UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VOTEAMERICA; et al., *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, et al., *Defendants*, REPUBLICAN NATIONAL COMMITTEE; et al., *Intervenor-Defendants*.	No. 1:21-cv-1390-JPB

INTERVENORS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Intervenors join the State's opposition in full. They write separately to highlight two points—one on the equities and one on the merits.

On the equities, resolving this motion should start and end with *Purcell*—a "bedrock tenet of election law" that Plaintiffs' motion fails to even *mention*. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurral). *Purcell* holds that the "traditional test" for injunctive relief "does not apply" when a plaintiff seeks "an injunction of a state's election law in the period close to an election." *Id.*; *see Purcell v. Gonzalez*, 549 U.S. 1 (2006). This principle means that "a court should ordinarily decline to issue an injunction—especially one that changes existing election rules—when an election is imminent." *Coalition for Good Governance v. Kemp* (*CGG*), 2021 WL 2826094, at *3 (N.D. Ga. July 7). Because Georgia's absentee-ballot application window opens on August

22 and Plaintiffs waited over a year to seek injunctive relief, this Court should decline to issue a preliminary injunction.

On the merits, two of the three provisions that Plaintiffs challenge are subject to rational-basis review because they do not regulate speech. The third should be reviewed under the flexible *Anderson-Burdick* standard because it regulates the mechanics of the electoral process. None of the challenged provisions is subject to strict scrutiny. And all survive. At the very least, these legal difficulties over the governing standard are reasons to deny Plaintiffs' request for a "preliminary" injunction that, unless it's stayed on appeal, would *permanently* alter the rules governing Georgia's 2022 elections.

ARGUMENT

I. *Purcell* forecloses preliminary injunctive relief.

Preliminary injunctions are always "extraordinary and drastic," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), but they are especially disfavored in election cases. Injunctions against state election laws undermine "[c]onfidence in the integrity of our electoral processes" and "the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. They cause "voter confusion" and drive citizens "away from the polls." *CGG*, 2021 WL 2826094, at *3. Exacerbating these harms is the "potential for 'whiplash' if orders of [a district court] and subsequent rulings of appellate courts resul[t] in different conclusions." *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 2022 WL 633312, at *75 (N.D. Ga. Feb. 28).

Injunctions against state election laws also disrupt a state's electoral machinery and raise federalism concerns. Federal injunctions force election

administrators to reorder their affairs and "grapple with a different set of rules." *CGG*, 2021 WL 2826094, at *3. "Even seemingly innocuous late-in-the-day judicial alterations … can interfere … and cause unanticipated consequences." *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurral). And these injunctions inherently cause the "seriou[s] and irreparabl[e] harm" of preventing a State from "conducting [its] elections pursuant to a statute enacted by the Legislature." *New Ga. Proj. v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020). "Our founding charter never contemplated that federal courts would dictate the manner of conducting elections." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1269 (11th Cir. 2020). So it is no small thing for a "federal court to swoop in and re-do a State's election laws in the period close to an election." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral).

The Supreme Court has "reiterated this directive on many occasions." *CGG*, 2021 WL 2826094, at *3. It has "often" stayed "lower federal court injunctions that contravened" *Purcell*. *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral); *e.g.*, *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020); *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *RNC v. DNC*, 140 S. Ct. 1205 (2020). So has the Eleventh Circuit, including this month in a case out of Florida. *E.g.*, *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State* (*LWVF*), 2022 WL 1435597 (11th Cir. May 6); *New Ga. Proj.*, 976 F.3d at 1283.

Two decisions from this year clarified the answer to the crucial question, "When is an election sufficiently 'close at hand' that the *Purcell* principle

applies?" *LWVF*, 2022 WL 1435597, at *3. First, in *Milligan*, the Supreme Court stayed an injunction where the next election was still "about four months" away. 142 S. Ct. at 888 (Kagan, J., dissental). And second, in *League of Women Voters of Florida*, the Eleventh Circuit stayed an injunction where absentee voting was "set to begin in less than four months." 2022 WL 1435597, at *3. Four months before voting, the Eleventh Circuit concluded, "*easily* falls within the time period that trigger[s] *Purcell*." *Id.* at *3 n.5 (emphasis added). Even injunctions granted six months before an election have been stayed under *Purcell*. *E.g.*, *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020), *application to vacate stay denied*, 2020 WL 3456705 (U.S.).

