IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VOTEAMERICA, *et al.,* *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.,* *Defendants*.	CIVIL ACTION FILE NO. 1:21-CV-1390-JPB

REPLY BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

"States—not federal courts—are in charge of setting [the] rules" for the electoral process. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) (*NGP*). Plaintiffs, however, clearly want this Court to micromanage the State's elections in their favor. But Plaintiffs' Response to Defendants' Motion to Dismiss makes clear why Plaintiffs' Complaint should be dismissed under both Rule 12(b)(1) and 12(b)(6): Plaintiffs do not have standing to bring this case, and even if they did, they have failed to articulate a claim upon which relief may be granted.

I. Plaintiffs have failed to prove standing.

Plaintiffs have failed to treat standing with the degree of specificity required by caselaw. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("Standing is not dispensed in gross."). Instead, their Response in Opposition to the Motion to Dismiss ("Response") paints with a broad brush, focusing on the impact of the entirety of "SB 202" on them collectively, rather than "demonstrate[ing] standing for each claim [they] seek to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). In so doing, they assert three overly broad theories to try and establish an injury-in-fact: SB 202 regulates them, requires them to expend resources, and undermines their

ability to speak with voters. *See*, *e.g.*, [Doc. 45, at 8–12]. But none of Plaintiffs' theories gets them out of the gate.

A. Although Plaintiffs are subject to SB 202's restrictions, the regulations do not implicate Plaintiffs' constitutional interests.

Plaintiffs' argument that they have standing simply because "they are subject to SB 202's restrictions" falls short. [Doc. 45, at 7]. Plaintiffs concede that the right to bring a pre-enforcement suit is limited to those situations where they "have alleged an intention to engage in a course of conduct *arguably affected with a constitutional interest*, but proscribed by statute." *Id.* (quoting *Wollchlaeger v. Gov. of Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017)). But they have not adequately alleged a cognizable constitutional interest: Although Plaintiffs try to couch their suit in terms of the First Amendment, the Supreme Court has already made clear that "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). The same logic holds for absentee ballot applications. In light of this precedent, the absentee ballot application requirements challenged here cannot be said to implicate Plaintiffs' First Amendment interests.

B. Plaintiffs have failed to plead what, if anything, they would divert resources away from.

Likewise, Plaintiffs' diversion of resources theory fails because they have still not demonstrated "what activities they would divert resources away *from* in order to spend additional resources on combatting" the law's supposed impact. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1250 (2020). With respect to VoteAmerica, for example, they claim only that the organization would be forced to divert resources from unspecified "existing programs." [Doc. 45, at 10]. Similarly, they claim VPC and CVI would divert resources from unspecified "other activities." *Id.* Plaintiffs have not pointed to any case law suggesting that such high-level generalities are sufficient to establish an injury-in-fact under a diversion of resources rubric. In fact, Eleventh Circuit precedent indicates a higher degree of specificity is required. *See, e.g., Florida State Conf. of N.A.A.C.P v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) (identifying the specific programs plaintiff would divert resources away from); *Common Cause/GA v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (finding an injury-in-fact because plaintiff would have to divert resources from getting voters to the polls to helping them obtain voter ID); *Ga. Latino All. for Human Rights v. Governor*, 691 F.3d 1250, 1260 (11th Cir. 2012) (observing that an

immigration organization "cancelled citizenship classes to focus on" increased inquiries about the challenged law).

C. SB 202 does not mute Plaintiffs' political speech.

Plaintiffs' claim that the regulations will "mute Plaintiffs' political speech" is similarly misguided. [Doc. 45, at 11]. As mentioned above, Plaintiffs' First Amendment interests are not implicated here. Nothing in the Complaint suggests that any Plaintiff would be precluded from communicating with voters. The challenged provisions merely regulate the *process* of third parties sending absentee ballot applications which, again, are "not forums for political expression." *Timmons*, 520 U.S. at 363. The Disclaimer Provision therefore does not impact Plaintiffs' political speech at all. Furthermore, the possibility that voters might be less likely to fill out a blank absentee ballot application and send it in, *see* [Doc. 45, at 3], is irrelevant: Plaintiffs do not have a right to have voters take certain actions.

