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

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

STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON DISCRIMINATORY-INTENT CLAIMS

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INTRODUCTION

This Court previously held that Plaintiffs had not shown a likelihood of success on their claims that various provisions of SB 202 were enacted for discriminatory reasons. [Doc. 686-1 at 59]. In reaching that conclusion, the Court held that Plaintiffs had not identified evidence showing that the Challenged Provisions have a genuine disparate impact; or that SB 202's legislative history, surrounding circumstances, or legislators' statements suggest discriminatory intent; or that there were any foreseeable disparate impacts that the legislature ignored; or that there were less discriminatory alternatives that the General Assembly should have considered. *Id.* at 28–59. Although that decision was issued under the standards applicable to a preliminary-injunction motion, rather than under the now-applicable standards for a summary-judgment motion, the Court should once again conclude that there is no evidence sufficient to create a triable issue on whether the Challenged Provisions were enacted for discriminatory reasons.

In fact, throughout their lengthy opposition [Doc. 822], Plaintiffs largely recycle the same facts and arguments the Court already rejected. Once again, as shown in detail below, Plaintiffs attempt to defeat summary judgment by relying on mischaracterizations of the applicable legal standards and the facts or by suggesting that immaterial disputes of fact are material. At each turn, these arguments fail to satisfy Plaintiffs' burden, and the Court should enter

summary judgment for State Defendants on Plaintiffs' claims that the Challenged Provisions violate the Fourteenth and Fifteenth Amendments and on Plaintiffs' claim that the Provisions violation § 2 of the Voting Rights Act (VRA).

Before addressing those claims, however, the discussion below disposes of Plaintiffs' procedural challenges to State Defendants' motion for summary judgment.

ARGUMENT

Plaintiffs initially attempt to defeat summary judgment by raising procedural attacks on State Defendants' Motion for Summary Judgment ("Mot.") [Doc. 759]. None has merit. Then, as to Plaintiffs' claims that the Challenged Provisions are intentionally discriminatory under the Fourteenth and Fifteenth Amendments, Plaintiffs largely ask the Court to deny summary judgment based on immaterial disputes of fact. The same is true for Plaintiffs' VRA § 2 claims, where Plaintiffs suggest material factual disputes where none exist. Finally, Plaintiffs' arguments overlook the evidence showing that the Challenged Provisions serve important State interests and would have been enacted in any event.

I. None of Plaintiffs' Procedural Arguments Undermines State Defendants' Motion.

Plaintiffs raise three meritless procedural attacks on State Defendants'

motion.

1. Plaintiffs first suggest (at 2) that summary judgment is entirely inappropriate for discriminatory-intent claims. This ignores that such claims are routinely resolved on summary judgment—particularly when defendants (who do not bear the burden of proof) move for summary judgment. And the Eleventh Circuit has routinely approved such decisions.[1]

2. Plaintiffs next claim (at 12 n.4) that State Defendants forfeited any arguments about Asian-American and Pacific-Islander (AAPI) voters because AAPI voters were not specifically referenced in State Defendants' Motion.

But State Defendants already showed that "Plaintiffs are unable to identify any evidence, let alone *sufficient* evidence, showing that racial bias was a motivating factor for any of SB 202's provisions," and that "no part of SB 202 imposes a burden on voting, by racial group or otherwise." Mot. at 29, 45. "Racial group," of course, includes AAPI voters. It was thus "apparent throughout" State Defendants' Motion "that [they] disputed" Plaintiffs' discrimination claims, regardless of the racial group. *See Serendipity at Sea, LLC v. Underwriters at Lloyd's of London Subscribing to Pol'y No. 187581*, 56

[1] *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1321-28 (11th Cir. 2021) ("*GBM*"); *Hallmark Devs., Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1284 (11th Cir. 2006); *Citizens Concerned About Our Child. v. Sch. Bd. of Broward Cnty.*, 193 F.3d 1285, 1295 (11th Cir. 1999).

F.4th 1280, 1288 (11th Cir. 2023). And where, as here, the non-movant bears the burden of proof, there is no "requirement in Rule 56 that the moving party support its motion [for summary judgment] with affidavits or other similar materials *negating* the opponent's claim." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). That is equally true in the summary-judgment context: "When the defendant has pointed to the absence of evidence of discriminatory intent, it becomes the plaintiffs' job to produce such evidence." *Citizens Concerned*, 193 F.3d at 1294-95. Accordingly, State Defendants did not have the burden to preemptively rebut Plaintiffs' anticipated arguments. Rather, they showed that summary judgment was appropriate because there are no disputed material facts suggesting *any* discriminatory intent as to any racial group.

3. Next, Plaintiffs contend (at 11-12) that State Defendants' Motion "violates … Local Rule 56.1(B)(1) because it relies on facts 'set out only in the brief and not in the movant's statement of undisputed facts.'" On the contrary, the "facts" to which Plaintiffs refer are either included in State Defendants' Consolidated Statement of Material Facts ("SOF") [Doc. 755], or they are not the kind of assertions that belong in the SOF.[2] State Defendants avoided cluttering their SOF with "argumentative conclusions" rather than "facts," *see*

[2] *See* Ex. II to Defs.' Resps. to Pls.' Statement of Additional Material Facts.

Inglett & Co. v. Everglades Fertilizer Co., 255 F.2d 342, 349 (5th Cir. 1958)—an improper practice in which Plaintiffs engage repeatedly in their own Consolidated Statement of Additional Material Facts ("PSOF") [Doc. 807-1].[3]

4. Lastly, Plaintiffs incorrectly argue (at 18) that, notwithstanding controlling precedent, they may bring a "stand-alone claim[] for intentional race discrimination under Section 2" of the VRA and need not prove discriminatory results. Plaintiffs' theory is that this Court is bound by *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046 (5th Cir. 1984), and thus should ignore recent Eleventh-Circuit cases holding that "a finding of discriminatory impact is necessary to establish a violation of section 2[.]" *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 922 (11th Cir.) ("*LWV II*"), *reh'g en banc denied,* 81 F.4th 1328 (11th Cir. 2023) (citing 52 U.S.C. § 10301).

Plaintiffs' argument is untenable. As the Eleventh Circuit explained in *LWV II*, the 1996 case of "*Johnson v. DeSoto County Board of Commissioners* … held that '[§ 2] … requires a showing of discriminatory results[.]'" 66 F.4th at 943 (quoting 72 F.3d 1556, 1563 (11th Cir. 1996)). And, the Eleventh Circuit confirmed, "[w]e never overruled *Johnson*, our earliest binding precedent, so

[3] In any event, the Court may also "use its discretion to consider all facts the Court deems material after reviewing the record." *Krass v. Obstacle Racing Media, LLC*, 667 F. Supp. 3d 1177, 1186 (N.D. Ga. 2023) (Boulee, J.).

we are obliged by stare decisis to follow it." *Id.* (quoting 72 F.3d 1556, 1563 (11th Cir. 1996)). *Johnson*, in turn, had concluded that a 1993 Supreme-Court decision rejected the proposition that "discriminatory intent alone can violate § 2[.]" 72 F.3d at 1562, 1564 n.8 (citing *Voinovich v. Quilter*, 507 U.S. 146, 157 (1993)). When a panel's published decision interprets a Supreme-Court case, courts in this Circuit are "bound by [that] interpretation." *Wilson v. Taylor*, 658 F.2d 1021, 1035 (5th Cir. Unit B 1981). Thus, the pre-*Voinovich* Circuit precedent that approved intent-only Section-2 claims (including *McMillan*) has been abrogated. *See United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) ("[A] subsequent panel is not obligated to follow a prior panel's decision where an intervening Supreme Court decision establishes that the prior panel decision is wrong.").

At any rate, even if the April 2023 decision in *LWV II* had not resolved this issue, the Supreme Court's June 2023 decision in *Allen v. Milligan* surely did: "[Section] 2 turns on the presence of discriminatory effects, not discriminatory intent." 599 U.S. 1, 25 (2023). It is obvious, then, that *McMillan*'s holding on this issue is no longer good law.

II. No Reasonable Factfinder Could Conclude that SB 202 was Enacted with Discriminatory Intent Under the Fourteenth or Fifteenth Amendments.

As State Defendants demonstrated in their Motion, there are no genuinely disputed material facts suggesting that the Challenged Provisions

were enacted for discriminatory purposes. In this Circuit, to determine "whether a law has … a discriminatory intent," courts "consider[] several factors":

> (1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; (5) the contemporary statements and actions of key legislators; (6) the foreseeability of the disparate impact; (7) knowledge of that impact; and (8) the availability of less discriminatory alternatives.

LWV II, 66 F.4th at 922 (cleaned up) (citing *Vill. of Arlington Heights v. Metro. Housing. Dev. Corp.*, 429 U.S. 252 (1977)). Plaintiffs largely reject this analysis, opting instead to aggregate 100-some pages of largely irrelevant facts, which come nowhere close to a legally sufficient showing on any of these factors.

Contrary to Plaintiffs' apparent misimpression, "totality of the circumstances" and "mosaic of circumstantial evidence" are not magic words that defeat a motion for summary judgment. Rather, a "plaintiff's 'mosaic' of evidence must still be enough to allow a reasonable [trier of fact] to infer" discrimination. *Yelling v. St. Vincent's Health Sys.*, 82 F.4th 1329, 1342 (11th Cir. 2023). And, in this Circuit, a court must scrutinize "each component of the mosaic and its limitations." *Doe v. Rollins Coll.*, 77 F.4th 1340, 1356 (11th Cir. 2023), *cert. denied,* 144 S. Ct. 1056 (2024). Here, Plaintiffs improperly "tr[y] to shoehorn miscellaneous allegations of wrongdoing by the [State] into the

categories of inquiry articulated in *Arlington Heights*," but they fail to demonstrate that the State's alleged "misdeeds are linked to discriminatory intent." *Rollerson v. Brazos River Harbor Nav. Dist. of Brazoria Cnty.*, 6 F.4th 633, 640 (5th Cir. 2021).

As shown below, the sequence of events before SB 202's passage does not suggest any discriminatory intent. Rather, the sequence confirms that the Challenged Provisions were each enacted for legitimate reasons, none of which was pretextual. This is further confirmed by SB202's legislative history and the lack of any discriminatory impact—actual or foreseeable. Finally, Plaintiffs fail to identify any genuinely disputed material facts suggesting that alternative measures were available.

A. The sequence of events immediately preceding SB 202's enactment does not create a material issue of intentional discrimination.

As to the sequence of events leading to SB 202, Plaintiffs point to the "historical background" leading to SB 202's passage. The statute, Plaintiffs insist, was a "sudden" and "dramatic about-face from longstanding policy," citing SB 202's rules for absentee voting, out-of-precinct (OP) provisional voting, and mobile voting units (MVUs). Opp. at 33, 32. There are many flaws in this argument—not least of which is that this Court has already rejected it, acknowledging "the Legislature's legitimate justifications for passing the law." PI Order at 45-46 [Doc. 686-1]. As this Court explained: "The Legislature's

reaction to both actual issues and voter perceptions pertaining to the 2020 election (after Trump, a white Republican, lost) is even less suspect given that the Legislature reacted similarly and amended voting laws after the disputed 2018 election (when Abrams, a black Democrat, lost)." *Id.* at 47. Plaintiffs have adduced no new evidence regarding SB 202's timing, and thus there is no reason for this Court to depart from its prior holding on this point.

Rather, Plaintiffs' "timing" argument rests on an unsound premise: "The *post hoc ergo propter hoc* fallacy," which "assumes causality from temporal sequence.... It is called a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a causal relationship." *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2005); *see LWV II*, 66 F.4th at 924 (rejecting argument that, because absentee-voting law was enacted following increase in Black turnout and use of absentee voting, the timing "suggest[ed] that black voters' increased reliance on vote by mail prompted the election reforms"). Hence, in cases where plaintiffs "ha[ve] contended that the timing" of state action "supports an inference that [that action was] racially motivated," courts have rejected such contentions where state officials have "posit[ed] ... alternative explanation[s] for the timing" and produced "evidence supporting [those] alternative explanation[s]." *See Lee v. Lee Cnty. Bd. of Educ.*, 639 F.2d 1243, 1268 (5th Cir. Mar. 1981); *Fusilier v. Landry*, 963 F.3d 447, 465 (5th Cir. 2020).

Here, "[n]o reasonable [trier of fact], when looking at the factual record as a whole, could conclude from … the timing and sequence of events" leading to SB 202's passage that the Legislature's "explanations for [the law] were pretextual" or that the true motives were discriminatory. *Bird v. West Valley City*, 832 F.3d 1188, 1204 (10th Cir. 2016) (cleaned up). The simpler (and accurate) explanation is that SB 202 was the General Assembly's response to controversy surrounding the 2020 election. *See* Mot. at 4-25; PI Order at 45-46. To credit Plaintiffs' inference of racism over this more plausible explanation for SB 202's timing would invert the "presumption of legislative good faith," which the court must extend to the legislature. *Abbott v. Perez*, 585 U.S. 579, 603 (2018).

Indeed, Plaintiffs' examples of SB 202's allegedly suspicious timing crumble upon scrutiny. Plaintiffs first argue that, "in 2005, when Georgia … exempted absentee voters from the ID requirement, … most absentee voters were Republican and white. Only after Black voters began using absentee voting disproportionately … did the Legislature … limit the use of absentee voting through SB 202." Opp. at 32-33 (cleaned up). That is misleading. As Plaintiffs elsewhere admit, it was during "the *2018* general election" that "Black voters' use of absentee voting outpaced that of white voters for the first time." *Id.* at 27 (emphasis added). Yet SB 202 was not enacted until March 2021—even though Black turnout was higher relative to white turnout in 2018

than in 2020. *See* Burden Rep. at 10 (Defs.' Ex. TTTT) (53.6% white and 49.4% Black turnout in 2018, versus 67.1% and 57.2% in 2020). Thus, contrary to Plaintiffs' claim that "absentee balloting suddenly became suspect only after Black voters began to use it at higher rates," Opp. at 46, the undisputed facts show there was nothing "sudden[]" about it.

Such "[g]aps in time and context may suggest a change in policy rather than differential treatment." *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 866 (6th Cir. 2012). That is what happened here, where the General Assembly responded after the unique circumstances of conducting an election during the COVID-19 pandemic. As a plurality of the Supreme Court confirmed, the General Assembly's "decision to reevaluate" certain aspects of State voting laws "was not a 'strange about-face.' It was a natural response to … newly identified problem[s]." *See Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (plurality opinion).

Nor can SB 202's ID rules for absentee voting be characterized as a "dramatic about-face from longstanding policy." Opp. at 32. SB 202 merely extended a version of the existing ID requirements for in-person voting to absentee voting after both Republican- and Democratic-affiliated groups sued over the use of signature matching. O.C.G.A. §§ 21-2-381(a)(1)(C)(i), 21-2-385(a), 21-2-417(c). If that is a "dramatic about-face," then it is hard to imagine *any* substantive legislation that would not amount to a dramatic about-face.

So too for Plaintiffs' portrayal of SB 202's provision restricting use of MVUs to states of emergency as a "sudden … change[] in longstanding policy." According to Plaintiffs, MVUs, "which had been authorized under Georgia law for nearly 40 years, became a target only after Fulton County deployed them to great effect in the 2020 election cycle." Opp. at 33. Plaintiffs gloss over the fact that MVUs had *never* been used in Georgia before 2020—and even then, were only used by Fulton County. SOF ¶ 339 (N. Williams 174:11–175:2 (Defs.' Ex. AA); Mashburn 3/14/23 194:14–20 (Defs.' Ex. KK); Germany 3/7 171:21–172:3 (Defs.' Ex. HH). That is why the Legislature decided to address the issue soon after the 2020 election. *See* Mot. at 18-20. And Plaintiffs identify no evidence that MVUs were so disproportionately used by voters of color that legislation restricting MVUs raises suspicion of discrimination. SB 202's rules for MVUs, then, were neither a "change[] in longstanding policy" nor suggestive of discriminatory intent.

The same is true of OP provisional ballots, where Plaintiffs claim (at 33) that, "for almost 20 years, the State counted [OP] provisional … ballots. Only when statewide elections became very close and Black-preferred candidates narrowly won historic elections did the Legislature take aim at this practice that provides a failsafe for voters." Opp. at 33. Again, this argument fails for a few reasons—including that, since 2014, the share of *all* votes cast provisionally (of which OP provisional votes are only a subset) was always less

than half of one percent and was less than one-*fifth* of a percent in 2020. *See* Defs.' Resps. to PSOF (DRSOF) ¶ 396; Grimmer Rep. ¶ 66 (Defs.' Ex. DDDD). Nor were there any substantial racial disparities in rates of provisional voting. *See infra* Part III(H). The theory that the General Assembly, by limiting (though not outright banning) OP provisional voting in 2021, must have been targeting voters of color is therefore implausible—especially if one accepts Plaintiffs' assertion that rates of OP provisional voting were *not* increasing over time. *See* Opp. at 54.

As weak as Plaintiffs' "timing" argument for discriminatory intent is with regard to Black voters, it is weaker still with regard to AAPI voters. Plaintiffs assert that "SB 202's limitations on absentee voting were intended to curtail the ways AAPI voters participate in the political process in response to … the rapid growth of the AAPI population and electorate," which Plaintiffs characterize as a "[r]apid demographic change[.]" Opp. at 36 (citing PSOF ¶ 59). But Plaintiffs' own expert states that Georgia's AAPI population went from 3.3% in 2010 to 4.5% in 2020. DRSOF ¶ 89; Palmer Rep. ¶ 12 & tbl. 1 (Pls.' Ex. 106). It is hard to understand how a 1.2-percentage-point increase over ten years could properly be called "[r]apid demographic change."[4] At the

[4] Similarly, AAPI voters comprised 2.5% of the Georgia electorate in 2020, *see* Asian Ams. Advancing Just.-Atl. & Asian Am. Advocacy Fund, *The Future of Voting: A Profile of Asian American and Pacific Islander Voters in Georgia* 24

very least, it is not so significant a shift that the timing of SB 202's passage is in any way suggestive of an intent to discriminate against AAPI voters.

Rather, as the record confirms, SB 202 was a response to controversy surrounding the 2020 election, including issues of administration and voter confidence. *See* Mot. at 4-23. That election saw record turnout, record rates of absentee voting, the introduction of MVUs and dropboxes, and complaints about election integrity and administration. Finally, what was said earlier regarding Black voters applies *a fortiori* to AAPI voters: AAPI voters have been voting by mail at higher rates than whites since 2016, *see* Grimmer Rep. ¶¶ 57-62 & Fig. 1; SOF ¶ 315, yet the Legislature did not enact SB 202 until 2021, undermining Plaintiffs' claim of a "sudden" policy change.

In addition to these myriad factual hurdles, Plaintiffs also identify no caselaw that supports their argument that the timing of SB 202 evinces discriminatory intent.[5] Indeed, the Supreme Court in *Brnovich v. Democratic*

fig. 15 (Aug. 2022)—which is hardly a "significant political shift" compared with the 2016 election, when AAPI voters were 1.6% of the electorate. Opp. at 37.

[5] Plaintiffs support this argument by mischaracterizing (at 24) the Supreme Court's decision in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 423, 427 (2006). Although the Court suggested in that case that a Texas redistricting law may have "t[aken] away the Latinos' opportunity because Latinos were about to exercise it," which "bears the mark of intentional discrimination that could give rise to an equal protection violation," the Court ultimately avoided the issue and did "not address appellants' claims" that the district "violates … equal protection." 548 U.S. at 440, 442.

