whether a requested accommodation is reasonable, ECF 758-1 at 22–23, but fail to show how they have met their *affirmative* obligation to “make reasonable modifications in policies, practices, or procedures” to avoid discrimination, nor have they shown that any such modifications would “fundamentally alter” their absentee voting program. 28 C.F.R. § 35.130(b)(7)(i); *see also Johnson v. Callanen*, No. SA-22-CV-00409-XR, 2023 WL 4374998, at *6 (W.D. Tex. July 6, 2023). In any case, determining whether an accommodation is reasonable or would fundamentally alter the program is “a highly fact-specific inquiry.” ECF 615 at 22; *see also NFB*, 813 F.3d at 508; *Disability Advocs., Inc. v. Paterson*, 598 F. Supp. 2d 289, 335 (E.D.N.Y. 2009).

Fourth, Defendants do not address AME Plaintiffs' claims that Defendants violate Title II's prohibitions on utilizing discriminatory methods of administration. 28 C.F.R. § 35.130(b)(3)(i)-(ii); *see* AME First Am. Compl. ¶¶ 355. Methods of administration claims lie where a program's administration or multiple aspects of a program compound to frustrate its purpose for disabled people. *See, e.g., La Unión del Pueblo Entero v. Abbott*, 618 F. Supp. 3d 449, 490 (W.D. Tex. 2022); *Lewis v. Cain*, No. 3:15-cv-318, 2021 WL 1219988, at *26–52 (M.D. La. Mar. 31, 2021).

The Timing Provisions, individually and cumulatively with SB 202's other barriers, discriminate against Georgia's disabled absentee voters.

C. Summary Judgment Is Inappropriate on AME Plaintiffs' Challenges to Defendants' Shortened Absentee Ballot Request Provision (Section 25).

There are genuine disputes of material fact that preclude summary judgment on AME Plaintiffs' claims that the Shortened Absentee Ballot Request Provision in Section 25 of SB 202 discriminates against voters with disabilities.

As described above, rejection rates for absentee ballot applications and ballots substantially increased after SB 202 was passed. SAMF ¶¶ 223 (Fraga ¶¶ 100–101 & Tbl. 7), 230 (Fraga ¶ 133 & Tbl 14; Grimmer ¶ 101 & Tbl. 17). Because absentee voting is the most (or only) accessible means of voting for many people with disabilities, these increased absentee rejection rates disproportionately harm voters with disabilities. SAMF ¶ 606 (Schur ¶¶ 8, 12, 73, 74, 98(b), & Tbl. 8).

Defendants argue that mere “[d]ifficulty” in accessing their voting program does not “establish a lack of meaningful access.” ECF 758-1 at 22 (quoting *Todd v. Carstarphen*, 236 F. Supp. 3d 1311, 1329 (N.D. Ga. 2017)). But unlike *Todd*, where the court—following multiple evidentiary hearings and a fact-intensive inquiry—found that the plaintiff had meaningful access and was offered but refused a number of potential accommodations that would have addressed the barriers she faced, *see id.* at 1316, 1329–6, Defendants have made no such showing here. Rather, the

evidence shows that the Timing Provision denied disabled voters’ meaningful access and equal opportunity to participate in Georgia’s absentee voting program, including disenfranchising some who lacked alternatives to accessing absentee voting. SAMF ¶ 632 (Green Decl. ¶ 8); SAMF ¶ 640 (Floyd Decl. ¶¶ 8, 12–14); SAMF ¶ 628 (Deposition of Georgia ADAPT Vol. I (“ADAPT Vol. I Dep.”) 109:23-110:3). Restrictions that dissuade voters from voting or force them to find workarounds to vote violate the ADA. *See supra* Section I.B.

Gwinnett County testified that voters with disabilities contacted it in the final days before the election to indicate that it would be hard for them to vote on Election Day because of the change in deadline to vote by mail. SAMF ¶ 630 (Gwinnett Cnty Manifold Dep. 186:21–187:10). Compounding the Shortened Absentee Ballot Request Provision, counties have had problems sending voters absentee ballots on time,⁶ creating additional hardships for voters with disabilities given the additional steps needed to vote absentee, like finding available assistors. *See* SAMF ¶ 590 (Schur ¶¶ 66–71); SAMF ¶ 607 (Schur ¶¶ 8, 73); SAMF ¶ 671 (Schur ¶ 92).

⁶ Cobb County failed to issue over one thousand absentee ballots for the November 2022 general election and the December 2022 runoff election with enough time for voters to complete and mail them back. SAMF ¶ 631 (Consent Order, *Cook v. Cobb Cnty. Bd. of Elections & Registration*, No. 22107734 (Ga. Super. Ct. Nov. 7, 2022); Interlocutory Injunction, *Crowell v. Cobb Cnty. Bd. Of Elections & Registration* (Ga. Super. Ct. Dec. 2, 2022)).

Some voters were disenfranchised outright due to the Shortened Absentee Ballot Request Provision. Desaree Green was unable to vote in the November 2022 election because her timely-requested absentee ballot never arrived and Election Day coincided with a lupus flare-up which prevented her from leaving her house to vote. SAMF ¶¶ 597, 632 (Green Decl. ¶¶ 3, 5–11). Others were unable to vote because they ran out of time to submit their ballots by mail and were unable to get a ride to a drop box. SAMF ¶ 628 (ADAPT Vol. I Dep. 109:23–110:3).

To the extent Defendants argue that they avoid liability because voters with disabilities have “multiple ways” to participate in the absentee voting program, ECF 758-1 at 23–24, they ignore that returning a timely absentee ballot application is the only way a voter can participate in that program. If a voter with a disability cannot apply in time, they will be excluded from that program, whether or not they have different options for returning a ballot.

Moreover, as stated above, voters with disabilities were denied access to the absentee voting program, or disenfranchised entirely, because the significant burdens they faced in casting their ballots were exacerbated by the Shortened Absentee Ballot Request Provision. Georgia ADAPT assisted 15-20 voters with disabilities who had to rely on workarounds to vote because of the Shortened Absentee Ballot Request Provision. SAMF ¶ 626 (Thornton Decl. ¶ 17). One voter’s ballot never arrived so she took a bus from North Carolina to Fulton County so that

Georgia ADAPT could drive her to the polls. SAMF ¶ 621 (Thornton Decl. ¶ 17). Another applied for but did not receive her absentee ballot and needed Georgia ADAPT's help to get to the polls. SAMF ¶ 621 (Thornton Decl. ¶ 18). Multiple voters with disabilities were unable to request their ballots within the timeframe because the process was “burdensome,” and they had to make copies of their IDs without access to a printer or computer and coordinate with personal care attendants to fill out and submit their ballots. SAMF ¶ 627 (Deposition of Georgia ADAPT Vol. II (“ADAPT Vol. II Dep.”) 27:3-25).

