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

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity of the Secretary of State for the State of Georgia, *et al.*, Defendants, REPUBLICAN NATIONAL COMMITTEE, et al. Intervenor-Defendants.	)	Civil Action Case No. 1:21-cv-1259-JPB

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO INTERVENORS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

After voters of color turned out in record numbers in the last election cycle, the Georgia General Assembly reacted in extreme fashion by passing SB 202, an omnibus voter suppression bill, packed with unlawful and unconstitutional restrictions intended to suppress the vote of Black voters and other voters of color in order to maintain the tenuous hold of the Republican Party over Georgia politics. Intentionally suppressing the electoral power of voters of color to achieve a partisan end violates both federal law and the United States Constitution. In their First Amended Complaint ("FAC"), Plaintiffs challenge eleven unlawful and unconstitutional provisions of SB 202 pursuant to the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, Section 2 of the Voting Rights Act, and the Civil Rights Act. FAC ¶¶ 3–8; 133–169 (challenged provisions); 170–238 (claims for relief).

Intervenors' motion to dismiss must be denied because it relies on conclusory statements, misreadings of SB 202, and incorrect interpretations of existing law to argue the merits of Plaintiffs' claims and they have failed to show that Plaintiffs' FAC fails to allege any plausible claims for relief meriting dismissal pursuant to F.R.Civ.P 12(b)(6). Additionally, to the extent Intervenors rely on the State Defendants' motion to dismiss, Intervenors' motion to dismiss should also be denied

because they failed to specifically identify which of the "several reasons" asserted in the State Defendants' Motion they are joining. (Intervenors' Mot. 1.) Alternatively, Intervenors' motion should be denied for the reasons set forth in Plaintiffs' Response to the State Defendants' Motion filed herewith. (*See* ECF No. 56.)

LEGAL STANDARD

For purposes of Intervenors' Rule 12(b)(6) motion, the FAC is adequately pled if it includes sufficient factual matter, which the Court must take as true and "draw all reasonable inferences in the plaintiff's favor," *PBT Real Estate, LLC v. Town of Palm Beach*, 988 F.3d 1274, 1286 (11th Cir. 2021), to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

In their FAC, Plaintiffs challenge eleven provisions of SB 202, including, but not limited to, SB 202's changes to Georgia's absentee voting laws. FAC ¶¶ 3–8; 133–169. Nevertheless, the first theory Intervenors posit in support of their motion to dismiss the entirety of Plaintiffs' right to vote claim in Count III of the FAC is based upon their contention that there can be no right to vote claim as a matter of law because they contend there is "no constitutional right to vote absentee." (Intervenors' Mot. 3–5.) Even were Intervenors right on the substance of their

argument, eliminating any absentee ballot claims would not affect any of the other bases of Plaintiffs' right to vote claim. In any event, Intervenors are wrong on the substance of their argument. Intervenors' second argument that right to vote claims must categorically apply to most voters, i.e., which they label as a "categorical approach," is similarly misguided.

One issue they raise can be disposed of summarily: although Intervenors acknowledge that Plaintiffs have brought a facial challenge to certain provisions of SB 202 they bizarrely argue that Plaintiffs' FAC should be dismissed because they lack standing to seek as-applied relief on behalf of members of organizations alleging associational standing. (Intervenors' Mot. 9.) Since Plaintiffs have not alleged an as-applied claim at this time, this contention does not support dismissal of the Plaintiffs' FAC.

A. Plaintiffs Have Adequately Pled a Right To Vote Claim.

A State may not place any burdens on the right to vote that are not adequately justified by the State's asserted interests. *See Anderson v. Celebrezze*, 460 U.S. 780, 899 (1983). When considering right to vote claims, courts must "weigh the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those

interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

The *Anderson-Burdick* framework is a "flexible" sliding scale, in which the "rigorousness of [the court's] inquiry" increases with the severity of the burden, ranging from rational basis for "reasonable, nondiscriminatory restrictions" to strict scrutiny for "severe" burdens that "categorically" burden the ability of an identifiable class of voters to take actions necessary to vote successfully. *Burdick*, 504 U.S. at 434; *see Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019); *see, e.g.*, *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1219 (N.D. Fla. 2018) (regulation failed the *Anderson-Burdick* test "because it disparately impose[d] significant burdens on Plaintiffs' rights weighted against imprecise, insufficiently weighty government interests."). That the burden impacts populations disparately is relevant to the inquiry. *Id.* Even where the burden is not "severe" enough to warrant strict scrutiny, courts will look to the "precision" with which the state's interests are advanced by the burdensome regulation. *Burdick*, 504 U.S. at 434. Where plaintiffs have plausibly alleged the challenged practice imposes a burden on voters under these standards, the allegations are sufficient to survive a motion to dismiss. *League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1288 (N.D. Fla. 2018). Thus, in *Duke*