National Committee, 141 S. Ct. 2321 (2021), recently rejected a similar argument that the timing of a challenged statute restricting mail-in voting evinced discriminatory intent. *Id.* at 2349. Here, too, Plaintiffs' theory is that SB 202 was enacted after a successful "Democratic get-out-the-vote strategy," followed by "unfounded and often far-fetched allegations of … fraud" that were "racially-tinged." *Id.* Yet, even if Plaintiffs' claims were true, SB 202 was the product of a subsequent "serious legislative debate on the wisdom" of Georgia's electoral rules. *Id.* Plaintiffs fail to identify any genuinely disputed material facts suggesting otherwise.

B. Plaintiffs have offered no evidence materially undermining State Defendants' showing that SB 202 was enacted to serve important public-policy objectives.

Plaintiffs' attempt to infer discriminatory intent from the timing of SB 202 is particularly misguided because it ignores the mountain of evidence showing that the Challenged Provisions were enacted to further important, non-discriminatory state interests. *See* Mot. at 4-23. As the Eleventh Circuit confirms, "a strong state policy in favor of [a challenged voting rule], for reasons other than race, is evidence that the [rule] does not have a discriminatory intent." *GBM*, 992 F.3d at 1323 (cleaned up). And SB 202 is supported by *many* "strong state polic[ies]." Thus, these material facts confirm that summary judgment should be entered for State Defendants. In addressing these facts, Plaintiffs attack them as "pretextual" for five of the

Challenged Provisions: those governing dropboxes; the absentee-application timetable; OP provisional voting; MVUs; and SEB takeover of local election offices. But the evidence of "pretext" is nonexistent.[6]

Dropboxes. Plaintiffs first rail against the reasons for SB 202's rules governing dropboxes—starting with the Legislature's concern that, absent some new statutory authorization, dropboxes would be unavailable after the pandemic-era emergency regulations expired. *See* Mot. at 4-7. Plaintiffs disagree, insisting that "drop boxes *were* authorized under prior law." Opp. at 53. For this claim, however, Plaintiffs cite only an internal email (sent *after* SB 202 was enacted) opining that droboxes were authorized before SB 202. *See* PSOF ¶ 288 (citing Pls.' Ex. 198). But the record shows that there was considerable disagreement on this point. The SEB's representative testified that "at the end of the governor's emergency declaration, there were no drop boxes anymore authorized under state law. So S.B. 202 creates drop boxes where there would have been none otherwise." Mashburn 3/7 74:11-14; *id.*

[6] Through each of these arguments, Plaintiffs attempt to diminish the concerns regarding election integrity. For instance, because there is no proof of widespread fraud, legislative concern about election integrity must have been "pretextual." Opp. at 47, 41. But this premise, that a state cannot pass a law aimed at preventing fraud until fraud has occurred, is wrong: "[I]mplicitly requiring evidence of voter fraud in [Georgia] to justify prophylactic measures [] does not follow [controlling] precedent[]." *LWV II*, 66 F.4th at 925 (citing *GBM*, 992 F.3d at 1334).

at 74:23-75:5 (Defs.' Ex. JJ). The SEB was not alone in this view. *See* Eveler 158:15-22 (Ex. D to DRSOF) ("[W]e were advocating for drop boxes to be codified so that we could continue to use it, because … the emergency powers that enabled them … had ended. So we didn't know if we would ever be able to use a drop box again."); Sterling 76:3-77:12 (Ex. AA to DRSOF) (noting disagreement on this point); Germany 7/27/23 Decl.¶ 62 (Defs.' Ex. C) ("Prior to SB 202, … [c]ounties did not generally interpret this provision of [Georgia] law to give them authority to establish dropboxes[.]").

There was therefore at least substantial doubt as to whether dropboxes would have been allowed absent SB 202. That SB 202 addressed those doubts does not suggest pretext of any kind, much less racist intent. Resolving uncertainty in existing law is, after all, an important State objective. *See Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 146 (3d Cir. 2014) ("the public interest in settlement of the uncertainty"). Regardless, even if Plaintiffs were right that preexisting Georgia law had authorized dropboxes, the General Assembly's good-faith contrary interpretation of that law is a non-pretextual justification for SB 202's dropbox rules and does not evince discriminatory intent. *See LWV II*, 66 F.4th at 930-31; *Burton v. City of Belle Glade*, 178 F.3d 1175, 1194 (11th Cir. 1999) ("Based on this undeniably conflicting authority [on the meaning of state law], we conclude that the City's reliance on the 1974 annexation statute as a justification for the [challenged

action] does not raise a genuine issue of material fact as to the City's discriminatory intent in 1995.").

Furthermore, as State Defendants explained, there is no genuine dispute that concerns were raised about dropbox placement, number, and availability. Mot. at 5-7. SB 202 itself explained: "The General Assembly considered a variety of options and constructed a system that allows the use of drop boxes, while also ensuring the security of the system and providing options in emergency situations[.]" SB 202 at 5:115-18 (Defs.' Ex. A). Plaintiffs' spurious response is that, "[a]lthough Defendants now cite two alleged incidents of improperly secured drop boxes in 2020, there is no evidence legislators were aware of these incidents." Opp. at 54 n.54. But Plaintiffs do not identify any authority for a requirement that the Legislature know of specific incidents of dropbox security failures before legislating regarding dropboxes. The relevant controlling authority says exactly the opposite: Concern about dropbox security was valid and non-pretextual even though "[n]o evidence was presented to the Legislature that drop box tampering actually occurs" in the state in question. *LWV II*, 66 F.4th at 927-28 (cleaned up). Moreover, State officials met with "legislators … in the aftermath of the 2020 election to have discussions about security of the 2020 election," during which "[t]here were discussions around concerns by ballot harvesting because of drop boxes." Sterling 124:16-19, 126:2-3 (Defs.' Ex. VVVV & Ex. AA to DRSOF). And the General Assembly *did*

know generally that dropboxes had been damaged and the subject of claims of election meddling. *See* 2/19/2021 H. Election Integrity Comm. Hr'g Tr. ("H. EIC Hr'g"), AME_000297:8-17, 300:20-301:8 (Ex. MM to DRSOF).

Plaintiffs' final line of attack on SB 202's dropbox provisions is that "the State's allegation that the number of drop boxes in some counties in 2020 were 'unmanageable' is *post hoc*, as there is no evidence that any county election official complained to … the Legislature [] about not being able to manage the number of drop boxes they *voluntarily* installed." Opp. at 134. But State Defendants never asserted that the number was unmanageable, only that "SB 202 also *ensured that counties would not add* an unmanageable number of dropboxes." Mot. at 7 (emphasis added).[7] The record clearly explains why this is an important issue: "Requiring human supervision of dropboxes, rather than video surveillance of dropboxes placed outside, also reduce[d] the … time-consuming open records requests that counties received for copies of video surveillance, which they were often not able to produce in its entirety, furthering theories of improper conduct that undermine voter confidence."

[7] Also, some county officials did share some of these concerns about the manageability of dropboxes. *See* Bailey 10/6 48:18-49:6 (Pls.' Ex. 49) ("[T]he biggest … problem with [dropboxes] … was the fact that we found ourselves having to maintain and empty those drop boxes in the days leading up to the election.… It was, I guess from an administrative point of view, a bit cumbersome to organize all that with everything else that was going on, … but for the most part they worked very well for us.").

Germany 7/27/23 Decl. ¶ 71.

Out-of-precinct provisional voting. Plaintiffs also deride SB 202's provision restricting out-of-precinct (OP) provisional voting as "another … solution in search of a problem. Contrary to legislators' claims, the number of OP provisional ballots had not drastically increased in recent years." Opp. at 54. But, as State Defendants have explained, the processing of OP provisional ballots is an arduous task for election administrators. *See* Mot. at 12-13. This remains true regardless of whether rates of OP voting have been increasing over time. Plaintiffs essentially concede this fact by not addressing it.

Absentee-ballot request deadline. Plaintiffs also attack the rationale for SB 202's requirement that absentee-ballot applications be received no later than 11 days before election day, as opposed to four days under prior law. As State Defendants have already explained, this provision was designed to reduce the need for county election officials to divert time and resources to processing absentee-ballot applications for ballots that were not frequently voted. *See* Mot. at 10 (citing SOF ¶¶ 380, 382). Plaintiffs' only response is an irrelevant one: "For a majority of days of the now-eliminated request period during the November 2020 election, more than half (52%-59%) of the absentee ballots requested each day were ultimately cast and counted …." Opp. at 55 (citing Burden Supp. Decl. 4-5 & tbl. 1 (Pls.' Ex. 87)). However, this ignores the fact that applications received in the 10 days before Election Day were

significantly less likely to result in a successfully voted absentee ballot than applications received before that timeframe, 75.5% of which were successfully voted. *See* Germany 5/14/24 Decl. ¶ 2 (Ex. A to DRSOF). And this topic was discussed with members of the General Assembly as they debated what became SB 202. *Id.* Regardless, the point still holds that it is administratively difficult to process ballot applications during this late period of the election cycle when many other election administration duties are vying for attention. *See* MSJ at 9-11. While Plaintiffs may disagree with the Legislature about exactly how to demarcate that period, that does not mean the Legislature's contrary view reflected racial bias.

Takeover provision. Plaintiffs also search for a discriminatory purpose behind SB 202's provision putting in place a process that, after significant notice and hearings, allows the SEB to dismiss and temporarily replace a county or municipal election superintendent who has been adjudicated to have committed a certain number of election-code violations within a given period. *See* O.C.G.A. §§ 21-2-33.1(f), 21-2-33.2. The reason for this provision, as SB 202 explains, is that "[c]ounties with long-term problems of … administration need accountability, but state officials are limited in what they are able to do to address those problems. Ensuring there is a mechanism to address local election problems will promote voter confidence and meet the goal of uniformity." SB 202 at 5:96-101.

Plaintiffs vigorously attack this reasonable reform, insisting without evidence that "[t]he *true* reason" for this provision was to target "Fulton County's large Black population[.]" Opp. at 57 (emphasis added). That is absurd. For one, Fulton County is, according to the 2020 Census, only 42.1% Black. More to the point, however, Fulton County has a well-known "history of difficulty administering elections."[8] Acknowledging that obvious fact is not discriminatory. Indeed, even if this provision of SB 202 were primarily passed with Fulton County in mind, that still would not evince *racially* discriminatory intent. *See Hearne v. Bd. of Educ. of City of Chi.*, 185 F.3d 770, 776 (7th Cir. 1999) ("[I]t is simply too great a stretch to say that the population represented by the Chicago school system is such a good proxy for African Americans that the ostensibly neutral classification is 'an obvious pretext for racial discrimination.'" (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979))).[9]

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[8] Danny Hakim et al., *Anatomy of an Election 'Meltdown' in Georgia*, N.Y. Times (July 25, 2020), https://tinyurl.com/mr2x57ae; *accord* Bailey 10/6 167:9-12 (Pls.' Ex. 49) ("[I]t's no secret that Fulton County has had its share of difficulties in elections administration[.]"); Sterling 230:4-24 (Ex. AA to DRSOF) ("Even our monitor that we had there from our consent agreement with Fulton said their practices were sloppy[.]").

[9] There are, after all, 22 Georgia counties with Black majorities, of which Fulton is not one. *See* U.S. Census Bureau, *Georgia: 2020 Census*, https://tinyurl.com/2s3ex8kc (last visited May 14, 2024) (search parameters: scroll to "Race & Ethnicity"; select State: Georgia; select Group: "Black or African American alone").

Plaintiffs try unpersuasively to brush these explanations aside as pretextual, quoting snippets of testimony stating that the SEB "ha[s] 'plenty of mechanisms to enforce [election] code violations without th[e takeover provision,]'" which Plaintiffs characterize as an admission that the takeover provision is unnecessary. Opp. at 56. But the testimony said the opposite: "This [provision] is directed toward a systemic problem over a significant period of time … that can't be remedied by the county by itself. So we have plenty of mechanisms to enforce code violations without this.… The … Board views this [as] a dramatic remedy to solve systemic problems." Mashburn 3/7 195:18-25 (cleaned up) (Pls.' Ex. 34). Nothing about this testimony suggests that there is no need for a backup procedure when counties *fail* to do what they are told. *See* 2/19/2021 H. EIC Hr'g, AME_000292:11-19 (remarks of Ryan Germany) (Ex. MM to DRSOF).

Finally, the takeover provision arose from accountability issues as well: The SOS was "getting blamed or … being asked to respond to things that were really county responsibilities …. [W]e certainly thought that if we're going to take the … blame for something, then there need[ed] to be some mechanism where the State can intervene … in counties." Germany 3/7 79:10-18 (Defs.' Ex. HH).

Mobile voting units (MVUs). Plaintiffs' next quibble is with SB 202's provision restricting use of MVUs to circumstances in which the Governor has

declared an emergency. As State Defendants explained, the reason for this was that "uneven allocation and distribution of [MVUs] raised concerns because some counties could get a benefit that others would not be able to enjoy. Voters also expressed concerns that county [officials] could abusively place mobile voting units in areas to boost turnout for their own elections or to benefit favored candidates." Mot. at 19 (citing SOF ¶ 400).

Plaintiffs' only response is to attack the sincerity of legislative "concerns about the non-uniform use of MVUs," alleging that this "remains the case under SB 202 today, since the statute does not require every county to utilize MVUs during an emergency[.]" Opp. at 57. Whether that is true, it was still reasonable for the Legislature to generally prohibit MVUs based on parity concerns but to also conclude that those concerns are outweighed during emergencies. SB 202's flexibility in this regard also recognizes that not all parts of the State will necessarily be affected by an emergency condition. *See* O.C.G.A. § 21-2-266(b) ("[R]eadily movable facilities shall only be used in emergencies … to supplement the capacity of the polling place where the emergency circumstance occurred."). Like much of SB 202, the provisions regarding MVUs do not completely ban them. Rather, SB 202 simply sets guidelines for their use in the future.

Plaintiffs go on to argue that the Legislature should not have been worried about giving certain local officials free rein over where to place MVUs,

since "the decision whether to utilize MVUs as additional voting locations … is no different than the decision of how many advance voting locations to establish, a decision that under Georgia law rests with local election officials." Opp. at 57-58 (citing O.C.G.A. § 21-2-385(d)(1)). But that is not quite right, either. Under SB 202, each county must offer at least one advance voting location, and counties' power to establish additional locations is constrained in various ways—*e.g.*, sites must be publicly announced, cannot be changed after being announced except in emergencies, and must be located in certain specific types of buildings. *See* O.C.G.A. §§ 21-2-385(d)-(e), 21-2-382(a)-(b). In other words, those types of decisions are already subject to many rules and limits.

Finally, Plaintiffs have no answer for the fact that, while not a "major" rationale for SB 202's MVU provision, a "general concern about security" played a role: "It's hard to drive away a courthouse. It's easier to drive away something that has wheels." Harvey 144:25-145:1 (Defs.' Ex. PPP); *accord* Mot. at 19. Thus, Plaintiffs fail to identify any materially disputed facts regarding the MVU limitations.

Voter complaints. Plaintiffs also argue that the State's explanations for these Challenged Provisions are generally pretextual because they were based on voter complaints that Plaintiffs contend were misguided. According to Plaintiffs, lawmakers should be barred from addressing voters' concerns because "[c]itizen complaints the State claims revealed a lack of voter

confidence were imbued with racial bias." Opp. at 47.[10] But the Eleventh Circuit has rejected this same argument, noting that "the Supreme Court has cautioned against relying on allegedly discriminatory voter sentiment to find that official acts were … motivated by racial animus when," as in this case, "there is no show[ing] that the voters' sentiments can be attributed … to the state actors." *Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1007 (11th Cir. 2018) (cleaned up). Regardless, Plaintiffs cite just four complaints—a woefully inadequate number to support their bold claim—and even Plaintiffs' handpicked examples do not support their charge of racism.

First, Plaintiffs cite an email from a voter in Dougherty County to the SOS's Office complaining that the organization Black Voters Matter was engaged in what it called "line warming" at an early voting location, and that "[o]lder voters felt intimidated by the presence of this group." Germany 6/24/22 Decl., Ex. F (Defs.' Ex. F). It is not obvious that the complainant was motivated by the race of those engaged in handing out items of value as opposed to the

[10] Plaintiffs also argue (at 136) that Ryan Germany's testimony regarding voter complaints must be ignored because he identified "few, if any, *specific* complaints relating to provisions challenged in this lawsuit," and because he "fails to establish that he has personal knowledge of these unidentified complaints." There is no requirement that Mr. Germany identify "specific" complaints. Moreover, the record confirms that Mr. Germany had personal knowledge of the complaints. *See* Germany 3/7 97:10-98:10, 107:25-108:4 (line warming), 155:9-18 (ballot harvesting), 172:7-9, 173:11-174:2 (MVUs) (Defs.' Ex. HH & Ex. J to DRSOF; Germany 4/13 55:19-56:5 (Defs.' Ex. GG).

line warming itself. At any rate, there is no evidence that the Legislature knew of this complaint, or that lawmakers would have been ratifying racial bias if they had taken the complaint into account.

Second, Plaintiffs cite the remarks of a woman who spoke at a February 2023 SEB hearing and complained that those engaged in handing out items to voters in line were playing "hip hop music" in violation of a local "noise ordinance" and that she "was assaulted while [she] was in line waiting to vote." The SEB apparently disagreed, dismissing the woman's complaint and even voting later at that meeting to refer her to the State Attorney General's Office for prosecution for allegedly possessing a gun at the polling place. Ga. State Election Bd. Hr'g (Pls.' Ex. 149 at ECF pp. 10-11, 15-16). Even assuming that this woman's complaint *was* motivated by racial bias, however, her complaint was aired at a meeting that took place nearly two years *after* SB 202 was enacted. SB 202 cannot be deemed discriminatory based on remarks made by a member of the public years after its passage.

Plaintiffs' final two examples of citizen complaints supposedly "imbued with racial bias" are emails that Plaintiffs claim show that voter "complaints [were] focused on precincts with many Black voters and areas with significant Black populations." Opp. at 47. The first is an email from Frances Watson, an investigator at the SOS's Office, to two Fulton County election officials, explaining that "[w]e are getting complaints" about interactions with voters in

line. Germany 6/24/22 Decl., Ex. D (Defs.' Ex. F). But there is no indication that the unspecified complaints were motivated by racial bias. The other complaint is an investigation report of alleged handing out of food and water at a polling place in East Cobb County during the January 2021 runoff. *See Id.*, Ex. E. Once again, nothing about the report suggests that racial bias motivated the complaints. Plaintiffs' apparent theory is that any complaints made with respect to a polling place in an area where members of a certain group live in "significant" numbers—whatever that means—are biased against that group. This logic is preposterous on its face. *See Hearne*, 185 F.3d at 776; *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 370 (6th Cir. 2002). And its factual premise is faulty, since the polling place in question is located in a mostly white neighborhood.[11]

At bottom, Plaintiffs have nothing to back up their outlandish claim that the General Assembly could not respond to election-related citizen complaints because they were "imbued with racial bias." Tellingly, Plaintiffs simply ignore many other citizen complaints, which Plaintiffs do not even attempt to cast as

[11] As the name indicates, the Center is located in Cobb County (which is only 27.5% Black) on the border of two zip codes: 30068, which in 2021 was 79.7% white and 4.1% Black; and 30067, which in 2021 was 51.2% white and 27.5% Black. U.S. Census Bureau, *American Community Survey, Cobb County, Georgia*, available at https://tinyurl.com/h8z2p2z6 (last visited May 14, 2024); *id., Race, 2021 5-Year Estimates Detailed Tables*, https://tinyurl.com/2u9c2jsa (last visited May 8, 2024).

racist. *See* Germany 6/24/22 Decl., Exs. A-C (Defs.' Ex. F).