Defendants' argue that voters with disabilities can vote in person during a week of early voting or on election day. ECF 758-1 at 23–24. That argument is irrelevant. For voters with disabilities who have physical or other limitations that make voting in person significantly burdensome or impossible, the existence of early voting does not negate the need for absentee voting described above. Defendants also make a specious argument that the ADA does not require “every voter be able to use every means of returning a ballot in precisely the timeline they choose.” *Id.* While a voter may not be entitled to *every* accommodation, they are entitled to effective accommodations. The appropriateness of an accommodation and whether it “fundamentally alters” a program is a fact-specific inquiry, *see NFB*, 813 F.3d at 508; *Disability Advocs.*, 598 F. Supp. 2d at 335, and one Defendants do not address.

Whether voting machines are available for *in-person* voting is also irrelevant to whether the *absentee* voting program is accessible. Having “accessible voting machines” does not provide an equal opportunity for those whom absentee voting is the only accessible option. SAMF ¶¶ 607–08 (Schur ¶ 8); *see also* SAMF ¶ 632 (Green Decl. ¶ 3) (voter unable to leave home during lupus flare up); SAMF ¶ 596 (Floyd Decl. ¶¶ 1–4, 6) (in-person polling places inaccessible); SAMF ¶ 610 (Papadopoulos Decl. ¶¶ 1–3) (voter unable to vote in person due to mobility disability); SAMF ¶ 630 (Gwinnett Cnty Manifold Dep. 186:21–187:10). Regardless, disabled voters’ other options or the extent of their burden is a fact-weighting inquiry for trial, not now.⁷

Defendants ignore the cumulative impact of the Shortened Absentee Ballot Request Provision which exacerbate the barriers that disabled voters face due to SB

⁷ Defendants rely on *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d at 233, to argue that having multiple methods to return a ballot (i.e. mail or drop box) means that there is no ADA violation. ECF 758-1 at 23. Defendants’ reference is inapposite; that the *Democracy N.C.* court ruled against a blind plaintiff on one challenged provision because it did not find sufficient evidence to conclude that his inability to use a mailbox was due to his disability, *Democracy N.C.*, 476 F. Supp. 3d. at 233, does not defeat, or even address, the focus of Plaintiffs’ claims. That case was also decided at the preliminary injunction stage where it was Plaintiffs’ factual burden to show likelihood of succeeding on the merits. At summary judgment, all facts including whether Plaintiffs have multiple means of voting, are construed in Plaintiffs’ favor. Moreover, some voters do not in fact have alternate means to vote. *See, e.g.*, SAMF ¶ 632 (Green Decl. ¶ 3) (unable to leave house); SAMF ¶ 628 (ADAPT Vol. I Dep. 109:23–110:3) (unable to mail and or reach a drop box).

202's other restrictions on in-person and absentee voting. As described above in Section I.A., these barriers deny disabled voters an equal opportunity to participate in Georgia's absentee voting program. SAMF ¶ 645 (Schur ¶ 108).

D. Summary Judgment Is Inappropriate on AME Plaintiffs' Challenges to Defendants' Runoff Provisions (Section 28).

Disputes of material fact that preclude summary judgment on AME Plaintiffs' claims that the Runoff Provisions in Section 28 violate the ADA and Section 504. Here too, the increase in ballot rejection rates demonstrates the disproportionate harm the Runoff Provisions inflict on disabled voters. *See supra* Section I.B.

For example, Earnestine Floyd lives with chronic asthma and arthritis and cannot vote in person due to her disabilities. SAMF ¶ 596 (Floyd Decl. ¶¶ 1–4, 6). She was unable to vote in the December 2022 runoff election because her timely-requested absentee ballot never arrived. SAMF ¶ 640 (Floyd Decl. ¶¶ 8, 10, 12–14). Voters with disabilities were also unable to vote in runoffs because of barriers to scheduling personal care attendants and transportation needed to vote in person. SAMF ¶ 639 (ADAPT Vol. II Dep. 34:9–17).

Defendants reiterate their argument that disabled voters “have the same opportunities to vote in multiple ways, either in-person or absentee by mail” and so they do not face discrimination. ECF 758-1 at 24. But even where voters with disabilities were able to vote in the runoff, they faced the cumulative barriers of SB

202's other restrictions that compound the impact of the Runoff Provisions and deny them meaningful access to Georgia's absentee voting program. *See supra* Section I.C. Within the shortened timeframe for runoffs, voters with disabilities encounter significant burdens in needing to coordinate with non-family members to vote, SAMF ¶ 633–34 (Schur ¶ 103), and it is burdensome if not impossible to schedule paratransit services in this timeframe, SAMF ¶ 638 (ADAPT Vol. I Dep. at 111:6–21). Voters with disabilities are forced to use workarounds and rely on third parties to vote, including plaintiff Georgia ADAPT, a small non-profit, who provided 459 rides in one week to bring voters with disabilities to the polls after a massive increase in requests for its ride services post-SB 202. *Id.* The Runoff Provisions, coupled with SB 202's other restrictions including the Shortened Absentee Ballot Request Provisions, limitations on drop boxes, and new ID requirements, among others, impose greater burdens on voters with disabilities. SAMF ¶ 645 (Schur ¶ 108).

E. Defendants Fail to Articulate How A Proposed Modification to the Timing Provisions Would Fundamentally Alter The Absentee Voting Program.

Defendants offer no facts demonstrating that a reasonable modification to the Timing Provisions would fundamentally alter the absentee voting program. They have admitted that implementing the Timing Provisions are burdensome on county election officials, undermining any argument that their purpose is administrative convenience. *See, e.g.*, SAMF ¶ 629 (Gwinnett Cnty Manifold Dep. 29:12–18, 30:2–

5; DeKalb Cnty Dep. 84:5–85:16; Hall Cnty Dep. 80:18–81:3); SAMF ¶ 635 (Gwinnett Cnty Manifold Dep. 140:16–42:6); SAMF ¶ 636 (Cobb Cnty Dep. 91:25–92:15). As such, genuine disputes of material fact as to whether changing the timing deadlines or making an accommodation to allow voters with disabilities to submit absentee ballots out of time is reasonable.

