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

VOTER PARTICIPATION CENTER and CENTER FOR VOTER INFORMATION,
Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia; SARA GHAZAL, JANICE JOHNSTON, EDWARD LINDSEY, and MATTHEW MASHBURN, in their official capacities as members of the STATE ELECTION BOARD,
Defendants,

and

REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; and GEORGIA REPUBLICAN PARTY, INC.,
Intervenor Defendants.

Case No. 1:21-cv-01390-JPB

Judge J.P. Boulee

PLAINTIFFS' RESPONSE TO STATE DEFENDANTS' AND INTERVENOR DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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I. INTRODUCTION

1. As set forth in their Proposed Findings of Fact and Conclusions of Law ("PFOFCOLs"), Plaintiffs Voter Participation Center ("VPC") and Center for Voter Information ("CVI") have demonstrated by a preponderance of the evidence that their absentee ballot application mailers are speech and expressive conduct; that the Ballot Application Restrictions[1] are a content-based restriction on core political speech; and that the Ballot Application Restrictions cannot survive any level of scrutiny. As a result, Plaintiffs have more than met their burden that the Ballot Application Restrictions unconstitutionally restrict speech, and trigger and fail First Amendment scrutiny.

2. Defendants[2] fail to accurately describe the facts and the law. In arguing against the expressive nature of Plaintiffs' absentee ballot application mailers, Defendants mischaracterize the relevant case law and ask this Court to summarily reinterpret the *Food Not Bombs* factors. Additionally, and for the first time, Defendants argue that speaking about absentee voting is not core political speech.

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[1] As in Plaintiffs' Proposed Findings of Fact and Conclusions of Law (referred to as "Pls. PFOFs" and "Pls. PCOLs," respectively), Plaintiffs refer to the Prefilling Prohibition, *see* Pls. PFOFs ¶ 8, and the Mailing List Restriction, *see id.* ¶ 9, collectively as the "Ballot Application Restrictions" or the "Challenged Provisions." *See id.* ¶ 6.

[2] Plaintiffs refer to State Defendants and Intervenor Defendants collectively as Defendants.

Finally, Defendants offer no evidence that any level but strict scrutiny should apply and continue to rely on unsupported assertions about governmental interests that are untethered to the activities the law regulates.

3. Plaintiffs have met their burden demonstrating that the Ballot Application Restrictions infringe their core First Amendment rights. Defendants have failed to meet their burden to establish that the unconstitutional restrictions are sufficiently justified by any government interest or tailored to that interest. Therefore, the Court should enjoin the restrictions and enter judgment in Plaintiffs' favor.

II. DEFENDANTS MISCHARACTERIZE THE FACTUAL AND PROCEDURAL BACKGROUND

4. In their description of the procedural history of the case, State Defendants mischaracterize the Court's rulings denying Plaintiffs' Preliminary Injunction Motion and denying in part and granting in part Defendants' motion for summary judgment. *See* State Defs. PFOFCOLs ¶¶ 13, 19. In its summary judgment order, the Court "assume[d] that Plaintiffs' conduct is protected by the First Amendment" for the purposes of State Defendants' summary judgment motion, acknowledging that "it analyzed this issue and others differently when it denied Plaintiffs' request for preliminary injunctive relief." Order on Motion for Summary Judgment, ECF No. 179 at 22, 22 n.17.

5. For purposes of summary judgment analysis, the Court concluded that the Challenged Provisions restrict core political speech. *Id.* at 25. In partially denying State Defendants' summary judgment motion, the Court concluded that (1) "a genuine issue of material fact exists as to whether a reasonable observer would perceive some sort of message from Plaintiffs' conduct," *id.* at 21, (2) "a genuine issue of fact exists as to whether the absentee ballot applications convey some sort of message" under *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1344-45 (11th Cir. 2021), and (3) a genuine issue of material fact existed as to whether the Challenged Provisions are narrowly tailored. Order on Motion for Summary Judgment, ECF No. 179 at 29.

