UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE NEW GEORGIA PROJECT, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, Defendants.	Civil Action No. 1:21-cv-01229-JPB

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PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENORS' MOTION TO DISMISS

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INTRODUCTION

A Rule 12(b)(6) motion tests the legal sufficiency of the pleadings. It is not an opportunity to ask the court to construe the allegations in the complaint against the plaintiff, nor is it a mechanism to resolve fact-intensive legal questions.

Intervenors ignore this and try to inject evidentiary disputes prematurely into the pleadings stage in their motion to dismiss. They also mischaracterize Plaintiffs' actual claims. The Amended Complaint ("Complaint") does not, as Intervenors contend, challenge a few discrete absentee voting rules. It plainly alleges that SB 202's multiple interrelated restrictions impose a broad and cumulative burden on voting rights in Georgia, especially for Black voters, and must be evaluated holistically in light of the entirety of the circumstances. Intervenors' attempt to rewrite the Complaint as if Plaintiffs are challenging each individual provision in a separate silo is inappropriate. As actually pled, Plaintiffs' Complaint more than satisfies the standard to survive a motion to dismiss.

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Intervenors also misread the Supreme Court's recent ruling in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), and misapply its non-exhaustive, fact-intensive guideposts to create dispositive rules for resolving Section 2 discriminatory result claims on the pleadings. But the Court was clear that it was *not* creating any bright-line rules. Instead, it emphasized that discriminatory result

claims must be resolved based on the totality of the circumstances and on a clearly developed record. This is further reason to reject the motion to dismiss, not grant it.

With regard to Plaintiffs' constitutional claims, Intervenors either reject applicable case law or stretch precedent to make propositions that are unsupported by the cases themselves. For example, they rely heavily on Justice Scalia's minority opinion in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), in formulating their preferred standard for Plaintiffs' right-to-vote claims while openly contradicting the applicable *Anderson-Burdick* standard. But a majority of the justices in *Crawford* actually *reaffirmed* that standard. Not only could the Eleventh Circuit not properly elevate a minority of justices' view to the law of the land, but it has not done so. And at the same time that Intervenors are making up precedent that the Eleventh Circuit has never actually blessed, they completely ignore that the court has in fact found that the provision of food and water *is* expressive conduct protected by the First Amendment. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018). These controlling precedents, among others, are fatal to Intervenors' motion to dismiss.

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LEGAL STANDARD

On a Rule 12(b)(6) motion to dismiss, the allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Chaparro*

v. Carnival Corp., 693 F.3d 1333, 1335 (11th Cir. 2012). The standard is not vigorous: a motion to dismiss must be denied so long as the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (omissions).

ARGUMENT

I. Plaintiffs have stated a right-to-vote claim.

Although the Supreme Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), supplies the appropriate standard for constitutional challenges to voting laws—commonly referred to as the *Anderson-Burdick* test—Intervenors rely instead on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), a pre-*Anderson* decision which held that a state's refusal to extend absentee voting to unsentenced pre-trial detainees did not violate the Equal Protection Clause. *See* Mot. at 3-5. But unlike the law in *McDonald*, SB 202 is an omnibus bill that touches virtually all aspects of the voting process. And Plaintiffs challenge not only absentee voting restrictions, but also provisions that make it harder to vote in person, all of which "individually and *cumulatively* operate to impose unconstitutional burdens" on the voting process. Am. Compl. ¶¶ 11, 158-63 (emphasis added).

Furthermore, the Supreme Court has been clear in its *Anderson-Burdick* jurisprudence: there are *no litmus tests* dividing appropriate restrictions from invalid

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ones. *Crawford*, 553 U.S. at 191. In every case, the court must take a hard look at the evidence and determine whether the burdens imposed by the restrictions are justified by the specific interests set forth by the state. *Anderson*, 460 U.S. at 789-90. These are highly fact-based questions. *See id*. To accept Intervenors' argument would be to find that there *is* a very broad litmus test shielding great numbers of restrictive voting laws from review entirely, a view that the Supreme Court has *never* come anywhere close to endorsing since announcing the *Anderson-Burdick* test.

