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

VOTER PARTICIPATION CENTER, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.*,

Defendants,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

Civil Action No.: 1:21-CV-1390-JPB

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STATE DEFENDANTS' POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INTRODUCTION

The trial record confirms that the Court should enter judgment in favor of State Defendants on Plaintiffs' remaining First Amendment claims, which challenge two provisions of Senate Bill 202 (SB 202). Plaintiffs first challenge SB 202's prohibition on sending prefilled absentee-ballot applications to voters (the "Prefilling Prohibition"). And they challenge SB 202's prohibition on sending absentee-ballot applications to voters who have already requested an absentee ballot (the "Anti-Duplication Provision") (collectively, the "Provisions"). However, each challenge fails for a multitude of reasons.

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Most significantly, Plaintiffs' First Amendment claims fail because their sending of absentee-ballot applications is not expressive conduct, and thus Plaintiffs failed to show that the First Amendment even applies. Rather, all expressive conduct is found in *other* parts of the mailings that Plaintiffs send to Georgia voters. That is perhaps why Plaintiffs failed to provide any evidence of even a single Georgia voter who perceived a message from Plaintiffs' sending them an absentee-ballot application. And, because those other components are necessary to explain Plaintiffs' message, binding authority from the Supreme Court and the Eleventh Circuit confirms that the applications themselves communicate no First Amendment-protected message.

But even if Plaintiffs had demonstrated that their conduct is expressive, they failed to show that it is "core political speech," as there is no evidence

showing any type of interactive communication concerning political matters between Plaintiffs and the individuals who receive the absentee-ballot applications. Rather, any interactions those voters have is with the county election officials to whom they send the absentee-ballot applications.

In contrast to these evidentiary gaps in Plaintiffs' case, State Defendants provided a wealth of evidence showing that the Provisions further important State interests of enhancing voter confidence in the integrity of Georgia elections, reducing voter confusion, and promoting electoral efficiency. The trial record is replete with evidence of voters and county officials raising concerns about prefilled and duplicate absentee-ballot applications. Indeed, there are many examples in the record of voters questioning the integrity of Georgia's elections because of prefilled or duplicate absentee-ballot applications sent by Plaintiffs or similar organizations. Similarly, State Defendants provided voluminous evidence showing that Plaintiffs' mailings substantially confused voters, often causing voters to submit multiple absentee-ballot applications even when the voter intended to vote in person. That significantly impairs electoral efficiency, as county officials must divert their limited time to processing unnecessary applications and, in many instances, they must also cancel absentee ballots on Election Day when there are many other pressing tasks to be handled.

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The evidence shows that each Provision responds directly to these issues. The Prefilling Prohibition completely eliminates voter concerns raised by receiving incorrectly prefilled absentee-ballot applications. And it completely eliminates voter concerns raised by receiving applications that include personal information that the voter thought was private. Moreover, by requiring the voter to complete the entire application, the record unequivocally shows that voters are more likely to engage with the document and understand that they are requesting an absentee ballot. Accordingly, the record establishes that this provision also reduces the strain on election officials.

The undisputed evidence further establishes that the Anti-Duplication Provision does likewise—by completely eliminating the need for county officials to process duplicate applications for any voters. And it reduces the likelihood that voters will complain to the State about receiving multiple applications, which allows election officials to focus on other tasks, while also enhancing voters' confidence in Georgia's elections.

The undisputed evidence also shows that, in furthering these important interests, the Provisions leave untouched Plaintiffs' actual expressive conduct. The record leaves no doubt that Plaintiffs may communicate their pro-absentee voting message conveyed through their cover letter to voters as often as they wish. And they may still provide absentee-ballot applications to any voter who has not yet requested an absentee ballot. Instead, the evidence shows that the

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Provisions focus squarely on the specific conduct that most directly undermined the State's interests.

Accordingly, under the undisputed evidence, the Provisions easily satisfy even the highest levels of First Amendment scrutiny. And, because the Provisions satisfy strict scrutiny, they necessarily satisfy any lower level of scrutiny that the Court may determine is appropriate.

Thus, for reasons explained in greater detail in the following proposed Findings of Fact and Conclusions of Law, the Court should enter judgment on all remaining claims in State Defendants' favor because the trial record confirms that Plaintiffs have fallen far short of showing that the Provisions violate the First Amendment.

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Before presenting proposed Findings and Conclusions on the substantive issues addressed at trial, however, State Defendants first address certain preliminary matters—specifically, the procedural history of this case, the parties, and the witnesses at trial.

I. PRELIMINARY MATTERS

A. Procedural History

1. On April 7, 2021, Plaintiffs filed a complaint challenging three provisions of Senate Bill 202 ("SB 202") related to absentee-ballot applications: the Prefilling Prohibition, the Anti-Duplication Provision, and the Disclaimer Provision. [Doc. 1].

2. The Prefilling Prohibition prohibits sending absentee-ballot applications that are "prefilled with the elector's required information[.]" O.C.G.A. § 21-2-381(a)(1)(C)(ii).

3. The Anti-Duplication Provision prohibits sending an absentee-ballot application to any voter who has already requested an absentee ballot. O.C.G.A. § 21-2-381(a)(3)(A).

4. However, a sender will not violate the Anti-Duplication Provision if the sender "relied upon information made available by the Secretary of State within five business days prior to the date such applications are mailed." *Id.*

5. The Disclaimer Provision requires organizations like Plaintiffs to include the following disclaimer on any absentee-ballot application it sends to a Georgia voter: "This application is being distributed by [insert name and address of person, organization, or other entity distributing such document or material], not by any government agency or any state or local election office. THIS IS NOT A BALLOT." O.C.G.A. § 21-2-381(a)(1)(C)(ii).

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6. Plaintiffs' challenge to the Disclaimer Provision was dismissed as moot by stipulation of the parties. [Doc. 176; Doc. 179 at 2 n.4].

7. State Defendants filed a motion to dismiss Plaintiffs' complaint on May 17, 2021. [Doc. 40].

8. The Court denied State Defendants' motion to dismiss on December 9, 2021. [Doc. 57].

9. State Defendants filed an answer to Plaintiffs' complaint on January 21, 2022. [Doc. 69].

10. Discovery commenced on February 1, 2022. [Doc. 70 at 2].

11. Plaintiffs moved for a preliminary injunction on April 26, 2022. [Doc. 103].

12. After holding a hearing and fully considering the parties' evidence and arguments, the Court denied Plaintiffs' motion for a preliminary injunction on June 30, 2022. [Doc. 131].

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13. In denying Plaintiffs' motion for a preliminary injunction, the Court concluded that: (i) Plaintiffs had not shown that they engage in expressive conduct when they send absentee-ballot applications, *id.* at 26; (ii) applying the *Anderson-Burdick* framework, the Plaintiffs had not shown a substantial likelihood of success on their claims that the Provisions impose an unjustifiable burden on Plaintiffs' conduct, *id.* at 38–43; and (iii) even if higher levels of scrutiny were applied, Plaintiffs had not shown a substantial likelihood of success on the merits of their challenges to the Provisions, *id.* at 43–45.

14. After discovery concluded, State Defendants moved for summary judgment on December 13, 2022. [Doc. 149].

15. The Court partially granted and partially denied State Defendants' motion for summary judgment. [Doc. 179].

16. The Court granted summary judgment to State Defendants with respect to Plaintiffs' claim that the Provisions are unconstitutionally overbroad. *Id.* at 38.

17. The Court also granted summary judgment to State Defendants on Plaintiffs' freedom-of-association claim. *Id.* at 36.

18. But the Court denied summary judgment to State Defendants on Plaintiffs' freedom-of-speech claim. *Id.* at 29.

19. In so doing, the Court identified several specific material factual disputes:

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a. "[W]hether a reasonable observer would perceive some sort of message from Plaintiffs' conduct" of including a ballot application in their mailers even if a cover letter were not also included, *id.* at 21;

b. Whether prefilled and duplicate applications are equivalent to "the discussion of public issues and debate on the qualifications of candidates, political expression designed to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people, and the discussion of governmental affairs," *id. at* 23–24 (quotation marks omitted); and

c. Whether the Provisions are narrowly tailored, *id.* at 27–28.

20. The Court heard evidence on Plaintiffs' remaining claims during trial from April 15–18, 2024. *See* [Docs. 230–33].

21. At trial, State Defendants and the Intervenor-Defendants moved for a directed verdict on all counts under Rule 52(c). 4/18/24 Trial Tr. 72:12–73:3. The Court deferred ruling on that motion. *See id.*

B. Parties

1. Plaintiffs

22. Plaintiffs are the Voter Participation Center ("VPC"), a 501(c)(3) nonprofit organization, and its sister organization, the Center for Voter Information ("CVI"), a 501(c)(4) nonprofit organization. 4/15/24 Trial Tr. 51:21–24, 51:2–9 (Lopach).

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23. Plaintiffs "run high volume direct mail and digital outreach to register voters, to help register voters to sign up to vote by mail, and help to get out the voters on election day." *Id.* at 52:4–9 (Lopach).

24. VPC targets its mailings to what it calls the "New American Majority," meaning people aged 35 and under, people of color, and unmarried women. *Id.* at 52:16–19, 191:11–192:8 (Lopach).

25. And CVI more broadly targets those who "share[] the values of wanting to see an inclusive and representative electorate." *Id.* at 189:3–4, 197:15–21 (Lopach).

26. VoteAmerica was originally a named plaintiff, but its claims were dismissed by stipulation of the parties in 2022. [Doc. 142; Doc. 179 at 2 n.5].

2. State Defendants

27. Defendant Brad Raffensperger, in his official capacity, is the Secretary of State of the State of Georgia. Compl. ¶ 44 [Doc. 1].

28. Rebecca Sullivan, Matthew Mashburn, David Worley, and Anh Le were previously members of the Georgia State Election Board. *Id.* ¶ 45. Pursuant to Federal Rule of Civil Procedure 25(d), the current Defendant members of the Georgia State Election Board are: John Fervier, Chairman; Sara Tindall Ghazal; Janice Johnston; Rick Jeffares; and Janelle King.[1]

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3. Defendant-Intervenors

29. The Court granted the motion to intervene filed by Defendant-Intervenors The Georgia Republican Party, Inc., National Republican Congressional Committee, National Republican Senatorial Committee, and Republican National Committee. [Doc. 50 at 7].

30. The Republican National Committee "is a national committee, as defined by 52 U.S.C. § 30101, that manages the Republican Party's business at the national level, supports Republican candidates for public office at all

[1] On May 17, 2024, Speaker Jon Burns appointed Janelle King to replace Edward Lindsey on the State Election Board. Ltr. from Jon Burns, Speaker, Ga. H. of Reps. to Amy Bottoms, Legis. Fiscal Officer, Ga. H. of Reps. (May 17, 2024), available at https://tinyurl.com/45jvm9hj.

levels, coordinates fundraising and election strategy, and develops and promotes the national Republican platform." [Doc. 25-1 at 3].