6. Likewise, State Defendants mischaracterize the nature and scope of the restrictions. The Mailing List Restriction prohibits sending an absentee ballot application within five business days of a county recording receipt of a voter's application, upon risk of financial and legal penalty. O.C.G.A. § 21-2-381(a)(3)(A)-(B); *accord* Pls. Ex. 7 at 41-42; *cf.* State Defs. PFOFCOLs ¶ 3. State Defendants summarily state that "a sender will not violate the [Mailing List Restriction] 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,'" but this obfuscates its flaws and the scope of the burden on Plaintiffs' absentee ballot application mailers. State Defs. PFOFCOLs ¶ 4 (quoting O.C.G.A. § 21-2-381(a)(3)(A)). In reality, the

Mailing List Restriction's five-day safe harbor turns on the date on which the individual in question first appeared in the Secretary of State's publicly available list of individuals who have requested an absentee ballot, not when the recipient actually mailed the application. Trial Tr. 4.16PM 176:8-22, 177:9-14 (Germany). As discussed *infra,* this makes the Mailing List Restriction logistically impossible to comply with and could result in cost-prohibitive fines of $100 per duplicate application. *See infra* Part IV; O.C.G.A. § 21-2-381(a)(3)(B).

7. Likewise, the Prefilling Prohibition is a per se ban on mailing personalized absentee ballot applications. *See* O.C.G.A. § 21-2-381(a)(1)(C)(ii). This ban, which State Defendants acknowledge can result in criminal penalties, *see* State Defs. PFOFCOLs ¶ 2, only targets third parties who engage in personalized absentee ballot application speech. *See* O.C.G.A. § 21-2-381(a)(1)(C)(ii).

III. PLAINTIFFS' ACTIVITIES ARE PROTECTED SPEECH AND EXPRESSIVE CONDUCT[3]

8. Plaintiffs have met their burden to demonstrate that their absentee ballot application mailers are speech and expressive conduct. *See* Pls. PFOFs ¶¶ 280-305; Pls. PCOLs ¶¶ 67-83.

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[3] State Defendants improperly combine their proposed findings of fact and conclusions of law. *See* Fed. R. Civ. P. 52 (providing that "the court must find the

9. As discussed below, Plaintiffs believe that their most effective means of communicating is by sending multiple waves of personalized absentee ballot application mailers. *See infra* Part III(A)(2). Moreover, and contrary to Defendants' assertions, sending the absentee ballot application alone constitutes speech.

A. Defendants Mischaracterize Plaintiffs' Speech and Expression

10. State Defendants' characterization of the reasons why Plaintiffs send direct mail is overly narrow, *see* State Defs. PFOFCOLs ¶ 82, as Plaintiffs send direct mail for several reasons. Plaintiffs send multiple waves of direct absentee ballot application mailers because they believe it is the most effective means to communicate their message. Trial Tr. 4.15AM 62:23-63:1 (Lopach). Direct mail allows Plaintiffs to reach as many people as possible, *id.* at 55:13-56:2, 60:14-17, 64:13-25 (Lopach), and to send a targeted message to an individual because direct mail can be addressed specifically to an individual. *Id.* at 63:11-14 (Lopach). Moreover, Plaintiffs believe this is the most effective way to communicate based upon their testing and review of the effectiveness of different messages over numerous election cycles. *Id.* at 63:2-6 (Lopach).

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facts specially and state its conclusions of law separately" in a bench trial). Plaintiffs' respond to State Defendants' proposed findings accordingly, notwithstanding State Defendants' failure to separate their proposed facts and proposed conclusions of law.

11. The entirety of Plaintiffs' absentee ballot application mailers—including the prefilled absentee ballot application—conveys a message and the elements of the mailer are intertwined to most effectively convey Plaintiffs' message. Trial Tr. 4.15AM 67:12-15, 78:18-23, 79:12-14, 93:13-16, 97:13-16, 98:22-99:2, 99:5-8, 101:4-10 (Lopach); Trial Tr. 4.15PM 129:6-11, 138:1-5, 233:20-21, 233:22-234:10 (Lopach); Trial Tr. 4.16AM 6:2-8 (Lopach); Trial Tr. 4.16AM 23:13-24:3 (Hesla); *see Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.").