II. STATE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’ CLAIMS CHALLENGING THE TIMELINE OF ABSENTEE BALLOT DISTRIBUTION FOR GENERAL AND RUNOFF ELECTIONS.

SB 202 made two major changes to the amount of time Georgians now have to receive and vote their absentee ballots. For elections other than runoffs and municipal elections, absentee ballots must now be distributed 20 days closer to election day (“Shortened Absentee Ballot Completion Provision”). O.C.G.A. § 21-2-384(a)(2) (2019); SB 202 § 27. And as described above, the Compressed Runoff Provision requires that runoff elections must now take place four weeks—rather than nine weeks—after election day. *Compare* O.C.G.A. § 21-2-501(a)(2) (2019), *with* SB 202 § 42. Both of these provisions lead to significant reductions in the amount of time voters have to apply for, receive, and vote their absentee ballots. Plaintiffs challenge both provisions under the First and Fourteenth Amendments because they impose an undue burden on the right to vote.

The legal standard for such claims is clear and well-established: courts “apply

the flexible standard from *Anderson* and *Burdick*.” *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Under the *Anderson-Burdick* test, courts must first consider whether and to what extent a challenged law burdens the right to vote. *See Anderson*, 460 U.S. at 789. The “relevant” burdens are “those imposed on persons who are eligible to vote” but are impacted by the operation of the state law. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (controlling op.); *see also id.* at 199; *id.* at 212-14 (Souter, J., dissenting) (similar); *id.* at 239 (Breyer, J., dissenting) (similar).

Once a court determines the character and magnitude of the burden, it must then consider the strength of the state interests and whether they justify the burden, with the standard the State must meet varying depending on the magnitude of the burden that the law imposes. Laws imposing severe burdens are subject to strict scrutiny, *Norman v. Reed*, 502 U.S. 279, 280 (1992), whereas burdens that are less severe are subject to a sliding scale under which the court must “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule,” and in so doing, consider both the “*legitimacy* and *strength* of each of those interests,” *Anderson*, 460 U.S. at 789 (1983) (emphasis added). For any law that burdens voters, even if that burden is less severe, the law must still be justified by state “interest[s] *sufficiently weighty* to justify the limitation.” *Norman*,

502 U.S. at 288–89 (emphasis added).

Under this standard, State Defendants are not entitled to summary judgment on either provision. First, State Defendants have waived any argument that summary judgment is appropriate as to the Shortened Absentee Ballot Completion Provision because they fail to address that provision at all in their briefing. But even if they had not waived their argument, there is clear, undisputed evidence in the record that this provision—which shortens the amount of time voters have to receive and return their ballots by almost three weeks—significantly burdens voters. Similarly, under the Compressed Runoff Provision, voters who want to participate in the runoff election and vote-by-mail have five fewer weeks to complete all the necessary steps to request, fill out, and return their ballot on time. Both of these provisions make the absentee voting experience in Georgia much more burdensome than it was before SB 202 was enacted, and they cannot be justified by State Defendants’ asserted interests. Thus, their motion for summary judgment should be denied.

A. State Defendants are not entitled to summary judgment on the Shortened Absentee Ballot Completion Provision.

As explained above, SB 202 shortened the window for election officials to distribute—and voters to return—absentee ballots by 20 days. Before SB 202, election officials could start distributing absentee ballots 49 days before election day. SB 202 amended these deadlines to forbid sending out absentee ballots more than

29 days before election day. O.C.G.A. § 21-2-384(a)(2) (2019); SB 202 § 27. As a result, voters now have less time to complete the absentee voting process.

Although State Defendants recognize that Plaintiffs challenge this provision, ECF 758-1 at 1, they fail to further address it at all in any of their motions for summary judgment. Instead, State Defendants limit their arguments to SB 202's compression of the time period during which voters can *apply* for an absentee ballot, as well as the state's new deadline to return ballots—different provisions altogether. *See* ECF 758-1 at 2–4 (citing O.C.G.A. § 21-2-381(a)(1)(A)); *id.* at 13–14.

This omission is consequential. By failing to offer any arguments about the burdens (or lack thereof) associated with the Shortened Absentee Ballot Completion Provision, as well as any state interests related to this statutory change, State Defendants have waived their entitlement to summary judgment on that provision. *See United States v. Campbell*, 26 F.4th 860, 872–73 (11th Cir. 2022) (en banc) (explaining that waiver is “the intentional relinquishment or abandonment” of a right or argument); *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004) (“The moving party bears ‘the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.”) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

1. Plaintiffs have ample evidence of the burden imposed by the Shortened Absentee Ballot Completion Provision.

Evidence in the record shows that when voters have less time with their absentee ballots, there is a higher risk of disenfranchisement. Existing issues with slow mail delivery can prevent a voter's ballot from being delivered on time. SAMF ¶ 238 (Kidd Dep. 180:25–181:7; Rose Dep. 39:5–12). And for voters who need more time to review their ballot before casting their vote, such as those with limited English proficiency or who may require language assistance to review ballot materials, this compressed time frame makes it even more difficult for them to participate in the franchise. SAMF ¶ 239 (Fulton Cnty Dep. 110:2–15).

State Defendants do not dispute this evidence; at most, in defending a *different* provision—SB 202's changes to the absentee ballot *application* deadlines—they claim that the deadlines cannot go beyond the usual burdens of voting when “more than 90% of absentee ballots cast in 2020 already complied with the deadlines before they were put in place.” ECF 758-1 at 13. Even if this argument were directed at the correct provision, State Defendants cite no evidence in the record to support their statistic; thus, the Court should not consider it. *See* L.R. 56.1(B)(1).

2. State Defendants' asserted interests are insufficient to justify the burden imposed by the Shortened Absentee Ballot Completion Provision.

State Defendants offer no evidence of any state interest advanced by compressing the absentee ballot distribution timeline by 20 days. But, again, even if

the Court were to consider the interests State Defendants assert in defense of *other* changes to election deadlines, none of them justify the burdens created by giving voters less time to receive and return their absentee ballot.