31. The National Republican Senatorial Committee "is a national political committee that works to elect Republicans to the U.S. Senate." *Id.*

32. The National Republican Congressional Committee "is [a] national political committee that works to elect Republicans to the U.S. House." *Id.*

33. The Georgia Republican Party, Inc. "is a political party that works to promote Republican values and to assist Republican candidates in obtaining election to partisan federal, state, and local office." *Id.*

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C. Trial Witnesses

1. Plaintiffs' Witnesses

34. Plaintiffs provided testimony from four witnesses: Tom Lopach; Maren Hesla; Blake Evans;[2] and Dr. Donald Green.

i. Tom Lopach

35. Tom Lopach is the president of both Plaintiffs CVI and VPC. 4/15/24 Trial Tr. 51:8–14 (Lopach).

36. Mr. Lopach has been serving in those roles since March 16, 2020. *Id.* at 51:12–13 (Lopach).

[2] Because Blake Evans was called by both parties, he is addressed in the following section.

ii. Maren Hesla

37. Maren Hesla is a partner in a direct-mail firm called Mission Control, which produces voter registration mailings and absentee-ballot application mailings for Plaintiffs and other organizations. 4/16/24 Trial Tr. at 8:14–23, 54:6–8 (Hesla).

38. Mission Control's clients are generally Democratic candidates and progressive organizations. *Id.* at 8:24–9:3, 53:16–19, 53:24–54:5 (Hesla).

iii. Donald Green, Ph.D.

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39. Plaintiffs presented the expert testimony of Dr. Donald Green, a professor at Columbia University. 4/16/24 Trial Tr. 70:21–24 (Green).

40. Among other related topics, Dr. Green studies voter mobilization, on which he authored a book many years ago titled *Get Out the Vote: How to Increase Voter Turnout*. *Id.* at 71:14–72:10 (Green).

41. Dr. Green provided a report and rebuttal report admitted as Plaintiffs' Exhibits (PX) 28 and 30 without objection. *Id.* at 6:4–6.

42. At trial, State Defendants renewed their previous motion to exclude Dr. Green's opinions. *Id.* at 161:3–162:23; [Doc. 187] (renewed *Daubert* motion). The Court denied State's Defendants' motion to exclude Dr. Green's opinions. 4/16/24 Trial Tr. 164:2–3.

2. State Defendants' Witnesses

43. State Defendants provided testimony from five witnesses: Ryan Germany; Frances Watson; Blake Evans; Brandon Waters; and Dr. Justin Grimmer.

i. Ryan Germany

44. Ryan Germany served as General Counsel to the Secretary of State of Georgia from 2014 through January 2023. 4/16/24 Trial Tr. 165:2–4 (Germany).

45. As General Counsel, Mr. Germany was responsible for providing legal support to the Secretary's office, including on election-related matters. *Id.* at 165:5–14 (Germany).

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46. Mr. Germany was also responsible for assisting the General Assembly in crafting election-related legislation, including SB 202 and, in particular, both Provisions challenged here. *Id.* at 178:21–179:19, 272:23–273:1 (Germany).

ii. Frances Watson

47. Frances Watson was Chief Investigator in the Investigations Division of the Georgia Secretary of State's Office from mid-2019 through late 2021. 4/16/24 Trial Tr. 166:13–14 (Germany); 4/17/24 Trial Tr. 12:4–10 (Watson). Before that, she was a police officer for the City of Roswell for nearly

thirty years, and she also held other positions in the Investigations Division before becoming Chief Investigator. 4/17/24 Trial Tr. 10:24–12:13 (Watson).

48. The Investigations Division investigates election-related tips and complaints from voters, county election offices, legislators, and the media. 4/16/24 Trial Tr. 166:15–22, 167:7–168:5 (Germany).

49. As Chief Investigator, Ms. Watson's job responsibilities included responding to and investigating such complaints, reviewing election cases, and preparing to present those cases to the State Election Board. 4/17/24 Trial Tr. 13:9–14 (Watson).

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50. As Ms. Watson confirmed, every such complaint must be reviewed. *Id*. at 15:21–25 (Watson). "[T]he main focus of the chief investigator is working with the elections cases and reviewing the elections cases and preparing those for presentation to the State Election Board." *Id.* at 13:11–14 (Watson).

iii. Blake Evans

51. Blake Evans is the Director of the Elections Division in the Secretary of State's Office. 4/18/24 Trial Tr. 8:22–9:1 (Evans). He was previously the Deputy Elections Director in the Division from July 2020 through July 2021, and before that he was Elections Chief for the Fulton County Department of Registration and Elections from March 2019 through July 2020. *Id.* at 7:1–17, 8:19–21 (Evans).

52. As Director of the Elections Division, Mr. Evans oversees the entire elections office, and he serves as a liaison between the Secretary of State's Office and county election officials. *Id.* at 9:5–11 (Evans).

53. Through these roles, Mr. Evans observed issues created by voters receiving duplicate or prefilled absentee-ballot applications. *Id.* at 88:12–20 (Evans).

iv. Brandon Waters

54. Brandon Waters is a partner in a direct mail and digital political advertising firm called Arena. 4/17/24 Trial Tr. 166:15–20, 168:5–9 (Waters).

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55. For mailing, Arena is a seamless entry firm, which means that it can send mail directly from its facility to local USPS section sorting facilities. *Id.* at 169:17–170:7 (Waters). USPS considers a parcel to be mailed according to the mailing date on official forms. *Id.* at 193:20–194:1 (Waters).

56. For printing, Arena primarily uses nonunionized printers. *Id.* at 169:15–16, 170:21–171:25 (Waters).

v. Justin Grimmer, Ph.D.

57. State Defendants presented the expert testimony of Dr. Justin Grimmer, a professor at Stanford University. 4/17/24 Trial Tr. 107:4–9 (Grimmer).

58. Plaintiffs did not object to Dr. Grimmer's being qualified as an expert. *Id.* at 108:11–19.

59. Dr. Grimmer provided a report admitted as PX33 and Defendants' Exhibit (DX) 1 without objection. *Id.* at 107:11–20.

60. Dr. Grimmer currently has a paper under peer review about voter persuasion and has evaluated papers on voter mobilization. *Id.* at 141:11–17 (Grimmer).

61. Dr. Grimmer has testified as an expert in several cases specific to SB 202. He also regularly monitors Georgia's absentee voter file on the Secretary of State's website as part of his research. *Id.* at 136:10–12 (Grimmer).

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62. Dr. Grimmer testified that he held his opinions to a "reasonable degree of scientific certainty." *Id.* at 140:2–4 (Grimmer).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

63. "In an action tried on the facts without a jury … , the court must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1).

64. In a bench trial, "it is the exclusive province of the judge … to assess the credibility of witnesses and to assign weight to their testimony." *Childrey v. Bennett*, 997 F.2d 830, 834 (11th Cir. 1993).

65. Indeed, "[a] trial judge sitting without a jury is entitled to even greater latitude concerning the admission or exclusion of evidence." *Fair Fight*

Action, Inc. v. Raffensperger, 599 F. Supp. 3d 1337, 1339 (N.D. Ga. 2022) (cleaned up).

66. As the Eleventh Circuit confirms: "[T]he level of the scrutiny to which election laws are subject varies with the burden they impose on constitutionally protected rights—Lesser burdens trigger less exacting review." *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 694 (11th Cir. 2014) (cleaned up).

67. As shown below, judgment should be entered for State Defendants for several reasons. Plaintiffs' conduct is not expressive, and thus the Provisions are only subject to rational basis review, which they easily satisfy. But even if a higher level of scrutiny were applied, the record confirms that the Provisions further substantial and compelling interests of reducing voter confusion, reducing concerns about voter fraud, and increasing electoral efficiency. And the Provisions do so in narrowly tailored ways, confirming that the Provisions pass even the highest levels of scrutiny.

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A. Plaintiffs' Activity Is Neither Expressive Conduct nor Core Political Speech.

68. Plaintiffs have failed to show that mailing duplicate or prefilled absentee-ballot applications is protected by the First Amendment. Rather, all protected expression from Plaintiffs is exclusively located in other parts of their mailers.

1. Sending prefilled or duplicate absentee-ballot applications is not expressive conduct.

69. In addition to spoken and written speech, the First Amendment protects expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

70. The Supreme Court has held that conduct is protected by the First Amendment only if it both expresses "[a]n intent to convey a particularized message," *Spence v. Washington*, 418 U.S. 405, 410–11 (1974), and if a "reasonable person would interpret it as *some* sort of message," although it need not be "a *specific* message," *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (raising fist was expressive conduct because some students would recognize it as an act of protest).

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71. However, the Supreme Court has also held that the necessity of "explanatory speech" to convey a message is "*strong* evidence" that the conduct at issue is "not so inherently expressive" that it warrants First Amendment protections. *Rumsfeld v. F. Acad. & Inst'l Rts., Inc.*, 547 U.S. 47, 66 (2006) (emphasis added).

72. To determine whether conduct is expressive, the Eleventh Circuit confirms that "context matters." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1237 (11th Cir. 2018). Not all conduct "accompanied by other speech" "loses its expressive nature," and thus "[t]he critical question is whether the explanatory speech is *necessary* for the

reasonable observer to perceive *a* message from the conduct." *Id.* at 1243–44 (second emphasis added).

73. Such context, the Eleventh Circuit explains, separates "the physical activity of walking from the expressive conduct associated with a picket line or a parade"; the act of sitting down from sit-ins protesting segregation; and nude dancing from private dressing. *Id.* at 1241 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995) (walking vis-à-vis parades); *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966) (sitting down vis-à-vis a sit-in); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (nudity vis-à-vis "marginally" expressive nude dancing)). The "'circumstances surrounding an event' help a reasonable observer discern the dividing line between expressive conduct and everyday conduct." *Burns v. Town of Palm Beach,* 999 F.3d 1317, 1343 (11th Cir. 2021) (quoting *Food Not Bombs,* 901 F.3d at 1240).

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74. To assist in this inquiry, the Eleventh Circuit has, in some instances, considered five factors to determine whether "the surrounding circumstances" "would lead the reasonable observer to view the conduct as conveying some sort of message." *Food Not Bombs*, 901 F.3d at 1242; *Burns*, 999 F.3d at 1346 (discussing same).