This motion likewise falls within *Purcell*'s window. The hearing on this motion is scheduled for June 9. Even if this Court issues an injunction that day from the bench, the absentee-ballot-application process will begin a mere ten weeks later, on August 22. *See* O.C.G.A. §21-2-381(a)(1)(A). Plaintiffs plan to send out their applications—the conduct regulated by the challenged statutes—starting that day. Lopach Decl. (Doc. 103-3) ¶¶53, 55. An injunction also would come only three months before the State starts mailing absentee ballots, on September 20. *See* O.C.G.A. §21-2-384(a)(2). And in-person voting would be only four months away, starting on October 17. O.C.G.A. §21-2-385(d)(1). The time for deciding this motion and the time it will take to litigate the inevitable appeal will only tighten this already-too-tight window.

Once a motion falls within *Purcell*, that principle is a *sufficient* basis to deny a preliminary injunction. *See LWVF*, 2022 WL 1435597, at *2. The Supreme Court has invoked the *Purcell* principle while expressing "no opinion"

on the merits, *Purcell*, 549 U.S. at 5; where the plaintiffs had "a fair prospect of success," *Milligan*, 142 S. Ct. at 881 n.2 (Kavanaugh, J., concurral); and even where the challenged law was "invalid," *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). District courts, too, often decline to issue injunctions based on *Purcell* where all other factors would favor relief. *See, e.g.*, *Alpha Phi Alpha*, 2022 WL 633312, at *76 (holding that plaintiffs were likely to succeed on the merits and suffer irreparable harm, but denying a preliminary injunction because "[t]he Court is unable to disregard the *Purcell* principle").

For plaintiffs to overcome *Purcell*, they must satisfy "at least" the following four factors:

1. the underlying merits are entirely clearcut in their favor;
2. they would suffer irreparable harm absent the injunction;
3. they have not caused undue delay; and
4. their requested changes are feasible before the election without significant cost, confusion, or hardship.

Milligan, 142 S. Ct. at 881 (Kavanaugh, J., concurral). If any one of these four factors is not met, then their motion must be denied. *See LWVF*, 2022 WL 1435597, at *4 n.8 ("Justice Kavanaugh provided three additional factors—*all* of which must be satisfied to justify an injunction under *Purcell*."). Plaintiffs cannot satisfy factors one, three, or four.

As to factor one, the merits of Plaintiffs' case are not entirely clearcut. As discussed in the State's brief and Part II of this brief, Plaintiffs' claims are novel and misguided. They seek a pioneering expansion of the First Amendment to cover the right to send duplicate, prefilled, and disclaimer-free

absentee-ballot applications. Their arguments, "at the very least, aren't 'entirely clearcut.'" *Id.* at *6.

Factor three independently forecloses relief because *Purcell* requires that, in addition to filing their complaint without delay, plaintiffs must pursue a preliminary injunction without delay. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Here, the challenged provisions were enacted in March 2021, but Plaintiffs waited until May 2022 to move for a preliminary injunction. The whole point of a preliminary injunction is to avoid "*imminent* harm," so "by sitting on [their] rights for even a few months"—let alone a year, and only months away from the next election—Plaintiffs have "squandered any corresponding entitlement to [that] relief." *Alabama v. U.S. Dep't of Com.*, 546 F. Supp. 3d 1057, 1073-74 (M.D. Ala. 2021) (collecting cases); *accord CGG*, 2021 WL 2826094, at *3 (denying a preliminary injunction because "Plaintiffs waited almost three months after SB 202 passed and until the eve before the underlying election to file their Motion"); *Kishore v. Whitmer*, 972 F.3d 745, 751 (6th Cir. 2020) (similar). Plaintiffs' delay is no mere foot fault: Because they waited over a year, they allowed several Georgia elections to go forward *under SB 202*, including the statewide primaries happening now. Because "all of the challenged provisions are already the law" and election administrators "have implemented them," Plaintiffs' request to "change the law" for the general election exacerbates the harms identified in *Purcell*. *CGG*, 2021 WL 2826094, at *3.