v. Cleland, 5 F.3d 1399 (11th Cir. 1993), the Eleventh Circuit vacated and remanded the dismissal of plaintiffs' complaint because the court could not undertake a proper review under *Anderson-Burdick* at the pleading stage before the development of an evidentiary record. *Id.* at 1405–06.

Plaintiffs have adequately pled a plausible claim for relief that the challenged provisions of allegations of SB 202 on absentee voting burden the right to vote when weighed against the insufficiently weighty government interests here. *See* FAC ¶¶ 134–58 (challenged absentee voting provisions of SB 202), 202–15 (Count III allegations)). That is all that is required at this stage of the proceedings.

B. Intervenors' Contention that There is "No Right to Vote Absentee" Is Wrong and Not Pertinent To This Motion.

Intervenors' theory that there can be no plausible claim for relief on a right to vote claim involving challenges to absentee voting because there is "no constitutional right to vote absentee" (Motion 3–5) flies directly in the face of the Supreme Court's *Anderson-Burdick* test as well as Eleventh Circuit precedent and lower court decisions in the Eleventh Circuit which have consistently considered right to vote claims in the context of challenges to absentee voting laws and have granted relief to the plaintiffs. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d at 1318 (denying a motion for a stay sought by Intervenors of a preliminary

injunction enjoining Florida's absentee ballot signature verification process); *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017 (N.D. Fla. 2018) (granting preliminary injunction enjoining signature match protocol applicable to voters casting mail-in ballots); *People First of Alabama v. Merrill*, 487 F. Supp. 3d 1237 (N.D. Ala. 2020), *reconsideration denied*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020), *appeal dismissed sub nom. People First of Alabama v. Sec. of State for Alabama*, 20-13695-GG, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), *and appeal dismissed sub nom. People First of Alabama v. Sec. of State for State of Alabama*, 20-13695-GG, 2020 WL 7028611 (11th Cir. Nov. 16, 2020) (granting preliminary injunction enjoining certain absentee ballot witness and ID requirements due to the COVID-19 pandemic).

Intervenors first rely upon *McDonald v. Bd. Of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969) and a handful of non-binding cases from other jurisdictions applying *McDonald*.[1] But *McDonald* was decided long before the

[1] *McDonald*: *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020) (Decision of motions panel, not merits panel, deciding probability of success, not actual success on the merits); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) (Order granting summary judgment to plaintiffs in a challenge to the state's deadline to apply for an absentee ballot due to plaintiffs' incarceration reversed on appeal); *Tully v. Okeson,* 977 F.3d 608, 611 (7th Cir. 2020) (Plaintiffs sought a preliminary injunction challenging Indiana's absentee voting law that restricted absentee voting to certain classes of individuals due to the Covid-19 pandemic). (Intervenors' Mot.

Supreme Court adopted the *Anderson-Burdick* test in 1983 to analyze constitutional right to vote claims. It concerned a person, who claimed his Equal Protection rights were violated because he was not allowed to vote absentee when in pretrial custody, but others who were "physically incapacitated" could. *Id.* at 807–08. The court's grant of summary judgment against plaintiff was specifically based on an absence of record evidence in his favor:

> Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.

Id. at 807–08 (emphasis added). *McDonald* is a slender reed upon which to base disposition of Plaintiffs' claim at this stage of the proceedings. This is particularly so in light of the fact that right to vote jurisprudence has developed from the subsequent *Anderson-Burdick* framework to allow courts to entertain a myriad of claims dealing with aspects of voting as to which there might not be a constitutional right per se, but which assume constitutional proportion when the burdens imposed on that right are weighed against the state's justification.

3–5). These decisions are not binding in the Eleventh Circuit, did not involve motions to dismiss, and are also distinguishable on their facts.