75. Those factors include whether:

a. The plaintiff distributed literature or hung banners in connection with its expressive activity, *Food Not Bombs*, 901 F.3d at 1242 (citing *Hurley*, 515 U.S. at 570);

b. The activity was open to all, *id.*;

c. The activity took place in a traditional public forum, *id.* (citing *Spence*, 418 U.S. at 410; *Johnson*, 491 U.S. at 406);

d. The activity addressed an issue of public concern, *id.* at 1243 (citing *Spence*, 418 U.S. at 410; *Johnson*, 491 U.S. at 406; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969)); and

e. The activity had been understood to convey a message over the millennia, *id.* (citing *Johnson*, 491 U.S. at 405).

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76. According to the Eleventh Circuit, these factors are not exclusive, and "[t]here may be other factors that are relevant to whether" something "is expressive conduct protected by the First Amendment." *Burns,* 999 F.3d at 1346.

77. More recently, however, the Eleventh Circuit has analyzed whether conduct was expressive without discussing *any* of these five factors. *See, e.g.*, *NetChoice, LLC v. Attorney General*, 34 F.4th 1196 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 144 S. Ct. 478

(2023) (mem.), *and cert. denied sub nom. NetChoice, LLC v. Moody,* 144 S. Ct. 69 (2023) (mem.).

78. Thus, the Court need not confine itself to the five factors that the Eleventh Circuit discussed in *Burns* and *Food Not Bombs*. Rather, in *NetChoice*, the Eleventh Circuit pointed to "our general standard for what constitutes inherently expressive conduct protected by the First Amendment" in *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021), which "built on our earlier decision in *Fort Lauderdale Food Not Bombs*." 34 F.4th at 1212. According to the Eleventh Circuit in *NetChoice*, the focus is simply "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Id.* (quoting *Coral Ridge Ministries*, 6 F.4th at 1254).

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79. Under any review of the context surrounding Plaintiffs' mailing of absentee-ballot applications, it is clear that the mailing of the application itself is not expressive and therefore is not protected by the First Amendment.

i. Plaintiffs' prefilled and duplicate applications were about facilitating voting, not sending a message.

80. Leading up to the 2020 election, Plaintiffs sent millions of mailers to certain registered Georgia voters over several waves. 4/15/24 Trial Tr. 69:20–23 (Lopach); [Doc. 179 at 8]; *see also* 4/15/24 Trial Tr. 69:8–16 (Lopach) (Plaintiffs also sent mailers in Georgia in 2018).

81. During the November 2020 general election, approximately 550,000 Georgia voters submitted absentee-ballot applications that Plaintiffs had mailed to them. And 88,500 did the same for the January 2021 runoff election. 4/15/24 Trial Tr. 69:17–70:3 (Lopach); [Doc. 179 at 80].

82. According to Mr. Lopach, Plaintiffs send direct mail because it "is something that can be addressed specifically to an individual." 4/15/24 Trial Tr. 63:11–22 (Lopach).

83. As relevant here, Plaintiffs' mailings contain four parts: (1) an envelope with the voter's name and address; (2) a cover letter inviting recipients to vote; (3) an absentee-ballot application prefilled with a voter's name and address; and (4) a postage-paid and pre-addressed return envelope to the voter's county board of elections. *Id.* at 14:8–11. Each document or envelope in the mailing is different.

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84. First, the carrier envelope includes an intended recipient's name and address, a banner announcing that it holds an absentee-ballot application, and a printed union "bug" signifying Plaintiffs' decision to use union printers. *Id*. at 91:10–17 (Lopach); *see id.* at 89:4–24, 90:15–91:25 (Lopach).

85. Second, "the cover letter includes instructions and different formulations of plaintiffs' pro-absentee voting messages that are targeted [to] the specific recipient." *Id.* at 14:24–15:2. And the cover letter includes the voter's name. PX26; PX27.

86. Plaintiffs' cover letters vary in their messaging. Sometimes, the letter includes the voter's personal voting history in comparison to other voters' history. *Id.* at 92:17–93:16, 135:21–137:2 (Lopach); *see also id.* at 94:7–95:4 (Lopach). Those comparisons help motivate voters to vote because "guilt is the single most effective tool at increasing voter participation." *Id.* at 136:20–22 (Lopach); *see also id.* at 136:8–10 (Lopach) ("That is called social pressure," like "Catholic guilt in an envelope.").

87. Third, Plaintiffs' mailer includes an absentee-ballot application. Before SB 202, Plaintiffs sometimes prefilled applications with a voter's name and address, as well as a specific election date. *Id.* at 67:21–24, 79:19–80:7, 96:1–97:3 (Lopach). But other portions of the application would still need to be completed by the voter. PX1.

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88. Although Plaintiffs include an application in their mailing, they acknowledge that the cover letter is needed to explain the application. 4/15/24 Trial Tr. 233:9–12 (Lopach). Indeed, Plaintiffs concluded that sending an application alone "would create greater confusion and concern among the people who received it." *Id.* at 233:13–17 (Lopach).

89. Fourth, the return envelope is pre-addressed to the intended recipient's county elections office and includes both a union "bug" and the intended recipient's name and address in the return-address location. *Id.* at 67:25–68:3, 98:11–19 (Lopach). This envelope also includes a unique barcode

that the Post Office can scan to record which return envelopes have been used. *Id.* at 72:20–73:14 (Lopach); *see id.* at 235:9–23 (Lopach).

90. Plaintiffs did not identify any evidence showing that the absentee-ballot application itself communicates any message. Rather, Plaintiffs explained that other parts of the mailers communicate that: "We are speaking to you with an envelope addressed to you. We're speaking to you with a letter addressed to you talking about why, in the pandemic election, voting by mail was a safe way to engage with democracy, why voting by mail is convenient." *Id.* at 67:16–20 (Lopach). Each such message is found in the cover letter or on an envelope, not on the absentee-ballot application itself.

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91. As Mr. Lopach further testified, the absentee-ballot application is merely a tool: "All of those work together to create a message to the recipient saying, we believe you are important. We believe your voice is important in our elections. We want you to participate. Here are the tools you need to participate if you choose to vote by mail." *Id.* at 68:4–8 (Lopach); *see also id.* at 66:2–3 (Lopach) ("[I]t is one more tool for us to help increase their participation").

92. That is why Plaintiffs have never sent an absentee-ballot application to a voter *without* a cover letter. *Id.* at 233:9–12 (Lopach).

93. But Plaintiffs include applications with their cover letters "so [the voters] have in their hands what they need to respond and engage with democracy[.]" *Id.* at 139:8–10 (Lopach).

94. While Plaintiffs suggest that prefilling applications increases participation by roughly half a percent, they did not present any analyses on the effectiveness of prefilling. *Id.* at 68:11–13, 256:11–24 (Lopach); *see id.* at 78:24–79:18, 80:13–22 (Lopach); *but see id.* at 266:10–13 (Lopach).

95. And Ms. Hesla's testimony that including an application causes a "much better success rate" says nothing about whether *prefilling* or *sending duplicates* had any effect on the response rate. 4/16/24 Trial Tr. 23:13–24:3 (Hesla).

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96. In 2020, two of Plaintiffs' five waves of mailers included blank applications that were not prefilled. 4/15/24 Trial Tr. 207:4–13 (Lopach). But Plaintiffs failed to provide data on response rates to prefilled versus non-prefilled applications sent in 2020. *Id.* at 207:11–13, 208:16–209:5 (Lopach).

97. Overall, Plaintiffs reported an 11.7% response rate in 2020. *Id.* at 78:8–11 (Lopach). But Plaintiffs did not offer any evidence as to whether increased response rates in 2020 were caused by prefilling, on the one hand, or by the general increase in absentee voting and voter turnout that occurred in 2020. *But see id.* at 100:15–23 (Lopach).

98. Likewise, after SB 202, Plaintiffs sent only blank applications in its more than one million mailers to Georgia voters. *Id*. at 127:20–24, 155:10–12 (Lopach); *see also id.* at 71:4–20, 83:25–85:3 (Lopach) (Plaintiffs sent two waves in Georgia, the four-part package and a follow-up letter).

99. As they always did, three of the other components of Plaintiffs' post-SB 202 mailers (the carrier envelope, the return envelope, and the cover letter) still included the intended recipients' personal information. *Id.* at 128:13–129:3 (Lopach). Moreover, even though these mailers had only blank absentee-ballot applications, the response rate was 3.12%. *Id.* at 155:13–14 (Lopach).

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100. Mr. Lopach testified that a 1% response rate is considered successful. *Id*. at 62:11–13 (Lopach).

101. When asked whether Plaintiffs' intended message is "all in the cover letter," Mr. Lopach responded that "the messages [we]re either" in the cover letter or, starting in 2022, in new text added to the "carrier envelope." *Id*. at 233:22–234:4 (Lopach).

102. With respect to messages, Plaintiffs' expert Dr. Green testified that prefilling applications is about lowering transaction costs for voters to submit the forms, not about sending recipients a message. 4/16/24 Trial Tr. 85:19–21 (Green).

103. For instance, Dr. Green discussed the positive impact on voter turnout and response rates from reducing transaction costs associated with voting. *Id.* at 79:2–24, 91:2–19 (Green). Again, this conclusion says nothing about an impact from any *message*.

104. Dr. Green similarly concluded that "prepopulating the fields in a form [would] reduce the transaction costs[.]" *Id.* at 85:19–22 (Green). Organizations like Plaintiffs, he opined, choose to prefill because "it's much more likely to actually be acted on by the recipient." *Id.* at 93:6–9 (Green); *see id.* at 94:16–20 (Green) (prefilling is "more likely to be effective in getting people to vote" and "going to require fewer rounds of such mailings because you can get people to act the first time"). The Prefilling Prohibition, he concluded, makes Plaintiffs' efforts "less cost efficient." *Id.* at 97:7–13 (Green).

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105. To support his conclusions, Dr. Green mentioned other nonpolitical arenas where prefilling reduces transaction costs and increases responses, such as tax forms, college scholarships, and online shopping cart transactions. *Id.* at 93:10–94:3 (Green). But Dr. Green did not provide any similar information or data from the context of absentee-ballot mailings. In fact, Dr. Green admitted he was unaware of *any* research showing that partially prefilling an absentee-ballot application—like Plaintiffs did with prefilling only names, addresses, and election dates—decreases transaction costs and increases response rates. *Id.* at 145:5–14 (Green).

106. As State Defendants' expert Dr. Justin Grimmer explained, Dr. Green's conclusions suffered from at least two "material errors." 4/17/24 Trial Tr. 110–111:7 (Grimmer). First, Dr. Green admittedly relied on a study (PX88) to reach a conclusion that was contrary to that study's conclusion. From the study, Dr. Green concluded that prefilling absentee-ballot applications increased response rates by roughly 2.3%. 4/16/24 Trial Tr. at 95:11–18 (Green). But not only did the study focus on absentee *ballots* rather than *applications*, *id.* at 141:10–13 (Green), the study's author concluded that his data were statistically insignificant, thus not supporting Dr. Green's conclusion, *id.* at 141:22–142:16 (Green).