Factor four also independently forecloses relief because an injunction would cause significant confusion and hardship. *Milligan*, 142 S. Ct. at 881

(Kavanaugh, J., concurral). Voters would be surprised to receive duplicate and prefilled applications that Georgia's written law says are illegal. And under a preliminary injunction, voters would likely receive both applications including the disclaimer provision and applications excluding it, which could lead them to infer that the disclaimer-free ballot *was* "provided to you by [a] governmental entity," or, worse, was "a ballot." O.C.G.A. §21-2-381(a)(1)(C)(ii). This turmoil would cause the public to lose "[c]onfidence in the integrity of our electoral processes." *Purcell*, 549 U.S. at 4. An injunction would also burden state officials who would have to educate the confused public, answer calls from voters, and "grapple with a different set of rules." *CGG*, 2021 WL 2826094, at *3. For example, an injunction would lead to more absentee-ballot applications, including duplicates—increasing the administrative burden on the officials who must process them. And these harms will be magnified given the likelihood of "conflicting orders" on appeal. *Purcell*, 549 U.S. at 4. In the time it takes to stay the preliminary injunction, voters could submit prefilled applications, organizations could spend resources printing materials that exclude the disclaimer, and organizations could send out thousands of duplicate applications—only to find out later that none of that was lawful.

Plaintiffs did not mention *Purcell* in their motion, so this Court should appropriately discount any untimely arguments that Plaintiffs make in reply. But Intervenors will do their best to preempt what Plaintiffs might say. All of their arguments will have been rejected already in prior cases.

First, Plaintiffs might argue that *Purcell* does not apply to First Amendment claims. *See CGG*, 2021 WL 2826094, at *3 (noting "Plaintiffs' argument

for a bright line exception to *Purcell* because they have alleged First Amendment harm"). Plaintiffs will be wrong. They "have not provided authority, nor is the Court aware of any, that would support this interpretation of the law." *Id.* The Eleventh Circuit just made that clear when it stayed a First Amendment–based injunction of Florida's election laws. *LWVF,* 2022 WL 1435597. The Supreme Court has issued similar stays in First Amendment cases. *E.g.*, *Little*, 140 S. Ct. 2616; *Clarno*, 141 S. Ct. 206; *see also Thompson*, 2020 WL 3456705 (declining to vacate a stay).

Second, Plaintiffs might argue that stay decisions (like Justice Kavanaugh's concurral in *Milligan* and the Eleventh Circuit's decision in *League of Women Voters of Florida*) are not formally binding. Judge Jones recently addressed this same argument. "Although Justice Kavanaugh's [*Milligan*] concurrence is not controlling," he explained, "this Court would be remiss if it ignored its conclusions." *Alpha Phi Alpha*, 2022 WL 633312, at *7. Because "five justices agreed that the stay should issue" in *Milligan*, "Justice Kavanaugh's opinion carries even more weight than typical Supreme Court dicta." *Id.* at 8. And typical Supreme Court dicta is, of course, "'not something to be lightly cast aside.'" *Id.* (quoting *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006)). Meanwhile, the opinion in *League of Women Voters of Florida* represents the unanimous view of three active judges of the Eleventh Circuit on a nearly identical question. Its reasons for granting a stay are comfortably within the mainstream of recent election decisions—unlike the older, outlier cases that Plaintiffs might cite.

Third, Plaintiffs might argue that *Purcell* applies only to redistricting claims, or ballot-processing claims, or some other subset of election laws. They would be wrong again. *Purcell* applies to injunctions against state election laws generally. *See Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral) (*Purcell* covers "election cases when a lower court has issued an injunction of a state's election law in the period close to an election"); *Purcell*, 549 U.S. at 4 (addressing "orders affecting elections"). In *League of Women Voters of Florida*, for example, the Eleventh Circuit applied *Purcell* where the challenged laws regulated similar subjects, including third-party organizations' attempts to help voters register and their solicitations of voters near polling places. 2022 WL 1435597, at *1. The Eleventh Circuit has also applied *Purcell* to laws setting deadlines for the receipt of absentee ballots. *New Georgia Proj.*, 976 F.3d at 1283. And in *Coalition for Good Governance*, this Court recognized that *Purcell* applies to laws that "impact election processes," including laws governing ballot applications. 2021 WL 2826094, at *3.