Accordingly, Plaintiffs do not have standing and this case should be dismissed for want of jurisdiction.

II. Plaintiffs fail to state a claim on which relief can be granted.

Similarly, each of Plaintiffs' claims is insufficient on the merits. As an initial matter, Plaintiffs ignore that it is only "[r]egulations imposing *severe* burdens on [the] rights" of election-statute challengers that "must be narrowly

tailored and advance a compelling state interest." *Timmons*, 520 U.S. at 358 (cleaned up, emphasis added); *see also* [Doc. 45, at 12–19]. Plaintiffs neglect to mention that "[l]esser burdens . . . trigger less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions." *Id.* Plaintiffs also fail to acknowledge the principle that everyday limitations "arising from life's vagaries" count as such lesser burdens. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197-98 (2008) (controlling opinion).

Plaintiffs, moreover, do not dispute Defendants' showing that the challenged SB 202 provisions are supported by several compelling interests: "(1) deterring and detecting voter fraud;" "(2) improv[ing] . . . election procedures;" (3) ensuring accurate information in voter registration systems; "(4) safeguarding voter confidence;" and (5) running an efficient and orderly election. *Greater Birmingham Min. v. Sec'y of State for Ala.*, 992 F.3d 1299, 1319 (11th Cir. 2021) (*GBM*); *NGP*, 976 F.3d at 1282; *see also Crawford*, 553 U.S. at 191; [Doc. 40-1, at 7–8]. The General Assembly also explained that its aim was to improve "elector confidence" and reduce voter confusion. SB 202 at 5:102-106. Plaintiffs' various claims founder on their failure to provide plausible allegations showing either that these interests are not "important" or that the challenged provisions are not rationally related to any of them.

A. Free Speech Claims

Plaintiffs suggest that Georgia is trying to suppress their free speech. *See* [Doc. 45, 12–19]. Yet ballots and absentee ballot applications or solicitations do not even implicate protected speech. *See Timmons*, 520 U.S. at 363; *see also Burdick*, 504 U.S. at 438; [Doc. 40-1, at 9].

Plaintiffs respond by suggesting that *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), and *Meyer v. Grant*, 486 U.S. 414 (1988), tacitly reclassified a ballot as a medium of core political speech—a result that would require curtailing *Timmons*. *See* [Doc. 45, 12–14, 18–19]. But, again, the Supreme Court made clear in *Timmons* that ballots do not constitute protected speech. 520 U.S. at 363. The Supreme Court itself retains the exclusive "prerogative" of "overrul[ing] one of its precedents," *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997), even where subsequent developments may appear to have "significantly undermined" the rationale undergirding its precedent, *United States v. Hatter*, 532 U.S. 557, 567 (2001). Moreover, like other cases in the elections space, *see*, *e.g.*, *Storer v. Brown*, 415 U.S. 724, 730 (1974) (rejecting "litmus-paper test[s]" and finding "no substitute for the hard judgments that must be made"), *Buckley* and *Meyer* were narrow decisions cabined to their specific contexts, *see Buckley,* 525 U.S. at 191–92. Finally, a State is entitled to great deference in conducting its own elections. *See Purcell*

v. Gonzalez, 549 U.S. 1, 4 (2006) (*per curiam*). None of Plaintiffs' free speech claims can survive application of these principles.

1. Disclaimer Provision

Plaintiffs argue that the disclaimer provision "mandate[s] that Plaintiffs both use the official government form and inaccurately state that it is not an official form." [Doc. 45, at 15–16]. But this argument overlooks that, while the absentee ballot *application* is a government form, Plaintiffs are required to identify themselves on their own unofficial and private *solicitations* to voters. Moreover, not only is this restriction unrelated to core political speech, it imposes, at most, a lesser burden amply justified by the State's compelling interests in "safeguarding voter confidence;" stopping voters from being misled; "improv[ing] . . . election procedures;" reducing voter confusion; and efficiently running elections. *GBM*, 992 F.3d at 1319; *NGP*, 976 F.3d at 1282; *see* SB 202 at 5:102-106. Plaintiffs offer no plausible, specific allegations to rebut that conclusion. Accordingly, this claim should be dismissed.