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107. Second, Dr. Green—without explanation—criticized the use of a statistical analysis called "null hypothesis testing" to interpret the study's data as the study's author did. 4/17/24 112:15–17 (Grimmer). But this statistical analysis is widely used and often required in the political science research field, including in Dr. Green's own most-cited works. *Id.* at 112:18–119:25 (Grimmer). Dr. Green's interpretation—without explanation—relaxes the threshold for significance. *Id.* at 120:1–121:5 (Grimmer).

108. And, as Dr. Grimmer showed, Plaintiffs do not send duplicate applications to further their own speech with an additional mailing, but rather to lower their own transaction costs. That is because the cost of identifying voters who have already submitted absentee-ballot applications could be

higher than Plaintiffs can tolerate. *Id.* at 126:18–127:1, 134:4–21 (Grimmer). This reinforces the conclusion that sending duplicate applications is also not expressive conduct.

109. Moreover, Dr. Grimmer explained a study (PX88) that concluded "there was no statistically significant increase in either the absentee voting rate or the overall turnout rate when comparing prefilled and generic absentee ballot applications." 4/17/24 Trial Tr. 110:7–10, 111:15–18 (Grimmer). As Dr. Grimmer explained, the slight difference between prefilled and blank applications was so small that it could not survive statistical inference, or null hypothesis, testing. *Id.* at 111:15–112:14, 146:5–23 (Grimmer).

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110. In any event, the transaction-costs explanation for Plaintiffs' actions refutes any notion that a recipient of an absentee-ballot application would perceive some message from that specific action. *Id.* at 125:5–17 (Grimmer). Those messages are all found elsewhere—especially in Plaintiffs' cover letters and envelopes—and they are unaffected by the Provisions.

ii. Plaintiffs failed to introduce any evidence showing that a reasonable recipient would have understood Plaintiffs' mailings to communicate any message.

111. While choosing to focus on *their* intent in sending mailings, Plaintiffs utterly failed to present evidence about whether *recipients* of

Plaintiffs' mailings would infer any message specifically from their inclusion of an absentee-ballot application.

112. Plaintiffs neglected to call even one of Georgia's over seven million voters to testify about any message they perceived, or any expert to provide an opinion on that issue. *See supra* ¶¶ 34–42.

113. In fact, Mr. Lopach testified that Plaintiffs would never send only an absentee-ballot application because the application on its own would be confusing to recipients. 4/15/24 Trial Tr. 233:9–12 (Lopach). To the extent a voter understands a message, it is from the other parts of the mailer. *See* 4/17/24 Trial Tr. 73:5–12 (Watson).

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114. First Amendment protections only extend to "conduct that is inherently expressive" because "conduct can[not] be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Rumsfeld*, 547 U.S. at 65–66; *see also Burns*, 999 F.3d at 1338 (collecting cases with expressive conduct). Here, as Plaintiffs stated, "the *cover letter* is expressive." 4/15/24 Trial Tr. 30:8 (emphasis added). "[I]t is expressive because it's clearly words on paper that's expressing that voting is easy and vote by mail is safe and secure." *Id.* at 30:12–14. But there are no such words on the absentee-ballot application, and it is not "inherently expressive." *Rumsfeld*, 547 U.S. at 66.

115. As the Court previously recognized, the necessity of the cover letters as "explanatory speech" is "strong evidence" that the application form is "not so inherently expressive" as to merit First Amendment protection. [Doc. 131 at 26 (citing *Rumsfeld*, 547 U.S. at 66)].

116. If all the elements of Plaintiffs' absentee-voter package together constitute their message, that means that every element is a necessary part of their overall message. Any "expressive component" an application package might have "is not created by the conduct itself but by the included cover information[.]" [Doc. 131 at 26]. And, as the Supreme Court confirms, that implies that the "explanatory speech" in the cover letter and carrier envelope is necessary for the reasonable observer to perceive a message. *Rumsfeld*, 547 U.S. at 66. Thus, the application itself conveys no message.

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117. This is so even though inherently expressive conduct does not "lose[] its expressive nature just because it is also accompanied by other speech." *Food Not Bombs*, 901 F.3d at 1243–44. For instance, an organization's sharing food with the intent to share a message was still expressive conduct even though it was accompanied by a banner with the organization's name and message. *Id.* at 1244.

118. But prefilling a state form and mailing multiple copies of that form are "clearly distinguishable" from burning a flag, holding a sit-in, or sharing

food as part of a demonstration. [Doc. 131 at 25]; *Rumsfeld*, 547 U.S. at 66; *Food Not Bombs*, 901 F.3d at 1244.

119. Though a district court in Kansas disagreed, that decision is awaiting review in the Tenth Circuit, and other courts agree that conduct like Plaintiffs' is not expressive. *VoteAmerica v. Schwab*, 671 F. Supp. 3d 1230, 1235, 1246 (D. Kan. 2023), *appeal docketed,* No. 23-3100 (10th Cir. June 1, 2023).

120. For instance, the Sixth Circuit was not convinced that distributing applications for absentee ballots was expressive conduct because, "unlike flying a flag, burning a flag, or wearing an armband, handing out an official document is not the type of thing that someone typically does 'as a form of symbolism.'" *Lichtenstein v. Hargett*, 83 F.4th 575, 595 (6th Cir. 2023) (quoting *Spence*, 418 U.S. at 410). The Sixth Circuit explained that, "[e]ven if it *discloses* that the Plaintiffs support absentee voting, it is not clear handing out a form symbolizes that support." *Id.* (cleaned up). "So it is unlikely that viewers would get the message from that conduct alone." *Id.* at 596.

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121. Similar to *Lichtenstein*, the Middle District of North Carolina expressly declined to find that assisting voters by filling out absentee-ballot applications was expressive conduct. *Democracy N.C. v. N.C. State Bd. of Elections,* 590 F. Supp. 3d 850, 863 (M.D.N.C. 2022).

122. Similarly, Plaintiffs' conduct here facilitates voting but does not communicate a message, just like the Ninth Circuit held in rejecting a First Amendment claim that collecting ballots was expressive. *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 392 (9th Cir. 2016) (holding that collecting ballots is not expressive conduct "[e]ven if ballot collectors intend to communicate that voting is important").

123. Beyond the messages contained in cover letters and on envelopes, Plaintiffs' mailings of absentee-ballot applications simply are not "inherently expressive" for similar reasons as to why the Fifth Circuit concluded that collecting and delivering voter-registration applications was not expressive conduct. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 389, 391–92 (5th Cir. 2013).

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124. The same conclusions are mandated by the factors the Eleventh Circuit identified in *Food Not Bombs* and reiterated in *Burns*.

125. First, Plaintiffs' conduct at issue here does not involve distributing literature or hanging banners. The entirety of their speech is in a separate cover letter. The prefilled and duplicate applications contain no messages themselves. Nor are the ballot application and cover letter so intertwined that they cannot be separated. Indeed, Plaintiffs have been able to communicate their pro-absentee-voting message in letters since SB 202 was enacted. 4/15/24 Trial Tr. 71:4–20, 83:25–85:3, 127:20–24, 155:10–12 (Lopach).

126. Second, Plaintiffs' conduct is not open to all. Rather, Plaintiffs target small subsets of Georgia voters—people of color, young people, and unmarried women, as well as people who share Plaintiffs' values. *Id.* at 188:25–189:4 (Lopach). And even those groups are not blanketed by Plaintiffs' mailings, as Plaintiffs only send their mailings to subsets of those groups. *Id.* at 188:12–24 (Lopach).

127. Third, Plaintiffs' conduct is not conveyed in a traditional public forum. Again, "[t]here is neither historical nor constitutional support for the characterization of a letterbox as a public forum." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128 (1981).

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128. Even if binding precedent did not foreclose a finding that the mail is a public forum, mail distribution is not "similar" to a traditional public forum. The key difference is that public fora are places where multiple people can gather and communicate with each other. *See, e.g.*, *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 103 (1983) (defining a public forum as "places which by long tradition or by government fiat have been devoted to assembly and debate,"); *Bloedorn v. Grube*, 631 F.3d 1218, 1234 (11th Cir. 2011) (same); *Keister v. Bell*, 29 F.4th 1239, 1252 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 1020, 215 L. Ed. 2d 188 (2023) (same). And that is not true of the forum here.

129. Fourth, Plaintiffs' conduct is not addressed to a matter of public concern. The issue here is whether the individual recipient of each mailer decides to vote specifically by absentee ballot, which is not a matter of public concern.

130. Finally, Plaintiffs' conduct is not understood to convey a millennia-spanning message. Plaintiffs cannot show that the mere act of mailing an absentee-ballot application has ever been understood in itself to convey a message, let alone a millennia-spanning one. The fact that our Nation's Founders thought mail was important is irrelevant. The relevant question is whether the act of mailing an absentee-ballot application has been understood for millennia to convey a message. It has not, and Plaintiffs provided no evidence suggesting that it has ever been understood to convey a message.

131. Thus, Plaintiffs' activity of sending absentee-ballot applications is not of itself expressive conduct. In the words of Mr. Lopach, Plaintiffs' speech is: "We want you to vote. And here is but one tool that may make it easier[.]" 4/15/24 Trial Tr. 67:3–9 (Lopach). The messages (if any) are found in Plaintiffs' cover letter and envelope, with the application serving as a tool, but not as an inherently expressive or symbolic act. And Plaintiffs presented no evidence that the reasonable observer would perceive any message from sending a tool.

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2. Plaintiffs' mailing of prefilled or duplicate absentee-ballot applications also is not core political speech.

132. Even if Plaintiffs had established that their conduct is expressive, it is not "core political speech"—*i.e.*, equivalent to "the discussion of public issues and debate on the qualifications of candidates, political expression designed to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people, and the discussion of governmental affairs." [Doc. 179 at 23–24].

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133. Core political speech must be speech, not conduct. Under Supreme Court precedent, "core political speech" involves "interactive communication concerning political change" and "necessarily requires a discussion" about a proposal, its merits, and why people support or oppose it. *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988).

134. It must also involve "a one-one-one communication," like circulating an initiative petition that someone signs to support passing a law or distributing a handbill urging voters to defeat a ballot issue. *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 186, 199 (1999) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)).

135. The speech can center on a candidate for office or an issue-based election. *McIntyre*, 514 U.S. at 347.

136. Here, as the Court previously concluded, mass-mailing of prefilled or duplicate absentee-ballot applications "do[es] not require the type of interactive debate and advocacy that the Supreme Court found constituted core political speech in *Meyer*." *VoteAmerica v. Raffensperger*, 609 F. Supp. 3d 1341, 1355 (N.D. Ga. 2022).