Even if *Anderson* had never been decided (and of course it was, and is binding on this Court), Intervenors far overread *McDonald*. The decision does not stand for the proposition that absentee voting restrictions do not implicate the right to vote. In decisions that closely followed *McDonald*, the Supreme Court acknowledged just the opposite: restrictions on absentee voting *can* impose burdens that violate equal protection. *See Am. Party of Tex. v. White*, 415 U.S. 767, 794 (1974); *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974). In other words, *McDonald* does not establish any categorical rules at all; it is simply another case that shows how the *factual record* is critical. *See* 394 U.S. at 806, 808 (finding "nothing in the record to support" claims in that case). Similarly, in *New Georgia Project v. Raffensperger*, the Eleventh Circuit did not reject the fact-intensive *Anderson-Burdick* analysis for challenges to

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absentee ballot restrictions. 976 F.3d 1278, 1280 n.1 (11th Cir. 2020).[1] Instead, it "look[ed] at the evidence" and then weighed the state's interests against what it called a "reasonable burden." *Id.* at 1281-82. Such analysis is impossible without a factual record, and courts' repeated emphasis on "evidence" confirms that a decision on the pleadings is premature given the robust allegations in the Complaint. *See O'Brien*, 414 U.S. at 529 (noting *McDonald* "rested on failure of proof").

The cases Intervenors cite confirm this: nearly all were decided on a fully developed factual record. *Burdick v. Takushi*, 504 U.S. 428, 432 (1992) (same); *Washington v. Davis*, 426 U.S. 229 (1976) (same); *McDonald*, 394 U.S. at 802 (same).[2] So was the Supreme Court's decision in *Crawford*, 553 U.S. at 191 (decided

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[1] *New Georgia Project* is also an unpublished, non-binding stay panel decision written "only for the parties' benefit." 976 F.3d at 1280 n.1.

[2] And so on: *Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021)(same); *Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020) (same); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1236 (11th Cir. 2020) (appeal of judgment after bench trial); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 612 (6th Cir. 2016) (same); *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009) (same); *Clingman v. Beaver*, 544 U.S. 581, 581 (2005) (same); *Tully v. Okeson*, 977 F.3d 608, 608 (7th Cir. 2020) (appeal of denial of motion for preliminary injunction); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220 (5th Cir. 2020) (motion for stay pending appeal of summary judgment order); *New Ga. Project*, 976 F.3d at 1278 (granting stay of preliminary injunction pending appeal); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020) (same); *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020) (cross-appeals of preliminary injunction); *cf. Storer v. Brown*, 415 U.S. 724, 724 (1974) (in ballot-qualification decision pre-dating *Anderson*, affirming dismissal in part and vacating and remanding in part for

after summary judgment), which cautioned that there is "no litmus test for measuring the severity of a burden that a state law imposes." And that is the reason why the Eleventh Circuit has reversed dismissals of right-to-vote claims at the pleadings stage. *See Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993) (concluding it was "impossible for [the court] to undertake the proper" *Anderson-Burdick* analysis when "[d]iscovery has not commenced"); *Bergland v. Harris*, 767 F.2d 1551, 1555 (11th Cir. 1985) (vacating and remanding dismissal to allow time "to develop the factual record necessary to follow the weighing process dictated by *Anderson*"); *see also Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1343 (11th Cir. 2020) ("[*Berland*] concluded that there was 'an insufficient factual record to carry out the *Anderson* requirements' because the evidentiary materials [were] 'inadequate.'"); *Soltysik v. Padilla*, 910 F.3d 438, 450 (9th Cir. 2018) (without a factual record, courts will find themselves "in the position of Lady Justice: blindfolded and stuck holding empty scales").

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Intervenors fare no better with their suggestion that this Court disregard burdens that do not impact *all* voters. Such an approach would run entirely contrary

further factfinding). *But see League of Women Voters of Minn. Educ. Fund v. Simon*, File No. 20-cv-1205 (ECT/TNL), 2021 WL 1175234 (D. Minn. March 29, 2021) (unpublished out-of-jurisdiction district court decision rejecting challenge to absentee-ballot witness requirements).

to how the Supreme Court has applied *Anderson-Burdick* dating back to its very inception. At issue in *Anderson* was the constitutionality of a deadline by which independent candidates must file to appear on the general election ballot. 460 U.S. at 782-83. The Court recognized "that the March filing deadline places a *particular burden* on an identifiable segment of Ohio's independent-minded voters," and "it is especially difficult for the State to justify a restriction that limits political participation *by an identifiable political group*[.]" *Id.* at 792-93 (emphasis added). In *Crawford*, too, six justices agreed that in evaluating burdens, courts should consider a law's impact on *identifiable subgroups* for whom the burden may be more severe. 553 U.S. at 199-203 (plurality op.); *id.* at 212-23, 237 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting). Lower courts have followed these instructions. *See, e.g.*, *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016); *League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1216-17 (N.D. Fla. 2018); *Veasey v. Perry*, 71 F. Supp. 3d 627, 686 (S.D. Tex. 2014), *vacated in part on other grounds*, 830 F.3d 216 (5th Cir. 2016) (en banc).

