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' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Republican Intervenors join in the State Defendants proposed finding of fact and conclusions of law, and submit the below additional proposed findings and conclusion.

FINDINGS OF FACT

1. Plaintiffs challenge two Georgia election laws.

2. 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).

3. 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).

4. Plaintiffs "distribute personalized absentee ballot application[s]." Doc. 159 at 2. They select target voters who they want to address, pre-fill ballot applications, and send "personalized absentee ballot applications" to those voters. Doc. 219 at 3.

5. Plaintiffs also send a cover letter urging the recipient to vote. Doc. 219 at 8.

6. The Court held a bench trial to assess whether the prefilling prohibition violates Plaintiffs' First Amendment rights, and whether the anti-duplication provision violates Plaintiffs' First Amendment rights.

CONCLUSIONS OF LAW

7. 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.

8. 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.").

9. The First Amendment protects only "conduct that is inherently expressive." *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 66 (2006).

10. Proving that their conduct is inherently expressive takes two steps.

11. First, Plaintiffs must prove that they intended to "convey a particularized message." *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

12. 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).

13. "[C]ontext matters" when deciding whether conduct is expressive *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.

14. 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.

15. The first factor is whether the activity involves a public display.

16. The Eleventh Circuit has described the food-sharing event in *Food Not Bombs* as public because "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." *Burns*, 999 F.3d at 1343. (citing *Food Not Bombs*, 901 F.3d at 1242). Other decisions have similarly recognized that inherently expressive activities involve public display. *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).

17. In contrast, courts have recognized that conduct meant to be viewed by only a narrow group is less likely to be expressive. 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.

18. Plaintiffs do not engage in the kind of public display that could suggest that their conduct is expressive. Plaintiffs send "personalized absentee ballot applications" through the mail to targeted voters. Doc. 218 at 3. They have presented no evidence that either the conduct of pre-filling ballots or the mailing of those ballots is public.

19. Because Plaintiffs do not engage in a public display, the first *Burns* factor weighs against finding that their mailing of pre-filled and duplicate ballots is expressive conduct.

20. The second factor is whether the Plaintiffs activities are open to the public.

21. An ordinary person would be more likely to understand the food-sharing event in *Food Not Bombs* because it "was open to everyone and the group invited all present to share in the meal at the same time." *Id.* That openness "has social implications" that encourage participation and influence those who engage with the activity. *Food Not Bombs*, 901 F.3d at 1242.

22. 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.

23. Plaintiffs mailing of pre-filled ballots and duplicate ballots is not an event that is open to everyone. Plaintiffs have never contended that the act of filling and mailing of ballots is open to the public. Nor do they take the position that their mailings are directed to the public. They "personalize … applications and "send" them "to their selected recipients." Doc. 218 at 5.

24. Plaintiffs' argument that their conduct is open to the public misunderstands this factor. They argue that their activities are open to the public because other groups could also mail pre-filled and duplicate ballots.

25. But the question is not whether others could engage in the same activity. It is whether Plaintiffs' own activity is open to the general public. The Eleventh Circuit explained that the conduct in *Food Not Bombs* was open to the public because the group "invited all present to share in the meal at the same time," *Burns*, 999 F.3d at 1343, not because anyone could have a picnic. And the construction of a home in *Burns* was not open to the public even though anyone could build a home. Plaintiffs' view of what it means for activity to be open to the public cannot be reconciled with those precedents.

26. Because Plaintiffs' conduct is not open to the public, the second *Burns* factor weighs against finding that they engage in expressive conduct.

27. The third *Burns* factor is 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.

28. 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.

29. The Supreme Court has held that the mail is not a public forum. *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.").

30. Because Plaintiffs' activity does not take place in a public forum, this factor weighs against finding that their mailing of pre-filled and duplicate ballots is expressive conduct.

31. The fourth *Burns* factor is whether the activity addressed an issue of public concern.

32. 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.

33. *Burns*, again, is a helpful contrast: "residential midcentury modern architecture" was not a "public concern." *Burns*, 999 F.3d at 1344. And there had been no public discussion of the proposed home design that would allow a reasonable observer to understand that the owner wanted to convey a message. *Id.*

34. Plaintiffs' mailing of pre-filled and duplicate ballots does not address a matter of public concern. Plaintiffs have not shown that the mailing of pre-filled or duplicate ballots has been a subject of public discussion that would lead a reasonable observer to conclude that they want to convey a message by sending pre-filled or duplicate ballots.

35. Plaintiffs' argument misunderstands how the fourth *Burns* factor applies. They argue that voting, voting by mail, and absentee balloting are issues of public concern. Doc. 218 at 19-21. But as *Burns* discussion of the specific home plan at issue illustrates, the fourth factor looks more narrowly at the regulated activity. *Burns*, 999 F.3d at 1344. Plaintiffs have not shown that the mailing of pre-filled and duplicate ballots is an issue of public concern that would lead a reasonable observer to conclude that they are trying to send a message.

36. Because Plaintiffs have not shown that the mailing of pre-filled and duplicate ballots is the kind of issue of public concern that would lead a reasonable observer to infer that they are sending a message, the fourth *Burns* factor weighs against finding that their conduct is inherently expressive.

37. The fifth *Burns* factor is whether the activity "has been understood to convey a message over the millennia." *Id.* at 1344-45.

38. 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.

39. Plaintiffs have not shown that sending prefilled and duplicate ballot applications has been understood to convey a message over millenia.

40. Instead of bringing forward evidence about the mailing of prefilled and duplicate ballot applications, Plaintiffs argue that there is a long history of using the mail to convey a message. Doc. 219 at 21-23. But as *Burns*' focus on residential architecture shows, the question looks to the specific regulated conduct. Plaintiffs' invocation of the mail generally being used to communicate is not consistent with that approach.

41. Because sending prefilled and duplicate ballot applications has not been understood to convey a message over millenia, the fifth *Burns* factor weighs against finding that Plaintiffs conduct is inherently expressive.

42. Plaintiffs have failed to show that the mailing of pre-filled and duplicate ballot applications is inherently expressive. Their regulated conduct is not expressive. And their First Amendment claim fails.

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/ *Baxter D. Drennon*

CERTIFICATE OF SERVICE

On May 31, 2024, I e-filed this document on ECF, which will email everyone requiring service.

/s/ *Baxter D. Drennon*