137. Sending prefilled and duplicate applications also does not involve a candidate or issue on the ballot like in *McIntyre*.

138. Likewise, Plaintiffs' conduct is not a two-way interaction. *See Meyer*, 486 U.S. at 421–22. Plaintiffs' "expression" contained in prefilled or duplicate absentee-ballot applications focuses solely on the individual voter's choice to use Plaintiffs' mass-mailed forms to apply to vote by absentee ballot, not on policy or partisan issues. The voters' interaction is then with their county elections office, not with Plaintiffs. 4/15/24 Trial Tr. at 67:25–68:3 (Lopach).

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139. For similar reasons, the Sixth Circuit in *Lichtenstein* held that "the distribution of official absentee-ballot application forms is not a speech 'input.'" 83 F.4th 575, 586 (6th Cir. 2023). "To be sure, the Plaintiffs' underlying get-out-the-vote activities—that is, their speech to convince voters to vote absentee—qualifies as 'core political speech[.]'" *Id.* But, as the Sixth Circuit explained, "nothing in [the Provisions] in any way restricts the Plaintiffs' actual oral or written speech about the 'benefits' of absentee voting." *Id.*

140. As in *Lichtenstein*, "[n]or does this statute make the creation of this speech 'more costly' and thereby reduce its volume under the basic laws of supply and demand." *Id.* (citation omitted). In fact, for duplicate applications, Mr. Waters explained that any increase in per-unit cost resulting from removing recipients who had already requested to vote absentee would be made up for by not having to pay for postage to that recipient. 4/17/24 Trial Tr. 176:9–16 (Waters).

141. In short, Plaintiffs failed to produce any evidence at trial showing that the mailing of prefilled or duplicate absentee-ballot applications is core political speech. Thus, there is no reason for the Court to depart from its earlier conclusion that such mailings are not core political speech. [Doc. 131 at 21].

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B. The Prefilling and Anti-Duplication Provisions Serve Substantial and Compelling State Interests.

142. As the Court previously held, moreover, the Provisions further "important regulatory interests," including "avoiding voter confusion and administering effective elections[.]" [Doc. 131 at 39]. The trial record confirms as much, and Plaintiffs have offered no evidence undermining those conclusions.

1. The Prefilling Prohibition.

143. The Prefilling Prohibition prohibits sending "any elector an absentee ballot application that is prefilled with the elector's required information[.]" O.C.G.A. § 21-2-381(a)(1)(C)(ii).

144. This Provision was enacted in response to complaints from voters and county election officials. Mr. Germany testified that the State received complaints from Georgia voters, counties, legislators, and others about prefilled absentee-ballot applications and that he "heavily relied" on the information he received from voters, county officials, and legislators when drafting the Provisions. 4/16/24 Trial Tr. 179:4–19 (Germany).

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145. For instance, prefilled applications often included incorrect information, which led voters to complain about fraudulent applications or, in some instances, the voters believed that the applications were actually fraudulent ballots. Such complaints were received by the Secretary of State's Office, counties, and legislators, and voters also made these complaints to the media and on social media platforms. *Id*. at 224:7–9 (Germany); 4/17/24 Trial Tr. 17:1–5 (Watson).

146. When prefilled information was incorrect, voters complained either that the personal information was wrong, or that they received a prefilled application for someone who did not live at their address or had never lived at their address. 4/15/24 Trial Tr. 219:4–24, 220:4–13, 221:15–222:16

(Lopach); 4/16/24 Trial Tr. 184:12–20, 187:12–18 (Germany); 4/17/24 Trial Tr. 18:11–21 (Watson); DX6; DX7; DX9; DX11; DX14; DX16; DX18; DX22; DX23; DX26; DX27; DX28; DX29; DX38; DX39; DX49; DX52; DX53; DX54; DX42; DX61; DX63; DX65; DX67. And voters expressed concerns that this was the result of fraudulent registrations. *See id.*

147. For instance, Ms. Watson testified that she investigated a complaint from a Fulton County voter who received a VPC mailing with her correct first and last name but with the incorrect middle name. 4/17/24 Trial Tr. 20:21–21:13 (Watson). The voter, in turn, "suspect[ed] this to be a fraudulent voter registration." *Id.* at 21:10–16 (Watson); DX5. If the voter had submitted the incorrectly prefilled application, her county elections office would have had issues processing her application. *See* 4/18/24 Trial Tr. 36:3–37:5 (describing how counties process absentee ballot applications), 37:20–38:7 (explaining that counties spend more time investigating when information on an application does not match a voter registration file), 40:8–21 (detailing information on absentee-ballot applications that must match voter registration file) (Evans).

148. Ms. Watson also testified about complaints she received from people stating that prefilled applications were addressed to deceased relatives, *see, e.g.*, DX13; and to nonresidents, 4/17/24 Trial Tr. 17:23–18:3, 25:20–26:13

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(Watson); DX17. This obviously undermined voters' perceptions of election integrity.

149. Additionally, Ms. Watson personally reviewed a complaint from a DeKalb County voter who said she received mail from CVI for a stranger who had never lived at her home and "wanted to call it to [the State's] attention as possible voter fraud." 4/17/24 Trial Tr. 19:9–20:8 (Watson); DX8. In response, Ms. Watson first investigated whether the stranger was registered to vote at the complainant's home and then contacted the complainant with the results of her investigation. 4/17/24 Trial Tr. at 20:9–20 (Watson).

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150. Another voter complained directly to Secretary Raffensperger about "rampant fraud" when he received a fourth absentee-ballot application from VPC at his home address with someone else's name and "a different preprinted address." *Id.* at 31:2–13 (Watson); DX67. Secretary Raffensperger forwarded this complaint to Mr. Germany, who asked Ms. Watson to investigate. 4/17/24 Trial Tr. 31:17–32:2 (Watson).

151. In other instances, voters worried that, if the information had been sent to the wrong place, then it could lead to voter fraud. For example, a Bibb County voter complained that he was "displeased" to receive an unsolicited CVI mailer because prefilling the application caused him to be concerned about voter fraud. *Id.* at 22:17–23:11 (Watson); DX25.

152. Additionally, voters often thought these incorrectly prefilled applications were sent by county election officials or the Secretary of State. 4/16/24 Trial Tr. 180:24–25, 212:16–18 (Germany); DX25; *see, e.g.*, DX53; DX58. Thus, the voters were worried that their official voter information was inaccurate.

153. Voters also often thought the mass-mailed applications were ballots themselves. 4/16/24 Trial Tr. 198:12–15 (Germany); *see, e.g.*, 4/18/24 Trial Tr. 88:15–20 (Evans); DX12. This led voters to believe that their or someone else's actual ballot was at risk of being voted by the wrong person, leading to voter fraud. 4/17/24 Trial Tr. 25:5–19 (Watson); *see, e.g.*, DX14.

154. The inaccuracy of information in Plaintiffs' mailings is not surprising, considering that Plaintiffs rely on data from third parties who manipulate data to identify Plaintiffs' target audience. 4/15/24 Trial Tr. 86:9–14, 197:22–198:6, 198:4–199:23, 219:4–24 (Lopach).

155. These third-party vendors, like Catalist, TargetSmart, and Civitech, provide "data only to Democrats and Progressives[.]" *Id.* at 203:8–204:1, 205:4–206:9 (Lopach).

156. Mr. Lopach acknowledged that data from at least one vendor—Catalist—led to Plaintiffs' sending incorrectly prefilled absentee-ballot applications to voters. *Id.* at 207:4–13 (Lopach).

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157. Plaintiffs opt to use such vendors despite the Secretary of State's Office's maintaining a publicly available file with names and addresses of all registered voters. Using information provided by counties, the Secretary of State's Office maintains both a list of all registered voters and an absentee voter file showing voters who have requested absentee ballots or voted early in an election. 4/16/24 Trial Tr. 177:2–16 (Germany); 4/18/24 Trial Tr. 15:6–10, 17:22–18:11 (Evans). The absentee file is publicly available online and updated daily during election cycles. 4/18/24 Trial Tr. 18:6–8, 95:3–95:8 (Evans).

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158. More broadly, Plaintiffs have substantial experience with sending election-related mailers that include incorrect data. For instance, the Florida State Association of Supervisors of Elections wrote a public letter about mailers that VPC was sending, which included incorrect information and was causing confusion among voters. 4/18/24 Trial Tr. 74:9–75:5 (Evans). That letter also reported that voters raised concerns about receiving prefilled election materials in names of children who no longer resided at the address, including a deceased child. *Id.* at 75:6–10 (Evans). And the letter reported that VPC's misleading or inaccurate mailings were not instilling voter confidence but were instead creating suspicion, mistrust and increased anger amongst voters. *Id.* at 75:11–15 (Evans). Thus, the Association requested that VPC "stop [sending] mailings or use better data." *Id.* at 75:16–19 (Evans).

159. As Plaintiffs' witness Ms. Hesla confirmed, "the *worst thing* that can happen" is for personalized mail to have incorrect information "because it could cause confusion for the recipient," complaints to government officials, and allegations of voter fraud. 4/16/24 Trial Tr. 15:2–7, 55:5–22 (emphasis added) (Hesla).

160. And Dr. Green also acknowledged that incorrectly prefilled information is ineffective. 4/16/24 Trial Tr. 144:2–6 (Green).

161. And the problems caused by Plaintiffs' mailings were not limited to inaccurate data. Rather, voters also complained about prefilled absentee-ballot applications when the prefilled information was accurate.

162. Even when prefilled information was correct, voters were confused about why they were sent unsolicited applications and whether they were required to return the applications to be eligible to vote. 4/16/24 Trial Tr. 180:20–23, 180:24–185.2 (Germany); 4/17/24 Trial Tr. 18:4–10 (Watson); DX24; DX40; DX41; DX43; DX50; DX72.

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163. Some voters were also concerned that mailings from Plaintiffs and others were unlawfully enticing votes by providing postage paid envelopes and designing mailers "unethically to look like an official government-supplied document" "to scam voters" into voting one way or another. 4/17/24 Trial Tr. 26:14–27:2, 29:12–25, 30:2–19 (Watson); DX30; DX33; DX46; DX57; DX59; DX71.

164. Accordingly, Plaintiffs' mailing of prefilled absentee-ballot applications raised myriad concerns regarding fraud.

165. Mr. Germany explained that prefilled applications create concerns about voter fraud and undermine the perceived integrity of elections. 4/16/24 Trial Tr. 225:4–226:1 (Germany).

166. That is true even if the complaint submitted is unfounded: Merely reducing voter confusion makes it more likely that voters will correctly submit their ballots, that county election officials are not diverted away from other tasks, and that voters will have confidence in the electoral system. *Id.* at 226:2–17, 227:4–6, 233:7–24 (Germany).