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Even the cases Intervenors cite do not embrace the approach that they urge this Court to adopt. In *Clingman v. Beaver*, 554 U.S. 581 (2005), the Court undertook the very subgroup-focused analysis that Intervenors claim it did not. *Id.* at 590-91 (analyzing specific burdens on political party and its supporters). And in *Storer* 415

U.S. 724, the Court remanded one set of claims "to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President under California law," *id.* at 740—which not only required the court to focus its burden analysis on a specific group (independent candidates), but also confirmed the fact-specific nature of the inquiry.

While Intervenors cite at length Justice Scalia's minority opinion in *Crawford* to advance their preferred standard, Mot. at 7-8, it does not govern. District courts apply majority opinions from higher courts, i.e. *Anderson*, until those decisions are overruled. The cases Intervenors rely on, despite citing snippets of Justice Scalia's minority opinion, do not suggest otherwise. *See Greater Birmingham Ministries,* 992 F.3d at 1327 (11th Cir. 2021) (quoting Scalia concurrence in consideration of *Arlington Heights* factors to reject discriminatory intent claim; no *Anderson-Burdick* right-to-vote claim at issue); *Jacobson*, 974 F.3d at 1261 (quoting inapposite line from Scalia concurrence); *Richardson*, 978 F.3d at 236 (citing Scalia concurrence in non-precedential motions panel ruling to reject "plaintiff-by-plaintiff" burden examination, but recognizing that "*Crawford*'s three-Justice plurality did not go as far as the three-Justice [Scalia] concurrence"); *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 631 (applying "[*Crawford*] controlling opinion's more liberal approach to burden measuring," not Scalia concurrence). Namely, to suggest that *Anderson-*

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Burdick is unconcerned with voting restrictions that burden identifiable groups gets the law exactly backwards, and this Court should not endorse this approach.

II. Plaintiffs more than adequately plead a Section 2 claim.

A. *Brnovich* does not create any bright-line rules or suggest that Section 2 claims should be resolved on the pleadings.

Brnovich addressed how Section 2's discriminatory results (or "vote denial") prong applies to cases challenging state laws "that specify the time, place, or manner for casting ballots." 141 S. Ct. at 2336. It clarified that courts should focus on a state's political process as a whole rather than on individual election code provisions—and ask whether "the process of voting [is] 'equally open' to minority and non-minority groups alike." *Id.* at 2337. Rather than announce any categorical or dispositive rules, the Court tread carefully since *Brnovich* was its "first foray into the area," *id.* at 2336; instructed courts to consider "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity'" in a discriminatory results case, *id.* at 2338; and offered a non-exhaustive list of "guideposts" that courts may use in their "totality of the circumstances" analysis. *Id.*

These guideposts confirm that a vote denial case should be resolved *after the factual record is developed* so a court can fully assess the totality of the circumstances. *Brnovich* does *not* create a new pleading standard that would permit dismissal here, as Intervenors urge. Balancing tests are, by their "very nature,

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generally inappropriate for [a] Rule 12(b)(6) dismissal for failure to state a claim." *Democratic Nat'l Comm. v. Bostelmann*, 466 F. Supp. 3d 957, 966-67 (W.D. Wis. 2020) (collecting cases). And the Eleventh Circuit has recognized that premature dismissal of a case involving a fact-intensive balancing test "makes it impossible . . . to undertake the proper review." *Duke*, 5 F.3d at 1405. Indeed, three of *Brnovich*'s guideposts likely require expert analysis, including "the size of the burden imposed by a challenged voting rule," the "degree to which a voting rule departs" from 1982 standard practice, and the "size of any disparities in a rule's impact on members of different racial or ethnic groups." 141 S. Ct. at 2338-39. And *Brnovich* itself was decided based on a full record compiled during a "10-day bench trial." *Id.* at 2334.