Intervenors' reliance on *New Ga. Proj. v. Raffensperger*, 976 F.3d 1278 (11th Cir. 2020) (review of grant of preliminary injunction) and the concurring opinion, *id.* at 1284–89 (Lagoa, J.) for the same proposition as in *McDonald* is similarly misplaced. The majority opinion merely concluded, in the context of review of a grant of a preliminary injunction, that the district court had misapplied the *Anderson-Burdick* test in granting an injunction barring enforcement of Georgia's Election Day deadline for receipt of absentee ballots. *Id.* at 1280. It did not categorically remove absentee ballot cases from the *Anderson-Burdick* framework.

The concurring opinion—which is not precedent—is also inconsistent with the Eleventh Circuit's controlling precedent in *Democratic Exec. Comm. of Fla.*, *supra* page 4, and other decisions granting relief in cases challenging absentee ballot procedures. *See, e.g.*, *People First of Alabama*, *supra* page 6.

C. Intervenors' "Categorical Approach" Should Be Rejected.

Intervenors next argue that a right to vote claim does not advance to the *Anderson-Burdick* test unless it "categorically" burdens all voters, rather than a "few voters" or a subset of the electorate. (Intervenors' Mot. 6–9.) In support of this

theory, Intervenors cite Justice Scalia's opinion concurring in the judgment in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205 (2008).[2]

First, the "categorical approach" argument is not relevant to this case, even if it were the law. Nowhere do Intervenors explain why the FAC's claims are on behalf of a "few voters," or a "small subset" of voters. In fact, the FAC claims are on behalf of all voters, and particularly all Black voters and other voters of color. How many of these voters may be impacted by the individual and cumulative effect of the challenged provisions of SB 202 will be the subject of exposition as the case proceeds, but is decidedly an inappropriate question for decision at this stage.

But, in any event, Intervenors are wrong. They first acknowledge, as they must, that the lead opinion in *Crawford* never embraced this "categorical approach." (Intervenors' Mot. 6). Moreover, while Intervenors also cite cases from within the Eighth Circuit which they argue support the "categorical approach," the court in one of them, *League of Women Voters of Minnesota Educ. Fund v. Simon*, 20-CV-1205, 2021 WL 1175234, at *8 (D. Minn. Mar. 29, 2021), acknowledged that there was disagreement in the circuits regarding this issue.

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[2] While Intervenors also argue that several out of circuit lower courts have followed Justice Scalia's concurrence (Intervenor's Motion 8), those decisions are not binding precedent in the Eleventh Circuit.

More crucially, contrary to Intervenors' argument (Intervenors' Mot. 8), the law of this Circuit does not support them. The court in *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1261 (11th Cir. 2020), did cite to Justice Scalia's opinion in *Crawford*, but only to explain that the issue before it—whether the ballot order of candidates violated *Anderson-Burdick*—did not burden the right to vote at all. Indeed, the court went on to say that, even if the ballot order burdened the right to vote "slightly," it would proceed to analyze the claim under *Anderson-Burdick*, *id.* at 1262—a far cry from a "categorical approach." And, while the court in *Greater Birmingham Ministries v. Sec'y of State for Ala.* ("*GBM*"), 992 F.3d 1299 (11th Cir. 2021) (challenge to a photo identification law), cited Justice Scalia's opinion in *Crawford*, the Court expressly stated that it would "proceed with a full review of Plaintiffs' claims," even in the context of a full evidentiary record, "despite the analysis and result in *Crawford*," *GBM*, 992 F.3d at 1321. A fair reading of the case completely belies Intervenors' implicit argument that the Eleventh Circuit had relied on Justice Scalia's "categorial approach" in a right to vote case. [3]

[3] While Intervenors also cite three Supreme Court cases from which they claim their "categorical approach" follows, none of the blurbs cited at the bullet points on pages 6 and 7 of their Motion appear to stand for the proposition that a right to vote claims must be predicated on a "categorical" burden to all or "most' voters equally in order to state a claim for relief. (Intervenors' Motion 6–7). Intervenors failed to provide a citation to the first case in the bullet point list at the bottom of page 6 of

Based upon the foregoing, Intervenors failed to demonstrate that Plaintiffs motion should be dismissed for the failure to state a plausible claim for relief based upon their contention that the claim is barred by a "categorical approach" that avoids analysis under *Anderson-Burdick* test—an approach which has not been adopted by the Supreme Court or Eleventh Circuit.