Voter confidence. Plaintiffs likewise attempt to discredit the State's explanations for these Challenged Provisions by claiming that concerns about voter confidence in election integrity are pretextual. But as State Defendants have explained, SB 202 was enacted in part to bolster "elector confidence in the election system," SB 202 at 4:79-80, which had taken a hit following the 2020 election. Mot. at 5, 14, 24, 34, 49-50. And the Supreme Court confirms that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Moreover, "increasing confidence in elections" is a "valid [race-]neutral justification[]" for a statute. *GBM*, 992 F.3d at 1327; *accord Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (controlling opinion). Plaintiffs do not deny that controversy surrounded the 2020 election in Georgia. Instead, they argue that SB 202's responsive measures are invalid because "[t]he General Assembly … used [a] racialized and self-created dip in 'voter confidence'" as a rationale for passing the statute. Opp. at 40. There are many problems with this argument.

For one, the notion that any dip in voter confidence was "racialized"—or, more specifically, so thoroughly "racialized" that the General Assembly was racist just for responding to it—is unsupported by any probative evidence or caselaw. Voter confidence in Georgia was down overall following the 2020

elections. *See* King Rep.at 17 fig. 2, 22 fig. 5 (Pls.' Ex. 99). And "[t]here is nothing inherently wrong with responding to community pressure," and doing so "does not demonstrate racial animus." *Hallmark Devs.*, 466 F.3d at 1285.

To the extent there are differences between racial groups' confidence in the election, these are easily explained by the correlation between race and partisan identification, combined with the "winner's effect." King Rep. at 9 ("When a voter's preferred party or … candidate wins an election, they are more likely to be confident in elections and election outcomes."). Regardless, a legislative response to a decrease in voter confidence is no less legitimate simply because the decrease is greater among some racial groups than others. *See Dowell v. Bd. of Educ. of Okla. City Pub. Schs.*, 8 F.3d 1501, 1519 (10th Cir. 1993) ("[E]ven if we assume, as do plaintiffs, that the board was motivated in part by white parents' antipathy toward busing, this does not establish discriminatory intent.").

Another problem with Plaintiffs' claim of a legislative "self-created" drop in voter confidence is that there is no evidence that the decline was caused in any substantial part by the General Assembly. Plaintiffs' main basis for their "self-created" theory is that, "in December 2020, the Legislature held several hearings that" in Plaintiffs' view "amplified and legitimized the false voter fraud narrative …." Opp. at 43. As this Court previously noted, however, "complaints and lawsuits pertaining to the 2020 election arose *almost*

immediately." PI Order at 7 (emphasis added). Many such suits were filed well before any of the December 2020 hearings that Plaintiffs implausibly blame for the drop in voter confidence.[12] Plaintiffs themselves remark that, as soon "[a]s the counting of November 2020 general election ballots finished, accusations of cheating … were … circulated widely on social media." PSOF ¶ 98. What is more, Plaintiffs point only to statements by *witnesses* at the hearings that, according to Plaintiffs, created the dip in voter confidence. Not only is that causal claim highly dubious, but there is also no reason why the Legislature's measures to address public mistrust should be suspect simply because several citizens who testified at legislative hearings may have reinforced the public's mistrust.

Plaintiffs complain, too, that "[l]egislative leadership at these hearings did not rebut the false fraud allegations …. Efforts by legislators in the minority party to contest the false claims were shut down by hearing organizers." Opp. at 45 (citing 12/10/2023 H. Gov. Affs. Comm. Hr'g Tr. (Pls.' Ex. 124)). But Plaintiffs cite no authority for the proposition that "[l]egislative

[12] *See, e.g.*, *In re Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on Nov. 3, 2020*, No. SPCV20-00982 (Ga. Super. Ct., Chatham Cnty. Nov. 4, 2020); *Brooks v. Mahoney*, No. 4:20-cv-00281-RSB-CLR (S.D. Ga. Nov. 11, 2020); *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG (N.D. Ga. Nov. 13, 2020); *Wood v. Raffensperger*, No. 2020CV342959 (Ga. Super. Ct., Fulton Cnty. Nov. 25, 2020).

leadership" had an obligation to argue with witnesses, and it is simply not true that "[e]fforts … to contest the false claims were shut down by hearing organizers." At the December 10th hearing, three members of the minority party were allowed to question witnesses and to give statements calling election-fraud claims baseless. *See* DRSOF ¶ 119. Plaintiffs' own expert points out that a witness's fraud claims "were dissected in real-time" at this hearing "and his data shown to be grossly flawed by Rep. Bee Nguyen who discovered … a litany of … inaccuracies …." Minnite Rep. at 58 n.181 (Pls.' Ex. 105).

Furthermore, the same House committee held another hearing on December 23, 2020, during which several officials from the SOS's Office testified and defended the 2020 election results. *See generally* Ga. H. Gov't Affs. Comm. Mtg. (Dec. 23, 2020), available at https://tinyurl.com/y4mce26h. Meanwhile, the State Senate's Government Oversight Committee held a hearing on December 3, 2020, during which Ryan Germany testified on behalf of the SOS's Office and rejected claims of election meddling, while county election workers likewise debunked conspiracy theories about alleged improprieties in tabulating ballots. *See* Parent Decl. ¶¶ 6-12 (Pls.' Ex. 10). As Plaintiffs acknowledge, "[t]he SOS's Office repeatedly and consistently debunked … fraud claims [] in … individual communications with legislators, and in legislative hearings …." Opp. at 43. Given that the December 2020 hearings saw testimony from witnesses on both sides of this issue, as well as

questioning of fraud-alleging witnesses by Democratic lawmakers, Plaintiffs' specious claims that the General Assembly allowed fraud "allegations [to] go unchallenged," Opp. at 45, and that the drop in voter confidence was "created" by the Assembly, lacks adequate support to create a material issue of fact.

Plaintiffs also claim that the General Assembly created the dip in voter confidence by "repeat[ing] the[] false claims" of mass voter fraud pressed by the Trump campaign. Opp. at 41. Plaintiffs' main example of this repetition, *see* Opp. at 45, is a December 17, 2020, report issued by the Study Subcommittee of the Standing Senate Judiciary Committee, which characterized Georgia's 2020 election results as untrustworthy. Chairman's Rep. of Election Law Study Subcomm. 2 (Pls.' Ex. 184). The problem for Plaintiffs is that this report was issued well after supporters of the losing candidates had widely publicized voter-fraud claims and filed lawsuits regarding Georgia's administration of the election. The report therefore can hardly be considered the origin of any drop in voter confidence, and certainly does not render the entire General Assembly's efforts to improve administration via SB 202 illegitimate. The report can also hardly be considered material evidence of the collective legislative intent behind SB 202, which was passed during the *next* legislative session: "A legislature's past acts do not condemn the acts of a later legislature, which we must presume acts in good faith." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 298 (4th

Cir. 2020) (citing *Abbott*, 585 U.S. at 605).

* * *

In sum, this evidence of important State interests behind various of the Challenged Provisions—none of which is pretextual—is far more probative of the underlying intent than Plaintiffs' mischaracterization of the sequence of events surrounding SB 202's passage. Here again, Plaintiffs have simply failed to offer evidence sufficient to rebut State Defendants' showing that each of the Challenged Provisions was and is supported by one or more important State interests.

C. SB 202's legislative history reveals no discriminatory intent.

Indeed, SB 202's legislative history clearly undermines any claim of discriminatory intent. Plaintiffs neither identify any meaningful "procedural [or] substantive departures" in the enactment process, nor any "contemporary statements" that evince discriminatory legislative motives. *See LWV II*, 66 F.4th at 922.

1. There were no legislative procedural departures.

Plaintiffs' purported evidence of irregularities in the legislative process behind SB 202 is woefully lacking. But even if Plaintiffs *were* able to identify disputed facts about procedural departures, it must be kept in mind, as the Fifth Circuit explained, that "procedural violations do not demonstrate invidious intent of their own accord. Rather, they must have occurred in a

context that suggests the decision-makers were willing to deviate from established procedures *in order to* accomplish a discriminatory goal." *Rollerson*, 6 F.4th at 640 (emphasis added). Here, the supposed procedural irregularities Plaintiffs claim to have identified in SB 202's drafting are either so trivial as to be no more than a "mere … scintilla of evidence" of discriminatory intent and thus insufficient to carry the case past summary judgment, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), or are not "irregularities" at all. This Court has already so held, *see* PI Order at 49–51, and Plaintiffs identify nothing that would warrant reconsideration of that eminently correct holding. Yet Plaintiffs try to gin up disputes of fact by discussing legislative hearings from December 2020, overall questions about transparency, and comparisons between SB 202 and the State's previous omnibus election legislation, HB 316. At each turn, Plaintiffs fail to identify any genuinely disputed material fact.

December 2020 Hearings. Plaintiffs first complain that, "[i]n a remarkable departure from normal practice, the [State] Senate Judiciary Committee Election Law Subcommittee allowed invited witnesses from the Trump campaign to ask questions during two of the[] [December 2020] hearings." Opp. at 44. But the cited evidence for this claim reveals that Trump campaign officials were simply permitted to ask questions of their *own* witnesses in order to bring out certain alleged facts. *See* 12/30/20 Sen. Jud.

Subcomm. Hr'g Tr., AME_002894:10-2899:11 (Pls.' Ex. 344); 12/3/20 Sen. Jud. Subcomm. Hr'g Tr., AME_002140:12-2318:25 (Giuliani) (Ex. JJ to DRSOF); AME_002178:11-2187:25, 2205:15-2215:10, 2243:5-6, 2258:1-2260:23, 2290:2-2300:7 (Smith) (Ex. F to DRSOF). This practice, whether or not it is a "departure from normal practice," is irrelevant to the intent behind SB 202. And a legislature's "procedural abnormalities are only relevant within a larger scope. Here, there is no context that renders [any] deviation suspect." *Hallmark Devs.*, 466 F.3d at 1285 (cleaned up). Nor do Plaintiffs try to explain how the specific things said at the December 2020 hearings shaped any specific provisions of SB 202, which was enacted during a *subsequent* legislative session.

Transparency of the legislative process. Plaintiffs next recount their version of SB 202's path through the Legislature, arguing that the process's "rushed" pace and alleged lack of transparency evinces discriminatory intent.

But those arguments run headlong into the Supreme Court's repeated rejection of arguments, in the discriminatory-intent context, that "the brevity of the legislative process can give rise to an inference of bad faith—… certainly not an inference that is strong enough to overcome the presumption of legislative good faith[.]" *Abbott*, 585 U.S. at 610. Here, as in other cases where courts have found no discriminatory intent, any "haste with which [the Legislature] acted … is as easily explained by the seriousness of the perceived

problem as by racial animus." *United States v. Clary*, 34 F.3d 709, 713 (8th Cir. 1994). As the Sixth Circuit explained, "[a]llegations that the Legislature acted with haste and did not engage in extensive fact-finding might be a legitimate and even a valid critique of its behavior, but it does not lead to an inference of racial discrimination." *Moore*, 293 F.3d at 370.

It is especially important in this case to contextualize Plaintiffs' vague allegations of a hasty legislative drafting process. Witnesses with deep knowledge of that process, when pressed as to whether SB 202's drafting was rushed, explained that it was no more rushed than usual, given Georgia's fast-paced legislative calendar. *See* Eveler 79:17-19 (Defs.' Ex. T) ("It's a very short session.… [S]o it always feels like it's rushing through."); Fuchs Tr. 102:19-104:5 (Defs.' Ex. NNN). Because the State Constitution limits regular legislative sessions to 40 legislative days per year, Ga. Const. art. 3, § 4, ¶ 1, a bill considered for 32 days, as SB 202 was, spans most of the session.

Regardless, the record demonstrates in spades that the legislative process leading up to SB 202's enactment involved deep consideration of election-related issues throughout 2021. The House Special Election Integrity Committee (EIC) held twelve hearings and meetings and four subcommittee hearings during the 2021 session over more than six weeks before passage of SB 202; likewise, the Senate Ethics Committee held 13 hearings and meetings over the same period. Mot. at 30. As this Court noted, "[i]n total, twenty-five

hearings" of the EIC and Senate Ethics Committee "were held between the House and the Senate." PI Order at 50. And 18 of the afore-mentioned 25 hearings concerned SB 202 or its predecessor bills. *See* DRSOF ¶ 135; Germany 7/27/23 Decl. ¶ 35; Germany 5/14/24 Decl. ¶ 3. Additionally, of the seven other hearings, four considered bills that were similar to certain provisions ultimately incorporated into SB 202. *Id.*

While Plaintiffs further complain of a "[l]ack of transparency," Opp. at 61, the record demonstrates that the legislature gave careful and close consideration to election bills in the 2021 session—with several Democratic members acknowledging the work of sponsors. In February 2021, Rep. Smyre, a Democrat, referred to the changes that were included from Democrats as part of a "good faith effort" to improve election administration in Georgia. SOF ¶¶ 414, 420 (Germany 7/27/23 Decl. ¶¶ 26–27, 47). Additionally, opponents of the election reform legislation recognized the work of the proponents of election reform. Germany 7/27/23 Decl., Ex. 23 (AME_001750:8-15) (Defs.' Ex. C at 310) (Sen. Harrell acknowledging "that the majority leader did do substantial research on voting laws before bringing pieces of this bill and other bills forward."). Even one of Plaintiffs' own declarants admits that "[a]ltogether, three hearings (committee meetings) were held on the House side" alone "as a result of the large number of people from the public coming to testify in opposition to SB 202." Battles Decl. (Pls.' Ex. 256) ¶ 15. And the

EIC's decision to hold additional days of hearings so that members of the public could weigh in on the bill showed legislative transparency, not opacity. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 161 (5th Cir. 2007) (rejecting discriminatory-purpose challenge to statute in part because "[t]he Legislature held well attended committee hearings in both of its chambers where proponents for and against the measure were given comparable time to testify").

After first claiming a lack of transparency, Plaintiffs pivot to claim that this public debate over SB 202 was somehow not meaningful. Opp. at 63. But Plaintiffs' own longwinded account of the testimony given by the statute's opponents all but proves that claim false. In arguing that SB 202 was passed despite a foreseeable racially disparate impact, Plaintiffs state (at 84) that witnesses "testified before the Legislature that each of the contemplated reforms would obstruct minority voters. Some of these witnesses provided specific examples[.]" State Defendants obviously disagree with Plaintiffs regarding the strength of these witnesses' arguments and the degree to which the Legislature had to bend to their demands. But the extensive testimony summarized by Plaintiffs over the course of four hearings gives lie to Plaintiffs' characterization of the legislative process as opaque or insufficiently inclusive of the public. *See* Opp. at 84-86.

Similarly, citing the EIC's hearings in February 2021, Plaintiffs protest

that, "in three of the five hearings on HB 531, one of SB 202's predecessor bills, legislators or witnesses complained that they had not been able to view the bill draft before the hearing …." Opp. at 63. But even if these complaints were valid, Plaintiffs ignore that the public was allowed to speak at subsequent hearings in March 2021. *See Hr'gs Before the S. Comm. on Ethics*, 2021 Leg., Reg. Sess. (Ga. 2021), https://tinyurl.com/4z326fua (3/16/21); https://tinyurl.com/mr4bthpx (3/17/21); *Hr'gs Before the H. Special Comm. on Election Integrity*, 2021 Leg., Reg. Sess. (Ga. 2021), https://tinyurl.com/2e2ban5x (3/17/21), https://tinyurl.com/2w99ydzs (3/18/21).

Much the same can be said of Plaintiffs' objection that, "when the final version of SB 202 returned to the Senate, … Senators were permitted only an up or down vote on the floor, limiting the Senate's opportunity to debate the substance of the final bill." Opp. at 63. But the Senate Ethics Committee had *already* held multiple hearings in which the bill's "substance" was debated and amendments proposed. Also, the fact that SB 202 was engrossed when it returned to the Senate for final passage is hardly a "procedural departure"; the same occurred in 2019 when HB 316—another recent comprehensive election statute—went to the Senate for a final vote, despite the minority party's objections to engrossment. *See* DRSOF ¶ 142; Video Recording of Senate Proceedings, 155th Gen. Assemb., 1st Sess. (Ga. 2019), at 1:10:12 (Mar. 13, 2019) (remarks by Sen. Henson (D-41st) ("Senate 3/13/19 Video"),

https://tinyurl.com/2wpy4be3; *id.* at 1:13:26.

Plaintiffs argue, too, that the large number of bills introduced during the same session is a procedural irregularity evincing a discriminatory intent behind SB 202. Opp. at 61. But the caselaw on discriminatory intent has repeatedly admonished that the inquiry into the challenged statute's legislative history must be focused on evidence "[]connected to the passage of the *actual law* in question." *GBM*, 992 F.3d at 1324 (emphasis added). Obviously, then, the mere *existence* of other proposed bills addressing the same topics cannot possibly be evidence that discriminatory motives animated the challenged legislation's enactment. The number of election bills is far better understood as an outgrowth of the extraordinary election that preceded them than a sign of discrimination.

Plaintiffs object, too, to the House's decision to establish the EIC to consider election bills during the 2021 session, rather than assigning such bills to the Governmental Affairs Committee. Opp. at 60. Plaintiffs fail to explain, however, what this decision has to do with discriminatory intent. The decision to form the EIC, which also included representatives of color, *see* Germany 7/27/23 Decl., Ex. 3 (Defs.' Ex. C), to draft what became SB 202 quite obviously does not evince discriminatory intent.

Nor was establishment of a special committee unusual—five special committees, as well as at least five "working groups[,] have been used in the

House on particular topics since 2017." Germany 7/27/23 Decl. ¶ 23; DRSOF ¶ 129; *see also* Germany 5/14/24 Decl. ¶ 11. Plaintiffs' argument on this point mirrors one the Supreme Court rejected in a discriminatory-intent case, namely, that courts should "infer bad faith because [a] Legislature 'pushed the [challenged] bills through quickly in a special session.'" *Abbott*, 585 U.S. at 610 (citation omitted). As with legislation enacted during a special session, so, too, with legislation enacted by a special committee.[13] And establishing a committee for the specific purpose of considering election bills promotes transparency by drawing attention to the issue rather than adding it to the laundry list of topics to be considered by Governmental Affairs.

Nor is there merit to Plaintiffs' complaint that House "Speaker Ralston excluded all but one of the Governmental Affairs Committee's Democratic members from the EIC, thereby dramatically reducing the number of committee members who had prior experience with election legislation." Opp.

[13] A key reason for establishing the EIC to consider election bills during the 2021 legislative session was to ensure that a committee could devote significant attention to this topic. The numbers illustrate the point: during the 2019-20 session, the Governmental Affairs Committee had 132 bills or resolutions assigned to it (roughly 7.3 per member), far fewer than the 74 total bills or resolutions the EIC had assigned to it during the 2021-22 session (roughly 5.3 per member). But had there not been a separate EIC, the combined workload of election bills on top of the other items that the Government Affairs Committee had to handle could easily have become unmanageable. Germany 5/14/24 Decl. ¶ 8.

at 61.[14] And Plaintiffs do not present any evidence that this aspect of SB 202's drafting differed from the General Assembly's usual practice and considerations in appointing committee members. *See Moore*, 293 F.3d at 370.