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Finally, *Brnovich* did not suggest that the vote-dilution factors articulated in *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986)—and which Plaintiffs pled in detail—are obsolete in a vote denial analysis. *See* Mot. at 10; Am. Compl. ¶¶ 128-54, 172-75. Far from it; the Court clarified that "§ 2(b) requires consideration of 'the totality of circumstances,'" and eschewed the bright line rules that Intervenors advance here. *Id.* As explained in opposition to the State Defendants' motion to dismiss, ECF No. 54 at 21-22, which Plaintiffs incorporate here, the Complaint more than adequately alleges that under the totality of the circumstances, the challenged provisions collectively deny Black voters an equal opportunity to participate in the political

process. This is more than sufficient to state a Section 2 discriminatory results claim.

B. Plaintiffs' allegations also state a discriminatory results claim when assessed under the *Brnovich* guideposts.

Instead of focusing on the openness of Georgia's political process "as a whole," *Brnovich*, 141 S. Ct. at 2339, Intervenors treat each of the guideposts as an independent pleading requirement. Their arguments cannot be squared with the Supreme Court's reasoning in *Brnovich* or with Plaintiffs' allegations, which make clear that the challenged provisions create interlocking, cumulative burdens that infect all aspects of the voting process. *See, e.g.*, Am. Compl. ¶¶ 5, 11, 110.

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The first guidepost considers "the size of the burden imposed by a challenged voting rule" in light of the "voting system" as a whole. *Brnovich*, 141 S. Ct. at 2338. Intervenors cherry-pick isolated provisions to argue that SB 202 "impose[s] nothing beyond the 'usual burdens of voting.'" Mot. at 11 (citation omitted). But SB 202 goes far beyond what is "usual" or "inconvenient" by simultaneously impeding access to absentee and in-person voting, all in an effort to squeeze Black voters out of the political process. To name just a few examples, the Complaint alleges that SB 202 reduces the window for most absentee voters to complete and cast their ballots, Am. Compl. ¶¶ 76-80; invalidates most out-of-precinct ballots, *id.* ¶¶ 101-05; and subjects Georgia voters to unlimited and immediate challenges from fellow citizens, *id.* ¶¶ 106-07. This goes well beyond "mere inconvenience"; the cumulative impact

of these provisions "effectively den[ies] [Black voters] an equal opportunity to participate in the electoral process" in Georgia. *Id.* ¶ 110.[3]

The second and fourth *Brnovich* guideposts dovetail directly into the first: they consider the extent to which the voting rule departs from standard practices in 1982, as well as the voting opportunities provided by Georgia's electoral system as a whole. Intervenors' interpretive gloss on the Complaint focuses entirely on mail and early voting, which they claim "didn't exist in 1982," Mot. at 11, but they again ignore the litany of other election procedures and practices (including in-person voting restrictions) that interact with absentee voting rules to deny Black Georgians the franchise. *See* Am. Compl. ¶¶ 68-110. Even if early voting was not widespread in 1982, the same could be said of identification requirements, excessively long lines, food and water bans, and the ability to file limitless voter challenges that require immediate hearings. *See, e.g.*, *id.* ¶¶ 50-54, 68-74, 96-100, 103, 106-107.

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The question posed by the second guidepost is not simply whether a specific rule was common in 1982 or has since been adopted by other states. The correct

[3] Intervenors speculate that Plaintiffs do not challenge parts of SB 202 because "those provisions make it *easier* to vote." Mot. at 15. That's wrong. As Plaintiffs explain in the Complaint, the provisions that make purportedly it easier to vote—like requiring each county to have a drop box—are more likely to benefit white voters, while the provisions that make it harder to vote—like restricting mobile voting units—target Black voters. *See, e.g.*, Am. Compl. ¶¶ 83-84, 87, 171.

inquiry is whether the burden a challenged rule imposes on a Black voter's access to the political process—when viewed in the context of the entire voting system—is comparable to the burden imposed in 1982 or in other states. Plaintiffs have adequately alleged that the cumulative impact of SB 202 far exceeds the "normal burdens" of voting, even when measured against voting practices in 1982.[4]

Finally, under *Brnovich*'s fifth guidepost, Georgia's purported interests in fraud prevention, improving election procedures, restoring voter confidence, or preventing intimidation or coercion, Mot. at 13, all fail to justify SB 202's burdens for the reasons explained in Plaintiffs' response to the State Defendants' motion to dismiss—which Plaintiffs incorporate here. In any event, the Supreme Court has said that no one factor is dispositive, and that is equally true of the purported state interests asserted by the State Defendants and Intervenors. *Brnovich*, 141 S. Ct. at 2341. As the Eleventh Circuit has recognized, even state interests require proof. *See Duke*, 5 F.3d at 1405 n.6. Thus, dismissal on the pleadings is unwarranted.