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167. But complaints about potential fraud are not entirely unfounded. Even with safeguards that should prevent voter fraud, it is possible that receiving an application with someone else's prefilled information could result in voter fraud. 4/16/24 Trial Tr. 187:19–25 (Germany). Though rare, there was an instance when a third party sent a prefilled application to an intended recipient's former PO Box. The current PO Box owner then completed the remainder of the application and received *and voted* the former PO Box owner's absentee ballot. Fortunately, the issue was discovered by a diligent county election official conducting signature-match verification, and the ballot was not counted. *Id.* at 186:18–20, 188:1–14 (Germany). That was attempted voter fraud facilitated by a prefilled ballot application.

168. However, concerns regarding fraud are not the only issues raised by Plaintiffs' mailings. Those mailings also created a host of efficiency issues.

169. For instance, whether a complaint is lodged about a correctly or incorrectly prefilled application, each such complaint must be examined. And that requires the State's investigators to divert their time away from other important responsibilities. 4/17/24 Trial Tr. 33:20–24 (Watson).

170. Indeed, Ms. Watson testified that mass-mailed prefilled and duplicate ballot applications increased the number of complaints her office needed to investigate and present to the State Election Board. *Id.* at Trial Tr. 32:25–33:6 (Watson).

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171. Though responding to a single voter complaint may not take significant time, "[c]ompounding that by the volume, it creates a lot of time spent on vetting and sorting and assigning cases" within the Investigations Division. 4/17/24 Trial Tr. 67:4–11 (Watson); *see also* 4/18/24 Trial Tr. 88:5–11, 88:21–89:5 (Mr. Evans testifying similarly regarding county and State officials).

172. Incorrectly prefilled applications also undermine electoral efficiency when voters *submit* the applications. As Mr. Evans explained, there was a substantial administrative burden imposed on counties when officials received an absentee-ballot application with incorrect information. Those officials must take additional steps to reach a "reasonable degree of certainty"

to match an applicant to a registered voter. 4/18/24 Trial Tr. 83:18–85:1 (Evans).

173. That process is more time-consuming than processing a correctly completed application. *Id.* at 38:9–39:10, 85:23–86:8 (Evans).

174. And this work must be completed while election officials are busy with other tasks. *Id.* at 81:6–10, 86:25–87:6 (Evans).

175. This burden falls particularly heavily upon Georgia's small- and medium-sized counties, which are the majority of Georgia's counties—where election officials juggle multiple tasks with a much smaller staff. *Id.* at 41:10–20, 86:17–23 (Evans).

176. As the record confirms, when Plaintiffs were mailing prefilled absentee-ballot applications to voters in Georgia, there was a substantial increase in applications submitted, albeit not necessarily for voters who actually *intended* to vote by absentee ballot.

177. In fact, State Defendants confirmed instances where voters submitted absentee-ballot applications but later forgot they had submitted one. 4/16/24 Trial Tr. 212:8–15, 212:19–24 (Germany). Many voters were surprised, and sometimes angry, when they showed up to the polls to vote but were told they had already requested a ballot be sent to them in the mail. *Id.* at 212:4–7, 230:14–22 (Germany). These voters or others in line around them sometimes thought that voter fraud had occurred because they did not

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remember requesting an absentee ballot. *Id.* at 212:25–213:7, 213:11–214:13 (Germany).

178. As one county election official explained, prefilled applications led to voters engaging less with the document, not noticing the inaccurate prefilled information, and not remembering that they had submitted it, which would lead to problems down the road, including the time-consuming process of canceling ballots. DX73.

179. Indeed, the trial record shows that county officials needed to cancel thousands of absentee ballots in 2020 for voters who applied for absentee ballots but, on Election Day, could not recall having done so. 4/18/24 Trial Tr. 46:18–48:10 (describing the time-consuming process of canceling a ballot) (Evans); DX31.

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180. Mr. Evans also testified it was possible to tie the volume of canceled ballots to prefilled mass-mailed applications. 4/18/24 Trial Tr. 90:12–21 (Evans).

181. Based on data from the Secretary of State's Office, county election officials canceled 6,629 absentee ballots in 2018, 148,809 absentee ballots in 2020, and 15,537 absentee ballots in 2022. *Id.* at 91:3–21 (Evans).

182. The process for cancelling an absentee ballot is time consuming. *Id.* at 46:18–48:10 (Evans); DX68 (excerpt from the Poll Worker Manual discussing steps required to cancel an absentee ballot). Because it takes

several minutes to cancel each absentee ballot, county election officials spent approximately 7,440.5 additional hours in 2020 canceling absentee ballots. *Id.* at 91:22–93:15 (Evans).

183. Because canceling a ballot occurs while a voter is in line, the volume of canceled ballots also contributed to longer wait times at polling places—a major past criticism of the voting system in Georgia. *Id.* at 93:18–94:1 (Evans).

184. Additionally, some voters interpreted the need to cancel ballots, when they did not recall requesting an absentee ballot, as fraud. 4/17/24 Trial Tr. 32:6–23 (Watson); DX70.

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185. And voters who witnessed other voters cancel absentee ballots sometimes believed they had witnessed voter fraud. 4/18/24 Trial Tr. 94:7–11 (Evans); DX69.

186. Thus, the record confirms that prefilled applications—whether prefilled accurately or not (4/16/24 Trial Tr. 184:5–12 (Germany))—led to time-consuming complaints and substantially undermined the efficiency of Georgia's electoral system.

187. However, running elections efficiently increases both voter turnout and voter confidence. 4/18/24 Trial Tr. 99:15–21 (Evans).

188. The State has a powerful interest in voters' *not* believing that the electoral system is rife with fraud, as that would make voters less likely to

participate, and reduce the overall perception of legitimacy and confidence in election results. 4/16/24 Trial Tr. 226:22–227:6 (Germany); 4/17/24 Trial Tr. 18:22–19:3 (Watson).

189. As the record confirms, since SB 202, the volume of complaints about absentee-ballot applications sent by third parties has "gone down tremendously." 4/16/24 Trial Tr. 180:8–12 (Germany). And the number of cancelled absentee ballots has substantially decreased since SB 202 was enacted. 4/18/24 Trial Tr. 91:3–21 (Evans).

2. The Anti-Duplication Provision.

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190. The Anti-Duplication Provision is also grounded in powerful and legitimate state interests. It requires "[a]ll persons or entities … that send applications for absentee ballots to electors" to "mail such applications only to individuals who have not already requested, received, or voted an absentee ballot[.]" O.C.G.A. § 21-2-381(a)(3)(A).

191. Under the provision's safe harbor provision, however, a "person or entity shall not be liable for any violation of this subparagraph if such person or entity relied upon information made available by the Secretary of State within five business days prior to the date such applications are mailed." O.C.G.A. § 21-2-381(a)(3)(A).

192. The Anti-Duplication Provision was included in SB 202 in response to voter confusion about receiving duplicate applications after submitting a request. 4/16/24 Trial Tr. 219:12–221:9 (Germany).

193. For instance, the Secretary of State's Office received many complaints from voters about receiving multiple absentee-ballot applications in the mail from Plaintiffs and other third parties. 4/17/24 Trial Tr. 17:1–5, 32:25–33:6 (Watson); DX42; DX47; DX53.

194. Some of those voters expressed confusion about receiving multiple applications in the mail because they believed they needed to submit each application to be able to vote at all. 4/16/24 Trial Tr. 188:15–189:9 (Germany).

195. Many voters were also concerned because they thought they were receiving multiple ballots. *Id.* at 189:7–15 (Germany); 4/17/24 Trial Tr. 17:16–23 (Watson); DX12. These concerns led voters to believe voter fraud was possible. *Id.*

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196. Additionally, when voters received multiple applications after they had already submitted a request to vote by mail, some voters were concerned that they were receiving a *new* application because there had been a problem with their first request. 4/16/24 Trial Tr. 222:5–10, 223:9–13 (Germany).

197. Even Plaintiffs' witness Ms. Hesla agreed that duplicate applications cause confusion, as she testified that "not sending applications to

voters who have already requested an absentee ballot helps *reduce* voter confusion[.]" *Id.* at 59:19–22 (emphasis added) (Hesla).

198. Additionally, one county election official expressed concern that, because people felt the need to complete and sign a form without paying close attention to what it says, voters receiving multiple unsolicited absentee-ballot applications would submit multiple applications despite actually intending to vote in person, which would require canceling more ballots on Election Day. *Id*. at 210:4–12 (Germany); DX73.

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199. Mr. Germany similarly explained that reducing duplicates lowers the burden on county officials by reducing or even eliminating duplicate absentee-ballot applications that must be processed. *Id*. at 224:24–225:3 (Germany); *see also* 4/18/24 Trial Tr. 39:12–40:1 (Evans).

200. Reducing such burdens on county officials is important, as increased burdens on county officials increase the risk of an error in processing applications or ballots. 4/16/24 Trial Tr. 221:5–222:4 (Germany); 4/18/24 Trial Tr. 87:7–24 (Evans). With the Anti-Duplication Provision in place, county elections officials should not need to process *any* duplicate requests to vote by mail. 4/16/24 Trial Tr. 224:24–225:3 (Germany).

201. And, with the Disclaimer Provision in place—a provision no longer challenged here—those who still receive duplicates will know whom to contact to have their name removed from the mailing list, thereby reducing the

number of complaints the State and counties would receive. 4/16/24 Trial Tr. 223:19–224:23 (Germany).

202. Additionally, with the safe-harbor provision, the State provided a straightforward way for Plaintiffs to comply with the Anti-Duplication Provision.

203. To begin, the "rollover list" identifies *all* voters who have "rollover status," meaning that they are elderly, disabled, or overseas, and that they have made a request to receive absentee ballots automatically in all elections during an election cycle. 4/16/24 Trial Tr. 177:21–178:6 (Germany); 4/18/24 Trial Tr. 34:19–35:3 (Evans). The absentee voter file automatically includes every voter with rollover status. 4/16/24 Trial Tr. 178:7–18 (Germany); 4/17/24 Trial Tr. 160:18–20 (Grimmer); 4/18/24 Trial Tr. 95:13–15 (Evans).

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204. Mr. Lopach incorrectly concluded that Plaintiffs did not have access to the rollover list. 4/15/24 Trial Tr. 145:21–25, 210:19–211:3, 212:17–20, 213:3–11 (Lopach).

205. Mr. Lopach also incorrectly concluded that the Anti-Duplication Provision prevented Plaintiffs from sending a second wave of their four-piece mailer to reach new voter registrants. *Id.* at 153:9–24 (Lopach). But the Anti-Duplication Provision does not prohibit sending applications to newly registered voters. And Plaintiffs can update their recipient lists between sending subsequent waves of direct mailers by comparing their lists with the

state's absentee voter file, which is updated daily during the time when absentee-ballot applications are accepted. *Id.* at 237:7–12 (Lopach).