At the outset, State Defendants assert that compliance with any absentee voting deadline is necessary to have a functioning election system, to prevent fraud or accusations of fraud, and to provide a more “definite period of absentee voting.” ECF 758-1 at 3, 13–14. But these arguments misconstrue Plaintiffs’ claims. Plaintiffs do not seek to eradicate all deadlines—indeed, the pre-existing law also imposed deadlines for absentee ballot distribution and return. Rather, Plaintiffs challenge a law that unnecessarily restricts the amount of time a voter has to receive and vote their absentee ballot by election day. And State Defendants offer no argument or evidence to explain why *shortening* the previously established timeline for absentee voting was necessary to accomplish any state interests they advance.

Additionally, none of the interests asserted in the preamble in SB 202 justify the shortened absentee voting period either. Moving the absentee ballot distribution window closer to election day does not reduce the burden on election officials, *see* SB 202 § 2(3)–(4), and in fact, the evidence demonstrates that the opposite is true: county officials testified that before SB 202, they started distributing absentee ballots at the same time as Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) ballots; but now, SB 202’s shortened timeline for absentee voting

means that most UOCAVA ballots and absentee ballots must be distributed on different schedules, which creates additional administrative burdens for the county officials. O.C.G.A. § 21-2-384(a)(2); SAMF ¶ 229 (Kidd Dep. 111:19–25, 180:5–22; Cobb Cnty Dep. 270:3–20; Gwinnett Cnty Manifold Dep. 144:4–146:7). Counties also recognize that having less time to prepare and mail absentee ballots is itself more burdensome on operations, and may compel counties to increase their staff in order to process applications and distribute absentee ballots in a shorter period. SAMF ¶ 241 (Gwinnett Cnty Manifold Dep. 146:8–147:2; DeKalb Cnty Dep. 87:6–88:22). That is why the vast majority of county election directors surveyed by Georgia Association of Voter Registration and Election Officials (“GAVREO”) opposed moving the ballot distribution window closer to election day—as SB 202 did—because they anticipated doing so would create a large amount of work for election offices while they prepare for and conduct early voting. SAMF ¶ 243 (Adams Dep. 34:15–17, 176:25–177:23, USA-ADAMS-000054.0009).

State Defendants have advanced no state interest that could justify these unnecessary burdens. Even if they had, evidence cited above demonstrates that there are disputes of material facts that should not be resolved on summary judgment.

B. State Defendants are Not Entitled to Summary Judgment on Plaintiffs’ Challenge to the Shortened Runoff Period.

SB 202 also shortened the amount of time between the general election and

runoff, such that the runoff now takes place four, rather than nine, weeks after election day. SB 202 § 28 (amending O.C.G.A. § 21-2-419). The result is that voters now have significantly less time to request, receive, and return their absentee ballots in time for it to be counted in the runoff.

Recognizing that this compressed timeline would create problems for UOCAVA voters, the Legislature created an automatic ranked-choice voting system that would allow military and overseas voters to make their selections for both the general election and, if necessary, the runoff, on ballots that are mailed at one time to the voter before the general election. SB 202 § 27 (amending O.C.G.A. § 21-2-384(e)(5), (6)). But they made no such accommodation for stateside voters who similarly rely on absentee ballots to participate in the runoff.

For instance, voter Keith Hollingsworth, who lives in New Jersey, applied for his ballot within two or three days after the November 2022 general election, but he did not receive his ballot until Friday, December 2. SAMF ¶ 485 (Hollingsworth Dep. 26:2–17); SAMF ¶ 484 (Hollingsworth Dep. 29:1–12). That left him with little time to return the ballot before the December 6, 2022 runoff, and Mr. Hollingsworth had to mail his ballot via FedEx to ensure it would be received on time and counted—an expense he would not have had to incur under the original runoff schedule. SAMF ¶ 486 (Hollingsworth Dep. 29:1–12, 36:13–20, 37:20–23).

County officials also recognize the burdens imposed on voters who have to

receive and return their absentee ballots during the compressed runoff period, especially considering the time required for mail transmission, potential mail delays, and major holidays that fall between the two elections. SAMF ¶ 489 (Athens-Clarke Cnty Dep. 129:11–25, 130:11–21; Cobb Cnty Dep. 168:17–23; Gwinnett Cnty Manifold Dep. 122:3–21; Fulton Cnty Dep. 145:1–3; *see also* Gwinnett Cnty Manifold Dep. 123:3–124:2 (explaining why it takes counties time to process absentee ballot applications before a runoff election before ballots can be mailed out)). In particular, officials recognize that with such a short turnaround, there is no room for error—if a ballot has to be reissued or there is a hiccup with ballot transmission, there is little to no time to correct any of that, thus increasing the risk of disenfranchisement. SAMF ¶ 490 (Gwinnett Cnty Manifold Dep. 122:10–123:2).

County officials also acknowledge that the reduced timeframe for absentee voting in the runoff election has pushed more individuals to vote in person, which can lead to longer lines. SAMF ¶ 491 (CDR00009771-773; Cobb Cnty Dep. 168:24–169:7; Harvey Dep. 117:2-14). These burdens are not just hypothetical. Voter Lorraine Rose did not even try to request an absentee ballot for the runoff election because she “did not believe that [she] would get it in time nor would [she] be able to return it in time.” SAMF ¶ 492 (Rose Dep. 41:8–13). But when she went to vote in person, she waited in line for nearly two hours. *Id.*

In response, State Defendants point to turnout data in an attempt to minimize

the burden caused by the compressed runoff period; that argument is flawed because turnout figures alone do not reveal anything about the barriers voters had to overcome in order to exercise their right to vote. Election regulations or practices that unduly burden the right to vote are no less objectionable simply because voters manage to overcome those burdens. *See League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1216–19 (N.D. Fla. 2018) (holding a Florida law that substantially increased the “costs of voting” for student voters unconstitutional).

State Defendants also argue that voters and election officials have a strong interest in avoiding drawn-out elections, thus justifying shortening the schedule from nine to four weeks. *See* ECF 758-1 at 5; 14; SB 202 § 2(11). But the evidence soundly rejects this theory: many election officials, including at the state and county level, actually *opposed* this change because they feared such a compressed timeframe would create new and unnecessary burdens on election administrators. SAMF ¶ 482 (USA-ADAMS-000027.0014 (GAVREO survey); Sterling Dep. 186:17-189:6 (echoing concerns about the strain a compressed runoff period would cause to state and county election administrators); CDR00009771-773 (Email from Janine Eveler, warning about the untenability of a shortened runoff); Harvey Dep. 117:2-14; SAMF ¶ 483 (AME_000238:6-9) (Tonnie Adams)). And as illustrated above, compressing the runoff period certainly does not protect voters.

