

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VOTER PARTICIPATION CENTER,
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

**INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF
MOTION IN LIMINE**

Plaintiffs' response confirms that the Republican Party mailers are not relevant. That the Republican Party sent out mailers does not transform Plaintiffs' mailers into protected speech. Plaintiffs assert that these documents are relevant, but they never explain how the Republican Party mailers make it more likely that an ordinary observer would understand their mailing of ballots to convey a message. Plaintiffs' failure to provide a straightforward explanation of why these documents are relevant only proves that trial testimony about these documents would waste time and confuse the issues. The Court should thus grant the motion in limine.

A. Plaintiffs can't explain how the GOP documents are relevant.

Nowhere in their response do Plaintiffs point to any legally relevant fact that the GOP documents would make “more or less probable.” Fed. R. Evid. 401. The core of Plaintiffs’ argument is that the GOP documents are “probative of whether such communications are protected political speech or expressive conduct” because the documents show that “Intervenor-Defendants also sent integrated mailers with date-prefilled absentee ballot applications and cover letters.” Doc. 208 at 4. Plaintiffs never explain *how* that is probative—they just assert that it is.

That more people engage in certain conduct doesn't change whether the conduct is speech. “[A] picket line or a parade” is protected not because lots of people engage in “the physical activity of walking,” but because the context makes it inherently expressive. *VoieAmerica v. Raffensperger*, 2023 WL 6296928, at 7 (N.D. Ga., Sept. 27) (cleaned up). Flag burning is protected not because lots of people start fires, but because it is “inherently expressive” in some contexts. *Rumsfeld v. FAIR*, 547 U.S. 47, 66 (2006). Likewise, whether residential architecture is speech doesn't depend on whether someone down the block also built a house. It depends on the “expressive elements” in the context of that particular house. *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1338 (11th Cir. 2021). The list goes on, and what matters is whether a “reasonable observer” of the conduct “in its surrounding context” would understand it “to be predominately communicating some message,” not whether *other people* engaged in similar conduct. *Id.* at 1329.

To that end, Plaintiffs don't explain how the GOP documents are relevant to the *Burns* factors. They cite *Burns* briefly, claiming the GOP documents demonstrate "that the activity is open to all, addresses an issue of public concern, and has a history of conveying a message." Doc. 208 at 4. Again, assertions are not explanations. And Plaintiffs rely on a misunderstanding of *Burns*, which instructs courts to look at "contextual factors" surrounding the conduct "to determine whether there was a great likelihood some sort of message would be understood by those who viewed" the conduct. *Burns*, 999 F.3d at 1338. It is the "context" of Plaintiffs' activity that matters in determining whether Plaintiffs' mailers are speech—not "the activity" writ large. That's why the *Burns* factors are focused on the plaintiff. *See id.* at 1344 (discussing whether "Burns has ... plans to set up tables, distribute literature, or hang up a banner," and whether "*his house* will be open to everyone" (emphasis added)). As to the last factor, the fact that the GOP sent mailers does not show a history of conveying a message. And even the oldest GOP documents from 2018 couldn't establish that mailing absentee ballot applications "has been used over the millennia to convey a message." *Id.* The GOP documents don't affect the *Burns* analysis.

That the Plaintiffs bring a facial challenge also has no bearing on the motion in limine. *See* Doc. 208 at 3 n.3. To prevail on a facial challenge, Plaintiffs must prove that the SB 202 provisions are unconstitutional in "all possible applications." *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1550 (11th Cir. 1997). The GOP documents don't comprise "all" applications of the law, even in combination with the Plaintiffs' other evidence. In other words,

it's not enough for Plaintiffs to prove that another set of circumstances is invalid under SB 202—they must demonstrate that “no set of circumstances exists under which the Act would be valid.” *United States v. Martinez*, 736 F.3d 981, 991 (11th Cir. 2013) (emphasis added), *cert. granted, judgment vacated*, 135 S. Ct. 2798 (2015). Regardless, as the next section explains, the GOP documents wouldn't have violated SB 202 even had they been sent when the law was in effect.