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[4] Further illustrating that these questions should be resolved on a factual record, Intervenors cite a report published by a third party in support of dismissal on the pleadings. Mot. at 12-13. That report cannot be considered at this stage because it was not relied upon in the Complaint and is not subject to judicial notice. *See U.S. ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 812 n.4 (11th Cir. 2015) (judicial notice of an article is inappropriate if it is to "determine[e] the truth" of the article).

C. Plaintiffs state a claim based on discriminatory intent.

Intervenors concede, as they must, that *Brnovich* did not alter the test for a Section 2 discriminatory intent claim.[5] Mot. at 13. Instead, the Court reaffirmed that the factors established in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977)—which include "the historical background and the sequence of events leading to [the bill's] enactment" and "any departures from the normal legislative process," 141 S. Ct. at 2349—apply. The historical background is particularly compelling in a Section 2 case because it is contemplated by the statute's plain text. *See* 141 S. Ct. at 2337 (analysis starts with "careful consideration of the text"); 52 U.S.C. § 10301(b) (courts can consider "[t]he extent to which members of a protected class have been elected to office in the State").

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Intervenors argue that Plaintiffs fail to allege discriminatory intent because "the only reliable evidence of the legislature's purposes are the formal legislative findings" in SB 202. Mot. at 14 (emphasis omitted). But they ignore that intent can be inferred from other sources, particularly at the pleadings stage.[6] For example,

[5] Plaintiffs also incorporate their arguments in opposition to the State Defendants' motion, ECF No. 54 at 20-21, and respond to Intervenors' new arguments below.
[6] Intervenors cite *Greater Birmingham Ministries*, 992 F.3d at 1299, where the court purportedly expressed "reluctan[ce] to speculate about a state legislature's intent." Mot. at 14. But *Greater Birmingham Ministries* was resolved at summary judgment, not on a 12(b)(6) motion to dismiss. It has nothing to do with pleading requirements.

Georgia has never elected a Black governor. Immediately after Georgia elected its first Black U.S. Senator, the General Assembly took up SB 202. The result was an omnibus bill that was rushed through the General Assembly and onto the Governor's desk at breakneck speed—a significant departure from normal legislative process—and which targets the methods of voting disproportionately used by Black voters when they turned out in large numbers to elect the State's first Black U.S. Senator. Am. Compl. ¶¶ 111-27, 134; *see also Carcano v. Cooper*, 350 F. Supp. 3d 388, 419 (M.D.N.C. 2018) (plaintiffs adequately alleged discriminatory intent, in part because legislative process was unusually rushed). The *Arlington Heights* factors and the plain text of Section 2 allow the Court to consider the circumstances surrounding SB 202's enactment, and the Complaint is replete with factual allegations that establish discriminatory intent under *Arlington Heights*. The Court must draw all reasonable inferences from those facts in Plaintiffs' favor and deny the motion to dismiss.

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III. Plaintiffs state a First Amendment claim for viewpoint discrimination.

Plaintiffs state a First Amendment claim for viewpoint discrimination for the reasons articulated in their opposition to the State Defendants' motion to dismiss, which they incorporate here. *See* ECF No. 54 at 22-24.

Intervenors' response mistakenly suggests that allegations of the General Assembly's partisan motivations undermine any claims of discriminatory intent and

vice versa, ignoring the fact that legislatures can act with multiple impermissible motives at the same time. *See Arlington Heights*, 429 U.S. at 265-66 (sufficient that "discriminatory purpose has been *a* motivating factor in the decision" (emphasis added)); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) (a plaintiff "need not show that discriminatory purpose was the 'sole[ ]' or even a 'primary' motive for the legislation, just that it was 'a motivating factor'" (citation omitted)). Plaintiffs allege that the General Assembly did just that when it enacted SB 202. *See, e.g.*, Am. Compl. ¶¶ 110, 171, 182-83.

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The Eleventh Circuit has also acknowledged that voting laws "facially or intentionally designed to discriminate based on viewpoint—say, for example, by barring Democrats, Republicans, or socialists from re-enfranchisement on account of their political affiliation"—can violate the First Amendment. *Hand v. Scott*, 888 F.3d 1206, 1211-12 (11th Cir. 2018). Plaintiffs allege that the legislature rushed to pass SB 202 in direct response to Democrats' electoral success to restrict Democrats' future ability to support and elect their preferred candidates. *See, e.g.*, Am. Compl. ¶¶ 182-83. That is an actionable First Amendment claim. *Hand*, 888 F.3d at 1211.