In sum, even if Plaintiffs' arguments had merit, their motion for a preliminary injunction must be denied because it asks this Court to interfere with Georgia's elections laws shortly before key deadlines. Plaintiffs themselves stress how close the 2022 election is: They "are preparing their 2022 election cycle communications now," and their "work on the 2022 election cycle has already begun." Mot. (Doc. 103) 33, 35. Plaintiffs' *Purcell* problem is that the same is true of election officials, political parties, campaigns, and candidates. *Purcell* does not mean that Plaintiffs will ultimately *lose* this case. 549 U.S. at

5. But it does mean that their case must "proceed without an injunction suspending the [challenged election] rules." *Id.* at 6.

II. Plaintiffs misstate the appropriate level of scrutiny.

Plaintiffs challenge three provisions of SB 202. They claim that all three regulate First Amendment activity and that all three must satisfy strict scrutiny. Plaintiffs are incorrect.

The "Mailing List Restriction" and "Prefilling Prohibition" do not regulate speech at all. These provisions regulate the mailing of prefilled and duplicate absentee-ballot applications. *See* O.C.G.A. §21-2-381(a)(3)(A)-(B); §21-2-381(a)(1)(C)(ii). Because sending prefilled and duplicate applications is not "inherently expressive," regulations of these activities do not implicate the First Amendment. *Rumsfeld v. FAIR*, 547 U.S. 47, 66 (2006). They are lawful so long as they satisfy rational-basis review, which they easily do. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969).

The "Disclaimer Provision" regulates speech, but election regulations that implicate the First Amendment do not automatically receive strict scrutiny. The challenged provision requires Plaintiffs to include statutorily prescribed language in their absentee-ballot applications. O.C.G.A. §21-2-381(a)(1)(C)(ii). Because it concerns "a constitutional challenge to an election regulation," the provision is lawful so long as it satisfies the more deferential *Anderson-Burdick* balancing test. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (op. of Stevens, J.).

A. The provisions restricting duplicate and prefilled applications do not regulate protected speech and are subject to rational-basis review.

Plaintiffs believe that their entire business model of mass-mailing absentee-ballot applications is a prolonged exercise of First Amendment conduct because it advances their values. Courts have long rejected this expansionist view. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

Properly understood, the First Amendment protects only that subset of conduct that is "inherently expressive." *FAIR*, 547 U.S. at 64. Conduct is "inherently expressive" when the expressive actor "inten[ds] to convey a particularized message" and "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). To satisfy this standard, expressive conduct must be "sufficiently imbued with elements of communication." *Id.* at 406. For example, wearing coordinated black armbands to protest a war, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 505 (1969), wearing military uniforms for a dramatic presentation, *Schacht v. United States,* 398 U.S. 58 (1970), or publicly burning an American flag at a presidential inauguration, *Johnson*, 491 U.S. at 404.

Here, Plaintiffs challenge two provisions that regulate the mailing of absentee-ballot applications to voters. One forbids sending an application to a voter who has "already requested, received, or voted an absentee ballot in the primary, election, or runoff." O.C.G.A. §21-2-381(a)(3)(A)-(B). The other forbids sending a voter "an absentee ballot application that is prefilled." §21-2-

381(a)(1)(C)(ii). In other words, the conduct prohibited by these two challenged provisions is the act of mailing a duplicate or prefilled application.