Finally, State Defendants attempt to compare Georgia’s runoff calendar to

other states to justify its compressed schedule. But in doing so, they ignore that several of the states they cite have runoff periods that are close to, or exceed, the nine-week schedule that Georgia had before SB 202. *See* Tex. Elec. Code § 41.007 (requiring an twelve-week runoff period); N.C. Gen. Stat. § 163-111(e) (requiring a ten-week runoff); S.D. Codified Laws § 12-6-51.1 (requiring an eight-week runoff).⁸ Contrary to State Defendants’ suggestion, there is no overwhelming comparative evidence that a majority of states with runoff elections actually follow a shortened runoff schedule like what Georgia now has, especially for general elections.

Their motion should be denied as to the Compressed Runoff Provision.

III. ISSUES OF DISPUTED MATERIAL FACT PRECLUDE SUMMARY JUDGMENT ON CLAIMS CHALLENGING SB 202’S SHORTENED TIME PERIOD FOR REQUESTING AND COMPLETING AN ABSENTEE BALLOT UNDER SECTION 2 OF THE VRA.

A. Section 2 Legal Standard

In deciding whether Section 2 of the Voting Rights Act has been violated, courts look to the “totality of the circumstances” to determine whether the state’s system of voting is not “equally open” to minority groups “in that [their] members have less opportunity than” non-minority voters “to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b). Courts

⁸ The runoff schedules in these states, as well as many of the others State Defendants cite including South Carolina, Mississippi, and Alabama apply only to primaries, not general elections.

ask whether minority voters are denied “*meaningful access* to the political process.” *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004) (emphasis added).

In analyzing § 2 claims, courts should consider “any circumstance that has a logical bearing on whether voting is ‘equally open,’” in that it affords minority voters an equal opportunity to participate in the franchise, including consideration of voters’ “ability to *use* the means that are equally open.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338 (2021). In *Thornburg v. Gingles*, the Supreme Court identified several salient factors, including some particularly applicable in vote denial/abridgement cases such as “the history of voting-related discrimination in the State;” and “the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate in the political process.” 478 U.S. 30, 44 (1986). In *Brnovich*, the Supreme Court identified additional guideposts courts may consider in § 2 cases, including the “size of the burden imposed;” “the degree to which a voting rule departs from” the standard when § 2 was amended; “the size of any disparities in a rule’s impact on members of different racial or ethnic groups;” “the opportunities provided by a State’s entire system of voting;” and “the strength of the state’s interests served by a challenged voting rule.” 141 S. Ct. at 2338–39.

While courts may consider any relevant circumstances, including the *Gingles* and *Brnovich* factors, the “core of §2(b) is the requirement that voting be ‘equally

open,” including “consideration of a person’s ability to *use* the means that are equally open.” *Brnovich*, 141 S. Ct. at 2338 (emphasis in original).

B. Defendants do not Address Plaintiffs’ Challenge to the Shortened Absentee Ballot Completion Provision.

As discussed above, SB 202 shortened the timeline to request an absentee ballot *and* complete an absentee ballot. *Compare* O.C.G.A. § 21-2-381(a)(1)(A) (2019) *with* SB 202 § 25, and O.C.G.A. § 21-2-384(a)(2) (2019) *with* SB 202 § 27. Though Defendants recognize that Plaintiffs have challenged both the Shortened Absentee Ballot Completion and Request Provisions, they seek summary judgment only on the latter, ECF 758-1 at 1.

Defendants have cited *no evidence* and presented *no argument* concerning the condensed timeline to complete an absentee ballot. Defendants only discuss changes to the timeline for requesting and submitting absentee ballot *applications*. ECF. 758-1 at 3-4. To the extent Defendants now claim they are moving for summary judgment on the Shortened Absentee Ballot Completion Provision, they have failed to point out the absence of evidence to support a Section 2 claim based on this provision and meet their burden. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Summary judgment on this provision should be denied on this basis alone. *See Livernois v. Med. Disposables, Inc.*, 837 F.2d 1018, 1823 (11th Cir. 1988) (holding that summary judgment is inappropriate where movant “did not satisfy its

burden of informing the district court of the basis of its motion”). Nonetheless, the record evidence precludes summary judgment against Plaintiffs on this provision.

C. The Experience of Voters of Color in Georgia

1. Past Discrimination against Voters of Color and Persistent Effects of that Discrimination Preclude Summary Judgment.

The disparate impact of SB 202’s condensed timelines for absentee ballots and absentee ballot applications on Asian American and Pacific Islander (“AAPI”), Black, Latinx, and Native American voters in Georgia requires an understanding of the past discrimination these groups faced and how these people continue to “bear the effects of [that] discrimination.” *See Brnovich*, 141 S. Ct. at 2338.

Georgia’s longstanding history of discrimination against Black Georgians and other minorities in voting and many other areas of life is well-documented and judicially recognized. *See, e.g., Wright v. Sumter Cnty. Bd. of Elections & Reg.*, 979 F.3d 1282, 1307–08 (11th Cir. 2020); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1323–24 (M.D. Ga. 2018); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, -- F. Supp. 3d --, No. 1:21-CV-05337-SCJ, 2023 WL 7037537, at *59–*64 (N.D. Ga. Oct. 26, 2023); SAMF ¶ 544 (Anderson 19–45, 57–63; Cobb 11–50; Tijerina 19–31). Georgia’s history of discrimination has contributed to suppressed political participation for Black and minority voters. SAMF ¶ 546 (Minnite 5; Clark 2–13).