Intervenors try to avoid this by misapplying *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019), which addressed partisan discrimination in the unique context of redistricting. Mot. at 16-17. But this case presents none of the factors that led the

Supreme Court in *Rucho* to determine that partisan gerrymandering disputes were non-justiciable. Count III of Plaintiffs' Complaint alleges viewpoint discrimination, a claim that federal courts have adjudicated under well-developed legal standards. *See Reed v. Town of Gilbert,* 576 U.S. 155, 164 (2015) (holding viewpoint discriminatory law can be justified only if it is "narrowly tailored to serve compelling state interests"). SB 202 was "intentionally designed to discriminate based on viewpoint . . . on account of [voters'] political affiliation" and thus violates the First Amendment. *Hand*, 888 F.3d at 1211-12. *Rucho* is irrelevant to this analysis.

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Intervenors next theorize that a plaintiff cannot bring a First Amendment viewpoint discrimination claim when a law is "facially neutral," Mot. at 17, but the Supreme Court rejected that argument in *Reed.* 576 U.S. 155. Instead, it made clear that facially neutral laws *are* content-based if they are adopted "because of disagreement with the message the speech conveys." 576 U.S. at 164 (brackets and citation omitted). And the lower-court authorities on which Intervenors rely do not sweep nearly as broadly as they suggest. For example, *In re Hubbard* involved a motion to quash based on legislative privilege; it did not resolve a 12(b)(6) motion. 803 F.3d 1298, 1301 (11th Cir. 2015). Nor did it suggest that a statute's facial neutrality dooms a viewpoint discrimination claim as a matter of law. *Cf.* Mot. at 17. It simply held that a plaintiff could not challenge "an otherwise constitutional

statute"—meaning that the statute did not abridge speech or implicate any constitutionally-protected conduct—based on lawmakers' subjective motivations. 803 F.3d at 1312.[7] SB 202, on the other hand, plainly restricts access to the franchise and outright bans certain forms of speech—i.e., providing food and water to individuals outside polling places. Thus, Intervenors' reliance on facial neutrality as a defense to viewpoint discrimination finds no support in any governing law and squarely contradicts controlling precedent. *See Reed*, 576 U.S. at 164.

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IV. The food and water ban violates the First Amendment.

In defense of SB 202's food and water ban, Intervenors claim that providing food and water is not speech, and that the organizational Plaintiffs lack standing to bring as-applied challenges—both conclusions they reach only after misapplying or ignoring controlling precedent, and disregarding Plaintiffs' allegations.

A. Plaintiffs' provision of food and water is expressive conduct.

Courts have "long recognized" that the First Amendment extends to not just

[7] Intervenors also cite *F.O.P. Hobart Lodge No. 121, Inc. v. City of Hobart*, 864 F.2d 551, 555 (7th Cir. 1988), an out-of-jurisdiction case which dealt with alleged political retaliation in the context of public employment. But the Eleventh Circuit has never cited that decision in a majority opinion, and employment retaliation is markedly different than viewpoint discrimination in voting laws. Similarly, in *O'Boyle v. Sweetapple*, the challenged statute did "not regulate speech or expressive activity at all." 187 F. Supp. 3d 1365, 1373 (S.D. Fla. 2016). That is not the case here. *See* ECF No. 54 at 22-24.

written and spoken word, but also expressive conduct. To determine whether an action is sufficiently communicative to invoke First Amendment protections, courts consider whether the act "inten[ds] to convey a particularized message," and whether "the likelihood [is] great that the message would be understood by those who viewed it" in light of surrounding context. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citation omitted); *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Notably, the conduct at issue need not convey a "narrow, succinctly articulable message"; otherwise, the First Amendment "would never reach the unquestionably shielded painting of Jackson Pollack[.]" *Food Not Bombs*, 901 F.3d at 1240 (citation omitted). It is enough that a "reasonable person would interpret [the act] as *some* sort of message, [even if] . . . the observer would [not] . . . necessarily infer a *specific* message." *Id.* (citation omitted); *see also Hurley v. Irish-Am., Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 569 (1995) (recognizing a "narrow, succinctly articulable message is not a condition of constitutional protection").