2. Prefilling Prohibition

While asserting that "prefilled applications are the most effective method of communicating with Plaintiffs' audiences," [Doc. 45, at 14], Plaintiffs do not explain why SB 202's restriction on such prefilling violates the First Amendment. Prefilling applications greatly increases the risk of the

application's being prefilled with inaccurate information. It is reasonable to assume that the voters themselves will have the most accurate information about their whereabouts and where they would like their absentee ballot sent; and disallowing applications prefilled by third parties ensures that this information comes from the voter. Furthermore, third parties sending out prefilled applications raises the likelihood of voters receiving prefilled applications for strangers who have no connection to their addresses, thereby increasing voter confusion. In any event, the minimal burden this provision imposes is justified by Georgia's interests in safeguarding election integrity, protecting voter confidence, reducing voter confusion, and ensuring correct information from voters. *See GBM*, 992 F.3d at 1319; *NGP*, 976 F.3d at 1282. Invalidating the reasonable line Georgia has drawn because this line happens not to favor some entities would "enmesh the courts in difficult line-drawing exercises." *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 140 S. Ct. 2082, 2089 (2020). Consequently, this claim should be dismissed.

3. Anti-Duplication Provision

Plaintiffs' argument that the Anti-Duplication provision attacks their core political speech, *see* [Doc. 45, at 14], has been refuted earlier, *see supra* at 6; [Doc. 40-1, at 9]. Additionally, Plaintiffs' contention that violating this provision would inflict fines on them, *see* [Doc. 45, at 14–15], says nothing

about why this provision violates their free speech rights. At any rate, Georgia's compelling interests in safeguarding election integrity, reducing voter confusion, reducing the burden on election officials, and increasing voter confidence clearly support this provision. As a non-severe burden, this provision should be upheld, and this claim should be dismissed.

B. Freedom of Association Claims

Plaintiffs argue that SB 202 prevents them from associating with voters in the manner of their choosing—mailer programs—and from associating with partner organizations; as well as from "persuading voters to action." [Doc. 45, at 19–20]. But SB 202 does not stop them from associating with or persuading anyone. Each of the challenged provisions imposes, at most, non-severe burdens and is amply justified by previously mentioned compelling governmental interests. *See* Part II(A), *supra*. For instance, the Disclaimer Provision ensures that, when Plaintiffs send absentee ballot applications to voters, they clearly tell those voters who sent it—rather than letting voters assume it was the government. Likewise, the Prefilling Prohibition stops voter confusion, prevents allegations of fraud and improves election security. Moreover, the Anti-Duplication Provision prevents Plaintiffs from sending duplicative applications, which confuse voters and burden election officials. Additionally, Plaintiffs have offered no evidence to show that these provisions

would effectively "eliminat[e] [their] mailer programs," [Doc. 45, at 19–20], since those programs could continue in compliance with SB 202. Finally, SB 202 is narrowly tailored to protect voters from abuse and exploitation and the election system from corruption. Thus, these claims should be dismissed.

C. Compelled Speech Claim—Disclaimer Provision

Plaintiffs further contend that the required disclaimer is "incorrect" and that it alters the content of their speech. [Doc. 45, at 21–22]. Not so. First, the disclaimer accurately conveys that the solicitation came from a private entity, not the government. Second, the disclaimer does not "alter[] the content of [Plaintiffs'] speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988). Aside from ensuring that Plaintiffs do not mislead voters into thinking their solicitations came from the government rather than a private entity, that provision permits Plaintiffs to convey to voters *precisely* what they want to convey. The disclaimer merely ensures that the voters are not confused or misled, a problem the Georgia legislature was trying to avoid. SB 202 at 5:102-106. Thus, this claim should be dismissed.