AAPI people have been and continue to be questioned for their loyalty to the United States and pushed to the political sidelines, including in the electoral system. SAMF ¶¶ 544, 549, 551, 556 (Derek Chang Rep. (“Chang”) 60–61; Taeku Lee Rep. (“Lee”) 40). Because of discriminatory immigration and naturalization laws, AAPI people have the shortest history with having the right to vote of any other racial group. *See* SAMF ¶ 547 (Chang. 15-18). AAPI voters are especially likely to be suspected of disloyalty and being fraudulent voters, with anti-Asian tropes often featured in election fraud claims, including openly in November 2020. *See* SAMF ¶¶ 557-61 (Chang 61; Lee 36; Ex. 103, Decl. of Taeku Lee ISO MSJ Opp. (“Lee Supp. Decl.”) ¶¶ 2-12). Representative Barry Fleming—a vocal supporter of SB 202—compared the “always-suspect absentee balloting process” to the “shady part of town down near the docks you do not want to wander into because the chance of being shanghaied is significant.” SAMF ¶ 559 (Lee Supp. Decl. ¶¶ 2-12). The use of the term “shanghaied” is racial both inherently and in the context in which it was made (*i.e.*, with respect to absentee ballots and in the same time period as SB 202’s legislative history). *See* SAMF ¶ 559 (Lee Supp. Decl. ¶¶ 2–12). In addition to the political discrimination AAPI Georgians face, they are also the subject of racial violence, which increased in the first quarters of 2020 and 2021. *See* SAMF ¶ 554 (Lee 37–38 (discussing the rise in hate crimes against AAPI people)); SAMF ¶ 552

(Lee Suppl. Decl. ¶ 8, Chang 61–62 (noting the Atlanta mass shootings that targeted Asian-owned businesses and killed six AAPI women)).

2. AAPI and Latinx Voters are More Likely to Have Limited English Proficiency (LEP) and Georgia Offers Limited Assistance to them.

Many AAPI and Latinx voters are also Limited English Proficiency (“LEP”) voters. The 2020 American Community Survey estimates that 33% of AAPI people, age 5 or older in Georgia speak English “less than ‘very well.’” *See* SAMF ¶¶ 67, 538 (Palmer ¶ 18). 35% of the Latinx population of the same age group are LEP. *Id.* In comparison, only 2% of white people and 1% of Black people in Georgia speak English “less than ‘very well.’” *Id.* Despite the significant percentage of AAPI and Latinx LEP voters, the State offers limited assistance to this group. *See* SAMF ¶ 542 (Lee 54); SAMF ¶¶ 144, 195–96 (Lee 81-83; GALEO Dep. 100; Germany 4/13 Dep. 41:3-11; DeKalb Cnty Dep. 69:5-8; Cobb Cnty Dep. 186:3-10; Fulton Cnty Dep. 118:14-21). Often this leads to LEP voters not voting at all. *See* SAMF ¶ 68 (Lee 52 (“Asian Americans far more than any other group, cite ‘difficulty with English’ as a main reason for not registering to vote.”)). AAPI LEP individuals who do vote prefer to use an absentee ballot because it allows for greater access to language assistance. *See* SAMF ¶ 542 (Lee 54); SAMF ¶ 81 (Lee 65); *see also* SAMF ¶¶ 234, 514, 672, 691-692, 894 (Lee 49, 54; Fulton Cnty Dep. 110:2–15; Paik Dep. 21:13–16, 24:5–25:4, 43:6–18, 47:18–48:6; GALEO Dep. 100; Gonzalez Decl. ¶ 6).

3. Voters of Color Use Absentee Ballots at Higher Rate Than Other Racial Groups

a. AAPI Voters

AAPI voters are the likeliest to vote by absentee ballot. SAMF ¶ 81 (Lee 65). AAPI LEP voters are forced to spend extra time and search for their own translation assistance in order to exercise their right to vote, so prefer absentee voting because it provides greater access. *See* SAMF ¶ 542 (Lee 54 (noting that 69% of AAPI absentee ballot voters reported in-language voting materials were available compared to 55% of AAPI in-person voters)); *see also* Resp. to SMF ¶ 129 (Paik Dep. at 49:9–51:2)); Resp. to SMF ¶ 133; SAMF ¶ 720 (Nora Aquino Dep. (“Aquino Dep.”) 29:1–30:4).

Because Georgia does not provide Asian-language materials to its voters, AAPI LEP voters rely heavily on third-party organizations such as Advancing Justice-Atlanta when registering to vote, as well as requesting, filling out, and returning absentee ballot applications. *See* SAMF ¶ 543 (Lee 85). Advancing Justice-Atlanta conducts outreach in multiple languages, including operating a voter hotline with in-language capacity in Korean, Chinese, Vietnamese, Spanish and Hindi. SAMF ¶ 699 (Lee 62).

Recent turnout rates throughout the United States demonstrate the high rate of growth in AAPI political participation, in large part due to the efforts of groups like Advancing Justice-Atlanta. SAMF ¶¶ 72, 74–78 (Lee 55–63). In 2020, a year of

record turnout, AAPI turnout increased at a greater rate than all other groups. *See* SAMF ¶ 74 (Lee 55, Fig. 1). In Georgia, AAPI turnout increased dramatically from the 2016 to the 2020 election, with surveys capturing at least a 21.9 percentage point differential, whereas overall turnout increased much more modestly by 5.9 percentage points. SAMF ¶ 23 (Lee 46). In all major Georgia statewide elections from November 2018 to January 2021, AAPI registrants had the highest rate of absentee ballot applications compared to other racial groups. *See* SAMF ¶ 383 (Fraga ¶¶ 67–68). AAPI voters also voted via absentee ballots at the highest rate compared to other racial groups from November 2018 to January 2021 in all major statewide elections. *See* SAMF ¶ 39 (Fraga Tbl. 2); *see also* SAMF ¶ 45 (Grimmer ¶ 59). AAPIs made up 2.6% of Georgia total voters in 2020, but made up 3.8% of Georgia’s absentee-by-mail users. SAMF ¶ 90 (Palmer ¶ 12, Tbl. 1; Lee 67).

b. Black and Latinx Voters

Prior to 2018, white voters in Georgia used absentee ballots more than Black voters. SAMF ¶ 35 (Anderson 99; Burden 11; Fraga ¶ 51). Ahead of the 2018 election, nonpartisan organizations and some campaigns concentrated on voter registration and turnout among non-white voters, with an emphasis on absentee voting. SAMF ¶ 50 (Burden 9; Burnough Decl. ¶ 12; Cotton Decl. ¶¶ 7–12).

In the 2018 general election, Black voters’ absentee voting rate outpaced that of white voters for the first time. SAMF ¶ 36 (Burden 11, Tbl. 5; Fraga ¶ 55 & Tbl.

2; Grimmer ¶ 63 & Fig. 2). In fact, compared to the 4.6% of white voters who voted absentee-by-mail in the 2018 general election, the percentages of Black, Latinx, and AAPI voters who voted absentee-by-mail were 7.1%, 6.3% and 11.5%, respectively. *Id.* Although the difference in the rates at which Black and white voters used absentee voting was less in 2018 and 2022 than in 2020, the pattern of disproportionate use by Black voters is consistent, and because of socioeconomic disparities in Georgia, the burden imposed by disruptions in access to absentee voting is even greater for Black voters. SAMF ¶¶ 525, 950 (*See* Burden 25–26). Black voters’ absentee ballots are also consistently rejected at higher rates than those of white voters. SAMF ¶ 49 (Burden 11–12 & Tbl. 6).