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The Complaint alleges that the organizational Plaintiffs coordinate distribution of food and water near polling places in Georgia. Am. Compl. ¶¶ 17, 21, 23, 25. They take those actions with the specific purpose of encouraging individuals to participate in the political process notwithstanding obstacles before them. *See id.* That sort of message—telling voters that their voices matter and supporting their

efforts to stay the course, despite long lines and significant wait times—is quintessential expressive conduct. Any reasonable observer would understand that Plaintiffs are trying to convey a message of support for voting, voters, and the democratic process. *See Food Not Bombs*, 901 F.3d at 1243.

In fact, the Eleventh Circuit has already decided that public provision of food to convey a message can be expressive conduct. In *Food Not Bombs*, the plaintiff was a non-profit that hosted events at a public park to share vegan and vegetarian food in order to "communicate [the] message that society can end hunger and poverty if we redirect our collective resources from the military and war." 901 F.3d at 1238 (cleaned up). The Eleventh Circuit held that these activities were expressive conduct protected by the First Amendment: by providing food "in a visible public space, and partaking in meals that are shared with others," the plaintiff engaged in "an act of political solidarity meant to convey the organization's message." *Id.*

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Intervenors ignore *Food Not Bombs* and other inconvenient precedent in their motion. Instead, they try to characterize Plaintiffs' provision of food and drink as merely "an act," and rely on *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006), where the Supreme Court found that imposing restrictions on military recruiters' access to campus was not sufficiently expressive because a reasonable observer was unlikely

to infer some message without additional speech. *Id.* at 66.[8] But *Food Not Bombs* soundly rejected the analogy that Intervenors attempt to draw between restrictions on recruiters' access to campus in *FAIR* and the provision of food and water here. In distinguishing *FAIR*, the court noted that context matters, and the history of sharing food to communicate a message dated back to when "Jesus shared meals with tax collectors and sinners to demonstrate that they were not outcasts in his eyes." 901 F.3d at 1243. It explained that meal sharing is a symbol that holds as much significance as the flag, and no additional "explanatory message" is necessary to infer that food sharing events are intended to convey some message. *Id.* at 1244-45. The handful of out-of-jurisdiction cases Intervenors cite have nothing to do with the long tradition of sharing food and drink to convey a message. *Cf.* Mot. at 18.

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B. The food and water ban fails any level of constitutional scrutiny.

Without *any* analysis, Intervenors claim that Plaintiffs' expressive conduct—offering food and water outside polling places—takes place in a non-public forum and conclude that the ban is subject to a "low level of scrutiny." Mot. at 19. They are wrong at each turn: the ban criminalizes conduct in a traditional public forum,

[8] Intervenors also cite *United States v. Williams*, 553 U.S. 285 (2008), without explanation. There, the Court held that Congress could criminalize "offers to provide or requests to obtain child pornography." *Id.* at 299. Congress's ability to criminalize behavior related to child pornography has no bearing on this case.

strict scrutiny applies, and the ban must be struck down because it is neither "necessary to serve a compelling state interest" nor "narrowly drawn to achieve that end." *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality op.) (citation omitted).

SB 202 bans providing food and water to electors "[w]ithin 150 feet of any outer edge of a building within which a polling place is established" or "[w]ithin 25 feet of any voter standing in line to vote at a polling place," no matter how far that line extends. SB 202 § 33. Intervenors call these locations "nonpublic," Mot. at 19, but the only case they cite disagrees. In *Minnesota Voters Alliance v. Mansky*, the Court simply held that the "interior" of a polling place was a nonpublic forum. 138 S. Ct. 1876, 1886 (2018). It reiterated that a four-justice plurality in an earlier decision, *Burson*, had treated "the public sidewalks and streets surrounding a polling place" as a ***public*** forum—the exact opposite of Intervenors' argument. *Id.* In other words, public fora include "parks, streets, sidewalks, and the like," all areas where Georgia law prohibits Plaintiffs from offering food and water if a polling place is nearby. *See Minn. Voters All.*, 138 S. Ct. at 1885; *Burson*, 504 U.S. at 196-97 & n.2.

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Second, the ban is content-based, not "content-neutral." *Burson*, 504 U.S. at 197. That is because the ban draws a distinction between different types of speech, and "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to" a specific kind of expressive

conduct—the provision of food and water. *Id.* It "leaves other speech untouched." *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1251 (11th Cir. 2004). For example, a local pizzeria could engage in commercial speech by sending an employee to dance in a pizza costume next to voters waiting in line, without running afoul of SB 202. *See Burson*, 504 U.S. at 197 (statute was content-based because it did "not reach other categories of speech, such as commercial solicitation").