D. Plaintiffs Alleged Sufficient Section 2 Discriminatory Results and Discriminatory Intent Claims in Counts I and II of the FAC.

Relying almost entirely on the recent Supreme Court decision in *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021), and by improperly arguing the merits of the Plaintiffs' underlying Section 2 claims in their F.R.Civ.P. 12(b)(6) motion to dismiss, Intervenors incorrectly contend Plaintiffs cannot state a sufficient claim for relief on their Section 2 discriminatory results or discriminatory intent claims alleged in Counts I and II of the FAC as a matter of law. (Intervenors' Mot. 10–17.)

First and foremost, there is nothing in the *Brnovich* opinion that suggests the Supreme Court changed the standards by which a court determines whether a complaint states a sufficient claim for relief under F.R.Civ.P. 12(b)(6), including in

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their motion and did not cite to any part of the decisions in these cases showing that the Court adopted the "categorical approach" they contend must be applied here. (Intervenors' Motion 6.)

Section 2 cases. In fact, other than its reiterating the prior settled standard, *Brnovich* has no bearing on the question of whether Plaintiffs' FAC states a sufficient claim for relief under F.R.Civ.P. 12(b)(6) as it was decided based on a review of a ten-day trial record and never mentions Rule 12(b)(6) in the opinion. *Id.* at 2334.

Moreover, the Court in *Brnovich* expressly stated it was not creating a test for all Section 2 challenges to "time, place and manner" voting laws. Instead, the Court stated that it was sufficient in its first case involving "vote denial" claims under Section 2 of the Voting Rights Act to "identify certain guideposts that lead us to our decision in these cases"—i.e., apparently referring to the two cases before it in *Brnovich* rather than Section 2 cases more generally. *Id.* at 2336.

And the Court reaffirmed that an "important feature" of Section 2 is the statute's provision requiring consideration of "the totality of circumstances." *Id.* at 2338. In fact, the Court stated that "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered" and that the Court "will not attempt to compile an exhaustive list, but several important circumstances should be mentioned." *Id.*

Among other considerations, the Court acknowledged that past racial discrimination and its persistent effects remain relevant to the totality of circumstances analysis employed in Section 2 claims. *Id.* at 2340. The Court also

made it clear that a plaintiff may still bring a Section 2 discriminatory results claim without having to prove discriminatory purpose in order to plead and prove a Section 2 claim. *Id.* at 2341. The Court also did not change the "familiar" framework for analyzing Section 2 discriminatory results claims utilizing the *Arlington Heights* factors. *Id.* at 2349.

Indeed, that the "non-exclusive guideposts" discussed by Justice Alito in *Brnovich* were meant to be applied at the merits stage of a case, and not at a motion to dismiss stage, flows naturally from the fact that the Court went on to analyze the factual record of the case, and did not rule as a matter of law that certain claims could not be applicable.

E. *Brnovich* Does Not Support the Dismissal of Plaintiffs' Section 2 Discriminatory Results Claim on the Pleadings.

Despite the Supreme Court's clear statement that its non-exclusive guideposts in *Brnovich* should not be read as a "test" for determining the merits of Section 2 claims generally, Intervenors have elevated the guideposts into "sub-rules" that, they contend, stop this case at the pleading stage. But, even if the Court is required to consider the five "non-exclusive guideposts" referred to by the Court in *Brnovich*, along with the "totality of the circumstance" analysis at this stage, it is clear Plaintiffs have alleged a plausible claim for relief under a Section 2 results theory in the FAC.

First, to the extent that *Brnovich* stands for the proposition that voters must "tolerate the usual burdens of voting," including "mere inconveniences," does not mean, as Intervenors would have it, (Intervenors' Mot. 11), that Plaintiffs' claims do not rise higher than those levels. This case challenges several forms of abridgement of Plaintiffs' rights, including at least four different ways that voting absentee is made more difficult. These changes include imposing restrictions on assistance provided to voters by third parties, including by Plaintiffs' organizations, which include the threat of financial and criminal penalties; truncating deadlines for requesting absentee ballots; imposing burdensome and arbitrary ID requirements that force voters to make multiple copies of ID documents even when they have a Georgia "free" voter ID and other acceptable ID documents for in-person voting if they do not have a Georgia drivers' license or state ID number (FAC ¶¶ 134-58); disenfranchising in-county out of precinct voters, including in communities of color where closures, consolidations and moving polling places has led to confusion about where voters are assigned to vote on Election Day and disproportionately result in long lines and delays at polls in communities of color (FAC ¶¶ 159-61); allowing unlimited voter challenges with only three days' notice by mail to challenged voters (FAC ¶¶ 164–65); prohibiting line-relief for voters faced with long lines at polls, particularly in communities of color (FAC ¶¶ 166–67); and prohibiting mobile