D. Disparities Due to the Shortened Absentee Ballot Request and Completion Provisions are Larger for Voters of Color Compared to White Voters.

The shortened timelines for requesting and completing an absentee ballot render Georgia’s voting system not equally open to voters of color. Summary judgment on the scant argument Defendants provide is inappropriate because of material facts showcasing the substantial impact the condensed timelines for requesting and completing absentee ballots have on voters of color.

After the passage of SB 202, requests for absentee ballots declined at higher rates for AAPI voters than all other racial groups, in both general and run-off elections. *See* SAMF ¶ 42 (Fraga Tbl. 3); SAMF ¶ 43 (Fraga ¶ 70). The rates at

which AAPI voters requested absentee ballots across pre- and post-SB 202 general and runoff elections declined by 30.5 and 20.1 percentage points, respectively. SAMF ¶ 958 (Fraga Tbl. 3). Meanwhile, the rates for white voters declined by only 18.9 and 13.8 percentage points across the same elections, **a difference of 11.6 and 6.3 percentage points between AAPI and white voters**, respectively. *See* SAMF ¶ 959 (Fraga Tbl. 3, ¶ 70); *see also* SAMF ¶ 44 (Fraga ¶¶ 63–70). Rates of Latinx voters applying for absentee ballots also decreased across the 2018 and 2022 midterm elections, while white voters’ rates increased. SAMF ¶ 981 (Fraga Tbl. 3). This significant showing of disparate impact alone is sufficient to deny Defendants’ summary judgment motion. *See League of Women Voters of Fla. Inc. v. Fla. Sec’y of State (“LWV Fla.”)*, 66 F.4th 905, 938 (11th Cir. 2023) (upholding the district court’s finding that disparity of 12.58 percentage points showed disparate impact).

Voters of color also saw their absentee ballot applications rejected for late arrival at increased rates after SB 202. In the elections immediately before the passage of SB 202, the rate of rejection of AAPI absentee ballot applications for late arrival was 5.5% in November 2020 and 6.5% in January 2021. SAMF ¶ 226 (Fraga Tbl. 7). After SB 202, the rate of rejection of AAPI absentee ballot applications for late arrival more than doubled, in the general election, and more than tripled, in the runoff election. SAMF ¶ 226 (Fraga Tbl. 7, ¶¶ 100–102). The rate at which white voters’ absentee ballot applications were rejected for late arrival rose at a smaller

rate between pre- and post-SB 202 runoff elections compared to AAPI voters, leading to **a difference of 5 percentage points** between the two groups' increased rejection rates. *See* SAMF ¶ 226 (Fraga Tbl. 7). As just one real life example of the disparate impact faced by AAPI voters, Plaintiff Uddullah missed the new absentee ballot application deadline and was forced to withstand a long line, with two young children, to vote in person after SB 202. *See* SAMF ¶ 723 (Angelina Thuy-Uddullah Dep. (“Uddullah Dep.”) 37:22–40:1).

In general elections before and after SB 202, Black voters' mail ballot applications were also more likely than white voters' to be rejected for arriving too late. SAMF ¶ 221 (Fraga ¶ 99, Tbl. 7). Georgia's Latinx voters were also consistently more likely to have their absentee-by-mail applications rejected as arriving “too late” in elections conducted after the implementation of SB 202 relative to white Georgia voters. SAMF ¶ 973 (Fraga ¶¶ 93–103, Tbl. 7).

If SB 202 had been in place during the 2020 election cycle, voters of color would have been disparately impacted. For example, in the November 2020 and January 2021 elections, more AAPI absentee ballot applications would have been rejected for late receipt under SB 202, compared to the would-be rejection rate of white registrants' applications. SAMF ¶ 220 (Fraga Tbl. 8, ¶¶ 108-113; Grimmer Tbl. 10). Under SB 202's rules, absentee ballot applications from AAPI registrants in 2020 would have accounted for 5.2% of all late absentee ballot applications, which

is greater than the overall turnout of AAPIs in the 2020. SAMF ¶ 222 (Taeku Lee Rebuttal Expert Rep. ¶ 7). This counterfactual data is bolstered by the rejection rate for late arrival of AAPI voters' absentee ballot applications post-SB 202, which was significantly higher than the pre-SB 202 rate. *Cf. LWV Fla.*, 66 F.4th at 932–33 (discounting the weight of statistically *insignificant* correlations while noting that small disparities can bolster other consistent evidence). These disparities create a triable issue of fact as to whether the Shortened Absentee Ballot Request Provision disproportionately impacts voters of color.

Defendants have cited no evidence about the condensed timeline to complete an absentee ballot, and summary judgment should be denied on that basis alone. *See Livernois*, 837 F.2d at 1023. Moreover, the record demonstrates the provision renders absentee voting no longer equally open to voters of color. In the November 2022 election, only 9.1% of AAPI voters voted utilizing absentee ballots, a 30.6 percentage point decline from November 2020, and all voters of color fared worse than white voters. *See* SAMF ¶¶ 41, 378 (Fraga Tbl. 2 (compared to a decline of 18.3 percentage points for white voters, 18.8 percentage points for Hispanic voters, and 21.7 percentage points for Black voters)). In the November 2022 general election, there was a **12.3 percentage point disparity** in the decline rate between AAPI and white voters' use of absentee ballots. *See* SAMF ¶ 41 (Fraga Tbl. 2). *See LWV Fla.*,

66 F.4th at 938 (upholding the district court’s finding that a disparity of 12.58 percentage points showed disparate impact).