Plaintiffs also take issue with the manner in which the General Assembly developed SB 202, vaguely alleging that it "was not normal legislative process." Opp. at 62 (citing Burnough Decl. ¶¶ 29, 36 (Pls.' Ex. 4); Jones Decl. ¶ 19 (Pls.' Ex. 8); Harrell Decl. ¶¶ 10, 13 (Pls.' Ex. 7). The declaration paragraphs cited, however, fail to identify *any* specific unusual features of SB 202's drafting that impeded consideration of the measure. *See* DRSOF ¶ 126; *cf. Parvati Corp. v. City of Oak Forest*, 709 F.3d 678, 681 (7th Cir. 2013) (no discriminatory intent where, although "the irregularities in the zoning process … were indeed numerous," the plaintiff "presented no evidence that the irregularities were more numerous or serious than in other zoning proceedings in [that city]"). In other words, it is not enough to blindly raise *purported* factual disputes; Plaintiffs must identify specific facts about the regularity of the procedure that suggests discriminatory purposes. They have not done so.

[14] In fact, four of 14 (28.6%) EIC members were Democrats, and one of the five (20%) EIC members who were also serving on the Governmental Affairs Committee was a Democrat. *See* H. Special Comm. on Election Integrity 2021-2022, *Members* (Germany 7/27/23 Decl., Ex. 3 (Defs.' Ex. C). One out of five was thus as close as possible to parity with the 28.6% figure.

Plaintiffs also object to the times when meetings were held, noting that some "committee meetings on election measures sometimes occurred at 7:00 a.m. with notice only provided the day before[.]" Opp. at 62. As this Court previously pointed out, however, "Plaintiffs did not … offer any additional evidence concerning when hearings are normally held" from which the Court could "determine whether this specific variation from procedure is significant or not." PI Order at 49.

The answer, it turns out, is "no, there isn't any significant variation." Of the 18 committee hearings held regarding SB 202 or its predecessor bills, only *two* were held at 7 AM and only three before 8 AM (which Plaintiffs use as a benchmark for an "early" meeting, *see* Opp. at 71). *See* DRSOF ¶ 135. These times were not "unprecedented." In the last three regular sessions (2019-20, 2021-22, 2023-24), there were at least 50 legislative committee meetings held before 8 AM (not counting the hearings on SB 202 or its predecessor bills), including at least 24 held at 7 AM or earlier. *Id.*; Germany 5/14/24 Decl. ¶ 6. Moreover, contrary to Plaintiffs' contention, it is not unusual for committee meetings to be announced no sooner than one day before they are held. *See* Germany 5/14/24 Decl. ¶ 7. In fact, of the seven meetings held in 2019 that considered HB 316 or its predecessor bills, three (the March 6th Senate and February 20th and 21st House hearings) were each announced either the day before, or the day of, the meeting. *See id.*; Pls.' Exs. 159-66. And, like Plaintiffs

here, opponents of previous legislation complained about the timing of hearings. *See* DRSOF ¶ 136.[15] There is thus nothing new or uncommon about the timing of hearings on SB 202 and its predecessors.

However, even if Plaintiffs had identified some factual disputes about the procedural maneuvers employed by the General Assembly in passing SB 202, which they have not, that still would not demonstrate discrimination, and such disputes would thus not be material here. *See Vision Warriors Church, Inc. v. Cherokee Cnty.*, No. 1:19-CV-3205-MHC, 2022 WL 775417, at *9 (N.D. Ga. Feb. 17, 2022) ("Even assuming the circumstances surrounding the revocation … are … unprecedented, they are not sufficient departures from the norm for a reasonable jury to find by inference that Defendants intentionally discriminated against [the plaintiff]."), *aff'd sub nom. Vision Warriors Church, Inc. v. Cherokee Cnty. Bd. of Comm'rs*, No. 22-10773, 2024 WL 125969 (11th Cir. Jan. 11, 2024).

Many of Plaintiffs' gripes with the process of drafting SB 202 are nothing more than general grievances about how legislation is generally drafted in Georgia. For instance, Plaintiffs complain that, "[r]ather than conducting a

[15] *See* Senate 3/13/19 Video, *supra,* at 1:55:33-1:56:09 (remarks by Sen. Henson (D-41st)) ("Now, just on our own committee process and how it's gone in the Senate, I have problems with it.… [T]hat was a strained process. That committee was announced 24 hours ahead of time.… [I]t was rushed.").

deliberate and public process, … sponsoring legislators worked out of the public eye with Ryan Germany, General Counsel to the SOS, and outside counsel Bryan Tyson and Javier Pico-Prats, to craft election-related bills." Opp. at 63-64 (citing Germany 3/7 33:1-35:11 (Pls.' Ex. 59)). Yes, initial drafts of what became SB 202 were drawn up by sponsors in collaboration with SOS staff and attorneys, and those drafts were then debated in committee meetings or on the floor. But, as explained below, such is the process by which legislation is frequently created.[16] *See* Germany 5/14/24 Decl. ¶ 9. And this perfectly normal method of drafting legislation does not evince discriminatory intent. *See Ala. Legis. Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1289 (M.D. Ala. 2013) (W. Pryor, J.) (three-judge court) ("[P]laintiffs also argue that the drawing of the district lines by [a third-party consultant to certain legislators] behind closed doors suggests an invidious racial purpose, but we disagree.… [T]he party in power ordinarily drafts redistricting plans behind closed doors."), *vacated on other grounds*, 575 U.S. 254 (2015).

The very testimony Plaintiffs cite shows that in this regard, SB 202's drafting was normal. Germany explained that his "duties did include drafting

[16] Meeting with persons outside the legislature is "a routine and legitimate part of the modern-day legislative process. The fact that such meetings are … conducted behind closed doors[] does not 'take away from the[ir] legislative character ….'" *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (quoting *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)).

legislation, including election-related legislation." Germany 3/7 27:4-5 (Ex. J to DRSOF)). When asked to "describe the legislative process behind drafting election-related bills in [his] role as general counsel at the Georgia Secretary of State's Office," Germany noted, too, that "it was not unusual for members of the General Assembly to approach the Secretary of State's Office if they're working on something that is related to what the Secretary of State's Office … does." *Id.* at 27:13-23. And, when asked if his "role in drafting election-related legislation for the 2021 legislative session differ[red] in any way from [his] role in drafting bills in prior legislative sessions," Germany responded, "no two sessions are exactly alike, but generally it was similar." *Id.* at 30:19-24 (Ex. J to DRSOF).

Plaintiffs continue along these lines, complaining that "SOS staff met privately with Republican members of the EIC before election bills were introduced in the Committee to explain the substance of the bills but did not meet with Democratic members of the EIC, all of whom are Black." Opp. at 64 (citing Germany 3/7 36:3-38:12 [Doc, 809-9]). But the insinuation is frivolous: Germany explained that "a lot of times legislators just come into the Secretary of State's Office and I meet with them." Had any Democratic members "come in, I certainly would have met with them[.]" 9/22/23 PI Hr'g Tr. 219:11-19 (Ex. DD to DRSOF). Any opacity Plaintiffs perceive in this process is not indicative of racism.

Thus, Plaintiffs' "evidence can be characterized as no more than objection to typical aspects of the legislative process …. Reasonable choices are to be made by the legislature[,] not the courts." *Miss. State Ch., Operation Push, Inc. v. Mabus*, 932 F.2d 400, 409 (5th Cir. 1991).

In any event, as this Court already recognized, SB 202's drafting *was* influenced by input from advocates with different policy preferences. PI Order at 58. At its February 4, 2021, meeting, the EIC made additional changes to the initial precursor bill based on input from Democrats, including the Minority Whip. *See* Germany 7/27/23 Decl., Ex. 4 (Defs.' Ex. C at 75). Additionally, SB 202's allowance of an ID *number* as opposed to a photocopied ID was added at the behest of a county election official and a Democrat on the EIC. *See* Kidd Tr. 105:6-24 (Ex. G to DRSOF). Similarly, former Lieutenant Governor Duncan, in the same interview on which Plaintiffs affirmatively rely, *see* Opp. at 45-46, explained that SB 202 "ultimately was a culmination of Democratic and Republican ideas"—a part of the interview Plaintiffs conspicuously omit, *see* Interview by John Berman with 'then-Ga. Lt. Gov. Geoff Duncan, CNN (Apr. 7, 2021), at 0:44-0:47, available at https://tinyurl.com/5tnfahnd (Pls.' Ex. 181). That proponents of SB 202 "did not categorically refuse to consider changes" to earlier drafts of the legislation cuts strongly against any inference of discriminatory intent. *See Abbott*, 585

U.S. at 611.[17]

Against all this, Plaintiffs are forced to rely heavily on the subjective impressions of SB 202's legislative *opponents* that some aspects of its drafting were unusual. But courts have cautioned "that the speculations and accusations of [a challenged] law's few opponents simply do not support an inference of the kind of racial animus discussed in … *Arlington Heights*." *Butts v. City of New York*, 779 F.2d 141, 147 (2d Cir. 1985). Opponents of a bill who fail to prevent its enactment may be disgruntled at the process. But their dissatisfaction is not evidence that the opposed legislation is discriminatory.

Similarity to HB 316. Finally, Plaintiffs' procedural objections are particularly misguided when SB 202's legislative process is compared with the similar legislative process that led to HB 316 in 2019. *See* Mot. at 3-4, 23-25. Plaintiffs challenge this proposition, but their attacks fail to distinguish the processes by which the two statutes were drafted.

According to Plaintiffs, the "process that resulted in HB 316 allowed legislators to learn about the issue and provided opportunities for meaningful

[17] What is more, the declaration paragraphs on which Plaintiffs primarily rely in arguing that SB 202's drafting process was unusual are loaded with vague, subjective claims. *See* DRSOF ¶¶ 126, 140; Burnough Decl. ¶¶ 34-36 (Pls.' Ex. 4); Jones Decl. ¶ 19 (Pls.' Ex. 8); Harrell Decl. ¶¶ 10-11, 13 (Pls.' Ex. 7); Battles Decl. ¶¶ 11-21 (Pls.' Ex. 256). Such "[c]onclusory allegations …, without specific supporting facts, have no probative value." *Gordon v. Terry*, 684 F.2d 736, 744 (11th Cir. 1982).

engagement on the substance of the bill." Opp. at 71. But examination of debates on HB 316 reveals that members of the minority party, including some of the same legislators whose affidavits Plaintiffs cite, complained at length about the supposedly inadequate process, just as they later did regarding SB 202's drafting. *See* DRSOF ¶ 136.[18] These parallels reinforce State Defendants' point that the processes of drafting the two statutes were materially the same—and undermine Plaintiffs' insistence that the "legislative process around … HB 316 [was] not comparable to SB 202." Opp. at 3.

First, citing a declaration from Cynthia Battles of the Georgia Coalition for the People's Agenda, Plaintiffs argue that "[a]dvocacy groups were given time to review the different iterations of HB 316, as well as any proposed changes, unlike SB 202." Opp. at 71. Not only is this claim implausible on its face, given that more time elapsed between introduction and passage of SB 202 as between introduction and passage of HB 316, *see* Germany 7/27/23 Decl.

[18] *See* Senate 3/13/19 Video, *supra,* at 2:32:53-56 (remarks by Sen. Jones (D-22d)) ("Why could that not be in this bill? Because we're rushing through it. Because we're going too fast."); *id.* at 2:26:14-21 (remarks by Sen. Jordan (D-6th)) ("[W]e need more time with this bill …, and we should all vote 'no.'"); *id.* at 3:36:30 (remarks by Sen. Orrock (D-36th)); *id.* at 3:17:49-3:18:30 (remarks by Sen. Seay (D-34th)); *id.* at 1:11:43 (remarks by Sen. Henson (D-41st)); *id.* at 1:55:33; Video Recording of Senate Ethics Comm. Mtg., 155th Gen. Assemb., 1st Sess. (Ga. 2019), at 1:55:39-1:56:58 (Mar. 6, 2019) (remarks by Sen. Harrell (D-40th)), https://tinyurl.com/48jfypja ("[W]e had a committee substitute that none of us saw until we walked in this morning.… This was a rushed process, and we didn't look at enough details.").

¶ 56, Germany 5/14/24 Decl. ¶ 10, but even Battles' declaration undercuts Plaintiffs' point: "Though organizations like [mine] had concerns, and voiced them, about the speed with which HB 316 moved through the general assembly, it seemed like everyone acknowledged that there were voting and elections issues that needed to be streamlined or fixed, and HB 316 seemed to represent a good faith attempt to do that." Battles Decl. ¶ 19 (Pls.' Ex. 256). In other words, activists complained about the drafting process in 2019, just as they did in 2021.[19] Indeed, other statements from organizations during HB 316's drafting undermine Plaintiffs' claim that the process that led to SB 202 was unusual because "[a]dvocacy groups were given time to review the different iterations of HB 316, … unlike SB 202." DRSOF ¶ 177.[20]

[19] In addition, Battles' remarks during a hearing on HB 316 make her more recent attempt to distinguish that statute from SB 202 seem disingenuous. *See* DRSOF ¶ 177; Video Recording of House Gov'tl Affs. Election Subcomm. Mtg., 155th Gen. Assemb., 1st Sess. (Ga. 2019), at 2:56:40-2:58:35 (Feb. 19, 2019) (remarks by Cindy Battles), https://tinyurl.com/4emft4cx ("[T]here needs to be a transparent process, and there needs to be accountability. And it doesn't feel like there's either one of those things.…"). Battles' declaration attacking SB 202 is little more than a cut-and-paste of her attack on HB 316, and thus her claim that these two drafting processes were different is unworthy of credence.

[20] *See* Video Recording of Senate Ethics Voting & Elections Subcomm. Mtg., 155th Gen. Assemb., 1st Sess. (Ga. 2019), at 7:03-7:46 (Mar. 4, 2019) (remarks by Marylin Marks (Coal. for Good Governance)), https://tinyurl.com/mwc2p6zw ("[T]here are major fundamental public policy issues not being discussed …. It's just being too rushed for something this major."); Press Release, Fair Fight, *Fair Fight Statement on HB 316 Vote* (Mar. 13, 2019), https://tinyurl.com/yjfe5m8x ("HB 316 … [i]s being rushed through the legislature with no fiscal note …, an … unprecedented omission ….").

Plaintiffs argue, too, that the General Assembly's failure to establish "a study committee also favor[s] a finding of discriminatory intent"; this failure, they say, "was another departure from past practice." Opp. at 68. Not so.

Further, when it comes to developing legislation, study committees are the exception, not the rule. Indeed, such committees are hardly more common than special committees or working groups, which Plaintiffs misleadingly call an "unusual legislative tactic," Opp. at 60. Within the last decade, several substantial election statutes have been enacted in Georgia, *see* 2023 Ga. Laws 273 (S.B. 222); 2017 Ga. Laws 250 (H.B. 268); 2016 Ga. Laws 347 (S.B. 199); 2014 Ga. Laws 343 (H.B. 310); *see also* 2023 Ga. Laws 341 (S.B. 129), yet Plaintiffs cannot point to a single recent Georgia election statute that resulted from a study committee's recommendations. The "study committee" that Plaintiffs cite as the impetus for HB 316 was not a *legislative* study committee at all but rather the SAFE Commission, created by then-Secretary of State Kemp in 2018 in response to "public scrutiny over whether the Direct Recording Electronic (DRE) machines and other components of the voting system … could be compromised[.]" *Secure, Accessible & Fair Elections (SAFE) Commission Report* 3 (2019) ("*SAFE Comm'n Rep.*") (Pls.' Ex. 157).

Plaintiffs also overplay their hand in claiming that "much of HB 316 came from a public recommendation by experts …." Opp. at 71. In fact, the SAFE Commission's eight recommendations concerned election technology, *see*

SAFE Comm'n Rep. at 8-19, and most of HB 316's provisions were *not* based on those recommendations, *see* 2019 Ga. Laws Act 24 (H.B. 316); Opp. at 72.

Plaintiffs next protest that, "unlike SB 202, HB 316 did not include multiple provisions that curtailed … existing methods of voting." Opp. at 72. Here, Plaintiffs are simply expressing stronger opposition to SB 202's reforms than to those of HB 316. But that has nothing to do with whether SB 202's drafting reflected "procedural departures" indicative of discriminatory intent.

Plaintiffs' attempted distinction between SB 202 and HB 316 boils down to their claim that, "rather than incorporating conspiracy theories derived from baseless post-election lawsuits …, HB 316 largely reflected the deliberative recommendations of a study committee and the affirmative findings of a federal court." Opp. at 72. This chain of assertions fails on every level. SB 202 did not "incorporat[e] conspiracy theories"; it responded to valid concerns about voter confidence, election integrity, and election administration, as State Defendants have explained. Moreover, Plaintiffs vastly overstate the role of "post-election lawsuits" in influencing SB 202, and in any event, the General Assembly's aim of revising the election code to avoid litigation, whether or not that litigation is successful, is entirely legitimate. *See Abbott*, 585 U.S. at 614 ("It was entirely permissible for the Legislature to favor a legitimate option that promised to simplify and reduce the burden of litigation. That the Legislature chose this course is not proof of discriminatory intent."). Nor did

HB 316 result from "recommendations of a study committee"; the SAFE Commission, which was not a study committee, made some proposals later included in HB 316, but these were less than half of the statute's provisions. *See* Opp. at 72.

Plaintiffs' observation that HB 316 "reflected … the affirmative findings of a federal court" is just as misleading. Opp. at 72. That court merely preliminarily enjoined aspects of Georgia's absentee-ballot-processing regime, *see Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), and such "a finding … cannot estop [a defendant] from contesting the same issue in another suit," *Sorenson v. Raymond*, 532 F.2d 496, 498–99 (5th Cir. 1976). There was therefore no binding obligation on the Legislature to rework the election code, and certainly no obligation to rework it in precisely the manner that HB 316 did. In this way, HB 316 hardly "reflected … the affirmative findings of a federal court" meaningfully more than did SB 202—which itself was in line with many courts' holdings recognizing the legitimacy of ID requirements and restrictions on OP voting, among other policies. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004); *Brnovich*, 141 S. Ct. at 2345, 2347-48; *Crawford*, 553 U.S. at 194-97.

Through all of this, Plaintiffs focus on the minutiae of the legislative process. But they fail to identify even one genuinely disputed *material* fact that would allow a reasonable fact finder to conclude that the Challenged

Provisions were motivated by discriminatory intent.

2. There were no substantive departures.

Plaintiffs are equally wrong in claiming that the Legislature "substantively departed from its usual procedures when it ignored the views of county election officials" during SB 202's drafting," and that "[e]lection officials opposed many of the challenged provisions of SB 202." Opp. at 59, 49. In reality, county officials' views were far from monolithic, and their feedback substantially influenced the final version of the statute.