voting units to reduce long lines at polls except in emergencies declared by the Governor, including in Fulton County, the only county which previously dispatched mobile voting units and is more than 44% Black, (FAC ¶¶ 168–69).

The degree of inconvenience caused by these provisions, individually and cumulatively, is clearly something not to be decided at the pleading stage. And nothing in *Brnovich* suggests that it should be.

Similarly, that the extent to which the methods of voting subject to Plaintiffs' challenge were in effect in 1982 should be "taken into account," means just that. It is a non-exclusive factor to be weighed ultimately in the totality of the circumstances, and, it will certainly be the subject of evidence and argument at the merits stage. But Plaintiffs' failure to specifically mention it in the FAC—particularly when it had never been hinted at previously in any case—is hardly the stuff of which dismissal for failure to state a claim is made of.[45]

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[4] In fact, the *Brnovich* Court noted, "[w]e have no need to decide whether adherence to, or a return to, a 1982 framework is necessarily lawful under § 2, but the degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account." 141 S. Ct. at 2339.

[5] If the Court believes otherwise as to this guidepost or any other, Plaintiffs respectfully request leave to file an amended complaint to address them.

Likewise, while the *Brnovich* Court discussed the sort of proofs that can support a finding of disparate treatment, and warned against the magnification of what it called "small numbers," nowhere did it rule that the precise disparities must be averred in the complaint, as opposed to through admissible factual and expert testimony.[6] Nevertheless, Plaintiffs did allege facts in the FAC supporting an inference that the challenged provisions of SB 202 disproportionately burden Black voters and voters of color, including because of their increasing levels of voter registration, turnout and use of the specific methods of voting that have been made more burdensome for them to utilize. (FAC ¶¶ 89–169.) Although Intervenors may not like these allegations, or think they are "inflated" or "statistical fallacies," (Intervenors' Mot. 13), this does not rise to the level of a demonstration of implausibility, which is the standard for this Motion, not Intervenors' extra-pleadings and completely unsubstantiated feelings.

[6] The *Brnovich* Court observed that the plaintiffs had been unable to produce statistical data at trial on the disparate impact of the ballot collection ban on minority voters and if they had, it might have allowed the fact-finder to reach a conclusion that the challenged law resulted "in less opportunity" for minority groups "to participate in the political process." *Id.* at 2346-47. However, there is nothing in the *Brnovich* opinion which mandates that plaintiffs allege such data in the initial pleadings.

Again, while ultimately, Georgia's entire system of voting may be relevant in order to assess the degree of denial or abridgement of Plaintiffs' right to vote (Intervenors' Mot. 13), this does not mean that the FAC should be dismissed at this stage. In any event, the FAC did discuss much of Georgia's entire system of voting, because SB 202 adversely impacted that entire system, the essence of Plaintiffs' claims. (FAC ¶¶ 3–8, 89–169, 199.) Plaintiffs also allege that SB 202 permits the majority party in the legislature to take-over county boards of election to potentially nullify the lawful votes of Black voters and voters of color. (FAC ¶¶ 162–63.) This provision alone would trump all other aspects of Georgia's voting systems through the disenfranchisement of Black voters and other voters of color—regardless of the method they used to cast a ballot.

The remainder of Intervenors' argument on the issue of Georgia's entire electoral system simply proves Plaintiffs' point: they are arguing the merits, not the adequacy of the pleadings. They may believe that every Georgia voter would be able to vote absentee or during early voting under SB 202, but the FAC plausibly alleges otherwise: that some voters may not be able to apply for absentee ballots the week prior to elections any longer; that some voters may not be able to meet the new ID requirements for absentee ballots; that some voters may not be able to vote without access to drop boxes or early voting sites open at the hours they had been in the past;

that some voters may, by circumstances influenced by their race, be more apt to vote out-of-precinct and not be able to cure it; and that some voters may not be able to vote because of the cumulative burdens imposed by SB 202.