In its summary judgment order, the Court found a genuine issue of material fact “as to whether a reasonable observer would perceive some sort of message from *Plaintiffs' conduct*.” Doc. 179 at 21 (emphasis added). The GOP documents have no bearing on that question, so they should be excluded.

B. The GOP documents are not speech.

Plaintiffs' response is based on another flawed assumption. They claim that “any evidence of speech that is affected by the provisions ... is relevant.” Doc. 208 at 3-4. That assumes that the GOP documents are speech regulated by the challenged provisions. But they aren't.

The First Amendment protects only “inherently expressive” conduct. *FAIR*, 547 U.S. at 66. All organizations, including political parties, engage in everyday conduct that is not “speech” under the First Amendment. The act of mailing absentee ballot applications to voters, for example, does not “express” an idea—it simply provides voters with applications. If those applications are accompanied by explanatory letters, that is only further evidence that the conduct “is not so inherently expressive that it warrants protection.” *Id.* Those letters might be protected speech, but the content of the letter is “needed to

convey that message.” *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1244 (11th Cir. 2018). The mere presence of the letter does not provide “sufficiently expressive” context for the entire mailing. *Id.* And without the letter, no “reasonable observer would interpret” the mailing “as conveying ‘some sort of message.’” *Id.*

Even under Plaintiffs’ theory the GOP documents aren’t speech. Plaintiffs admit that the issue at trial is whether “mailing a *personalized* absentee ballot application with a cover letter” protected by the First Amendment. Doc. 208 at 4 (emphasis added). And they contend their mailers are speech because they “personalize their applications” with “voter information” to communicate a “pro-absentee voting message.” Doc. 159 at 7. Intervenors do none of that, and Plaintiffs even avoid referring to the GOP applications as “personalized.” Doc. 208 at 4. At most, some of the GOP documents prefill the date, which is not prohibited even under SB 202. Plaintiffs gloss over that distinction by claiming it is “an open question” whether prefilling the date is permissible. Doc. 208 at 5 n.5. But they cite nothing to support that claim, least of all the statute. *See* Ga. Code §21-2-381(a)(1)(C) (prohibiting prefilling the elector’s “name, date of birth, address as registered, address where the elector wishes the ballot to be mailed,” and driver’s license or ID-card number). In short, this Court can’t assume, as Plaintiffs do, that the GOP documents are “evidence of speech that is affected by the provisions.” Doc. 208 at 3-4. And without that false premise, Plaintiffs’ argument fails.

Of course, Intervenor contend that these arguments apply equally to Plaintiffs' conduct. Their mailers are no more expressive than those of the Republican Party—none of them are speech. *That* argument would “go to the merits of Plaintiffs' claims.” Doc. 208 at 6. But the point for this motion in limine is that whether the Republican Party engages in that conduct or not doesn't change whether the conduct is speech.

CONCLUSION

For the foregoing reasons, the Court should grant the motion in limine.

Respectfully submitted,

/s/ William Bradley Carver

Gilbert C. Dickey*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
(703) 243-9423

Tyler R. Green*
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423

John E. Hall, Jr.
Georgia Bar No. 319090
William Bradley Carver, Sr.
Georgia Bar No. 115529
Baxter D. Drennon
Georgia Bar No. 241446
HALL BOOTH SMITH, P.C.
191 Peachtree Street NE, Suite 2900
Atlanta, Georgia 30303
(404) 954-5000
(404) 954-5020 (Fax)

*admitted pro hac vice

Counsel for Intervenor-Defendants

CERTIFICATE OF COMPLIANCE

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

/s/ William Bradley Carver

CERTIFICATE OF SERVICE

On March 15, 2024, I e-filed this document on ECF, which will email everyone requiring service.

/s/ William Bradley Carver

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