12. Contrary to State Defendants' assertions, *see* State Defs. PFOFCOLs ¶¶ 90-91, 101, 125, Plaintiffs' speech is contained in all aspects of their mailers using written words. *See, e.g.*, Pls. Exs. 26, 27, 321. The carrier envelope tells the voter what is inside, and the cover letter includes a personalized message reiterating the voter should complete the personalized application and says absentee "voting [] is EASY." *E.g.*, Pls. Ex. 26; Trial Tr. 4.15AM 94:24-95:4 (Lopach). The cover letter also provides instructions to the voter such as to not submit an application if they have already done so, *see, e.g.*, Pls. Exs. 26, 27, and makes recipients aware the mailing has been sent by a nongovernmental entity. *Id.* The personalized application contains the voter's name and registered address to express that the recipient has specifically been "selected" to receive this application, and the return envelope tells

the voter to return the application to their local election official. *See* Pls. Ex. 26, 27, 313, 319; Trial Tr. 4.15AM 78:16-18, 89:8-10 (Lopach), Trial Tr. 4.15PM 232:22-233:8 (Lopach); ECF No. 185-4, Consolidated Stipulations of Fact ("Stipulated Facts") ¶¶ 17, 18. And contrary to State Defendants characterization, State Defs. PFOFCOLs ¶ 125, in 2022 in Georgia, Plaintiffs were not able to as effectively communicate their pro-absentee voting message because Plaintiffs did not personalize their mailed absentee ballot applications and sent follow-up letters without the remainder of their message, solely to comply with SB 202. Pls. Ex. 318; Trial Tr. 4.15PM 146:14-17, 147:5-6, 147:14-18, 149:14-18 (Lopach).

13. State Defendants contend Plaintiffs reported an 11.7% response rate from their absentee ballot application program in 2020, but that misunderstands the evidence. State Defs. PFOFCOLs ¶ 97. Plaintiffs received 635,000 responses out of 9.6 million mailers in Georgia, which is a 6.6% response rate. Trial Tr. 4.15AM 69:22-70:1, 70:21-23 (Lopach). Rather, the 11.7% response rate was observed as part of testing Plaintiffs conducted on different types of messaging used in an earlier part of their 2020 absentee mail program. Pls. Ex. 36. Specifically, Plaintiffs received an 11.7% response rate from their "selected" messaging that called "attention to the fact that the voter was explicitly chosen to receive the application by mail . . . [and] provides an exclusive voter experience." *Id.* at 7. Plaintiffs' testing and analysis demonstrates the effectiveness of this "selected" messaging in

expressing their pro-absentee voting ideas. *See* Pls. Exs. 36, 321; Trial Tr. 4.15AM 71:24-72:14 (Lopach); Trial Tr. 4.15PM 129:13-14 (Lopach).

1. Plaintiffs' Prefilling of the Absentee Ballot Applications They Distribute Conveys a Message

14. Prefilling helps communicate Plaintiffs' most effective message. Contrary to State Defendants' assertions, *see* State Defs. PFOFCOLs ¶ 96, Plaintiffs' own testing confirms that prefilled applications are more effective than blank applications. Trial Tr. 4.15AM 68:11-12, 79:12-14, 80:16-22 (Lopach); Trial Tr. 4.15PM 256:14-18 (Lopach).

15. Plaintiffs' personalized applications are in fact expressive and State Defendants' arguments to the contrary, *see* State Defs. PFOFCOLs ¶¶ 90, 114, are inconsistent with the facts established at trial. Plaintiffs' personalized application is tailored to a specific voter, populated with information pulled directly from the State's voter file, and used to convey the message that the specific voter can and should submit an absentee ballot application. Trial Tr. 4.15AM 81:24-82:1, 96:10-14, 97:13-16, 99:5-8 (Lopach); Trial Tr. 4.15PM 256:3-5 (Lopach). As Plaintiffs explained, a prefilled application, on its own, communicates to recipient that "this form is for [them]," Trial Tr. 4.15AM 97:13-16 (Lopach), and that the specific voter can and should submit an absentee ballot application. *See VoteAmerica v. Schwab*, 671 F. Supp. 3d 1230, 1244 (D. Kan. 2023) (holding that "[b]y personalizing the

mail ballot applications, plaintiff engages in expressive conduct which is distinguishable from distributing blank absentee ballot applications.")

16. Additionally, since 2006, Plaintiffs have almost always personalized the absentee ballot applications in Georgia, except for a few waves in 2020 due to data issues, and once in 2022 because of SB 202. Pls. Exs. 313, 319, 320, 321; Trial Tr. 4.15AM 84:17-19 (Lopach); Trial Tr. 4.15PM 127:22-24, 153:12-14, 207:8-13 (Lopach). Thus, State Defendants' attempt to minimize Plaintiffs' prefilling practices is incorrect. *See* State Defs. PFOFCOLs ¶ 87, 96.