For example, county officials acknowledged that the General Assembly took their views into account in drafting SB 202. Lynn Bailey, Director of the Richmond County Board of Elections during SB 202's drafting, testified that "legislators ask[ed] for feedback on election-related bills from multiple election officials, not just [her][.]" Bailey 10/6 63:3-12 (Pls.' Ex. 49). Another county election official acknowledged that the legislature "did take some of our recommendations." Eveler 277:16-17 (Ex. D to DRSOF). For instance, earlier drafts of what became SB 202 eliminated no-excuse absentee voting, a proposal later scrapped after county officials objected. *See* Email from T. Adams to H. Special Comm. on Election Integrity Mbrs. at 1 (Feb. 10, 2021) (Pls.' Ex. 202). Likewise, another county official explained that his feedback helped shape SB 202's ID requirements for absentee voting: "The original provisions of the bill were to provide a photocopy of your ID itself. I gave [Democratic]

Representative Alexander the idea of providing the driver's license number …. So that was a provision that I believe she offered as an amendment to the original proposals of the bill." Kidd Tr. 105:6-24 (Ex. G to DRSOF). Some county election officials also opposed sending absentee-ballot applications to all registered voters (a practice prohibited by SB 202) and supported SB 202's restrictions on providing things of value to voters in line at polling places. *See* Eveler 190:8-18, 288:20-24, 290:12-21 (Defs.' Ex. T & Ex. D to DRSOF).

Plaintiffs' specific illustrations of how county officials' views were supposedly sidelined fare no better. Most such illustrations are drawn from an informal survey of officials: "During the 2021 Legislative session, Tonnie Adams, Heard County Election Supervisor and Legislative Committee Chairman for the Georgia Association of Voter Registration and Election Officials (GAVREO), solicited feedback from county election officials statewide on pending legislative proposals" and "sent the responses to this survey to all legislators on March 10, 2021 …." Opp. at 49 n.13. Notably, Adams' survey was informal and non-randomized. *See* Adams 143:7-150:21 (Ex. O to DRSOF).

According to Plaintiffs, the results of Adams' survey nevertheless show that discriminatory intent motivated the passage of SB 202: "For example, dozens of county election officials informed the Legislature of their opposition to the 11-day absentee ballot request deadline." Opp. at 49. However, of the 56 county election officials who gave input on this issue, only 11 favored

keeping the then-existing deadline of four days; 19 supported the 11-day deadline, whereas 23 advocated a slightly different deadline. Email from T. Adams to Ga. H. Reps. (Mar. 10, 2021) (Pls.' Ex. 216 at 5). That the General Assembly ultimately opted for the eleven-day deadline in the face of this disagreement among election officials about the correct number of days comes nowhere close to suggesting discriminatory legislative intent.[21] There is no constitutional requirement that the General Assembly side with only those county officials who agree with Plaintiffs on this issue, and the Assembly's failure to do so is certainly not evidence of discriminatory intent.

Plaintiffs, again citing Adams' survey, assert that "[c]ounty officials opposed SB 202's severe limits on the number of drop boxes permitted in each county …." Opp. at 50. This contention is misleading. The survey in fact reported that "[a]bout half of the officials believed that the counties that did not use drop boxes last year should not be forced to install them. [The Heard County] Board and [Adams] agreed that [they] did not need them," whereas some officials apparently felt that "[t]he counties who installed them should not have to close them due to a change in the allowed number based on population." Pls.' Ex. 216 at 9. One official whose comments Adams

[21] Additionally, the Association County Commissioners of Georgia "[s]upport[ed] [e]stablishing an absentee ballot application receipt deadline at 11 days before [an] election." Email from T. Edwards to Legislators (Mar. 23, 2021) (Pls.' Ex. 227 at 3).

highlighted said: "[I]f we have to have a drop box [then] it should be only 1 outside the Registrar's Office …." *Id.* at 10. Overall, "35 officials said that the current rules established by the S.E.B. should be written into code." *Id.* at 9. And Lynn Bailey approved of aspects of SB 202's dropbox provisions: "I like the consistency that was built in Senate Bill 202. I like the fact that every county is now required to have one …." Bailey 10/6 218:18-22 (Ex. P to DRSOF). What these responses indicate is that the General Assembly formulated SB 202's dropbox provisions to balance competing concerns—requiring every county to have at least one dropbox and providing for additional dropboxes according to a county's population.

The same goes for the comments from officials as reported by Adams who opposed SB 202's requirements that dropboxes be indoors and available only during early voting hours: Not only did Adams give no numerical data on how many of the surveyed officials opposed these provisions, but the General Assembly was within its rights to consider and reject input from county officials. Indeed, Adams admitted that "[v]oters seemed to prefer handing their ballot directly to an election official," and that some "express[ed] their concerns about ballot boxes." Pls.' Ex. 216 at 9. No lobby, after all, always gets everything it wants. *See Moore*, 293 F.3d at 370 ("[T]he Legislature's rejection of amendments and choice of methods to address the perceived problems … is simply the operation of the democratic process," "n[ot] … evidence … of

impermissible motives.").

Plaintiffs likewise cite Adams' informal survey in asserting that "[c]ounty election officials informed the Legislature that the new ID requirements for absentee voting would *increase* the administrative burden on election officials." Opp. at 51-52. But in actuality, Adams stated that he "received various responses to this question. About half of the officials believe that there shouldn't be a change." Pls.' Ex. 216 at 6. Others, meanwhile, said, "I have no problem adding the Driver's License number" or "State ID number" in addition to "signature verification"; and others said that "[h]aving a photo ID should be mandatory." *Id.* at 6, 7; *see also* Bailey Rep. ¶ 62 (Defs.' Ex. AAAA). On the whole, then, opinions among those informally polled varied widely, and the General Assembly was indisputably not discriminating by siding with one half of respondents as opposed to the other half. Moreover, "the administrative burden" posed by signature matching is not the only reason behind SB 202's adoption of objective methods of identity verification. *See* SB 202 at 4:73–75; Germany 7/27/23 Decl. ¶¶ 116-21 (Defs.' Ex. C) (listing objectivity, speed, and avoidance of litigation over signature matching as rationales).

Plaintiffs, again relying on Adams' informal survey, misleadingly claim that "[e]lection officials informed legislators of their concern that the ban on counting out-of-precinct provisional ballots cast before 5:00 p.m. would

disenfranchise voters ….” Opp. at 52. Actually, “[i]n [Adams’] survey, 31 officials favored either leaving the current rules in place or allowing out of precinct provisional ballots ONLY if the voter can not travel to their correct precinct before 7:00 PM.” Pls.’ Ex. 216 at 15. Adams gave no further statistics on officials’ responses to the question, instead merely quoting two such responses. The first was short, stating that OP provisional ballots “should not be banned,” whereas the other argued that “[p]oll workers can … encourage voters to go to the correct polling location if there is time and they are able.” *Id.* Thus, given the lack of quantitative data, Adams’ survey cannot tell us how county officials *overall* felt about SB 202’s OP-voting rules. But the information provided suggests that SB 202 struck a sensible balance: OP provisional ballots were “not … banned,” but there were limited cases where a “voter can not travel to their correct precinct before” a certain time.

Finally, Plaintiffs insist that “[l]ocal election officials also expressed alarm at the SEB takeover provision[.]” Opp. at 52. But even if this were correct, it is entirely unremarkable that some local officials would be critical of the proposal, which was intended to remedy failures by local officials. Even so, Adams also reported mixed feelings from election officials regarding the takeover provision. While “[m]ore … were against” it “than in favor,” at least some were in favor: one was “100% in favor,” whereas another said that there should be some circumstances in which “the state can take over” from a county,

and another that "there [are] times when the state might need to step in." Pls.' Ex. 216 at 17. To reiterate, the General Assembly did not act imprudently, much less discriminatorily, by failing to meet the demands of those officials with whom Plaintiffs agree.

At bottom, the role of county election officials in shaping SB 202 was entirely appropriate and not in the least suggestive of discriminatory legislative intent. Indeed, when asked whether "the process for enacting SB 202 differ from those previous … major changes to election or voting laws … in any notable way," the official representative of the Cobb County Board of Elections testified, "I can't think of anything that would be different, no." Eveler 50:7-8, 50:22-23 (Defs.' Ex. T). The Gwinnett County Board of Registration and Elections' representative concurred: "[W]as the legislative process for passing S.B. 202 similar to the process for election-related bills in past legislative sessions? A. To my knowledge, that is correct." K. Williams 22:7-23:22 (Ex. M to DRSOF).

Ultimately, Plaintiffs' focus on statements by county election officials does nothing to defeat State Defendants' summary judgment motion. The Eleventh Circuit's *LWV II* decision confirms as much. The Eleventh Circuit noted that: "The county supervisors of elections, through their trade organization, influenced the final version" of the statute, and that the statute's "proponents were receptive to input during the legislative process" (including

that of "[t]he lobbyist for the Supervisors of Elections," "who did not formally support or oppose the bill as a whole"); "the Legislature adopted some alternatives that were more palatable to the bill's opponents. It did not accept all of them, nor was it required to do so." *LWV II*, 66 F.4th at 919, 940, 941. Much the same can be said here. And Plaintiffs' only effort to defeat summary judgment is to rely on mischaracterized and inconsequential evidence. That will not do.

3. Contemporaneous statements do not suggest any discriminatory intent.

Plaintiffs' final attempt to read discriminatory intentions into SB 202's legislative process is a series of mischaracterizations of statements made around the time of SB 202's consideration. This thin evidence consists of one statement by House Speaker David Ralston and one by Rep. Fleming, plus some remarks made by Rudy Giuliani during his testimony at a December 2020 legislative hearing. Not only are all these statements race-neutral, but none of them was even made about SB 202, and they therefore cannot defeat summary judgment.

December hearing. Plaintiffs' main illustration of supposedly racist intent by the General Assembly is that during a December 10, 2020 House hearing, Rudy Giuliani appeared on the Trump Campaign's behalf and testified that there was mass meddling in Georgia's election. *See* 12/10/2020

H. Gov. Affs. Hr'g Tr., AME_002498:6-24, 2514:5-25 (Pls.' Ex. 124). Plaintiffs argue that Giuliani's characterizations of certain poll workers reflect implicit racial bias, and Plaintiffs then try to apply that bias to the General Assembly. Again, this argument is flawed in myriad ways.

First, this Court already correctly rejected Plaintiffs' argument "that the comments Giuliani made during the December 2020 hearings are circumstantial evidence of the Legislature's intent. Because statements of individual legislators have limited probative value, this isolated statement by a non-legislator has even less probative value." PI Order at 46 n.23. Plaintiffs have adduced no new evidence that would cast doubt on this holding.

Second, Giuliani's remarks at the December 10, 2020, hearing have nothing to do with SB 202, and Plaintiffs' attempts to connect his comments to the statute are at best contrived. Giuliani did not even testify during the same session in which SB 202 was enacted. Nor can Plaintiffs point to any provision of SB 202 shaped by his remarks. Plaintiffs cite testimony from the December 10th hearing "advocating for [a] ban on unsolicited mail ballot applications" and "for ID numbers on absentee ballot applications and ballots," Opp. at 46 (citing 12/10/2020 H. Gov. Aff. Hr'g, AME_002434:14-20, 2436:1-14 (Pls.' Ex. 124)), but both suggestions came from another witness who testified before Giuliani.

Nor does Plaintiffs' contrived argument find support in the caselaw. For

instance, the Eleventh Circuit rejected a claim of religious discriminatory intent in a recent case involving a city's zoning decision, despite the plaintiffs' reliance on comments made by citizens at a community meeting that preceded that decision. The court rejected the plaintiffs' claim that the city's subsequent zoning decision was intentionally discriminatory, explaining that one "cannot attribute the residents' purported bias to city officials absent at least some proof that the officials 'ratified' it.… [W]e won't impute the discriminatory intent of one or a few decisionmakers to the entire group—let alone, as here, of a subordinate *non*-decisionmaker to the final decisionmakers." *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 835 (11th Cir. 2020) (quoting *Hallmark Devs.*, 466 F.3d at 1285). Here, the basis for imputation of discriminatory intent is even weaker: Not only was Giuliani *not* a decisionmaker as to SB 202, but, unlike the residents' comments in *Thai Meditation*, his December 2020 comments were not even about the decision at issue – SB 202, which had not been introduced yet. Indeed, Giuliani's comments did not even relate to any policy eventually included in that legislation. *See also Hallmark Devs.*, 466 F.3d at 1285; *Fusilier*, 963 F.3d at 466.[22]

[22] In arguing that discriminatory motives should be ascribed to the General Assembly, Plaintiffs rely on *Stout*, 882 F.3d 988. But the facts of *Stout* were so different that it cannot be regarded as relevant. In *Stout*, litigants

Legislators' statements. Plaintiffs' examples of purportedly racist remarks by legislators—one statement by Speaker Ralston and one by Rep. Fleming—fare no better than their purported examples from non-legislators.

As for Rep. Fleming, he wrote in a November 2020 op-ed that, "[i]f elections were like coastal cities, absentee balloting would be the shady part of town down near the docks you do not want to wander into because the chance of being shanghaied is significant. Expect the Georgia Legislature to address that in our next session in January." Plaintiffs call this "racially derogatory language," Opp. at 60, but it is not. To "shanghai" means "to put aboard a ship by force often with the help of liquor or a drug," or "to put by trickery into an undesirable position." The word is derived, not from the wrongdoers' ethnicity, but rather from "the former use of this method to secure sailors for voyages to eastern Asia." *Shanghai, Merriam-Webster Online Dictionary* (2024), https://tinyurl.com/mrxv3dca. The term, to reiterate, has nothing to do with

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challenged as intentionally discriminatory a city board's decision to separate its school system from that of the county, relying in part on racial comments by citizens supportive of the separation. The court rejected the argument that this reliance was "impermissibly ascrib[ing] the racially discriminatory motivations of a few to the actions of the Gardendale Board as a whole.… [T]he statements of those who played a primary role in lobbying for the state action 'translate[d] their grassroots effort into official action.' And the secession leaders became members of the Gardendale Board …. They testified … that they 'put the mayor and the council in a head lock ….'" 882 F.3d at 1007-08. Here, by contrast, Giuliani was not a "member[] of the" Legislature and did not "put the [Legislature] in a head lock" or "spearhead" any of SB 202's Challenged Provisions with his December 2020 testimony.

race. And that is why this Court has previously noted that Rep. Fleming's remark does not "show[] racial animus towards black voters." PI Order at 51. To the contrary, he merely expressed the common concern that "[f]raud is a real risk that accompanies mail-in voting[.]" *Brnovich*, 141 S. Ct. at 2348; *see also* Lori Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud* 26 (2003) (Minnite Dep. Ex. 17) (Ex. FF to DRSOF) ("Overall, the absentee mail-in ballot process is the feature most vulnerable to voter fraud …."), available at https://tinyurl.com/5epze57m. Incredibly, Plaintiffs double down on their claim that Rep. Fleming's comment was racist (though they now characterize it as targeting Asian Americans), even citing purportedly expert opinion. *See* Opp. at 77.[23] But their expert's claims are baseless *ipse dixit* and, as such, are nowhere near enough to establish a triable of issue of fact. *See* DRSOF ¶ 559.

What is more, Rep. Fleming's 2020 op-ed did not concern SB 202, which would not even be introduced in the General Assembly until the next session, "and thus do[es] not evidence discriminatory intent behind" the statute. *See GBM*, 992 F.3d at 1323. Plaintiffs nevertheless insist that Rep. Fleming's

[23] Plaintiffs also allege that several other eminently reasonable, race-neutral measures introduced in, or passed by, the Legislature evince anti-AAPI bias, *see* Opp. at 76-78, but Plaintiffs' claims on this score are frivolous and are addressed in DRSOF ¶¶ 560-62.

comment was "about SB 202" because "the very next sentence of [his] op-ed … reveals the close link between the views he expressed in the op-ed and SB 202: 'Expect the Georgia Legislature to address that in our next session in January.'" Opp. at 75-76. But the mere fact that a legislator made a comment about a *subject* on which the General Assembly legislated in a subsequent session does not mean that the comment was "about" the then-nonexistent legislation, and it hardly even establishes a "close link" between the comment and that legislation.

The Eleventh Circuit also confirms that the putative link between Rep. Fleming's op-ed and SB 202 is too attenuated to be probative of the overall legislative intent. *See Brooks v. Miller*, 158 F.3d 1230, 1237 (11th Cir. 1998) ("Plaintiffs' theory was that a discriminatory purpose behind the 1964 provision could be inferred circumstantially from the improper motives behind Groover's previous majority vote bill … and from evidence that Sanders' support of previous measures, such as at-large voting, was racially motivated. The district court did not commit clear error by rejecting this theory and focusing instead on specific evidence concerning … the 1964 election code.").

The Supreme Court has also held that, even if a redistricting statute passed by one session of a legislature was tainted by discriminatory intent, another redistricting statute passed by the following session of the legislature was still presumptively passed *without* such intent. *Abbott*, 585 U.S. at 605.

For this reason, too, Rep. Fleming's comments cannot be considered as relevant to the legislative intent animating SB 202.

Plaintiffs also cite "the contemporaneous statement[]" of then-House "Speaker Ralston," which they say "show[s] that key legislators promoted unfounded and racialized claims of election fraud around absentee voting to minimize Black and AAPI voters' voting power[.]" Opp. at 74-75. But Speaker Ralston said nothing racial or indicative of an intent to "minimize Black and AAPI voters' voting power"; he simply expressed concern that sending absentee-ballot applications to all voters "will be extremely devastating to Republicans and conservatives in Georgia."[24] Speaker Ralston clarified, too, that he was not endorsing voter suppression: "It's really not a question about higher turnout.... It's just that the election needs to be secure and it must have integrity." Niesse, *supra*, note 24. In any event, as with Rep. Fleming's comments, this Court has noted that Speaker Ralston expressed not "animus towards black voters" but rather, at *most*, "a partisan purpose since [Ralston] said that increased turnout would be negative to Republicans." PI Order at 52. And "[a] connection between race and partisan voting patterns is not enough to transform evidence of partisan purpose into evidence of racially

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

discriminatory intent." *LWV II*, 66 F.4th at 931.

What is more, neither Rep. Fleming's nor Speaker Ralston's comments referenced race. Plaintiffs detect racial undertones in each statement based on their own contrived interpretations of each lawmaker's words. But such subjective perceptions provide no legal basis for finding discriminatory purpose. A plaintiff's reliance on facially non-racial comments alleged to be "'subtle' statements of bias" is "not sufficient to overcome summary judgment. … [A]mbiguous remarks … rarely will suffice to conceive an issue of material fact when none otherwise exists." *Hallmark Devs.*, 466 F.3d at 1284–85 (cleaned up).

Plaintiffs strain to distinguish this caselaw, arguing that "[t]he[] cases merely hold that ambiguous statements … cannot be the *sole* piece of evidence on which an intentional discrimination claim depends." Opp. at 74. But that is false: The plaintiffs in many of these cases also purported to have "mosaics" of evidence in addition to the ambiguous remarks, yet courts nonetheless rebuffed their constitutional challenges.[25]

[25] *See Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 934 (8th Cir. 2006); *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994); *Brnovich*, 141 S. Ct. at 2349; *United States v. Thurmond*, 7 F.3d 947, 953 n.6 (10th Cir. 1993). Plaintiffs lean on an Eleventh-Circuit case where the court treated a reference to the "corrupt and the ignorant" as coded racial language. Opp. at 73. But that was because, in that case, the "defendants' expert freely admitted" as

In any event, as this Court previously held, Speaker Ralston's and Rep. Fleming's "isolated statement[s] do[] not inform the Court about the *Legislature's* motivations as a whole." PI Order at 51 (emphasis added). And, "[a]pplying the presumption of good faith—as a court must—[a] statement by a single legislator is not fairly read to demonstrate discriminatory intent by the state legislature." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022). The race-neutral statements Plaintiffs cite were made by two representatives in a General Assembly made up of 236 members. SB 202 passed the House by a vote of 100 to 75, and the Senate by a vote of 34 to 20. Germany 7/27/23 Decl. ¶¶ 52, 54. And, 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 II*, 66 F.4th at 932. Indeed, as the Eleventh Circuit has noted, "[i]t stretches logic to deem" even "a sponsor's 'intent' … *the* legally dispositive intent of the entire body of the … legislature on that law." *GBM*, 992 F.3d at 1324–25.

