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' TRIAL BRIEF

On February 7, 2024, the Court granted the parties' joint scheduling motion, instructing the parties to file trial briefs addressing the application of *Burns v. Town of Palm Beach*, 999 F.3d 1317 (11th Cir. 2021). The Republican Intervenors file this trial brief in accordance with that order.

BACKGROUND

Plaintiffs challenge two Georgia election laws. First, they challenge the prefilling prohibition, which prohibits persons and organizations from sending any "elector an absentee ballot application that is prefilled with the elector's required information." Ga. Code §21-2-381(a)(1)(C)(ii). Second, they challenge the anti-duplication provision, which prohibits persons and organizations from sending "applications for absentee ballots to electors" who have "already

requested, received, or voted an absentee ballot in the primary, election, or runoff." *Id.* §21-2-381(a)(3)(A). Plaintiffs filed First Amendment, overbreadth, and vagueness challenges to these provisions. The State moved for summary judgment, and the Republican intervenors joined the motion. *See* Docs. 149, 151.

The Court largely ruled in favor of Defendants, dismissing most of Plaintiffs' claims on summary judgment. *See* Doc. 179. The Court denied summary judgment on two claims that will proceed to trial: whether the prefilling prohibition violates Plaintiffs' First Amendment rights, and whether the anti-duplication provision violates Plaintiffs' First Amendment rights. Because this will be a bench trial, "the court must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1).

APPLICABLE LAW

At trial, Plaintiffs bear the burden of proving their case by a preponderance of the evidence. *See Jabil Inc. v. Gen. Elec. Co.*, No. 1:19-cv-2260, 2023 WL 7109685, at *5 (N.D. Ga. Sept. 13, 2023) (citing *Johnson v. Florida*, 348 F.3d 1334, 1347 (11th Cir. 2003)). "The burden of showing something by a 'preponderance of the evidence,'" requires the judge, as the trier of fact, "to believe that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (citation omitted). To prevail, Plaintiffs must establish "every element" of their claims by a preponderance of the evidence. *Jabil*, 2023 WL 7109685, at *5.

To begin, Plaintiffs must prove that sending out their personalized absentee ballot applications is inherently expressive conduct. "As the party invoking the First Amendment's protection, [Plaintiffs] have the burden to prove that it applies." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013); *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies."). The First Amendment protects only "conduct that is inherently expressive." *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 66 (2006).

Proving that their conduct is inherently expressive takes two steps. First, Plaintiffs must prove that they intended to "convey a particularized message." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Next, they must prove that message would likely be "understood by those who viewed it." *Id.* That is, Plaintiffs must prove that a "reasonable person would interpret it as some sort of message." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) (emphasis and citation omitted). Here, "context matters." *Id.* A centerpiece of the context is the letter that Plaintiffs include in their application mailers. "The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection…." *FAIR*, 547 U.S. at 66. To overcome that "strong evidence," *id.*, Plaintiffs must prove that "the explanatory speech is [not] necessary for the reasonable observer" to derive a message from Plaintiffs' mailers, *Food Not Bombs*, 901 F.3d at 1240.

At summary judgment, this Court found a genuine issue of material fact as to whether a reasonable observer would perceive a message from Plaintiffs' conduct. The Eleventh Circuit distilled "five contextual factors" to guide that inquiry. *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1343 (11th Cir. 2021). Interpreting its earlier opinion in *Food Not Bombs*, the Eleventh Circuit used these factors to explain why a reasonable person would perceive a message from a group sharing a meal with the homeless in a city park.

First, the court found that the activity involved public displays, as compared to the same activity conducted in private. In *Food Not Bombs*, "the group set up tables and its banner and distributed literature at its events, which distinguished its activity from simply sharing a meal with friends." *Id.* (citing *Food Not Bombs*, 901 F.3d at 1242). That is, a community event designed to disseminate messages to the general public is "distinguished" from acts that target specific individuals in private. *Id.* This is why cases recognizing inherently expressive activity invariably involve open, public displays. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (publicly displaying a black armband to school during the Vietnam War); *Spence v. Washington*, 418 U.S. 405, 410 (1974) (publicly displaying an American flag with a peace symbol taped over it by hanging it upside down out of an apartment); *Texas v. Johnson*, 491 U.S. at 404 (publicly burning an American flag); *Food Not Bombs*, 901 F.3d at 1240 (publicly sharing food). In other words, when the conduct does not target a specific individual but instead is a public display, it is more likely that a reasonable person would view that conduct as expressing a message. Conduct that targets a particular person out of the

public's view is more like "sharing a meal with friends," and not inherently expressive. *Burns*, 999 F.3d at 1343.