Mailing a duplicate or prefilled absentee-ballot application is not inherently expressive. Plaintiffs list a few "particular message[s]" that they try to convey by sending these applications—namely, that "political participation is worthwhile" and that "absentee voting is safe, accessible, and beneficial." Mot. 14. But whatever Plaintiffs' intentions, the "likelihood" is not "great" that these "particular message[s]" will be "understood by those who vie[w]" them. *Johnson*, 491 U.S. at 404. A recipient of a prefilled or duplicate application might understand those messages. But he might hear other, very different messages, like "We think you are incapable of filling out simple forms," or "You need a sophisticated organization to guide you because absentee voting is *not* 'accessible,'" or "We think you will vote for our favored candidates so we are targeting you." Most recipients will view a duplicate or prefilled absentee-ballot application like any other mass-mailing and perceive no message at all. To discern a message, the person receiving the application needs *additional* speech—a telltale sign that the mailing itself is "not inherently expressive." *FAIR*, 547 U.S. at 66.

Court after court has rejected similar attempts to characterize third parties' efforts to encourage or facilitate voting as expressive conduct. *See, e.g.*, *New Ga. Proj. v. Raffensperger*, 484 F. Supp. 3d 1265 (N.D. Ga. 2020) ("[C]ollecting ballots does not qualify as expressive conduct."); *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (rejecting that "the conduct of collecting ballots would reasonably be understood by viewers as conveying … a symbolic

message of any sort"); *Voting for America v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013) (finding "nothing 'inherently expressive' about receiving a person's completed application and being charged with getting that application to the proper place"); *Voting for Am. v. Andrade*, 488 F. App'x 890, 898 (5th Cir. 2012) (same); *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1057, 1084 (9th Cir. 2016) ("[A] viewer would reasonably understand ballot collection to be a means of facilitating voting, not a means of communicating a message."); *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008) (agreeing that "the collection and handling of voter registration applications is not inherently expressive activity"); *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1234-35 (N.D. Okla. 2020) ("completing a ballot request for another voter, and collecting and returning ballots of another voter, do not communicate any particular message"); *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 769 (M.D. Tenn. 2020) ("The Court perceives not a single case cited by Plaintiffs in which the act of distributing absentee-ballot applications was treated as within the scope of the First Amendment.").

The cases explain that "an observer would not have any particular reason to associate any specific message with the action of giving someone an absentee-ballot application." *Lichtenstein*, 489 F. Supp. 3d at 768. They emphasize that regulations like these do not inhibit groups from expressing their desired messages. *See id.* at 765 ("[T]he Law prohibits no spoken or written expression whatsoever and also leaves open a very wide swath of conduct, prohibiting just one very discrete kind of act."). Here, too, Plaintiffs remain free to send every voter in Georgia thousands of letters with their messages "that

political participation is worthwhile" and "that absentee voting is safe, accessible, and beneficial." Mot. 14. SB 202 inhibits not their expression, but their conduct.

Plaintiffs' analogies to *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), fall flat. Those cases held that Colorado could not regulate the process of advocacy itself by dictating who could initiate petitions and how those petitions could be circulated. *See, e.g.*, *id.* at 192. That is because "[w]hen a voter is presented with a petition for a potential signature, it is objectively clear that the presentation is conveying a political message," *Lichtenstein*, 489 F. Supp. 3d at 771, and "the very nature of a petition process requires association between the third-party circulator and the individuals agreeing to sign," *Andrade*, 488 F. App'x at 898 n.13. Here, by contrast, when a recipient is presented with an absentee-ballot application, it is not clear what message is being conveyed. And nothing about the nature of the application process requires associating with organizations like Plaintiffs'.

Nor do these provisions restrict Plaintiffs' First Amendment right of association. *Cf.* Mot. 19. The freedom of association protects "join[ing] in a common endeavor" or engaging in "collective effort on behalf of shared goals." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 622 (1984). It does not protect connections between people who "are not members of any organized association," are "strangers to one another," and do not come together to "take positions on public questions." *Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989).

Mailing duplicate and prefilled absentee-ballot applications is not the freedom of association. It is a unilateral act that can be ignored by the would-be associate. The recipients are not members of any organization or otherwise joined in a common endeavor or collective effort on behalf of shared goals, but are strangers who simply receive similar mass-mailers. Some complete the application to elect a particular candidate, some complete the application to elect that candidate's opponent, and some ignore the application. What's more, unlike a petition that requires joint effort, "applications are individual, not associational, and may be successfully submitted without the aid of another." *Andrade*, 488 Fed. App'x at 898 n. 13. If these sorts of bare communications constituted First Amendment association, then most of modern civilization would be immune from regulation.