D. Substantial Overbreadth Claims

1. Disclaimer Provision

Moving on to overbreadth challenges, Plaintiffs argue that the Disclaimer Provision applies to "any application for an absentee ballot sent to

any elector by *any* person or entity." [Doc. 45, at 22]. But they ignore that SB 202 permits authorized family members to request an absentee ballot for their relative, without complying with the Disclaimer Provision. *See* [Doc. 45, at 22–23]. Moreover, Georgia reasonably (and permissibly) has chosen to minimize the potential for abuse by not exempting any other senders and recipients. Even if this determination elicited constitutional concerns, that would be on an as-applied basis. The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge," *United States v. Williams*, 553 U.S. 285, 303 (2008) (cleaned up), when—as here—the provision has a legitimate sweep. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Therefore, this facial claim should be dismissed.

2. Prefilling Prohibition

Plaintiffs contend that State Defendants have conceded the Prefilling Prohibition "is problematic." [Doc. 45, at 23]. But Defendants have never made such a concession. *See* [Doc. 40-1, at 19–20]. Plaintiffs further argue that pre-filling applications lets them help disabled voters. *See id.* But Georgia already permits Plaintiffs to assist illiterate or physically disabled voters by formally presenting themselves as and signing as assistors. In any case, the narrow

category of voters this provision *might* affect could not constitute the required *substantial* overbreadth. *See Williams*, 553 U.S. at 303.

Finally, Plaintiffs assert that "VoteAmerica's model"—which they suggest relied on prefilling absentee applications—was "*used by* more than 48,000 Georgia voters in 2020-21." [Doc. 45, at 23] (emphasis added); *see also* [Doc. 1, at ¶¶ 19, 21]. But this allegation—even assuming it's true—is irrelevant to substantial overbreadth: The question is whether the Prefilling Prohibition sweeps substantially more broadly than the relevant state interests. *See, e.g., Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989); *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973). And Plaintiffs' claim about the number of voters who used their prefilling tool in the past is not relevant to whether that legal standard is satisfied here. Thus, Plaintiffs have not plausibly pleaded an overbreadth violation based in this portion of SB 202.

3. Anti-Duplication Provision

Plaintiffs' overbreadth challenge to the Anti-Duplication Provision, *see* [Doc. 45, at 23], founders on the Supreme Court's holding that neither ballots nor ballot applications or solicitations are protected speech, *see Timmons*, 520 U.S. at 363. Plaintiffs also contend that this easily administrable provision is over-inclusive, *see* [Doc. 45, at 23–24], but this provision does not impinge on any protected speech or activity. In any event, any over-inclusiveness here

would be insubstantial since it affects, *at most*, only a narrow class of voters. *See Williams*, 553 U.S. at 303; [Doc. 40-1, at 21]. Thus, Plaintiffs' argument lacks merit, and this claim must be dismissed as well.

E. Vagueness Claims

Plaintiffs also contend that vagueness and indeterminacy afflict: (1) the word "send" in each of the challenged provisions; and (2) the font-size requirements of the Disclaimer Provision. *See* [Doc. 45, at 24–25]. Neither contention has merit, and thus the associated claims must be dismissed.

1. "Send" in SB 202 clearly refers to postal mail.

Plaintiffs first deny that the dictionary refutes their vagueness claims as to the meaning of "send" in the challenged provisions. *See id*. But the meaning of "send" as used in the challenged provisions depends not *only* on the dictionary definition of "send" at the time of SB 202's enactment, but also on its ordinary, contemporary, natural meaning taken as a whole. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 493 (2020); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 109 (2001). After all, the words of a statute "mean what they conveyed to reasonable people at the time" of their enactment. A. SCALIA & B. GARNER, READING LAW 16 (2012).

That is why, in ascertaining the meaning of the word "send," we also consult the statutory context, structure, and circumstances. *See*, *e.g.*,

Alexander v. Sandoval, 532 U.S. 275, 288 (2001); John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 78–80 (2006). And as Defendants have explained, when those sources are consulted it becomes clear that "send" simply refers to postal mail. *See* [Doc. 40-1, at 22–24]. Indeed, because Plaintiffs' objections are focused on SB 202's impact on their *mailers*, they have effectively conceded as much. *See* [Doc. 1, at ¶¶ 28, 31, 32, 37, 38, 42, 96, 97, 98, 113]; [Doc. 45, at 3, 5, 9, 10, 13, 15, 16, 20]. Because the provision's meaning is clear, there is no vagueness problem, and this claim should be dismissed.