Finally, that the State's interests must be taken into account and that fraud prevention may be a strong interest does not compel dismissal either. *Brnovich* nowhere ruled (Intervenors' Mot. 14) that pretextual justifications as alleged in the FAC, ¶ 198—even those of fraud prevention—are adequate. The validity of the State's asserted interest will be a factor at the right time: the merits stage.

F. *Brnovich* Does Not Mandate Dismissal of Plaintiffs' Section 2 Intent Claim in Count I of the FAC.

The Court in *Brnovich* did not change the pleading requirements for Section 2 discriminatory purpose claims. In fact, the Court reaffirmed what it referred to as the "familiar" framework for analyzing Section 2 discriminatory purpose claims outlined in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266–68 (1977). *Brnovich*, 141 S. Ct. at 2349. [7]

[7] The *Arlington Heights* factors are: "(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; and (5) the contemporary statements and actions of key legislators." *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1321-23 (11th Cir. 2021). The Eleventh Circuit also considers: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives." *Id.*

Plaintiffs have sufficiently pled allegations addressing the relevant *Arlington Heights* factors: FAC ¶¶ 2–8; 80–102; 111–32 (Georgia's history of voting discrimination, including recent history; and legislative history of SB 202 in this context); FAC ¶¶ 117–32;183 (deviation from procedural norms in the legislative history of the bill); FAC ¶¶ 2–3; 92–116, 117–32; 180–86 (sequence of events surrounding the passage of SB 202); FAC ¶¶ 186–87 (facts showing the decisionmakers were on notice of foreseeability of discriminatory racial impact and existence of less discriminatory alternatives). The FAC also alleges SB 202's discriminatory effect on the organizational Plaintiffs and voters of color. (FAC ¶¶ 2–8; 99-201.)

Unable to refute that Plaintiffs have easily met the plausibility standard applicable to this motion, Defendants improperly argue the merits of Plaintiffs' Section 2 discriminatory purpose claim, contending that Plaintiffs have not shown that the entire Georgia legislature is "racist," that the only "reliable evidence" consists of the self-serving legislative "findings" in the preamble to SB 202, and that partisan motives are not the same as racist motives, ignoring that racial animus is not an element of an intentional discrimination claim, and that Plaintiffs have alleged that the legislators used race to discriminate against Black voters and voters of color to achieve a partisan end. *North Carolina State Conference of NAACP v. McCrory*,

831 F.3d 204, 222 (4th Cir. 2016) ("Intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose.").[8]

Further, Intervenors' reliance on SB 202's preamble as demonstrating lack of discriminatory purpose ignores that the very purpose of the *Arlington Heights* factors is to use them to determine whether inferences of an invidious purpose can be drawn from facially neutral laws. *Arlington Heights*, 429 U.S. at 270. Such inferences must be drawn here in Plaintiffs favor on this motion.

Based upon the totality of the circumstances alleged in the FAC, reasonable inferences can be drawn in Plaintiffs' favor that Georgia's General Assembly enacted SB 202 with a discriminatory intent to suppress the vote of Black voters and other voters of color by (1) making it more difficult to vote absentee (FAC ¶¶ 134–47); (2) making it more difficult to vote during early voting periods and to access ballot drop boxes (FAC ¶¶ 148–58); (3) disenfranchising out of precinct voters (FAC ¶¶ 159–61); (4) by giving the General Assembly the ability to take control over

[8] Intervenors argue that Plaintiffs alleged the legislature had a partisan motive which is not actionable following *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019). (Intervenors' Mot. 17). But a partisan motive does not excuse a racial motivation, when there is proof of the latter, and *Rucho* does not suggest otherwise.

county boards of election in counties with large percentages of voters of color (FAC ¶¶ 162–163); (5) by encouraging unlimited voter challenges with only three days' notice by mail to voters being challenged (FAC ¶¶ 164–65); (6) by criminalizing line-relief for voters faced with long lines at polls (FAC ¶¶ 166–67); and (7) by prohibiting the use of mobile voting units to help reduce long lines at polls except in emergencies declared by the Governor. (FAC ¶¶ 168–69). Intervenors have failed to show otherwise. Therefore the motion to dismiss should be denied.