Of course, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," including in Plaintiffs' mailing of duplicate and prefilled absentee ballots to strangers. *Stanglin*, 490 U.S. at 25. But "such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.* Plaintiffs' activity falls well short of the threshold for a protected expressive association. And because Plaintiffs are bringing a facial challenge, *see* Compl. (Doc. 1) 58, they must establish that "no set of circumstances exist[s]" where the challenged provisions could be validly applied. *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1254 (11th Cir. 2015). Because it is easy to imagine circumstances where a recipient of Plaintiffs' applications would not understand them to convey Plaintiffs' messages, and because it is easy to imagine circumstances where a recipient would not be a part

of anything resembling a joint expressive endeavor with Plaintiffs, some "set of circumstances" necessarily exists where the challenged provisions would be valid.

Because these provisions do not regulate protected speech or association, they are subject to rational-basis review unless they burden the right to vote. When election laws implicate constitutional rights, they are typically subject to the *Anderson-Burdick* balancing test. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *see also Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1261 (11th Cir. 2020). But when laws do not implicate constitutional rights, they pass muster whenever they "bear some rational relationship to a legitimate state end." *McDonald*, 394 U.S. at 809; *see also Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020) ("election laws that do not curtail the right to vote need only pass rational-basis scrutiny"); *Andrade*, 488 F. App'x at 898 ("Because we conclude that the physical receipt and delivery of completed voter registration applications are not 'expressive conduct' … we employ rational basis scrutiny"); *Ne. Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012) ("a rational basis standard applies to state regulations that do not burden the fundamental right to vote"). This approach follows the general rule that "[w]hen a challenged law does not infringe upon a fundamental right," a court reviews that act "under the rational basis standard." *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 945 (11th Cir. 2013).

As explained, these two provisions do not implicate the First Amendment; and Plaintiffs forfeited any argument that they implicate the funda-

mental right to vote. They brought no such claim in their complaint or motion. In fact, Plaintiffs' motion waives the argument by insisting that the "*Anderson-Burdick* framework for voting regulations does not apply here" because these laws do not implicate "'the electoral process.'" Mot. 23 n.5. Plaintiffs cannot remedy their forfeiture or waiver in their reply brief. *See TransWorld Food Serv., LLC v. Nat. Mut. Ins. Co.*, 2020 WL 4464611, at *7 n.74 (N.D. Ga. Aug. 4) ("arguments raised for the first time in a reply brief will not be considered").

It follows that the two provisions regulating duplicate and prefilled absentee-ballot applications are subject to rational-basis review. To survive "this minimal scrutiny," these challenged provisions "need only be rationally related to a legitimate government purpose." *Schwarz v. Kogan*, 132 F.3d 1387, 1390-91 (11th Cir. 1998). Put another way, if there is "any conceivably valid justification" for the challenged provisions, and if there is "any plausible link between the purpose of the [provisions] and the methods selected to further this purpose, then no violation … exists." *Id.* at 1391. For the reasons discussed in the State's opposition, both challenged provisions are rationally related to several legitimate government purposes. On the merits, that is enough to uphold them, making Plaintiffs' claims likely to fail.

B. The disclaimer provision is subject to *Anderson-Burdick*.

The remaining provision requires organizations to include a disclaimer with their absentee-ballot applications. O.C.G.A. §21-2-381(a)(1)(C)(ii). Intervenors agree that this provision implicates First Amendment rights, but they disagree that strict scrutiny applies. *Anderson-Burdick* is the test, and

Plaintiffs make no argument for how the disclaimer provision fails that flexible standard.