2. The "clearly readable" requirement is not vague.

Plaintiffs offer no specific argument as to why, in their view, the "clearly readable" requirement is vague. *See* [Doc. 1, at 56; Doc. 45, at 4 n.1, 25]. But the use of the adjective "clearly"—as in the Disclaimer Provision's requirement that the disclaimer be "clearly readable"—and the color-contrast requirement leave no doubt as to the meaning of the "clearly readable" requirement. This requirement affords everyone "fair notice" as to the conduct that SB 202 proscribes, *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972), because it permits "reasonable people" easily to "understand its terms." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233 (2018) (Gorsuch, J., concurring in part and concurring in judgment). Finally, numerous laws nationwide (including a

federal election law) contain similar "clearly readable" provisions[1]—and declaring them unconstitutionally vague would be a bold and unwarranted step.

CONCLUSION

Plaintiffs lack standing and have not pleaded any plausible legal claims. Thus, Plaintiffs' entire Complaint should be dismissed with prejudice.

Respectfully submitted this 15th day of June, 2021.

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[1] *See*, *e.g.*, 52 U.S.C. § 30120(c)(1) (using language very similar to SB 202's Disclaimer Provision); ARIZ. REV. STAT. § 5-703(G)-(H); ALASKA STAT. § 05.45.060(f); ALA. CODE 1975 § 6-5-337(d)(1); CAL. BUS. & PROF. CODE § 17570; CAL. BUS. & PROF. CODE § 12516; CAL. CIV. CODE § 7101(b); CAL. CIV. CODE § 7100(a); CAL. BUS. & PROF. CODE § 12733; CAL. CORP. CODE § 2603(12)(A)(i); CAL. CORP. CODE § 204(12)(A)(i); COLO. REV. STAT. § 13-21-119(5)(a); COLO. REV. STAT. § 33-44-107(8)(b); CONN. GEN. STAT. § 9-621(b)(1); DEL. CODE ANN. tit. 10, § 8140(d)(1); IDAHO CODE ANN. § 6-3005(1); FLA. STAT. § 106.1437; FLA. STAT. § 570.89(b); IND. CODE § 34-31-9-13; IND. CODE § 34-31-5-4(a); IND. CODE § 3-11-4-5.2(d)(1); 625 ILL. COMP. STAT. 5/6-404; MICH. COMP. LAWS ANN. § 691.1666(6)(2); MISS. CODE ANN. § 69-53-5(1); MISS. CODE ANN. § 95-11-7(1); MISS. CODE ANN. § 63-7-13(3); MD. CODE ANN., AGRIC. § 11-315; ME. REV. STAT. ANN. tit.1, § 603(1)(C); LA. STAT. ANN. § 14:223.6; LA. STAT. ANN. § 9:2795.1(E); LA. STAT. ANN. § 9:2795.3(E); LA. STAT. ANN. § 9:2795.5(E)(1); MINN. STAT. § 325F.54(a); MASS. GEN. LAWS ANN. ch. 128, § 2D(d)(1); KY. REV. STAT. ANN. § 247.8091(1); KY. REV. STAT. ANN. § 247.4027(2); KAN. STAT. ANN. § 32-1434(b); KAN. STAT. ANN. § 60-4004(a); MO. REV. STAT. § 537.856(2); MO. REV. STAT. § 570.225(1)(4); MO. REV. STAT. § 537.325(6); N.C. GEN. STAT. § 99E-32(a); NV Stat. 118B.170(3)(a); NEV. REV. STAT. § 482.31565(3); NEB. REV. STAT. § 25-21,253(2); N.Y. ELEC. LAW § 6200.10(f)(2)(i)-(iii); WASH. REV. CODE § 4.24.835(1).

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Reply Brief in Support of Defendants' Motion to Dismiss has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/Gene C. Schaerr
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