Second, the court examined whether the activity was open to everyone. In *Food Not Bombs*, the fact that "the meal was open to everyone and the group invited all present to share in the meal at the same time" made it more likely that a reasonable person would perceive a message. *Id.* The purpose of an open event is to grab the attention of passersby. The event itself "has social implications" that encourage participation and influence those who engage with the activity. *Food Not Bombs*, 901 F.3d at 1242. In contrast, activity that is "shielded … from public view," that is not "open to everyone," or that is not a general invitation to "the public" would not be understood by a reasonable person as conveying a message. *Burns*, 999 F.3d at 1344.

Third, the court examined whether the activity took place in a traditional public forum. "Although the choice of location alone is not dispositive, it is nevertheless an important factor in the 'factual context and environment' that [courts] must consider." *Food Not Bombs*, 901 F.3d at 1242. Public forums are public areas that "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citation omitted). Everyone agreed that the city park in *Food Not Bombs* was a traditional public forum, as parks have been "historically associated with the exercise of First Amendment rights." *Food Not Bombs*, 901 F.3d at 1242 (quoting *Carey v. Brown*, 447 U.S. 455, 460 (1980)). A "private

residence," however, "is not a traditional public forum." *Burns*, 999 F.3d at 1344. The home is quintessentially private—absent invitation, a person's home is not open to the general public "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n*, 460 U.S. at 45. For the same reasons, the mail is not a public forum, either. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128 (1981) ("There is neither historical nor constitutional support for the characterization of a letterbox as a public forum.").

Fourth, the court examined whether the activity addressed an issue of public concern. In *Food Not Bombs*, "the record demonstrate[d] without dispute that the treatment of the City's homeless population [was] an issue of concern in the community." *Food Not Bombs*, 901 F.3d at 1242. That evidence consisted of city meetings, public workshops, and "local discussion regarding the City's treatment of the homeless." *Id.* at 1242-43. That background, the court said, "adds to the likelihood that the reasonable observer" would understand the food sharing even as conveying a message, "particularly in light of the undisputed fact that many of the participants are homeless." *Id.* at 1243. *Burns*, again, is a helpful contrast: a home's architectural design was a matter of private concern, not "public concern." *Burns*, 999 F.3d at 1344. Building residential homes was a commonplace, "uncontroversial" activity. *Id.*

Fifth, the court examined whether the activity "has been understood to convey a message over the millennia." *Id.* at 1344-45. Courts frame the activity narrowly. In *Burns*, for example, the plaintiff's extensive evidence that architecture had a history of expressive design was insufficient. The Eleventh

Circuit required the plaintiff to show that "*residential* architecture, specifically, has a historical association with communicative elements that would put a reasonable observer on notice of a message." *Id.* at 1345. Absent a lengthy history that "a particular symbol or type of conduct" has been used as a "means for conveying [a] message," this factor weighs against finding the activity as inherently expressive. *Food Not Bombs*, 901 F.3d at 1243.

These factors help the Court evaluate the context surrounding the expressive activity, but they are not "exclusive." *Burns*, 999 F.3d at 1346. "There may be other factors that are relevant" to whether a reasonable observer would perceive a message from Plaintiffs' conduct. *Id.* Although Plaintiffs do not need to prevail on all five factors (and neither do Defendants), the sum of Plaintiffs' evidence on the factors must indicate that "the likelihood was great that the message would be understood by those who viewed it." *Spence*, 418 U.S. at 410-11. That evidence must overcome Defendants' evidence, plus the "strong evidence" of the accompanying letter that suggests Plaintiffs' conduct is not inherently expressive. *FAIR*, 547 U.S. at 66.

If they prevail on this fact-intensive showing, then Plaintiffs' absentee-application mailers are inherently expressive conduct under the First Amendment. To obtain the benefit of strict scrutiny, Plaintiffs must then prove that the challenged laws restrict "core political speech." *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 207 (1999). At summary judgment, the Court found that the provisions restrict core political speech "[b]ased on the present record and given the case's current procedural posture." Doc. 179 at 24-25. At trial, Plaintiffs can no longer rely on inferences drawn in their favor, and they

must support that element by a preponderance of the evidence. The burden then shifts to Defendants to provide evidence of the State's interests in enforcing the laws. The Court found factual disputes on these elements at summary judgment. *See* Doc. 179 at 27-29.

Respectfully submitted,

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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 April 3, 2024, I e-filed this document on ECF, which will email everyone requiring service.

/s/ *William Bradley Carver*