Because the ban is a content-based restriction that applies in a traditional public forum, strict scrutiny applies and the Court must ascertain if it "is necessary to serve a compelling state interest and [] is narrowly drawn to achieve that end." *Id.* at 198 (citation omitted). It does not. The only government interest articulated in SB 202 that could possibly apply is "[p]rotecting electors from improper interference, political pressure, or intimidation while waiting in line to vote." SB 202 § 2(13); Mot. at 19. The pre-SB 202 election code already met that interest by prohibiting solicitation of votes, distribution and display of campaign material, and solicitation of signatures. *See* SB 202 § 33(a). If the legislature was concerned about bribery, it could have prohibited giving money and gifts to electors. Providing food and water to individuals standing in long lines does nothing other than make it harder to vote.

Even under a more deferential level of scrutiny, the ban would still be unconstitutional. That is clear from *Minnesota Voters Alliance*, where the Supreme

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Court suggested that even in a nonpublic forum like a polling place—where viewpoint neutral regulations on political speech need only be "reasonable in light of the purpose served by the forum: voting"—a state could not restrict a "T-shirt merely imploring others to 'Vote!'" 138 S. Ct. at 1888. That same reasoning would apply to Plaintiffs' expressive conduct—which occurs outside polling places—and the ban would similarly fail under even the most deferential level of scrutiny.

C. Plaintiffs have standing to raise an as-applied challenge.

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Intervenors argue that organizational Plaintiffs lack standing to bring as-applied challenges, Mot. at 19-20, but the case upon which they rely, *Free Speech Coalition, Inc. v. Attorney General*, 974 F.3d 408, 421-22 (3d Cir. 2020), holds no such thing. There, the Third Circuit held that organizational plaintiffs may not have *associational* standing to bring as-applied claims on behalf of their members because they must first satisfy the prudential (not Article III) requirement that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 421 (citation omitted). This reasoning is inapplicable here because organizational Plaintiffs also assert standing in their own right, not just on behalf of their members. *See* ECF No. 54 at 3-10. They allege that they coordinate and participate in distributing food and water to voters waiting in line, making the organizations themselves subject to the ban. *See* Am. Compl. ¶¶ 17, 20-22, 25.

Intervenors also argue that Plaintiffs' "facial challenge fails" because the ban "is not unconstitutional in 'all possible applications.'" Mot. at 20 (citation omitted). But in the First Amendment context, the Supreme Court has "recognized a second type of facial challenge whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (quotation marks and citation omitted). That test is plainly satisfied here. Plaintiffs challenge the ban on providing food and water outside a polling place; they do not (as Intervenors would have it) challenge bans on offering money, on giving gifts inside the polling place, or on soliciting votes. And a substantial number of applications of the food and water ban are unconstitutional, as Plaintiffs have described. But even assuming Intervenors were correct, it would not justify dismissal. The ban is still unconstitutional as applied to Plaintiffs' activities. "[T]he distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).

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CONCLUSION

For these reasons, the motion to dismiss should be denied.

Respectfully submitted, this 26th day of July, 2021.

/s/ *Uzoma N. Nkwonta*
Uzoma N. Nkwonta*
Jacob D. Shelly*
Zachary J. Newkirk*
Jyoti Jasrasaria*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
unkwonta@perkinscoie.com
jshelly@perkinscoie.com
znewkirk@perkinscoie.com
jjasrasaria@perkinscoie.com

Laura Hill*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-3349
Facsimile: (206) 359-4349
LHill@perkinscoie.com

Halsey G. Knapp, Jr.
Georgia Bar No. 425320
Joyce Gist Lewis
Georgia Bar No. 296261
Adam M. Sparks
Georgia Bar No. 341578
KREVOLIN & HORST, LLC
1201 W. Peachtree St., NW
One Atlantic Center, Suite 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
hknapp@khlawfirm.com
jlewis@khlwafirm.com
sparks@khlawfirm.com

Counsel for Plaintiffs
*Admitted *pro hac vice*

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a point size of 14.

Dated: July 26, 2021.

s/ *Uzoma N. Nkwonta*
Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2021, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Dated: July 26, 2021.

s/ *Uzoma N. Nkwonta*
Counsel for Plaintiffs

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