G. Plaintiffs Have Stated A Plausible First Amendment Claim Based On SB 202's Line-Relief Ban.

The Intervenors are the only Defendants to even suggest that Plaintiffs' First Amendment challenge to the criminalization of line-relief in Count 5 of the FAC ¶¶ 223–32 fails to meet the expressive conduct and speech requirement. Their slim two-paragraph argument, (Intervenors' Mot. 18–19), does not even consider or distinguish the recent and primary Eleventh Circuit precedent that finds specifically that the expressive conduct of feeding persons meets the First Amendment test if the conduct appears to express "some sort of message." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1243 (11th Cir. 2018) ("[F]ood sharing events are more than a picnic in the park. FLFNB has established an intent to 'express[ ] an idea through activity,' and the reasonable observer would interpret

its food sharing events as conveying *some* sort of message") (citation omitted, emphasis in original). Moreover, Intervenors are dead-wrong when they argue that O.C.G.A. § 21-2-414(a) "regulates conduct alone." (Intervenors' Mot. 18). The statute, by its terms, also criminalizes speech as well—"offer[ing]" food and water.

Finally, Intervenors misapprehend the scope of Plaintiffs' challenge, and they drift into inapplicable cases about gifts, collecting ballots, collecting voter-registration ballots, and distributing absentee ballots. (Intervenors' Mot. 18). Plaintiff's challenge, as stated in the FAC, is specifically targeted to that portion of O.C.G.A. § 21-2-414(a) that implicates the line-warming activities engaged in by Plaintiffs, namely the expressive speech and conduct of offering food and drink and/or providing food and drink. (FAC ¶¶ 3, 5, 24, 36, 37, 44, 57, 69, 166, 167, 223–232.)

Intervenors' remaining arguments match those of named Defendants. They too fail to recognize that the restriction is a content-based regulation in a traditional public forum that triggers strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (defining content-based restrictions); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (law barring electioneering within 100 feet of a polling place "bars speech in quintessential public forums."). And Intervenors' remaining cases are easily

distinguishable.[9]

Plaintiffs have presented a highly plausible claim that the restriction on expressive speech and conduct supporting voting in a traditional public forum does not survive strict scrutiny. Accordingly, Intervenors' motion to dismiss Plaintiffs' line relief claim in Count V of the FAC should be denied.

CONCLUSION

For the foregoing reasons, Intervenors' motion to dismiss should be denied in its entirety. In the event the Court decides to dismiss all or part of the FAC for a

[9] While Intervenors cite *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), that case actually struck down a Minnesota law that prohibited individuals, including voters, from wearing a "political badge, political button, or other political insignia" inside the polling place buildings on Election Day. The invalidated law in *Mansky* was actually a closer question than the expressive conduct and speech restriction on food and drink here. The Supreme Court found that the Minnesota law addressed only speech activity within the building—a "non-public forum." *Id.* at 1886 ("A polling place in Minnesota qualifies as a nonpublic forum."). Here, Georgia's law has far broader geographic reach—"150 feet of the outer edge of a building." In contrast to the *Mansky* non-public forum, the area covered by Georgia's law is a "traditional public forum" for free speech purposes. *Burson*, 504 U.S. at 196 (Tennessee law barring electioneering within 100 feet of a polling place "bars speech in quintessential public forums"). Beyond this important difference in forum analysis, the *Mansky* law that was also struck down involved speech in support of a particular candidate which at least triggered concerns "that partisan discord not follow the voter up to the voting booth." 138 S. Ct. at 1888. In contrast, the positive and non-partisan expressive act of offering and providing food and water to voters as a "thank you" advances the government interest also articulated in *Mansky* to support the "sense of shared civic obligation," *id.*, without any partisan message.

failure to state a claim under F.R.Civ.P. 12(b)(6), Plaintiffs request leave to amend, particularly if the Court is inclined to dismiss on account of the Supreme Court's decision in *Brnovich* which was decided on July 1, 2021—after Plaintiffs filed their FAC on May 28, 2021.

Respectfully submitted,

Dated: July 26, 2021

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS has been prepared in Times New Roman 14, a font and type selection approved by the Court in L.R. 5.1(C), and that I provided notice and a copy of the foregoing using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

Respectfully submitted this 26th day of July, 2021.

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