206. In addition, Mr. Lopach misunderstood the safe harbor provision. *Id*. at 214:6–20 (Lopach) ("It's not if I mail, but if I cause a person to submit a duplicate."). He was under the misimpression that the five business days referred to the time it takes a voter to send in a second application after receiving Plaintiffs' mailers. *Id.* at 151:11–17 (Lopach). Thus, Mr. Lopach incorrectly thought the safe harbor provision would *not* cover a situation in which Plaintiffs send their mailers, but before receiving Plaintiffs' mailers a voter applies for an absentee ballot; the voter then receives Plaintiffs' mailers, and the voter submits Plaintiffs' application more than five days later. *Id.* at 151:18–22 (Lopach).

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207. But the text of the Anti-Duplication Provision provides that Plaintiffs may not "*mail* such applications" to individuals who "already requested, received, or voted an absentee ballot[.]" O.C.G.A. § 21-2-381(a)(3)(A) (emphasis supplied). And an item is considered mailed on its mailing date, not its delivery date. 4/17/24 Trial Tr. 193:20–194:1 (Waters). So, Plaintiffs would be protected by the safe-harbor provision in that scenario.

208. Moreover, the five-day clock for the safe harbor starts to run once the data are made publicly available by the State, not on the date a county election office processes the voter's application. 4/18/24 Trial Tr. 96:17–24

(Evans). So here again, the safe-harbor provision further protects Plaintiffs and similar groups from liability.

209. Indeed, the record shows that organizations like Plaintiffs can comply with the Anti-Duplication Provision by downloading the absentee voter file on the first day when applications are accepted, saving that file with its time stamp, removing voter IDs from its mailing list, and then mailing the applications to the remaining voters within five days. 4/17/24 Trial Tr. 136:2–12, 139:17–25, 157:8–12, 161:21–162:11 (Grimmer); 4/18/24 Trial Tr. 20:12–19, 27:13–28:14, 96:21–98:18 (Evans). The same process of downloading the absentee file used for de-deduplicating could also be utilized to defend against any complaints. *Id.*

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210. Accordingly, there are a host of ways for organizations like Plaintiffs to comply with the Anti-Duplication Provision without undermining the State's important interests.

C. Because Plaintiffs' Activity Is Not Protected by the First Amendment, the Provisions Easily Pass Rational-Basis Review.

211. The above facts foreclose Plaintiffs' First Amendment claims.

212. First, the Supreme Court confirms that Plaintiffs bear the burden to "demonstrate that the First Amendment even applies" here. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

213. As discussed above, Plaintiffs have not established that their regulated conduct is expressive at all, much less core political speech. *See supra* ¶¶ 68–141.

214. Thus, the Provisions are only subject to rational-basis review. *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1300–01 (N.D. Ga. 2020) (citing *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974)).

215. Rational-basis review requires only that a law "bear[] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see New Ga. Project*, 484 F. Supp. at 1301 (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

216. This standard can be met with "any *reasonably conceivable state of facts* that could provide a rational basis" for the statute. *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001) (emphasis in original) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)).

217. Under rational-basis review, "[i]f the relationship between a State's interest and its means of achieving it is 'at least debatable,' then it survives scrutiny." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1036 (11th Cir. 2020).

218. The trial evidence discussed above confirms that the General Assembly enacted the Provisions because of the State's interests in reducing the burdens on election administrators, decreasing voter confusion, and

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improving voter confidence in Georgia's electoral system. *See supra* ¶¶ 142–210.

219. These reasons provide more than a rational basis for the Provisions, and thus, the Provisions pass rational-basis review.

D. In the Alternative, the Provisions Satisfy Any Level of Scrutiny.

220. Even if Plaintiffs' conduct were core political speech, or if the Provisions were content-based regulation of Plaintiffs' protected speech such that strict scrutiny applied, the Provisions would satisfy that higher standard because they are narrowly tailored to serve compelling state interests. *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1286 (11th Cir. 1999) (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)) (content-based regulation); *Meyer*, 486 U.S. at 422–23 (core political speech).

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221. The test for strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest[.]" *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011)).

222. Here, the evidence is undisputed that the State has compelling interests in preventing voter confusion, preventing administrative burdens,

and protecting the actual and perceived integrity of Georgia's electoral system. *See supra* ¶¶ 142–210.

223. In other contexts, the Supreme Court has described a State's interest in minimizing voter confusion as "important"—indeed, "compelling." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193–95 (1986) (citation omitted); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion). And the Supreme Court has also confirmed that avoiding undue administrative burdens and protecting voter confidence in elections are likewise compelling interests. *E.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021) (combatting fraud is a "strong and entirely legitimate" reason for enacting voting laws); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n.14 (1974) ("preservation of the integrity of the electoral process" is a "compelling" objective); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (legitimate state interest in "conducting an efficient election").

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224. The Provisions are narrowly tailored to the State's compelling interests because they are necessary to address concerns including threats to actual and perceived election integrity, burdens on election officials, and sources of voter confusion and frustration such as unauthorized use of personal information, incorrect data, and sending duplicate forms after a voter has already applied. *See supra* ¶¶ 142–210.

225. Meanwhile, the Provisions strike a balance between addressing these concerns and still allowing organizations like Plaintiffs to send their mailers, unlike in states which banned third parties distributing absentee ballot applications altogether. *See, e.g.*, K.S.A. § 25–1122 (forbidding non-residents from mailing application to Kansas voters); Tenn. Code Ann. § 2-6-202(c)(3) (making it a class E felony to distribute an absentee-ballot application); S.C. Code § 7-15-330 (not permitting third-party distribution).

1. The Prefilling Prohibition is narrowly tailored to the State's compelling interests.

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226. As already demonstrated, the Prefilling Prohibition furthers the State's interest in enhancing voter confidence, reducing voter confusion, and enhancing electoral efficiency. The Prefilling Prohibition is narrowly tailored to further each such interest.

227. First, voter confidence: The General Assembly sought to achieve a balance by allowing Plaintiffs to engage in substantial speech and conduct regarding absentee voting, while only targeting the conduct that most significantly undermined voter confidence by eliminating all incorrectly prefilled applications and eliminating all applications where prefilled information caused voters to be confused as to why their personal information was publicly available. *See supra* at ¶¶ 143–189. Indeed, the General Assembly could have entirely prohibited third parties from sending absentee-

ballot applications to any Georgia voters. But the General Assembly instead targeted only the most problematic conduct.

228. Second, voter confusion: State Defendants presented ample evidence of complaints from voters and county election officials showing that Plaintiffs' conduct in prefilling applications caused significant confusion that had repercussions throughout the electoral system. Here again, the Prefilling Prohibition eliminates only the most significant reasons for that confusion—applications with personal information (correct or incorrect) already included. *See supra* ¶¶ 143–189.

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229. Plaintiffs' own witness Ms. Hesla made this very point—that inaccurate information in an absentee-ballot mailing is the "worst thing that can happen." 4/16/24 Trial Tr. 15:2–7, 55:5–22 (Helsa).

230. Similarly, the Secretary of State's Office received complaints that voters did not like to see their information being prefilled, and viewed it as bait for potential voter fraud, even when the information is correct. 4/16/24 Trial Tr. 180:20–23, 180:24–185:3; *see, e.g.*, DX24.

231. The Prefilling Prohibition also ensures that voters will more thoroughly engage with the application to ensure they input the correct address. *See supra* ¶ 178. Thus, voters will be less confused about whether they requested an absentee ballot.

232. As the Court explained in its summary-judgment order, Plaintiffs attempt to cast blame for any confusion onto the State, suggesting that Plaintiffs' data vendors merely rely on data from the State. [Doc. 179 at 28]. But Mr. Lopach acknowledged that Plaintiffs' vendors routinely manipulate such data, and thus Plaintiffs' pointing to the State's data does nothing to undermine the narrow tailoring of the Prefilling Prohibition. 4/15/24 Trial Tr. 207:4–13 (Lopach).

233. And third, electoral efficiency: The Prefilling Prohibition narrowly targets for reduction the 7,000+ additional hours of work county officials had to undertake to cancel absentee-ballot applications and ballots. *See supra* ¶ 182. It also seeks to reduce the time county officials spent trying to resolve applications that were submitted with incorrectly prefilled information. *See supra* ¶ 147. And it seeks to reduce the numerous complaints the State received about prefilled applications. *See supra* ¶¶ 146, 153, 162.

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234. In achieving these goals, the Prefilling Prohibition is not overinclusive. "Narrowly tailored," the Eleventh Circuit confirms, does not mean "perfectly tailored." *McClendon v. Long*, 22 F.4th 1330, 1338 (11th Cir. 2022) (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015)). And even if it did, it is hard to imagine how the Prefilling Prohibition could be tailored more narrowly or perfectly than it is.

235. The First Amendment, moreover, imposes no freestanding "'underinclusiveness' limitation" but a "content discrimination" limitation upon a State's prohibition of proscribable speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992). The Supreme Court has "upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Williams-Yulee*, 575 U.S. at 449 (citations omitted). If a category of conduct or speech is "proscribable," then the state is free to proscribe a narrower subset of that conduct or speech if it has a rational basis for doing so. *See R.A.V.*, 505 U.S. at 419 (Stevens, J., concurring).

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236. Here, sending absentee-ballot applications in general is proscribable conduct—as evidenced in other states. *See Lichtenstein*, 83 F.4th at 595. Thus, proscribing only a subset of related activity is certainly permissible under the First Amendment.

237. Moreover, Plaintiffs may still engage in a subset of the relevant proscribable activity: They may still send blank absentee-ballot applications. They may still send postage-paid return envelopes, and they may still personalize three of the four parts of their mailers with voters' names and addresses.

238. Thus, the Prefilling Prohibition is narrowly tailored to the State's compelling interests.

2. The Anti-Duplication Provision is also narrowly tailored to the State's compelling interests.

239. Despite Plaintiffs' contention, the Anti-Duplication Provision is also not underinclusive. Rather, as shown earlier, it also furthers the State's important interests in very limited and targeted ways.

240. As this Court explained in its summary-judgment order, Plaintiffs argue that the Anti-Duplication Provision does not reduce complaints from those voters who received multiple applications and who had no intention of voting absentee. [Doc. 179 at 28].

241. But Plaintiffs are mistaken, as the evidence refutes Plaintiffs' concern that the Anti-Duplication Provision is underinclusive because it does not prohibit all duplication.

242. Unlike statutes the Supreme Court considered underinclusive, the Anti-Duplication Provision is not "riddled with exceptions" that "raise 'doubts about whether the government is in fact pursuing the interest it invokes[.]'" *E.g.*, *Williams-Yulee*, 575 U.S. at 449 (cleaned up).

