UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE CONCERNED BLACK CLERGY OF METROPOLITAN ATLANTA, INC., et al., *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, et al., *Defendants*, REPUBLICAN NATIONAL COMMITTEE; et al., *Intervenor-Defendants*.	No. 1:21-cv-1728-JPB

INTERVENORS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS*

* Because Plaintiffs "agree" that Intervenors can file a motion to dismiss, Opp. (Doc. 50) 2 n.2, this Court need not treat this motion as one for summary judgment. *See Virginia v. Ferriero*, 2021 WL 848706, at *3 n.1 (D.D.C. Mar. 5) (treating intervenors' motion for summary judgment as a motion to dismiss because "Plaintiffs do not object" to that treatment).

While Intervenors joined the State's motion, they also filed their own motion—arguing, for example, that restrictions on absentee voting do not implicate the constitutional right to vote, that idiosyncratic burdens on some voters do not implicate the constitutional right to vote, and that distributing food and drink is not speech. *See* Mot. (Doc. 47-1) 4-10, 19-20. In response to *those* defenses, Plaintiffs say little. And what they do say is nonresponsive.

This Court "has no duty to formulate arguments that Plaintiff[s] might have made in response to [Intervenors'] motion[] to dismiss, but did not." *Lindsay v. Bank of Am. Home Loans*, 2016 WL 4546654, at *2 n.3 (N.D. Ga. Feb. 1). Under the Local Rules, a party's "failure to respond to any portion or claim in a motion indicates such portion, claim or defense is unopposed." *Kramer v. Gwinnett Cty.*, 306 F. Supp. 2d 1219, 1221 (N.D. Ga.) (citing LR 7.1(B)), *aff'd*, 116 F. App'x 253 (11th Cir. 2004). Plaintiffs' failure to respond to Intervenors' defenses is reason enough to dismiss Counts IV and V of the complaint. And this Court should dismiss the entire complaint for the reasons given in Intervenors' motion, the relevant parts of the State's briefs (which Intervenors join), and Intervenors' replies in the related cases.

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Count IV of Plaintiffs' complaint contends that SB 202's provisions "individually and collectively" violate the "constitutional" "right to vote." Compl. (Doc. 1) ¶¶190-94. In their motion to dismiss, Intervenors explained how Plaintiffs' allegations fail to even implicate the constitutional right to vote. *See* Mot. 4-10. The challenged provisions do not "implicate the right to vote at all"

because Georgia provides at least one constitutionally adequate way to vote: in-person on election day. *New Ga. Proj. v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020). And Plaintiffs' allegations of "excessive burden 'on some voters' cannot plausibly support a facial constitutional challenge." *League of Women Voters of Minn. Educ. Fund v. Simon*, 2021 WL 1175234, at *8 (D. Minn. Mar. 29).

Intervenors do not understand Plaintiffs' response to these well-developed defenses. Plaintiffs mostly discuss the fact that they pleaded claims of intentional racial discrimination. *See* Opp. 2-3 (citing paragraphs from Counts II and III of the complaint). But Intervenors' arguments address Plaintiffs' right-to-vote claim, not their racial-discrimination claims. In defense of *that* claim, Plaintiffs offer only conclusions, not arguments. Plaintiffs flatly deny that they "allege only 'idiosyncratic' burdens on voting," but they never explain how. Opp. 2. Plaintiffs insist that the Court "need not" decide whether regulations of absentee voting implicate the constitutional right to vote, but they never explain why. Opp. 3. Plaintiffs do not respond to Intervenors' analysis, distinguish Intervenors' cases, or cite contrary cases of their own. The Court should treat this part of Intervenors' motion as "unopposed" and dismiss Count IV. *Fisher v. Citimortgage, Inc.*, 2013 WL 12106932, at *3 (N.D. Ga. Jan. 29).

* *

Count V contends that SB 202's ban on gift-giving violates the "First Amendment rights of speech and expression." Compl. ¶196. Intervenors' motion argued that the distribution of food and drink is conduct, not speech. *See*

Mot. 19-20. In response, Plaintiffs offer no argument or analysis explaining why this conduct is actually speech. This point, too, should be deemed "unopposed." *Kramer*, 306 F. Supp. 2d at 1221. Conduct is not "presumptively expressive"; it is Plaintiffs' "obligation" to "demonstrate that the First Amendment even applies" here. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). They haven't tried.

Plaintiffs instead purport to catch Intervenors in a nonexistent contradiction. If distributing food and drink "carries no understandable party or political 'message,'" Plaintiffs say, then Georgia has no legitimate interest in prohibiting it. Opp. 4. But if distributing food and drink is not expressive, then it's pure conduct and the gift-giving ban is subject to "rational-basis scrutiny." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013). The ban is plainly rational: Georgia acted to prevent undue influence on voters, and it chose a prophylactic ban because a case-by-case approach would be difficult to enforce. *See Burson v. Freeman*, 504 U.S. 191, 206-07 (1992); *id.* at 216 (Scalia, J., concurring in the judgment); *Hill v. Colorado*, 530 U.S. 703, 729 (2000). Plaintiffs do not argue otherwise. Count V should also be dismissed.

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Plaintiffs' only real response is that Intervenors' defenses should not be decided on a motion to dismiss. *See* Opp. 3-5. But each of Intervenors' arguments raises a pure question of law. Restrictions on absentee voting either implicate the constitutional right to vote or they don't. Plaintiffs' noncategorical

burdens either count under *Anderson-Burdick* or they don't. And SB 202's gift-giving ban either regulates speech or it regulates conduct.

If the Court agrees with Intervenors on these legal disputes, it should dismiss Plaintiffs' claims now. *E.g.*, *Fidell v. Bd. of Elections of N.Y.C.*, 343 F. Supp. 913, 915 (E.D.N.Y.) (dismissing a complaint that rested on the nonexistent right to vote absentee), *aff'd*, 409 U.S. 972 (1972); *League of Women Voters of Minn.*, 2021 WL 1175234, at *7-9 (dismissing a claim based on Intervenors' "purely legal" argument about noncategorical burdens); *Shanks v. Forsyth Cty. Park Auth., Inc.*, 869 F. Supp. 1231, 1234 (M.D.N.C. 1994) (granting a motion to dismiss after concluding that the alleged conduct was "not speech"). And because Plaintiffs' other claims also fail as a matter of law, this Court should dismiss the complaint with prejudice.

Respectfully submitted,

Dated: August 9, 2021

/s/ *Tyler R. Green*

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with Local Rule 5.1(B) because it uses 13-point Century Schoolbook.

/s/ *Tyler R. Green*

CERTIFICATE OF SERVICE

On August 9, 2021, I e-filed this document on ECF, which will serve everyone requiring service.

/s/ *Tyler R. Green*