Accordingly, Plaintiffs have failed to identify any genuinely disputed material fact from SB 202's legislative history that would suggest a

much. *See Underwood v. Hunter*, 730 F.2d 614, 621 (11th Cir. 1984), *aff'd,* 471 U.S. 222 (1985).

discriminatory intent behind the Challenged Provisions.

D. SB 202 had no disparate impacts, foreseeable or otherwise.

Plaintiffs also fail to show, for purposes of *Arlington Heights*, that the Challenged Provisions had foreseeable disparate impacts. This Court recently noted that "Plaintiffs ha[d] not shown … that any of the provisions have a disparate impact …. Without this showing, the Court questions whether the Legislature could have foreseen or known about a disparate impact." PI Order at 53; *accord LWV II*, 66 F.4th at 938 (similar). No new evidence has surfaced to change that math. At any rate, even if Plaintiffs' disparate-impact claims were tenable—and they are not, *see infra* Part III—Plaintiffs cannot show that the disparities were foreseeable to the General Assembly.

Preliminarily, Plaintiffs' foreseeability argument relies mainly on comments from witnesses and legislators who *opposed* SB 202. *See* Opp. at 84-87. But "concerns expressed by political opponents during the legislative process are not reliable evidence of legislative intent." *LWV II*, 66 F.4th at 940. The remarks of SB 202's *non*-legislator opponents are even "weak[er] evidence of foreseeability," since their "testimony … concerning … disparate impact … was general" and "not supported by evidence or statistics." PI Order at 54.

Moreover, the legislative testimony on which Plaintiffs rely in arguing that the General Assembly was warned of disparate impacts is not persuasive. Plaintiffs cite the alarmist fears of two witnesses, for instance, who asserted

that SB 202's rules for OP provisional voting "would have a hugely disparate impact on Black voters.'" Opp. at 84 (quoting PSOF ¶¶ 159-60). But the only statistics these witnesses cited were from the 2018 elections—during which there was no meaningful racial disparity, let alone a "hugely disparate impact," in Georgians' reliance on OP provisional voting. *See infra* Part III(H). The General Assembly need not bend to the demands of witnesses who testify in opposition to proposed legislation, and this is all the more true when those witnesses' factual premises are incorrect.

The same goes for the other legislative witnesses whom Plaintiffs cite, such as one who testified at the February 22, 2021 EIC hearing that:

> (a) even if 97% of registered voters … had a DDS ID in their voter registration file, 'that would leave about 210,000 Georgians … without access due to [SB 202's] ID requirements," (b) … the limitations to getting an ID, or making a photocopy of an ID, would disproportionately burden [voters of color]; (c) "drop boxes being used only during normal business hours in this legislation would very well defeat the purpose of having drop boxes at all"; and (d) "[v]oters in predominantly [B]lack neighborhoods wait on average 29 percent longer than those in non-[B]lack neighborhoods."

Opp. at 85-86 (quoting PSOF ¶ 158). These claims are laden with inaccuracies and unfounded assumptions. First, voters who lack valid ID numbers in their registration files do not necessarily lack valid ID; according to Plaintiffs' own figures, at least 48.3% of registrants marked as having missing, incorrect, or out-of-date DDS ID numbers in the November 2022 registry do in fact have

DDS IDs. *See* Opp. at 105. Second, even those who lack DDS ID have multiple means of satisfying the ID requirement: "a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address," including free ID cards available at offices in every county. *See* O.C.G.A. §§ 21-2-381(a)(1)(C)(i), 21-2-417(c). Third, whether limiting dropboxes to "normal business hours" would "defeat the purpose of having drop boxes at all" is the witness's personal opinion, and in any case has nothing to do with disparate impact. Finally, SB 202's effects on polling-place wait times are highly debated, so lawmakers did not have to agree with this witness's assumption that it would adversely affect racial gaps in wait times. That some racial groups waited in line longer on average than others before SB 202 does not prove that SB 202 made those disparities worse.

Likewise, the single document Plaintiffs cite that was provided to the Legislature regarding SB 202's impact on AAPI voters is a two-page email from an advocacy group. But the only concrete evidence to support the email's claim of racially disparate impact are rates of mail-in voting by race in 2020. *See* Email from P. Nguyen to Rep. Fleming & legislative staff (Mar. 22, 2021) (Pls.' Ex. 226). That rates of mail-in voting differ by race, however, is not evidence that SB 202 had a disparate impact. *See* PI Order at 36. The email also claims that, "[i]n the June 2020 primary, Asian American voters in Gwinnett County voters [sic] had their absentee ballot applications rejected at a rate three times

that of white voters …. Late applications were the top reason for rejection." No citation is provided, nor does the email explain its focus on this tiny subset of voters—a glaring deficiency in light of this Court's pronouncement that it "is not convinced that a statewide statistical relationship can be inferred from data from a single county." *Id.* at 34 (citing *LWV II*, 66 F.4th at 933-34).

When more complete data are consulted, the email's attack on SB 202's deadlines is dubious at best, as the claimed racial disparities range from negligible to nonexistent. *See infra* Part III(D). The General Assembly was not obligated to rewrite the bills that became SB 202 according to the demands of opponents whose criticisms were unsound.

In addition, Plaintiffs contend that foreseeability is established because the General Assembly accessed "a spreadsheet specifying the number of votes each presidential candidate received in November 2020, broken down by county and method of voting …. Because of racially polarized voting, legislators also would have known" of SB 202's supposed disparate impact. Opp. at 79-80. This logical leap fails because controlling precedent "has warned against conflating discrimination on the basis of party affiliation with discrimination on the basis of race.… [Courts] must be careful not to infer that *racial* targeting is, in fact, occurring based solely on evidence of partisanship." *LWV II*, 66 F.4th at 924 (citations omitted). Accordingly, because SB 202 has not had a disparate impact, there were no reasonably foreseeable disparate

impacts.

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

Finally, Plaintiffs repeat their argument that the General Assembly's "failure to enact less discriminatory alternatives" is evidence of discriminatory intent. Opp. at 88. However, not only is SB 202 not discriminatory at all, but the fact that the Assembly "'did not include the alternative options that Plaintiffs would have preferred' is not evidence of discriminatory intent." *LWV II*, 66 F.4th at 940 (quoting *GBM*, 992 F.3d at 1327). As the Eleventh Circuit confirms, "[t]he legislative branch is not hamstrung by judicial review to adopt any amendment that a bill's opponents claim would improve it." *Id.*[26]

Moreover, Plaintiffs' musings about "less discriminatory alternatives" are unpersuasive even on their own terms. For example, Plaintiffs assert that "county election officials petitioned the Legislature to adopt several alternatives to the challenged provisions. They advocated for a 7- or 8-day absentee ballot request deadline instead of the enacted 11-day deadline …."

[26] Plaintiffs cite a 46-year-old Seventh-Circuit case they portray as "holding [that] a plaintiff can make a prima facie case of discrimination by establishing that the government ignored less discriminatory options …." Opp. at 87. But that holding was based on the theory that "governmental institutions must be presumed to have knowledge of the natural and foreseeable consequences of their action …." *United States v. Bd. of School Comm'rs*, 573 F.2d 400, 413 (7th Cir. 1978). This "constructive-intent" theory of discriminatory purpose was rejected outright by the Supreme Court the very next year and is thus no longer good law, even in the Seventh Circuit. *See Feeney*, 442 U.S. at 279.

Opp. at 88. As already explained, however, county officials' views were not uniform, and some supported the 11-day time frame. *See infra* at Part II(C)(b).

Similarly, Plaintiffs argue, "[e]lection officials opposed the dramatic reduction in the number of drop boxes allowed per county, and proposed several alternatives …." Opp. at 88. This claim is misleading because, as discussed earlier, many of those officials wanted counties to enjoy free rein over dropbox policy, which might have meant that some counties had no dropboxes. SB 202 instead adopted a sensible middle ground by requiring one dropbox per county, with additional dropboxes determined based on an objective formula.

The same goes for Plaintiffs' complaint that the General Assembly should have "include[d] a provision allowing voters to use the last four digits of their Social Security Number (SSN4) to request an absentee ballot" in addition to the other forms of ID allowed by SB 202. Opp. at 89. Although SB 202 allows voters to use their SSN4s when *returning* absentee ballots, the General Assembly reasonably concluded that this form of ID was inappropriate at the ballot-*application* stage. Germany 7/27/23 Decl. ¶ 127.

Plaintiffs also overreach in claiming that "[t]he option to use SSN4 would have mitigated the disparate impact of SB 202's ID requirement …, as more than 95% of registrants" who have defective "DDS ID number[s] … their voter registration file[s] do have their SSN4." Opp. at 89. Plaintiffs again gloss over the fact that at least 48.3% of registrants with missing, incorrect, or out-of-

date ID numbers in the November 2022 registry *do* in fact have DDS ID. *See* Opp. at 105. And even those who do not still have multiple means of satisfying the ID requirement: a utility bill, bank statement, government check, paycheck, free ID card available at offices in every county, or another government document that shows a voter's name and address.

Finally, Plaintiffs' demands for alternatives to SB 202's OP-provisional-voting rules are unsound. Plaintiffs quote one witness's testimony from a legislative hearing that, if the "goal were to reduce down-ballot votes not counting, a more narrowly tailored solution to the problem … should be contemplated, such as investing in voter education and outreach, mandating that poll workers stand outside precinct to check and redirect voters, or following the model that Senator Harrell outlined yesterday and giving voters their actual ballots." Opp. at 90 (quoting AME_001410:22-1411:14 (Pls.' Ex. 131)). But, for starters, SB 202's rules for OP voting served purposes other than merely "to reduce down-ballot votes not counting"—namely, to reduce administrative burdens. *See* SB 202 at 6:130–38. Also, the SOS *already* engages in "voter education and outreach." Germany 4/13 182:2-18 (Ex. I to DRSOF); Germany 3/7 204:9-15, 226:10-227:14 (Ex. J to DRSOF); Harvey 22:5-19. And SB 202 *does* instruct "poll workers" to "redirect voters" to the proper precinct—unless those voters have arrived too late to go to their assigned precincts, in which case they may vote at the precincts at which they arrived.

See SB 202 at 74:1899–75:1907. Finally, this legislative witness's reference to "the model that Senator Harrell outlined" was Sen. Harrell's proposal that, "if somebody shows up at the wrong precinct, the election worker can bring up the correct ballot on the [voting] machine so you don't lose those votes in the down ballot races." Tr. of Hr'g Before the S. Comm. on Ethics, 2021 Leg., Reg. Sess. (Ga. 2021) (AME_001309:11-16 (3/15/21)) (Ex. OO to DRSOF). But, as Rep. Fleming explained in response to Sen. Harrell, "let's just assume … you're correct on that. What you can't do though is have enough machines to do that if you have several more hundred people show up at a precinct that are registered to vote there because we have a precinct-by-precinct election process on election day." *Id.* at AME_001309:15-22. There was, therefore, a valid, non-discriminatory basis for the General Assembly's rejection of Sen. Harrell's proposal.

* * *

All told, Plaintiffs have identified no substantial evidence that could create a triable issue of fact on their claim of discriminatory legislative intent under the *Arlington Heights* factors.

III. No Reasonable Factfinder Could Conclude That SB 202's Challenged Provisions Violate § 2 of the VRA.

Plaintiffs also have not come close to satisfying their burden of showing that any of the Challenged Provisions violate § 2 of the VRA, which prohibits

a state from adopting voting rules that "result[] in a denial or abridgement of the right … to vote on account of race or color," and declares that "[a] violation … is established if, based on the totality of circumstances, … the political processes … are not equally open to participation …." 52 U.S.C. § 10301.

As demonstrated below, Plaintiffs start off by relying on misunderstandings of the legal requirements for § 2 claims, and they base their claims on speculation about potential harms. In neither instance have Plaintiffs identified genuinely disputed material facts. And the same is true then for the each of the Challenged Provisions. Plaintiffs fail for each to identify material facts in dispute that would allow a reasonable fact finder to conclude that there were discriminatory motivations.

A. Plaintiffs rely on several misunderstandings of the legal requirements for § 2 claims.

Plaintiffs start by relying on four serious misunderstandings of § 2. First, they shrug off the fact that "the available statistical evidence reveals [that] relatively few … voters" are affected by SB 202, contending that "the Eleventh Circuit has not specified a minimum number of affected voters or size of statistical disparity that is required to show discriminatory effect." Opp. at 91, 92. Actually, "the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open …. The size of any disparity matters…. What are at bottom very small differences should not be artificially

magnified." *Brnovich*, 141 S. Ct. at 2339; *accord Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 628 (6th Cir. 2016) ("A law cannot disparately impact minority voters if its impact is insignificant to begin with."). As this Court held: "When considering disparate effect the focus should … be … on whether the challenged requirements 'operate to disqualify [minority voters] at a *substantially* higher rate.'" Order at 14 [Doc. 786] (emphasis added) (quoting *Williams v. City of Dothan*, 818 F.2d 755, 764 (11th Cir. 1987)).

In this way, "§ 2 imposes something other than a pure disparate-impact regime." *Brnovich*, 141 S. Ct. at 2341 n.14. The Supreme Court has thus rejected an "interpretation of § 2" under which "any 'statistically significant' disparity … may be enough to take down even facially neutral voting rules[.]" *Id.* at 2343. Thus, the Supreme Court explained, "[w]hen practical significance is lacking—when the size of a disparity is negligible—there is no reason to worry about statistical significance[.]" *Id.* at 2343 n.17 (quotation marks and citation omitted). Caselaw interpreting § 2 or considering discriminatory-effects arguments in other settings offers guidance on what degree of disparity is practically significant—and it is well above what Plaintiffs can establish here.[27]

[27] *See LWV II*, 66 F.4th at 933, 935, 937 (describing 3.89- and 2.21-percentage-point gaps between racial groups as not "of large magnitude," and "a difference of 1.3 percentage points" as "hardly meaningful"); *United States v. Dallas Cnty.*

Second, Plaintiffs contend that "[c]ase law requires the Court to consider the impact of SB 202's many challenged provisions collectively," where Plaintiffs argue that the Challenged Provisions "affect about 1.6 million registered voters." Opp. at 91-92 (citing Fraga Rep. ¶¶ 174-175, 182 & tbl. 21 (Pls.' Ex. 96)). There are many problems with this analysis.

For instance, the notion that one should "consider the impact of SB 202's … provisions collectively" cuts both ways. That is, "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." *Brnovich*, 141 S. Ct. at 2339. Thus, compared with many other states, Georgia has long made it easy to vote, including through no-excuse absentee voting, O.C.G.A. § 21-2-380(b), a robust automatic voter registration system via Georgia's DDS since 2016, *see* Germany 7/27/23 Decl. ¶ 122, and many other voter-friendly provisions.

Furthermore, Dr. Fraga's methodology for reaching the 1.6-million figure is patently unreliable. For example, he counts "[r]egistrants" as

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Comm'n, 739 F.2d 1529, 1538 (11th Cir. 1984) (VRA, § 2 case) ("[B]lacks were 49.8 percent of the voting age population but only 44.8 percent of the registered voters..... [A] difference of 5 percent is not significant."); *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1243-44 (N.D. Ga. 2022) ("[T]hose in MIDR status … account for 2.03% of Black registered voters, 0.19% of white non-Hispanic registered voters, 1.50% of Hispanic registered voters, and 1.19% of [AAPI] registered voters.... [T]he disparate impact … is de minimis.").

"affected" by SB 202's dropbox rules if they merely "had a drop box available in their county in the November 2020 election, but had the distance to a drop box increase beyond the statewide 2022 average of 4.8 miles for the November 2022 election." Fraga Rep. ¶ 174. The problem with this metric is that it counts voters as "affected" even if they did not vote—or do not plan to vote—using dropboxes (or, specifically, the dropboxes closest to their homes); and this is a substantial error, as it makes up more one million of Fraga's "affected" voters.

Dr. Fraga also determines whether absentee-ballot applicants are "affected" based on whether their applications would have been timely had SB 202 been in effect in 2020, Fraga Rep. ¶ 178, but of course one cannot show disparate impact by speculating about voters' compliance with a deadline that did not yet exist. *See* PI Order at 38.[28] For these reasons, Dr. Fraga's estimates overstate both the overall impact and any disparate impact of SB 202—and again, are patently unreliable.

Third, Plaintiffs, trying to preempt the rejoinder that any racial

[28] Similarly, to calculate the number "affected" by the ID requirements, Dr. Fraga counts "[r]egistrants who are confirmed not to have a DDS number associated with their registration record, and did not register to vote online or at a DDS office." Fraga Rep. ¶ 174. But it is clear from comparing his count of voters in this group (161,603) to Dr. Meredith's estimates of the number in the November 2022 registry who have neither DDS ID nor an accurate DDS ID number in the database (125,626) that Dr. Fraga has mistakenly included many other voters.

disparities are negligible at best, argue that the usual rules do not apply: "In Georgia," Plaintiffs insist, "with a combination of racially polarized voting and statewide elections determined by a few thousand votes, an intentionally discriminatory law that impairs even a small number of Black or AAPI voters" violates § 2 of the VRA. Opp. at 93. But caselaw does not support the notion that otherwise-unobjectionable voting rules become illegal simply because recent elections are close and there is a correlation between race and voters' preferences. The only case Plaintiffs cite for that proposition is *Voinovich*, 507 U.S. at 154-55, but that case involved vote dilution under § 2. And the Supreme Court thus applied "factors [that] grew out of and were designed for use in vote-dilution cases," whereas in cases like this one "involving neutral time, place, and manner rules," the "relevance of these … factors … is much less direct." *Brnovich*, 141 S. Ct. at 2340; *accord GBM*, 992 F.3d at 1331-32. In fact, in cases involving neutral voting legislation such as SB 202, controlling decisions have declined to relax the standards that a plaintiff must meet under the VRA § 2, even in states where elections are "close and racially polarized," *Brnovich*, 141 S. Ct. at 2349. And those decisions have sometimes done so over the objections of dissenters who made the same polarization argument that Plaintiffs make here. *See* 141 S. Ct. at 2367 (Kagan, J., dissenting).

Fourth, Plaintiffs contend (at 93-94) that "qualitative factors can also contribute to a law's discriminatory effect and render the political process 'not

equally open,'" where "[t]hese qualitative factors include the accessibility and atmosphere of polling places[.]" Even if true, Plaintiffs still bear the burden of showing a violation of the VRA, and merely speculating about "qualitative" factors comes nowhere close to establishing a genuine factual dispute. *See Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004). Instead, the evidence clearly cuts against Plaintiffs on "qualitative" factors: 98.7% of white, 99.5% of Black, and 97.8% of "Other" Georgia voters reported no problems voting in the November 2022 election. Survey Rsch. Ctr., Sch. of Pub. & Int'l Affs. Univ. of Ga., *2022 Georgia Post-Election* Survey 6 (2023) ("*SPIA Survey*") (Defs.' Ex. YYYY), https://tinyurl.com/4kxeb373; *see also* PI Order at 31–32. Similarly, few disparities emerged when voters in the recent SPIA Survey were asked: "Comparing your experience voting the last general election in 2020, would you say this time that it was easier" or "harder to cast a ballot, or there was no difference …?"