17. State Defendants wrongly suggest that Plaintiffs "did not present any analyses on the effectiveness of prefilling" or evidence specific to prefilling absentee ballot applications. State Defs. PFOFCOLs ¶ 94, 105. Dr. Green testified that transaction costs associated with absentee voting can include obtaining the application form, filling it out, and mailing it in. Trial Tr. 4.16AM 79:21-80:5 (Green); *see also* Pls. Ex. 28. Dr. Green presented substantial academic evidence about the effectiveness of prefilling. Trial Tr. 4.16AM 95:12-18 (Green); Pls. Ex. 88; *see also* Pls. Ex. 30. Dr. Green testified more broadly about the role of transaction costs in voter mobilization, explaining how sending a voter a prefilled application reduces transaction costs for that voter and therefore, is "likely to raise their likelihood to engage in this behavior by a percentage point or two." Trial Tr. 4.16AM 94:6-15 (Green); *see also* Pls. Exs. 28, 30. Dr. Green also testified that the "prefilling

of forms with a recipient's information" is "a common practice in political mail. Trial Tr. 4.16AM 92:25-93:5 (Green).

18. Indeed, despite Dr. Grimmer's initial critique of the Hassell study upon which Dr. Green relied, *cf.* State Defs. PFOFCOLs ¶ 106, Dr. Grimmer later corrected himself and confirmed that the Hassell study did find a difference in absentee voting between those who received a prefilled vs blank application. Trial Tr. 4.17 PM 111:19-23 (Grimmer). Indeed, based on the study's findings, it can be said with 80 percent certainty that prefilling was the cause of increased absentee voting. *Id.* at 146:10-23 (Grimmer); *cf.* State Defs. PFOFCOLs ¶ 109.

19. Additionally, Dr. Green explained why State Defendants' fixation on statistical significance is misplaced here. *See* State Defs. PFOFCOLs ¶ 107. Dr. Green explained that the cutoff for statistical significance is arbitrary and does not take into account the results of similarly conducted experiments and literature on the topic. Trial Tr. 4.16AM 102:24-103:7 (Green); Pls. Ex. 30 at 10, 11; Trial Tr. 4.16AM 107:10-17 (Green). Dr. Green did not deny that statistical significance can be useful in certain circumstances but cautioned that over-relying on it can be detrimental. Pls. Ex. 30 at 9; Trial Tr. 4.16AM 105:21-107:1 (Green). Dr. Green does not relax the standard of significance, rather he approaches the question in a different, but nevertheless scientifically rigorous, way. Pls. Ex. 30 at 9-11; Trial Tr. 4.16AM 105:21-107:1 (Green).

20. To this end, Dr. Green explained how the results of the Hassell study were substantively significant in terms of informing the best approach to voter mobilization in this area, and that a betting odds approach clearly demonstrated the efficacy of prefilling. Pls. Ex. 30 at 9-11; Trial Tr. 4.16AM 105:21-107:1 (Green). In an attempt to avoid the obvious conclusion that prefilling absentee ballot applications reduces transaction costs for voters, State Defendants misleadingly characterize Plaintiffs' applications as "partially prefill[ed]." State Defs. PFOFCOLs ¶ 105. Yet, the fact that Plaintiffs do not—and could not—prefill every field on an absentee ballot application does not limit the applicability of the substantial evidence put forward by Dr. Green that prefilling reduces transaction costs to Plaintiffs' activities. *See* Pls. Ex. 30 at 8-9; Pls. Ex. 88; Trial Tr. 4.16AM 78:16-21, 85:5-9, 85:19-22, 93:6-9, 93:10-94:3, 94:6-15, 95:12-18 (Green). Indeed, State Defendants offer no evidence that the concept of transaction costs does not apply unless a given form is completely prefilled. *But see* Trial Tr. 4.16PM 145:12-14 (Green) (Dr. Green indicating that he is unaware of any literature supporting the contention that the effectiveness is different between prefilled and partially prefilled applications); *cf.* State Defs. PFOFCOLs ¶ 105, 109.

21. State Defendants' next claim—that Dr. Green testified that prefilling is about "lowering transaction costs for voters to submit the forms, not about sending recipients a message"—is nonsensical. State Defs. PFOFCOLs ¶¶ 102-103, 110.

