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.

CIVIL ACTION NO.

1:21-CV-01728-JPB

PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENORS' MOTION TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT

Plaintiffs, in response to Intervenors' Motion to Dismiss or Alternatively for Summary Judgment [Doc. 47],[1] incorporate the arguments in their opposition to Defendants' Motion to Dismiss Complaint, and state the following in further opposition to Intervenors' motion:

I. Plaintiffs sufficiently allege that SB 202 violates their constitutional right to vote.

Intervenors base their motion to dismiss Plaintiffs' constitutional claims on the astonishing arguments that the right to vote "is not 'at stake' here" and that the alleged burdens on that right are "irrelevant." Intervenors' Brief at 4, 7. But, contrary to Intervenors' contention, Plaintiffs' constitutional claims do not depend on whether there is a right to vote absentee per se. Nor do Plaintiffs allege only "idiosyncratic" burdens on voting. Rather, plaintiffs plainly allege that SB 202, as a whole, "was purposefully enacted and operates to deny, abridge, or suppress" the right to vote "on account of race or color." Complaint ¶¶ 181-183, 189.

While the Supreme Court in *Brnovich* ultimately concluded that the Arizona election statute passed constitutional muster, it did so only on a trial record that, the district court concluded, showed that the law was passed without discriminatory purpose. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2365-2369 (2021).

[1] For the reasons stated in Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss, summary judgment is inappropriate at this stage of the proceedings. Plaintiffs agree with Intervenors that the Court should treat their motion only as a motion to dismiss. Intervenors' Brief at 2.

Plaintiffs in this case have alleged in great detail that SB 202 was passed in direct response to historic Black turnout in the 2020 elections—"intentionally enacted…to deny, abridge, or suppress the right to vote on account of race or color," in disregard of public concerns about its potential racial impact. Complaint ¶ 189, 106. Whether SB 202 was passed as a result of "a serious legislative debate on the wisdom" of voting restrictions, *Brnovich,* 141 S. Ct., 2349, or whether the legislature's stated concern for election fraud was merely pretextual, remains to be determined in discovery.

The Supreme Court has not decided whether there is or is not a right to vote by any of the methods restricted by SB 202, and this Court need not do so now. Rather, the Court must ultimately weigh the overall alleged burdens on Plaintiffs' right to vote against the "precise interests put forward by the State as justifications for the burden imposed by [SB 202]." *Crawford v. Marion Cnty. Election Bd.,* 128 S.Ct. 1610, 1616 (2008). Just as the Court must consider the State's "entire system" of voting under SB 202, Intervenors' Brief at 14, so it must consider the entirety of the statute's restrictions on those same voting methods. It cannot do so at the motion to dismiss stage.

II. The State has no legitimate interest in criminalizing "line warming" if, as Intervenors contend, the practice "expresses no particularized message that anyone would understand."

Intervenors contend that the State enacted the ban on "line warming"—offering food or drink to voters waiting in long lines at polling places—to protect voters from political pressure or intimidation. At the same time, however, they argue that line warming cannot be First Amendment protected speech because it "expresses no particularized message that anyone would understand." Intervenors' Brief at 19-21. Intervenors cannot have it both ways. An offer of food or drink, with no other discernable meaning, can hardly be said to pressure or intimidate voters, and Intervenors do not explain how a bottle of water intimidates anyone. By their own characterization, it carries no understandable party or political "message."

The Complaint plausibly alleges that an offer of food and drink to voters waiting in long lines "encourages voters to stay in line and emphasizes that every vote matters." It also alleges that this message of perseverance is particularly directed toward Black voters, "who are disproportionately affected by longer lines." Complaint ¶ 154. These allegations are sufficient to state a claim that line warming implicates First Amendment expression and to survive a motion to dismiss. Which position the state and Intervenors may take as the evidence

unfolds—protection from intimidation or "no message" at all—must be developed in discovery.

The Court must consider whether, in the factual context of Black and other voters of color in disproportionately long lines to vote, an offer of food or drink is an encouragement to participate in our democracy or a coercive "gift." It should not do so on a motion to dismiss.

CONCLUSION

For the foregoing reasons, and those stated in Plaintiffs' opposition to Defendants' motion to dismiss, Intervenors' motion should be denied in its entirety.

Respectfully submitted,

/s/ Kurt Kastorf

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Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using the Times New Roman font at a point size of 14.

Dated: July 26, 2021 /s/ Kurt Kastorf

Kurt Kastorf
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on July 26, 2021, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Dated: July 26, 2021 /s/ Kurt Kastorf

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