243. Rather, the evidence shows that the General Assembly limited the Anti-Duplication Provision to voters who had *already* applied for an absentee ballot, and it did so for two reasons.

244. First, these are the only voters who might potentially submit duplicate ballot applications, which would increase administrative burdens on

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county election officials. The Anti-Duplication Provision effectively brings that number to zero. 4/16/24 Trial Tr. 224:24–225:3 (Germany).

245. Second, these voters are also the ones most likely to be confused by receiving another application, as they may worry that their initial applications were not accepted. *Id.* at 188:15–189:1 (Germany).

246. As Mr. Germany explained, the General Assembly tailored the Anti-Duplication Provision to address these issues specifically, without myriad exceptions, and without prohibiting more activity than necessary. *Id.* at 219:12–221:9 (Germany).

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247. Additionally, the State crafted the Anti-Duplication Provision in a way that allows Plaintiffs to comply with minimal effort, while also still allowing Plaintiffs ample opportunities to communicate their messages. Plaintiffs' witness Ms. Hesla confirmed as much. *E.g.*, 4/16/24 Trial Tr. 59:14–22, 60:10–14 (Plaintiffs already remove individuals who have requested absentee ballots); *id.* at 62:10–14 (stating that only union printers take three days to process suppression file) (Hesla); PX40.

248. To the extent Plaintiffs have any difficulty complying with this provision, that difficulty arises from the fact that Plaintiffs' printing vendor—Mission Control—works *only* with union printers. 4/16/24 Trial Tr. 10:13–17, 11:15–12:3, 54:9–16 (Hesla).

249. Each such printer, moreover, relies on inline printing, which Ms. Hesla stated requires the printer to receive a mailing list six weeks in advance of the target mailing date. *Id.* at 27:13–17 (Hesla). Additionally, Ms. Hesla stated that it would take Plaintiffs' vendors six days to determine which voters should be removed from their mailing list. *Id.* at 32:15–23 (Hesla). Then, the printers upload Plaintiffs' list of voters to remove three days before starting printing, during which the printers manually remove recipients. *Id.* at 30:15–18, 33:9–18 (Hesla). These printers can print 485,000 mailers per day. *Id.* at 33:19–21 (Hesla).

250. In contrast, Mr. Waters testified that his company—a non-union printer called Arena—has distributed ballot applications in Georgia and can easily meet the deadlines imposed by the Anti-Duplication Provision. 4/17/24 Trial Tr. 168:10–19, 169:15–16, 172:4–173:14 (Waters).

251. Mr. Waters also testified about the mechanics of removing names from a mailing list before the mailing is sent. Mr. Waters testified that it is regular practice to remove recipients from mailing lists, such as if they have already voted, and that it takes "[g]enerally 12 to 24 hours at most" "[p]robably less than 12." 4/17/24 Trial Tr. 171:16–172:3 (Waters). He also identified ways that Arena streamlines the process. *Id.* at 172:18–173:1 (Waters).

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252. Thus, Arena would be able to update a client's voter data file within the safe harbor provision, and he could not imagine why another printer would not be able to do so. *Id.* at 172:10–17, 173:2–9 (Waters).

253. Although Arena is able to provide this service, neither Plaintiff CVI nor VPC has contacted Arena about printing their mailings in Georgia. 4/15/24 Trial Tr. 261:9–18 (Mr. Lopach testifying that Plaintiffs have not evaluated non-union printers to see if they could meet SB 202's requirements); 4/17/24 Trial Tr. 172:4–173:14 (Mr. Waters testifying that Arena could provide this service).

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254. Thus, any complaint from Plaintiffs that the Anti-Duplication Provision is too broad because Plaintiffs cannot comply with it is demonstrably false. Rather, any obstacles are of Plaintiffs' own making.

255. Finally, Plaintiffs did not present any evidence that there are less restrictive alternatives that the State could deploy that would vindicate the above-described interests as effectively. Plaintiffs may still send as many applications as they want to voters who have not already applied for absentee ballots and as many letters as they want to voters encouraging them to vote, regardless of whether they have already applied for an absentee ballot.

256. Thus, the Anti-Duplication Provision is narrowly tailored to further important State interests.

E. Alternatively, the Provisions Satisfy Intermediate Scrutiny.

257. Not surprisingly, the Provisions also satisfy intermediate scrutiny —the standard that would apply if Plaintiffs' activity is expressive conduct, or if Plaintiffs' activity is speech protected by the First Amendment and the Provisions are content-neutral.

258. These two standards are very similar but sufficiently different that, as the Eleventh Circuit has held, it "may occasionally be outcome determinative." *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1364 (11th Cir. 1999). As shown below, the Provisions survive any form of intermediate scrutiny.

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1. The Provisions survive *O'Brien* intermediate scrutiny.

259. As explained above, Plaintiffs' activity of sending absentee-ballot applications is not expressive conduct, but rather is a practical act of sending a government form alongside cover letters that hold their message. But if that activity were expressive conduct, then the intermediate-scrutiny standard under *O'Brien* would apply.

260. Under *O'Brien*, a law will be upheld if it: (1) "[F]urthers an important or substantial governmental interest;" and (2) the "incidental restriction" on expressive conduct is "no greater than is essential[.]" *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

261. The Provisions further the State's interests in removing unnecessary burdens on election administrators, reducing voter confusion, and improving voter confidence in the electoral system, and they do so in a way that is very limited as to not burden Plaintiffs' conduct more than necessary. *See supra* ¶¶ 142–210.

262. Plaintiffs may still send blank absentee-ballot applications, and they may still send as many applications as they wish to voters who have not already applied for absentee ballots. And they may still send postage-paid return envelopes, and they may still personalize three of the four parts of their mailers with voters' names and addresses. *See supra* ¶ 99. Thus, the Provisions do not restrict any more of Plaintiffs' activities than necessary to further the State's interests.

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263. In *Lichtenstein*, the Sixth Circuit held that the Tennessee law prohibiting distribution of absentee-ballot applications easily satisfied the *O'Brien* expressive-conduct standard. 83 F.4th at 596–601. It was content-neutral, and it was no greater than essential to further substantial government interests in "minimizing voter confusion." *Id.* at 599. As the Sixth Circuit further explained: "In short, because [voters] would be more exposed to voter confusion without [the Provisions] than with [them], the ban is safe from invalidation under the First Amendment." *Id.* at 600 (cleaned up) (citing *Clark*, 468 U.S. at 297).

264. Like Plaintiffs here, the plaintiffs in *Lichtenstein* argued that state law banned more conduct than necessary. *Id.* at 600. But the Sixth Circuit held that, under the expressive-conduct test, "alternative methods … are beside the point." *Id.* at 600–01 (citing *Rumsfeld*, 547 U.S. at 67). Ultimately, the Sixth Circuit concluded, the plaintiffs' "claim would still fail because [the law]'s nearly non-existent intrusion on their expression survives the expressive-conduct test." *Id.* at 601.

265. There, like here, the Sixth Circuit said that there is "no stopping point" to an argument "that a ban on conduct triggers strict scrutiny if the ban makes it harder for an entity to achieve the policies it promotes[.]" *Id.* at 587. Even if the plaintiffs had good policy arguments, assessing such arguments "is the job of the [State] legislature." *Id.* at 604. Moreover, if there are some states that require an excuse to vote absentee and can prohibit mass mailing absentee-ballot applications in general, then states surely must be able to regulate sending prefilled absentee-ballot applications without violating the Constitution.

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2. The Provisions survive intermediate scrutiny for time, place, and manner restrictions.

266. If the Plaintiffs' activity were speech and the Provisions were content-neutral, then the intermediate-scrutiny standard for time, place, and manner restrictions would apply.

267. Time, place, and manner regulations concern the "where or when" of activity protected by the First Amendment. *Club Madonna, Inc. v. City of Miami Beach*, 42 F.4th 1231, 1245 (11th Cir. 2022).

268. Under the *Renton* time, place, and manner standard, a law will be upheld if it: (1) "[S]erve[s] a substantial governmental interest;" and (2) "do[es] not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

269. A valid time, place, and manner regulation must also be narrowly tailored, but the "requirement of narrow tailoring is satisfied so long as the regulation ... promotes a substantial government interest which would be achieved less effectively absent the regulation." *One World One Family*, 175 F.3d 1282 (ellipses in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 781 (1989)).

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270. To be a valid time, place, and manner regulation, the Provisions must be content-neutral, meaning focused on "placement," not "subject matter." *One World One Family*, 175 F.3d at 1287

271. For example, a regulation can prohibit vending on streets or sidewalks, even with an exception for outdoor tables for restaurants and a restricted number for nonprofits. *One World One Family*, 175 F.3d at 1284–85.

272. And a regulation could require all strip clubs to follow an age-verifying record-keeping and identification-checking regime to ensure performers were not minors. *Club Madonna*, 42 F.4th at 1245–47.

273. Here, the Provisions are content-neutral because they focus on timing and "placement," not "subject matter."

274. The Prefilling Prohibition allows Plaintiffs to convey information about a voter from the State's voter files; it just requires that information to be conveyed somewhere other than on the absentee-ballot application.

275. Similarly, the Anti-Duplication Provision regulates timing: Plaintiffs may send all the messages they wish to encourage a voter to vote by absentee ballot. But if they want to send a ballot application to the voter—which can result in issuance of a live ballot—they must do so before the voter has submitted an application.

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276. There is no dispute that here, the Provisions allow alternative channels of expression for Plaintiffs. They are permitted to send blank absentee-ballot applications, as they did twice in 2020 and once in 2022. *See supra* ¶ 99. They are also able to send follow-up letters to voters who have already applied for an absentee ballot or who have voted absentee to congratulate them or share another message. And they are able to send mailers without an absentee-ballot application to voters who have not yet voted.

277. Since the Provisions pass strict scrutiny, they likewise pass intermediate scrutiny under either intermediate-scrutiny standard.

CONCLUSION

278. As the trial record confirms, Plaintiffs' sending of prefilled or duplicate absentee-ballot applications is not expressive conduct, and thus the Provisions are subject only to rational basis review, which they easily satisfy.

279. But even if a higher level of scrutiny were applied, the Provisions would still survive as they serve compelling State interests of reducing voter confusion, enhancing voter confidence, and increasing electoral efficiency. And, in doing so, the General Assembly ensured that the Provisions were narrowly tailored to further those interests, leaving substantial speech and conduct untouched.

280. Accordingly, judgment should be entered for State Defendants on each of Plaintiffs' remaining claims.

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May 31, 2024

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CERTIFICATE OF COMPLIANCE

Under L.R. 7.1(D), the undersigned hereby certifies that the foregoing State Defendants' Post-Trial Proposed Findings of Fact and Conclusions of Law has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(C).

/s/ Gene C. Schaerr
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