Voters can both obtain the benefits of lower transaction costs and infer a message from the receipt of a prefilled absentee ballot application. More to the point, that Plaintiffs' communications lower transaction costs—thereby increasing the likelihood that the voter will act on the communication—demonstrates the effectiveness of Plaintiffs' absentee ballot application communications. Trial Tr. 4.16AM 85:5-9, 85:19-22, 93:6-9, 94:6-20, 108:2-6 (Green). State Defendants' attempt to confuse the "impact" of Plaintiffs' communications and the ability for recipients to understand a message betrays State Defendants' understanding of Plaintiffs' speech. State Defs. PFOFCOLs ¶ 103.

2. Plaintiffs' Mailing of Multiple Waves of Absentee Ballot Applications Is The Most Effective Means of Conveying Their Message

22. As with prefilling, State Defendants mischaracterize Plaintiffs' practice of sending multiple waves of absentee ballot applications. State Defs. PFOFCOLs ¶ 108.

23. No evidence supports State Defendants' contention that Plaintiffs' goal in sending multiple waves of applications is to lower Plaintiffs' own transaction costs. State Defs. PFOFCOLs ¶ 108. State Defendants' reliance on Dr. Grimmer for this point is misplaced. *See* State Defs. PFOFCOLs ¶¶ 108-10. Dr. Grimmer did not cite any studies or evidence other than the studies or evidence cited by Plaintiffs' expert, Dr. Green, or perform any empirical analysis himself. Trial Tr. 4.17PM

142:16-25, 143:25-144:6, 144:23-145:5 (Grimmer). Nor has Dr. Grimmer published a paper on voter mobilization. *See* State Defs. PFOFCOLs ¶ 60. Along these lines, Dr. Grimmer clarified the assertions in his report were not "conclusions," but hypotheticals. Trial Tr. 4.17PM 145:14-15 (Grimmer). State Defendants notably omit this clarification. *See* State Defs. PFOFCOLs ¶ 62.

24. Rather, Dr. Green explained that "sending an individual a piece of political direct mail more than once lead[s] to a greater increase in turnout than sending it just once." Trial Tr. 4.16AM 109:14-18 (Green). In particular, multiple studies, including a study Dr. Green himself conducted in 2014, found that "increase[ed] numbers of mailings led to increased voter turnout," up until approximately the fifth or sixth mailing. Trial Tr. 4.16AM 111:11-24 (Green). As a result, Dr. Green opined that "if a civic organization sends only one absentee ballot application mailer to a voter instead of multiple," that is "a less effective method of increasing voter turnout." Trial Tr. 4.16AM 111:25-112:4 (Green).

25. Further, State Defendants' suggestion that "the cost of identifying voters who have already submitted absentee-ballot applications could be higher than Plaintiffs can tolerate" seriously misstates the facts. State Defs. PFOFCOLs ¶ 108. The record shows that it is not the cost of identifying voters who have already submitted an absentee ballot application that is prohibitive, but rather the tight timeframe for doing so that is not reflective of how large-scale, statewide direct mail

campaigns concerned with personalization and accuracy operate. *See* Trial Tr. 4.16AM 25:20-26:5, 26:11-20, 30:15-31:4, 32:15-33:3, 33:11-25, 34:17-35:11, 36:17-23 (Hesla). And to the extent the cost is "higher than Plaintiffs can tolerate," State Defs. PFOFCOLs ¶ 108, it is because the Mailing List Restriction imposes threat of criminal and civil liability, not transaction costs. *See* O.C.G.A. § 21-2-381(a)(1)(3)(B).

3. Plaintiffs' Sending of An Absentee Ballot Application Conveys A Message On Its Own

26. State Defendants are incorrect that Plaintiffs produced no evidence that the application communicates a message. *See* State Defs. PFOFCOLs ¶¶ 90, 111, 113-116, 123, 125, 131. Plaintiffs' sending of an absentee ballot application conveys a message on its own. Trial Tr. 4.15AM 78:18-23, 97:13-16, 20-23, 99:5-8, 101:5-10 (Lopach); Trial Tr. 4.15PM 256:4-5 (Lopach); Trial Tr. 4.16AM 23:13-24:3 (Hesla); Pls. Ex. 36 at 2.

27. The fact that Plaintiffs prefer to include a cover letter with their distribution of absentee ballot applications does not mean that the application itself does not communicate a message. Rather, Plaintiffs merely view the inclusion of a cover letter with a prefilled application as the most effective means to communicate their message. Trial Tr. 4.15AM 78:18-23, 101:5-10 (Lopach); Trial Tr. 4.15PM 138:1-5 (Lopach); Trial Tr. 4.16AM 23:13-24:3 (Hesla).