Margin of Error +/-2.8%	White	Black	"Other"
Harder	4.4%	6.9%	12.6%
Easier	13.3%	19.1%	10.3%
No difference	80.1%	72.5%	74.7%
Don't know	2.2%	1.4%	2.3%

Although Plaintiffs attack the *SPIA Survey* on several grounds, *see* Opp. at 100 n.26, none of their attacks are meritorious, *see* DRSOF ¶¶ 572-75.

B. Plaintiffs' speculation about potential harm does not carry their burden.

Plaintiffs next attempt to dodge the weaknesses in their case by speculating about counterfactuals. For instance, Plaintiffs assert that "disparities calculated from … election data often understate even these quantifiable effects because they do not account for individuals who were deterred from voting or even attempting to vote by the challenged provision." Opp. at 94 n.23. But even if there were any deterrent effect, Plaintiffs offer no data showing that the racial disparity would be greater for any group so deterred. And Plaintiffs bear the burden of showing a *racial disparity* in deterrent effects. Merely speculating as to the existence of such effects is not evidence that they exist. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 639–40 (6th Cir. 2016) ("Though we acknowledge the[ir] argument, plaintiffs' otherwise unsubstantiated criticism of the reliability of the record evidence is insufficient to meet their burden of establishing that S.B. 238 results in a racially disparate impact actionable as a violation of Section 2.").

Similarly, Plaintiffs argue that "it is almost impossible to determine the influence of an election law such as SB 202 with data from just one election cycle." Opp. at 95. Even if true, that would not inure to Plaintiffs' benefit, since *they* bear the burden of proof in this case. Moreover, the 2022 figures cited above are either neutral or cut *against* Plaintiffs, who need more than

speculation about alternative explanations to defeat summary judgment.

Relatedly, Plaintiffs deny that they need "to show that voters have been completely disenfranchised.… [L]aws making voting more difficult, though not impossible, … can violate Section 2." Opp. at 95. But Plaintiffs carry this proposition too far. The Eleventh Circuit recently endorsed the reasoning of another court that, "presented with a challenge to a photo ID law, refused to make the unjustified leap from *the disparate inconveniences* that voters face when voting to *the denial or abridgement of the right to vote*." *GBM*, 992 F.3d at 1330 (cleaned up). It is therefore misleading for Plaintiffs to assert that "burdens in voting, rather than raw turnout, are the appropriate measure of discriminatory impact." Opp. at 98.

Attempting to preempt future turnout figures that are unfavorable to their case, Plaintiffs again speculate about counterfactuals: "In 2022, Black voters, churches, and organizations undertook extraordinary efforts to help voters of color mitigate SB 202's discriminatory effects.… Any success of these efforts is not evidence that SB 202 caused no harm …." Opp. at 99. But Plaintiffs' argument rests on an unfalsifiable hypothesis: If turnout for voters of color decreases after SB 202, then SB 202 is discriminatory; if turnout increases or holds steady, then SB 202 is still discriminatory, but community efforts must have mitigated its disparate impacts. Plaintiffs never explain *why* organizations and activists helping drive turnout among voters of color would

be probative of whether SB 202 is discriminatory—since Plaintiffs have no evidence of what turnout would have been without those activists' efforts.

Plaintiffs alternatively argue that, "to the extent total turnout *is* relevant, the record suggests that Black voters have not fared well under SB 202.… The turnout gap between white and Black voters increased from about 4.2 percentage points in the November 2018 midterm to about 12.0 percentage points in November 2022." Opp. at 100. Plaintiffs further cite data showing that white turnout in Georgia as a share of the voting age population went from 53.6% in 2018 to 54.5% in 2022, while Black turnout went from 49.4% to 42.5% (a 14% decrease). Burden Rep. at 10 tbl. 4 (Pls.' Ex. 85). What Plaintiffs neglect to mention, though, is that the trends in Black turnout relative to white turnout from 2018 to 2022 in Georgia mirror the corresponding trends in other states.[29] *See* Grimmer Rep. ¶¶ 36-51 (Defs.' Ex. DDDD); Shaw Rebuttal Rep. ¶¶ 48-51 (Defs.' Ex. LLLL).[30] Overall turnout, too, has been robust since SB

[29] Nationally, Black turnout nationwide went from 51.3% in 2018 to 40.6% in 2022 (a 20.9% decrease, compared with just 14% in Georgia), and White turnout went from 55.2% to 52.8%. *See* Supp. Grimmer Decl. ¶ 4 tbl. 1. The Black-White gap thus grew by 313% nationally, compared to 286% in Georgia

[30] It is noteworthy that Plaintiffs focus here only on Black voters and ignore AAPI voters, when Plaintiffs argue SB 202's effects on the latter are just as severe. Perhaps that is because "Asian voters [in Georgia] saw their highest midterm turnout rate in the 2022 midterm election": "38.2% (35.3% if we take into account trends in group size), a 24.9 percentage point increase over the 2014 midterm election (22 percentage point increase taking into account trend

202's enactment: In 2022, Georgia had the highest turnout in the South and the 13th-highest in the nation. *See* Mot. at 25; Grimmer Rep. ¶¶ 42, 44. That election saw more total votes and more mail-in votes than in any other midterm, and a record-breaking midterm rate of early voting. *See* Mot. at 25.

Accordingly, Plaintiffs' speculation about turnout and SB 202's effect has no basis in fact, and it certainly fails to satisfy Plaintiffs' burden of showing material facts that could lead a reasonable fact finder to conclude that the Challenged Provisions were motivated by a discriminatory intent.

C. Plaintiffs fail to identify facts showing a discriminatory intent behind requiring ID for absentee voting.

Turning to the specific Challenged Provisions, Plaintiffs begin by attacking SB 202's ID requirements for requesting an absentee ballot as violating § 2 of the VRA. But Plaintiffs' attacks are meritless, and their evidence is insufficient to create a triable issue of fact.

For instance, Plaintiffs say this provision is discriminatory because "5.6% of all Black registrants" as of November 2022 have "either no DDS ID number or an inaccurate DDS ID number in the voter registration system are Black," compared to "2% of white registrants." Opp. at 102 (citing Meredith Rep. ¶ 65 Tbl. VI.A.1 & ¶ 91 tbl. VI.F.1 (Pls.' Ex. 88). But the same data show

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in group size) and a 3.9 percentage point increase relative to 2018 (1 percentage point if [one] take[s] into account trends in group size)." Grimmer Rep. ¶ 32.

that 2.5% of AAPI registrants had missing, inaccurate, or out-of-date DDS ID numbers in the system. These figures, which show *at most* a 3.6-percentage-point gap between groups, do not support Plaintiffs' position because disparities this small generally do not amount to violations of § 2 or other discriminatory-effect statutes. *See LWV II*, 66 F.4th at 933-34 (describing "difference of 3.89 percentage points" as not "of large magnitude"); *Frank v. Walker*, 768 F.3d 744, 752 n.3, 754 (7th Cir. 2014) (no § 2 violation despite 3.5-percentage-point gap in Whites' and Latinos' rates of ID possession); *Scott v. Pac. Mar. Ass'n*, 695 F.2d 1199, 1208 (9th Cir. 1983) ("The rule … amounts to only 3.4% of the additions to Local 34 workforce …. The effect of the rule … is *de minimis*.").

But even these low numbers overstate SB 202's impact: while Plaintiffs fixate on DDS ID, they have "presented no evidence that black registered voters fail to have the other acceptable forms of identification allowed by" SB 202—including "utility bills, bank statements, paychecks and other government documents that include a name and an address"—"at a … higher rate than white voters." PI Order at 43-44.[31]

[31] Relatedly, "registrants who recently voted will be more likely than registrants who have not recently voted to request a mail ballot in future elections, because one of the more predictive markers of whether a registrant will participate in the future is whether that registrant has voted in the recent past." Meredith Rep. ¶ 34. Among registrants who voted in the 2020 or 2022

Plaintiffs respond that, while "most registered voters *do* have a DDS ID number in their voter registration record, a system that fails to accommodate 243,000 registrants … does not work for 'nearly every voter.'" Opp. at 102-03. This argument runs headlong into the Eleventh Circuit's explanation that relying on "absolute numbers rather than on proportional statistics" to "measur[e] disparate impact" is "inappropriate." *Hallmark Devs.*, 466 F.3d at 1286 (cleaned up).

Plaintiffs also argue that "courts … have found a discriminatory effect based on similar disparities." Opp. at 103 (citing *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (1.3-point disparity); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231 (4th Cir. 2016) (3-point disparity). But neither *Veasey* nor *McCrory* can carry the weight Plaintiffs place on it. In *Veasey*, the Fifth Circuit was engaging in the same "statistical manipulation" later condemned in *Brnovich* (i.e., measuring racial disparity by reporting the demographics of a tiny subgroup). Such statistical trickery has also been criticized by the Eleventh Circuit, *GBM*, 992 F.3d at 1329-30, and by this Court, *see* PI Order at 40 n.18. *Veasey* was therefore abrogated in this respect by *Brnovich*. As for *McCrory*, the Fourth Circuit was citing the 3-percentage-

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general elections, the already-small gaps between groups become smaller still: 2.05% of Black and 1.62% of white registrants have missing, out-of-date, or inaccurate ID numbers in the DDS database. *Id.* ¶ 67 & tbl. VI.A.3.

point disparity as just one of multiple factors in a discriminatory-intent analysis, not in holding that the challenged statute violated § 2 of the VRA. *See* 831 F.3d at 231. Many courts confirm that such disparities are minor in the VRA context. *See LWV II*, 66 F.4th at 933; *Frank*, 768 F.3d at 752 n.3, 754; *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1373-74 (2d Cir. 1991) ("The mean score of blacks … was 72.03 percent and whites scored 79.17 percent … [T]hough the disparity was found to be statistically significant, it was of limited magnitude"); *Dallas Cnty. Comm'n*, 739 F.2d at 1538.

Undeterred by such minimal disparities, Plaintiffs contend that, "because [some voters'] ID number is not properly reflected in the … registration system … they will be shunted to the provisional … ballot process if they write their DDS ID number on a mail ballot application." Opp. at 105. But these voters, who comprise just 1.5% of registrants, have many other options: vote in person with their valid photo ID; submit a scan or picture of a DDS ID by mail or online, or bring the documents to a county office; submit another form of ID allowed by SB 202. *See* K. Smith 74:3-20 (Ex. F to DRSOF).

Nevertheless, Plaintiffs continue, "obtaining DDS ID can be difficult," and "Black Georgians are less likely than white Georgians to possess the technology necessary to provide a copy of an alternative ID." Opp. at 104-05 (citing Meredith Rep. ¶¶ 45-47). Again, the disparities in access to technology cited by Plaintiffs range from trivial to nonexistent. For one, the data on which

Dr. Meredith relies (RECS data) show "that 10 percent of Black Georgians lack access to a smart phone in their household, as compared to 9 percent of White Georgians." Meredith Rep. ¶ 46 (citing U.S. Energy Info. Admin, Residential Energy Consumption Survey (2020) ("RECS"), available at https://tinyurl.com/2t3k3w2m). But only "417 [RECS respondents] … are from Georgia." *Id.* ¶ 41 n.29. As Dr. Meredith admitted, a sample size of 417 means that the 9%-to-10% gap is "almost certainly" within the margin of error—that is, not statistically significant. *See* Meredith 124:3-4 (Ex. U to DRSOF). Similarly, Dr. Meredith relied on the RECS data in stating that "10 percent of Black Georgians lack access" "to printers, scanners, copiers, … fax machines" and "smartphone[s] in their household[s] …, compared to 7 percent of White Georgians." Meredith Rep. ¶ 47. But this disparity, too, is practically and statistically insignificant. *See* Supp. Grimmer Decl. ¶¶ 7-8 (Ex. HH to DRSOF). And, though Dr. Meredith relied on RECS data showing a racial gap in home internet access, Meredith Rep. ¶ 48, he relied elsewhere in his report on the Census's 2018 American Community Survey on computer and internet access. *See Id.* ¶ 44 & n.33 (citing Michael Martin, *Computer and Internet Use in the United States: 2018, American Community Survey Reports* (2021), available at https://tinyurl.com/yuftnbb8).

By Plaintiffs' own criteria, *see* PSOF ¶ 573, the ACS is the more reliable,

given its *far* larger sample size of 53,230 Georgia respondents.[32] The most recent ACS data show that 93.8% of White, 90.7% of Black, and 96.4% of AAPI Georgians have home internet access.[33]

All told, no reasonable trier of fact could conclude that SB 202's ID provisions violate § 2 of the VRA. Those provisions are, after all, "more protective of the right to vote than other states' voter-ID laws that courts have approved." *Raymond*, 981 F.3d at 310. And SB 202's ID provisions, of course, have several "mitigating features"—free ID cards, options to use other documents as alternatives to DDS ID, and a "cure" process. *See id.*

D. Plaintiffs fail to identify facts showing discriminatory intent behind the timeline for requesting absentee ballots.

Nor does Plaintiffs' evidence establish a triable issue of fact as to whether SB 202's timetable for requesting an absentee ballot violates the VRA.

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[32] *See* U.S. Census Bureau, *Sample Size: American Community Survey*, https://tinyurl.com/mrr92e32 (last visited May 14, 2024) (search parameters: select Georgia from the "Select Nation/State" drop-down menu).

[33] *See* U.S. Census Bureau, *Presence of a Computer and Type of Internet Subscription in Household (White Alone), American Community Survey, Georgia*, available at https://tinyurl.com/4m84sbr6 (last visited May 14, 2024); *id., Presence of a Computer and Type of Internet Subscription in Household (Black or African American Alone)*, https://tinyurl.com/4pp93ks5 (last visited May 14, 2024); *id., Presence of a Computer and Type of Internet Subscription in Household (Asian Alone)*, https://tinyurl.com/mrb2fh44 (last visited May 14, 2024); *id., Presence of a Computer and Type of Internet Subscription in Household (Native Hawaiian and Other Pacific Islander Alone)*, https://tinyurl.com/mv6p3dfe (last visited May 14, 2024).

According to Plaintiffs, "Black voters are … more likely to be impacted by SB 202's earlier deadline (11 days before Election Day) to submit mail ballot applications" because, Plaintiffs say, "they are more likely to submit mail ballot requests later in the election cycle," and their "mail ballot applications were more likely … to be rejected for arriving too late." Opp. at 106 (citing Fraga Rep. ¶¶ 99-100 & tbl. 7). For this, Plaintiffs compare the percentages of rejected absentee-ballot applications in elections from 2018 to 2022 that were rejected for untimeliness. But when more relevant data are considered—namely, the share of *all* absentee-ballot applications that were late under SB 202's timetable—racial disparities essentially vanish: In 2018, 8.4% of white voters' applications would have been late had SB 202 been in effect, compared to 7.6% of Black and 6.8% of Asian voters' applications. *See* Grimmer Rep. ¶ 77 & tbl. 9. In 2020, the corresponding figures were 1.4%, 2.2%, and 2.4%. *Id.* ¶ 78 & tbl. 10. And in 2022, 0.22% of white voters' applications were rejected as late, compared to 0.27% of both Black and Asian voters' applications, as well as 0.37% of Hispanic voters' applications, *id.* ¶ 89 & tbl. 12—the final statistic undermining Plaintiffs' assertion that "Latino voters in Georgia were also more likely than white voters to have their … applications rejected for arriving 'too late' … in November 2022," *see* Opp. at 129. These are tiny disparities; no non-white group's share of potentially late applications was ever more than one percentage point above that of white voters.

Nor do Plaintiffs' statistics regarding AAPI voters create a genuine fact issue as to whether SB 202 violates § 2 of the VRA. "After the passage of SB 202," Plaintiffs say, "the rate of AAPI voters' mail ballot applications also fell drastically …. In the November 2022 general election post-SB 202, only 4.3% of AAPI registrants requested mail ballots—a decline of 30.5 percentage points from the November 2020 election. In comparison, mail ballot applications for white voters declined by 18.3 percentage points …." Opp. at 110. But Plaintiffs have compared apples and oranges: they compare the decline post-SB 202 among AAPI voters in *requesting absentee-by-mail ballots* (Fraga Rep. tbl. 3) to the drop-off among whites in *voting by mail* (*id.* at 23 tbl. 2). A more meaningful comparison is the percentage decrease in the proportion of each group *requesting* mail-in ballots: an 87.6% drop-off for AAPI voters and an 84% drop-off for white voters—a minor difference. So, too, with the *voting* figures: a 77.1% drop-off in the proportion of AAPI voters voting by mail compared to a 76.6% drop-off for whites. *Accord* Grimmer Rep. ¶ 64 ("The decrease in mail-in absentee ballot usage among white voters was 76.6%" and "among Asian voters was 76.8%.").

In fact, according to uncontested data, from 2020 to November 2022, "the smallest percent decrease in mail-in absentee ballot usage [was] among Black voters, whose rate of mail-in absentee ballot usage decreased 74.6%." *Id.* And the rates of absentee-ballot-application rejection in the 2022 cycle were

essentially the same for White voters (0.22%) as for Asian and Black voters (both 0.27%). *Id.* ¶ 89 & tbl. 12. This lack of a disparate impact on Black voters, and the almost-equal proportional declines in mail-in voting among white and Asian voters in post-SB-202 elections, foreclose Plaintiffs' claim that SB 202's deadline disparately impacted both Black and AAPI voters.

Additionally, Plaintiffs contend that "AAPI voters, especially those who … [have limited English proficiency (LEP)], find the compressed timeline to be a barrier to vote because it provides less time to access translation assistance." Opp. at 111. This argument is pure *ipse dixit*. Plaintiffs give no estimates of how long it takes LEP AAPI voters to obtain translation, or how much more time would be needed to close any racial disparity in the difficulty posed by SB 202's deadline. Instead, Plaintiffs cite only two depositions of individual voters—one of whom *was* able to vote absentee in both 2020 and 2022 despite requiring translation help, and who said he was "not sure" if SB 202's timetable made voting more difficult, Paik 42:20-45:2 (Ex. V to DRSOF); and another who, when asked if SB 202 "made it more difficult for [her] to vote," answered, "[n]ot for me …. I don't have that experience," Aquino 29:9-12 (Pls.' Ex. 48). Thus, neither of these deponents had personal knowledge that would support an inference that SB 202's timetable for absentee applications would render voting not equally open in violation of the VRA, § 2. And Plaintiffs cannot create a genuinely disputed material fact by relying on these witnesses'

speculation.[34]

Ultimately, Plaintiffs fail to identify any material and legally relevant factual dispute regarding SB 202's rules regarding timelines for absentee-ballot applications.

E. Plaintiffs fail to identify facts showing discriminatory intent behind the ban on officials' mailing of unsolicited absentee-ballot applications to all registered voters.

Plaintiffs' evidence of disparate impact is even thinner as to SB 202's prohibition on official mailings of unsolicited absentee-ballot applications. Plaintiffs first argue that "[s]ocioeconomic disparities mean that completing the [application] process is more likely to be onerous for Black voters, who … are less likely than white voters to have access to a printer, scanner, or smartphone …." Opp. at 113. But the gaps in access to these technologies range from negligible to nonexistent, as discussed earlier. *See supra* at Part III(C).