The decline for AAPI voters’ use of absentee ballots from the January 2021 to the December 2022 runoff election was greater than for any other racial group. *See* SAMF ¶ 41 (Fraga at Tbl. 2 (a 28.7 percentage point decline for AAPI voters, 16.5 percentage points for white voters, 17.7 percentage points for Hispanic voters, and 22.5 percentage points for Black voters)). In the runoff elections, there was a **12.2 percentage point disparity** in the decline rate between AAPI and white voters’ use of absentee ballots. *See* SAMF ¶¶ 41, 381 (Fraga Tbl. 2); *LVW Fla.*, 66 F.4th at 938 (upholding the district court’s finding that a disparity of 12.58 percentage points showed disparate impact).⁹

AAPI voters had their absentee ballots rejected for late arrival at the highest rate compared to other racial groups post-SB 202—leading to a **1.55 and 3.62 percentage point difference** between AAPI and white voters in the November and December 2022 elections, respectively. *See* SAMF ¶¶ 232, 234 (Fraga Tbl. 14). The

⁹ Individual voters’ experiences exemplify the barriers the shortened timeline to complete an absentee ballot creates on AAPI voters. Plaintiff Enjeti-Sydow testified that upon requesting her absentee ballot, she faced a long wait time to receive her absentee ballot, yet a short turn-around time for completing her ballot. SAMF ¶ 731 (Ex. 56, Anjali Enjeti-Sydow Dep. (“Enjeti-Sydow Dep.”) 69:15–72:18). As election day drew closer, she had not received her ballot and was forced to take additional steps to contact the local elections office to ensure she was able to vote. SAMF ¶ 731 (Enjeti-Sydow Dep. 69:15–72:18).

rate of AAPI voters' rejected absentee ballots for late arrival also grew at a steeper incline than any other racial group. *See id.*

E. The Burden Imposed by the Shortened Timelines to Request and Complete Absentee Ballots is Especially Large for Voters of Color when Assessing the Lack of Opportunities Provided by Georgia's Entire System of Voting.

The burden created by the Shortened Absentee Ballot Request and Completion Provisions is greater for AAPI and Latinx voters because of the significant number of those voters who are LEP. *See Brnovich*, 141 S. Ct. at 2338. For AAPI and Latinx voters, especially those who are LEP, the compressed timeline presents a barrier to vote because it does not allow sufficient time for translation assistance. *See* SAMF ¶ 719 (Paik Dep. at 42:12–14, 44:5–12 (“So when the time is shorter, then it’s difficult for me . . . I have to ask [Advancing Justice-Atlanta] and then they can translate, and it take time.”)); SAMF ¶ 720 (Aquino Dep. at 28:7–29:8 (“[T]he time frame for when you can drop your ballots has been decreased . . . making it shorter and making it more difficult for voters to fill out their information and to complete the process.”)).

Steven Paik’s experience is just one example of the disparate impact LEP AAPI voters face because of the condensed timelines for absentee ballots. Mr. Paik was unable to vote previously due to the lack of language assistance, but voted for the first time in the 2020 election after he moved to Georgia because he was able to

get such assistance. *See* SAMF ¶ 718 (Paik Dep. 20:5–21:24). Every time Mr. Paik has voted, he has had to seek translation assistance. SAMF ¶ 719 (Paik Dep. 21:13–16, 24:5–25:4, 26:5–9, 43:6–18, 47:18–48:6). He testified that it takes time seek this assistance and a condensed timeline creates a danger that he will not be able to request or complete his absentee ballot in time. SAMF ¶ 719 (Paik Dep. 42:12–14, 44:5–12). Voting in person is not possible for Mr. Paik because the polling places are not required to translate election materials into Korean. *See* SAMF ¶ 69 (Germany Dep. 4/13 at 41:24–42:10 (noting that only Gwinnett County must make election materials available in a language other than English, which is Spanish)).

LEP voters already have a limited “ability to use the” voting methods in place, and therefore, oppressive changes to their preferred or only means of voting through absentee ballots directly targets their opportunity to equally participate in the electoral system. *See* SAMF ¶¶ 81 (Lee 65), 542 (Lee 54), 239 (Fulton Cnty Dep. 110:2–15); *Gingles*, 478 U.S. at 44 (noting that the “right question [in § 2 results cases] is whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice”) (citations omitted); *Brnovich*, 141 S. Ct. at 2338 (same). There aren’t “opportunities provided by [Georgia’s] entire system of voting” that alleviate the “burden imposed” by the condensed timeline for requesting and completing an absentee ballot. *Brnovich*, 141 S. Ct. at 2339. Instead, translation

assistance from the state is scarce for the AAPI population. *See* SAMF ¶¶ 69, 197, 198, 200 (Germany 4/13 Dep. at 41:3–11 (testifying that the Secretary of State website is only in English)); Fulton Cnty Dep. 118:11–13 (same); 30(b)(6) Dekalb Cnty, Keisha Smith Dep. 69:5–8 (same); Lee 81–83 (same)). Not all LEP AAPI voters have access to translated election materials or bilingual election workers because election officials are not required to provide such assistance to AAPI voters. SAMF ¶ 69 (Ryan Germany Dep. 4/13 at 41:24–42:10).

F. The Condensed Timelines for Requesting and Completing Absentee Ballots do not Serve the State’s Interests.

Defendants argue the changed timelines for absentee ballots and applications are necessary for “creating a definite period of absentee voting [that] will assist electors in understanding the election process while also ensuring that opportunities to vote are not diminished.” ECF 758-1 at 3. Yet, Defendants fail to explain how the pre-SB 202 time periods were indefinite and how giving voters less time to complete the absentee ballot process provides an opportunity to vote. Further, to the extent that Defendants argue the condensed timelines are in the State’s interest, they fail to account for the record evidence demonstrating that elections officials find the shortened timeline to be a burden. *See* SAMF ¶ 235 (Kennedy 13); SAMF ¶¶ 191, 236 (30(b)(6) Athens-Clarke Cnty (Charlotte Sosebee) Dep. 88:8–25).

As shown above, the record presents a triable issue of fact as to whether voters of color are disparately impacted by the condensed timelines for absentee ballot applications and absentee ballots. *See Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 985 (N.D. Fla. 2021) (denying summary judgment where plaintiff presented evidence that people of color would bear the brunt of the “costs associated with requesting” an absentee ballot). Though only the changed timelines are addressed in this brief, all the provisions affecting absentee ballots, discussed across briefs, are interdependent and cumulatively impact and prevent voters of color from participating equally in Georgia’s voting system. A denial of summary judgment is warranted on the Shortened Absentee Ballot Request and Completion Provisions.

CONCLUSION

For the foregoing reasons, this Court should deny State Defendants’ and Intervenor-Defendants’ motions for summary judgment on SB 202’s changes in timing to absentee and runoff voting.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(D)

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

/s/ Davin Rosborough
Davin Rosborough

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2024, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

/s/ Davin Rosborough
Davin Rosborough

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