"An election law that burdens First Amendment rights is not necessarily subject to strict scrutiny." *Caruso v. Yamhill Cnty. ex rel. Cnty. Com'r*, 422 F.3d 848, 855 (9th Cir. 2005). "Rather, such laws are generally subject to [the *Anderson-Burdick*] balancing standard." *Id.* This "more flexible" approach reflects the reality "that government must play an active role in structuring elections." *Burdick*, 504 U.S. at 433. Subjecting "every voting regulation to strict scrutiny ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* Courts "borrow" the *Anderson-Burdick* test in election cases, instead of applying traditional First Amendment doctrines, because only that test "resolve[s] the tension between the deference that the courts owe to legislatures in areas meriting careful regulation and the need to protect 'fundamental' First Amendment rights." *Fusaro v. Cogan*, 930 F.3d 241, 258 (4th Cir. 2019); *see, e.g.*, *SAM Party of N.Y. v. Kosinski*, 987 F.3d 267, 274-75 (2d Cir. 2021) (applying *Anderson-Burdick* to free-association and compelled-speech claims in an election case).

Plaintiffs suggest that *Anderson-Burdick* does not apply here based on a case that applied strict scrutiny to a law prohibiting the "distribution of anonymous campaign literature." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 (1995). But *McIntyre* confirmed that *Anderson-Burdick* applies to laws that, instead of controlling freestanding speech, "control the mechanics of the electoral process." *Id.* at 345. Because the disclaimer provision regulates absentee-ballot applications, which have a formal legal function in the electoral

process, it falls in the latter category. Just as "'[b]allots serve primarily to elect candidates, not as forums for political expression,'" absentee-ballot applications serve primarily to request ballots from the State. *Schmitt v. LaRose*, 933 F.3d 628, 638 (6th Cir. 2019) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997)). The challenged law "regulate[s] the process by which [third parties distribute absentee-ballot applications], which has, at most, a second-order effect on protected speech." *Id.*; *accord Fusaro*, 930 F.3d at 258 ("[O]ur Court and the Supreme Court have each distinguished between laws that, on the one hand, regulate 'pure speech,' and those that, by contrast, are a step removed from direct acts of communication, with the latter receiving more flexible treatment."). Plaintiffs remain free to say (or not say) whatever they wish about absentee ballots; they just have no unfettered "right" to do so on "the [application] itself." *Timmons*, 520 U.S. at 362-63.

* * *

For all these reasons, strict scrutiny does not apply; but at the very least, the governing legal standard is a difficult question. That difficulty alone defeats Plaintiffs' motion. As the Eleventh Circuit recently explained, plaintiffs seeking late-breaking injunctions against election laws must "show … that [their] position is 'entirely clearcut.'" *LWVF*, 2022 WL 1435597, at *4. To deny Plaintiffs' motion, this Court need only conclude that their merits arguments are "vulnerable" or that Defendants' responses to them are "substantial." *Id.* at *4 & n.8, *6. Plaintiffs are certainly vulnerable here.

Plaintiffs' burden is especially heightened because their request for a preliminary injunction is not "preliminary" at all. If granted (and not stayed),

their requested injunction would *permanently* alter the rules that govern Georgia's 2022 elections. Preliminary injunctions that give plaintiffs "practically all of the relief" they sought when they sued "should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party." *Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958). The law and facts are not clear enough here to give Plaintiffs a right to the drastic relief they seek.

CONCLUSION

This Court should deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

Dated: May 20, 2022

/s/ *Cameron T. Norris*

John E. Hall, Jr.
Georgia Bar No. 319090
William Bradley Carver, Sr.
Georgia Bar No. 115529
W. Dowdy White
Georgia Bar No. 320879
HALL BOOTH SMITH, P.C.
191 Peachtree St. NE, Ste. 2900
Atlanta, GA 30303
(404) 954-6967

Tyler R. Green (*pro hac vice*)
Cameron T. Norris (*pro hac vice*)
Jeffrey S. Hetzel (*pro hac vice*)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
tyler@consovoymccarthy.com
cam@consovoymccarthy.com
jhetzel@consovoymccarthy.com

Counsel for Intervenor-Defendants

CERTIFICATE OF COMPLIANCE

This document complies with Local Rule 5.1(B) because it uses 13-point Century Schoolbook.

/s/ *Cameron T. Norris*

CERTIFICATE OF SERVICE

On May 20, 2022, I e-filed this document on ECF, which will email everyone requiring service.

/s/ *Cameron T. Norris*