Plaintiffs nonetheless continue along these lines, claiming that "[t]he SOS's website is only in English, making the task of obtaining an absentee ballot application online difficult, if not impossible, for LEP AAPI voters" and

[34] Relatedly, Plaintiffs assert that "AAPI voters also had their absentee ballots rejected for late arrival at the highest rate compared to other racial groups post-SB 202." Opp. at 112. But this fact has limited relevance, since SB 202 made no changes to the deadline for receipt of absentee ballots.

that "AAPI persons are less likely to have access to the technology necessary to produce alternative identification …." Opp. at 114-15 (citing N. Williams 118:11-13 (Pls.' Ex. 21); K. Smith 69:5-8 (Pls.' Ex. 18); Lee Rep. 81-83 (Pls.' Ex. 100); Lee Supp. Rep. ¶¶ 13-17, 19 (Pls.' Ex. 103). But neither Plaintiffs nor the portions of the record they cite explain why the supposed disparity between AAPI voters and other groups would be reduced if counties' unsolicited mass mailings of ballot applications were allowed, since presumably LEP voters would still need those mailings translated as well. Moreover, the cited portions of Dr. Lee's declaration provide no statistics about AAPI Georgia voters' access to technology.[35] The most recent ACS data, meanwhile, show that 96.4% of AAPI Georgians have household internet access, compared to 93.8% of white Georgians.[36] Here again, Plaintiffs fail to identify any materially disputed

[35] The only statistics Dr. Lee cites are from a *nationwide* survey that was "not designed as a rigorous research study," *see* Ye Eun Jeong, OCA-Asian Pac. Am. Advocates, *AAPI Digital Access Survey* (Sept. 2023), available at https://tinyurl.com/235dnf4p [*see* Doc. 812-6]; and a vague finding that those "with limited English proficiency are half as likely as native English speakers to have high levels of proficiency using digital tools,"—which is not specific to AAPI voters or to Georgia. *See* Lee Supp. Rep. ¶ 19 & nn.20-22 (citing Alexis Cherewka, Migration Pol'y Inst., *The Digital Divide Hits U.S. Immigrant Households Disproportionately during the COVID-19 Pandemic* (Sept. 3, 2020), available at https://tinyurl.com/vnyw2v3k [*see* Doc. 812-7]).

[36] *See* U.S. Census Bureau, *Presence of a Computer and Type of Internet Subscription in Household (White Alone), American Community Survey, Georgia*, available at https://tinyurl.com/4m84sbr6 (last visited May 14, 2024); *id., Presence of a Computer and Type of Internet Subscription in Household*

facts that are relevant to their § 2 claim.

F. Plaintiffs fail to identify facts showing discriminatory intent behind the dropbox rules.

Plaintiffs have similarly failed to produce sufficient evidence for a reasonable factfinder to conclude that SB 202's dropbox rules violate the VRA.

First, Plaintiffs rattle off various macro-level statistics about counties and their demographics: "64.65% of the 550,000 absentee ballots returned via drop box in November 2020 were cast in just eight counties in which 53.2% of the State's Black population but only 29.1% of the State's white population reside …." Opp. at 116. But multiple unsupported leaps would be required to derive from these facts the conclusion that Black voters are disproportionately burdened by SB 202. This Court has already pointed out the flaws in Plaintiffs' logic: while Plaintiffs stress that 33.7% of the State's Black population resides in the three counties that experienced the largest decreases in dropboxes, "in 133 other Georgia counties, which comprise 34.7% of the state's black population, there was no change or an *increase* in the number of drop boxes.… Moreover, evidence related to the removal of drop boxes—'absent information about the race of the voters' who used the drop boxes in those counties—'does

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(Asian Alone), https://tinyurl.com/mrb2fh44 (last visited May 14, 2024); *id., Presence of a Computer and Type of Internet Subscription in Household (Native Hawaiian and Other Pacific Islander Alone)*, https://tinyurl.com/mv6p3dfe (last visited May 14, 2024).

not prove that the [Drop Box Provision] will have a disparate impact on black voters.'" PI Order at 33 (quoting *LWV II*, 66 F.4th at 935-36).[37]

Plaintiffs' arguments on SB 202's timetable for availability of dropboxes are no more persuasive. Plaintiffs claim that "Black voters disproportionately returned absentee ballots during the last four days of the November 2020 election period …, as they did in all federal general elections since at least 2014" but that "SB 202 eliminated drop boxes in these four days, … thereby removing the only method—other than hand delivering the ballot to an elections office—that guaranteed a voter could get their ballot in on time." Opp. at 116-17. But, other than the 2014 and 2016 elections, the racial gaps to which Plaintiffs allude are almost nonexistent: Black voters' absentee ballots were 7.9 and 7.2 percentage points more likely than white voters' to be returned in the last four days in the 2014 and 2016 elections, respectively—but the corresponding gap was 0.1 points in 2018, 1.1 points in 2020, and 0.2 points in November 2022. *See* Grimmer Rep. ¶ 107 & tbl. 20. These differences

[37] For the same reasons, Plaintiffs come nowhere close to showing a § 2 violation with their complaint that SB 202 "cut the total possible number of drop boxes …, with the largest decreases required in the eight counties … that are home to … 69% of the State's AAPI population." Opp. at 118-19. So, too, for Plaintiffs' claim that, "post-SB 202, Latino registered voters experienced a 15.5% decline in having a drop box located within 4.8 miles of their homes in the November 2022 election, while white voters experienced a 12.4% decline." Opp. at 129.

are far too small to support a § 2 claim. *See LWV II*, 66 F.4th at 935. Plus, to conclude from these data that SB 202's dropbox-hours rules have racially disparate impacts would require several more unsupported leaps—including that Black voters were more likely to have their most convenient dropboxes eliminated; that Black voters who returned absentee ballots during the four days before election day were not more likely to hand deliver them than use dropboxes; and that Black voters affected by SB 202 would experience more than minor inconvenience from having their first-choice dropboxes eliminated. None of these assumptions has been substantiated.

Plaintiffs try to bridge this logical gap by relying on data from Douglas County, which "is the only county in Georgia that recorded drop box use by voter in the 2020 election cycle." Opp. at 117. But, as this Court already held, not only is it inappropriate to draw conclusions about disparate impacts from a single county's data, *see* PI Order at 34 (citing *LWV II*, 66 F.4th at 933-34), even Douglas County's data do not suggest that reducing the number of dropboxes will disproportionately affect Black voters. Those data show that dropbox usage is heavily concentrated: "73.9% of Black voters returned their ballots to a single drop box location, while 64.7% of white voters returned their ballots to the most used location," as did most "Asian (75%), and Hispanic (67.3%) voters. Notably this … was also the drop box location available in Douglas County during the 2022 election cycle." Grimmer Rep. ¶ 136 (citation

omitted). If anything, these figures suggest that white voters were comparatively more affected than other groups because whites' use of dropboxes was less concentrated around this particular dropbox.

Plaintiffs' last-ditch effort to bridge the logical gaps in their argument is to assert that "[e]xtant evidence indicates that most voters use the drop box closest to their home," Opp. at 121, and so, the argument goes, SB 202 will have a racially disparate impact because several counties with large minority populations saw reductions in dropboxes. The facts suggest otherwise. According to an MIT survey, 35.9% of Georgia dropbox voters report selecting a drop-off location because it was "close to my home," whereas 25.9% chose somewhere "convenient to work or school" or "close, or on my way, to where I had errands to run"; and 15.2% chose "the only [location] available to [me]."[38] Grimmer Rep. ¶ 143. Even if some who chose drop-off locations because they

[38] Dr. Fraga attacks this finding, arguing that "Dr. Grimmer did *not* subset the survey data to drop box voters only, instead including individuals who reported that they dropped off their ballot at government offices, USPS collection boxes, or a number of other non-drop box locations." Fraga Sur-Rebuttal Rep. ¶ 56 (Pls.' Ex. 97). On the contrary, Dr. Grimmer's methodology was entirely valid. Dr. Fraga apparently would limit the inquiry to voters who selected the option saying they voted using a "[d]rop box used only for ballots, not located at an election office or polling place." The obvious problem with Fraga's contention is that many "drop boxes [are] located at a main election office or an early voting center.... So instead [Dr. Grimmer] use[d] a more appropriate definition that includes individuals who said they used a voting center," "a main election office," or "polling place because that's [a] mechanism whereby you would return your ballot there, it's through drop box." Tr. of 9/22/23 PI Hr'g at 241:24-242:7 (Ex. DD to DRSOF).

were the only ones available also happened to be choosing the locations closest to their homes, that still means that, at *most*, barely 50% of dropbox voters chose the dropboxes closest to their homes.

Non-survey data confirm these findings. When comparing the distribution of ballots returned via dropbox to population distribution, one finds that, "[a]cross all [Georgia] counties with more than one drop box in the 2020 election, the average maximum discrepancy between the share actually returned in a drop box and the share expected in that drop box" if voters were using the dropboxes closest to where they live "was 37.4 percentage points." *Id.* ¶ 150. And a similar pattern emerges when one breaks down this data by race: 21% of Black, 23% of white, 34% of Asian, 16% of Hispanic, and 22% of all "mail-in absentee voters who use drop boxes … return their ballots to the nearest drop box, and … mail-in absentee voters who use drop boxes return their ballots to the nearest drop box." *Id.* ¶ 145. In other words, there is no meaningful racial disparity—at least not a disparity that could possibly disfavor Black or Hispanic voters.

In sum, Plaintiffs have failed to raise a triable issue of material fact as to whether SB 202's dropbox provisions violate the VRA, § 2. The evidence lends no support to the claim that voters of color are more likely than white voters to have the most convenient dropboxes eliminated by SB 202. And, even if Plaintiffs had identified some such evidence, one cannot "make the

'unjustified leap from *the disparate inconveniences* that voters face when voting to *the denial or abridgement of the right to vote*.'" *GBM*, 992 F.3d at 1330 (quoting *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600-01 (4th Cir. 2016)). Section 2 prohibits "obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important.... Mere inconvenience," such as having to use one's second choice of a location to drop off an absentee ballot, "cannot be enough to demonstrate a violation of § 2." *Brnovich*, 141 S. Ct. at 2338. And would-be dropbox voters who find that intolerable also have many other ways to vote. *See id.* at 2339.

G. Plaintiffs fail to identify facts showing discriminatory intent behind the rules on distributing things of value to voters in line.

Nor could a reasonable factfinder conclude that SB 202's rules for handing things of value to voters in and around voting lines violate § 2 of the VRA. Plaintiffs' attack on this provision of SB 202 is twofold: First, they say the new rules make waiting in line less pleasant and thus render elections not equally open to voters of color, who experience longer average wait times at polling places; and second, they claim that SB 202's new rules for absentee voting will make lines longer because voters will opt to vote in person instead of absentee. Opp. at 131-32. There are major flaws in both theories—flaws that preclude their being used to establish a material issue of fact.

First, this Court has already rejected Plaintiffs' claim that SB 202's

restrictions on giving items of value to voters in line violate the VRA: "Plaintiffs presented evidence showing that, for voters waiting in line for more than sixty minutes, there were statistical differences of 0.1%, 2%, 2% and 4% for the elections held between 2014 and 2020. However, … the[se] statistics … show even smaller differences than those reviewed and rejected by the Eleventh Circuit" and hence do not "demonstrate that black voters wait in longer lines at a meaningfully higher rate than white voters." PI Order at 34 (citing *LWV II*, 66 F.4th at 935). No new evidence has surfaced that would warrant revisiting this conclusion.

Moreover, the 2022 data show that the difference in the percentages of white voters and voters of color in Georgia who waited in line for over 30 minutes was not statistically significant, and the overall percentage for both groups was remarkably low. The following table shows 2022 wait times for in-person voting in Georgia as reported by the Cooperative Election Study (CES) in the first three columns and by the *SPIA Survey*, at 5, in the shaded columns:

% Waiting > 30 mins.	White	Black	All Voters of Color	White	Black	"Other"
Not at all	43.3%	27.5%	28.5%	41.1%	32.2%	42.3%
Less than 10 mins.	38.2%	46.5%	43.8%	36.3%	36.5%	32.1%
10 – 30 mins.	14.2%	23.7%	24.3%	17.8%	27.3%	19.2%
31 mins. – 1 hour	3.14%	1.90%	2.3%	3.6%	3.4%	3.8%
More than 1 hour	1.16%	0.40%	1%	1.2%	0.6%	2.6%

Combining percentages, the CES data show that the percentage of White voters waiting in line more than 30 minutes was 4.3%, compared to 3.3% for

all voters of color and 2.3% for Blacks – again not statistically significant differences.[39] *See* Supp. Grimmer Decl. ¶ 9 tbl. 2. And those same data show that more than 72.3% of all voters of color waited in lines for fewer than 10 minutes, and 96.6% of all voters in color waited in line for fewer than 30 minutes, which is almost exactly the same as the 95.7% of white voters that report waiting in line less than 30 minutes.

But in any event, the core problem with Plaintiffs' line-length theory is that they have no evidence that SB 202's *restrictions on giving items of value to voters in line*, as opposed to the almost-nonexistence lengths of lines, render Georgia's electoral system not equally open to all. Plaintiffs baselessly declare that "[l]ine relief encouraged Black voters to stay in the long lines. Banning these efforts therefore disproportionately impacts Black voters." Opp. at 124. On the contrary, "even if the evidence established that black voters were more likely to wait in lines at the polls, that finding would not support a conclusion that the *solicitation* provision has a disparate impact on black voters." *LWV*

[39] Compared with 2018, the percentages of all three groups of Georgia voters waiting over 30 minutes were lower in November 2022, as were the already-small disparities between the groups. *See* Supp. Grimmer Decl. ¶ 9 tbl. 2 (showing that 16.24% of whites, 19.05% of Blacks, and 19.3% of all voters of color waited for over 30 minutes in 2018) (Ex. HH to DRSOF); *see also* Shaw Rebuttal Rep. ¶ 38 (wait times averaged "0 minutes to approximately 10 minutes"); Germany 6/15/23 Decl. ¶¶ 10–11 (Defs.' Ex. E) (average wait of 1 minute 45 seconds); Manifold 30:11–17 (Pls.' Ex. 35).

II, 66 F.4th at 937. One cannot simply "assume[] … that by restricting the ability of third parties to hand out water bottles and snacks," a statute "makes it harder for voters waiting in line to cast their ballots." *Id.* Yet that is the core of Plaintiffs' argument, and Plaintiffs have no evidence that line warming so disproportionately benefits voters of color that restrictions on the practice necessarily have any racially disparate impacts.

Plaintiffs' other theory—that SB 202 increases line length by causing voters to opt for absentee-by-mail over in-person voting—is equally baseless. The CES data on the 2022 election showed that the rate of mail-in voting in Georgia was 6.2%, higher than in any midterm (and higher than in *any* election except 2008 and 2020) since Georgia adopted no-excuse absentee voting in 2006. *See* Shaw Rebuttal Rep. ¶ 24 & fig. 5; Grimmer Rep. ¶ 54 & tbl. 7. Moreover, as mentioned earlier, turnout in Georgia was not down compared with other states and historical trends. There is therefore no evidence that SB 202 *caused* would-be absentee voters instead to opt for in-person voting, or to skip voting altogether. Plaintiffs' failure to connect these line-length issues to SB 202 dooms this branch of their VRA claim. *See Bruni v. Hughs*, 468 F. Supp. 3d 817, 824 (S.D. Tex. 2020); *Nemes v. Bensinger*, 467 F. Supp. 3d 509, 531 (W.D. Ky. 2020); *cf. Curling v. Raffensperger*, 50 F.4th 1114, 1123 (11th Cir. 2022).

For the foregoing reasons, State Defendants are entitled to summary

judgment on Plaintiffs' VRA challenge to SB 202's line-warming restrictions.

H. Plaintiffs fail to identify facts showing discriminatory intent behind the rules for provisional ballots.

Finally, Plaintiffs fail to establish a genuine factual dispute as to whether SB 202's restrictions on OP provisional voting violate § 2 of the VRA. According to Plaintiffs, "Evidence from 19 counties in November 2018, 77 counties in November 2020, and 67 counties in January 2021 shows that Black voters were more likely than white voters to cast OP ballots." Opp. at 124-25. But this claim is highly misleading. Rather, the share of *all* votes cast provisionally (of which OP provisional votes are only a subset) was less than half of one percent throughout the period from 2014 to 2022; and the gap between white and any other race of voters' rates of provisional voting never exceeded 0.44 percentage points. Grimmer Rep. ¶ 66 tbl. 8. These trivial differences do not come close to a VRA § 2 violation. And Plaintiffs' expert incorrectly portrays these gaps as larger than they are only by engaging in the same "statistical manipulation" that the Supreme Court recently condemned—namely, reporting the demographics of a tiny subgroup rather than those of all voters affected by the challenged statute. *See Brnovich*, 141 S. Ct. at 2345.

Finally, Plaintiffs fall back on arguing that, "[w]hile the raw numbers of voters who cast OP ballots may be small, the impact from not being able to cast an OP ballot on Election Day is severe: complete disenfranchisement." Opp.

at 127-28. But "small" is an understatement, and the rest of Plaintiffs' assertion is simply wrong: Under SB 202, if voters arrive at incorrect polling places after 5:00 p.m., they may vote provisionally if they execute a sworn statement that they are unable to vote at their correct precincts prior to closure of the polls. O.C.G.A. § 21-2-418(a). That is a far cry from "complete disenfranchisement," and Plaintiffs again come up short in identifying material factual disputes.

IV. SB 202 Serves Important Interests and Thus Would Have Been Enacted Absent Any Discriminatory Intent.

Finally, even if Plaintiffs had identified any substantial evidence that "racial discrimination [wa]s … a 'substantial' or 'motivating' factor behind enactment" of SB 202, it would still be constitutional because "the law would have been enacted *without* this factor." *Hunter*, 471 U.S. at 228. The sound public-policy rationales for SB 202's Challenged Provisions, discussed earlier, demonstrate that SB 202 would have been enacted despite any invidious legislative intent that may have existed—though, as explained, it didn't. Plaintiffs' constitutional intentional-discrimination claims therefore fail on this independent ground. Their claim under VRA § 2 fails for similar reasons: "Even if … [P]laintiffs had shown a disparate burden caused by" SB 202, "the State's justifications" for the Challenged Provisions "would suffice to avoid § 2 liability." *See Brnovich*, 141 S. Ct. at 2347.

CONCLUSION

All told, Plaintiffs have "attempt[ed] to establish" discriminatory intent "by firing a spirited volley of … charges, with the hope that the resulting smoke will be considered proof of fire.… [B]ut … the smoke dissipates with the firing of each charge." *Ronda-Perez v. Banco Bilbao Vizcaya Argentaria–P.R.*, 404 F.3d 42, 45 (1st Cir. 2005). While Plaintiffs may be right that one "must consider all of the evidence cumulatively," Opp. at 16 (cleaned up), at the end of the day, "[t]wo half-nothings is a whole nothin'," *Merrie Melodies: A Fractured Leghorn*, (Warner Bros. Sept. 16, 1950). And that is all Plaintiffs have advanced—nothing.

In short, even drawing all inferences in Plaintiffs' favor, they have simply failed to identify any genuine disputes as to material facts that have any bearing on their discriminatory-intent claims. And that is fatal to their attempt to defeat summary judgment. Accordingly, the Court should follow the path it set when denying Plaintiffs' preliminary-injunction motion, and conclude that there is no evidence from which a reasonable trier of fact could find that the Challenged Provisions were motivated by discriminatory intent. Accordingly, summary judgment should be entered for State Defendants on Plaintiffs' discriminatory intent claims.

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