28. State Defendants misstate Mr. Lopach's testimony on this issue. *See* State Defs. PFOFCOLs ¶¶ 88, 90, 91, 101. First, Mr. Lopach never testified that all of Plaintiffs' message is contained in the cover letters and envelopes of Plaintiffs' absentee ballot application mailers, and State Defendants have disingenuously quoted Mr. Lopach's testimony. *Compare* State Defs. PFOFCOLs ¶¶ 90,101 *with* Trial Tr. 4.15PM 233:20-234:5 (acknowledging that Plaintiffs' message is also in the cover letter and envelopes but repeating that the whole mailer conveys a message) *and* Trial Tr. 4.15AM 67:21-24 (stating the personalized application speaks to a voter). Second, Mr. Lopach did not testify that a cover letter is "needed" or "necessary for the reasonable observer to perceive a message from" their mailing a prefilled absentee ballot application, *compare* State Defs. PFOFCOLs ¶ 88 *with* *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1244 (11th Cir. 2018) ("*FNB*"), but just that Plaintiffs would likely not send an application without a cover letter. Trial Tr. 4.15 233:12 (Lopach). Thus, he simply acknowledged that including a cover letter with their mailed application is more effective than sending an application alone, just as including a personalized application is more effective than sending an unaccompanied letter. Trial Tr. 4.15PM 233:17-21 (Lopach); Trial Tr. 4.15AM 79:12-14 (Lopach). Moreover, Plaintiffs are not prohibited by law from sending a cover letter, therefore it would be illogical to send an application without an accompanying letter.

29. Despite State Defendants' efforts to cast Mr. Lopach's testimony in some other light, his consistent testimony was that Plaintiffs "view the whole package as the most effective way to communicate [Plaintiffs'] message." Trial Tr. 4:15 AM 68:2-8 (Lopach); Trial Tr. 4.15PM 233:17-21 (Lopach); Trial Tr. 4.16AM 6:2-8 (Lopach).

30. Further, contrary to State Defendants' assertions, *see* State Defs. PFOFCOLs ¶ 113 (citing Trial Tr. 4.17AM 73:5-12 (Watson)), the fact that one voter in one complaint inferred a message from the cover letter and return envelope does not mean they did not also infer a message from the absentee ballot application or the mailer as a whole.

B. Defendants Mischaracterize the Applicable Law

31. State Defendants argue that Plaintiffs' absentee ballot application mailers are "neither core political speech nor expressive conduct," but this mangles the free speech analysis.

32. As Plaintiffs argue, the first inquiry is whether Plaintiffs' absentee ballot application mailers constitute pure speech. *See* Pls. PCOLs ¶ 7 (citing *Meyer*, 486 U.S. at 421-22 & 422 n.25). It is undisputed that Plaintiffs "disclose, publish, [and] disseminate information" regarding absentee voting in Georgia by sending personalized mailers that include absentee ballot applications prefilled with the recipient's name and registered address as both appear in the Georgia voter file. Pls.

PCOLs ¶ 8. Thus, the entirety of Plaintiffs' mailers is pure speech. State Defendants provide no evidence to the contrary in their proposed findings.

33. Additionally, the First Amendment protects speech as well as expressive conduct. *See generally Texas v. Johnson*, 491 U.S. 397 (1989). Plaintiffs assert that mailing personalized absentee ballot applications is protected speech and expressive conduct, *see* Pls. PCOLs ¶¶ 7-17, 18-19, not solely expressive conduct as Intervenor Defendants seem to contend. Intervenor Defs. PFOFCOLs ¶ 8.

1. Plaintiffs' Activities Are Expressive Conduct

34. Notwithstanding Defendants' assertions to the contrary, Plaintiffs' activities constitute expressive conduct. *See, e.g.*, Intervenor Defs. PFOFCOLs ¶¶ 19, 26, 30, 36, 41, 42; State Defs. PFOFCOLs ¶¶ 79, 122, 123, 125-131, 213. Conduct is sufficiently expressive if (1) there was an intent to convey a particularized message, and (2) "the surrounding circumstances would lead the reasonable observer to view the conduct as conveying some sort of message." *FNB*, 901 F.3d at 1242; *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004); *Burns*, 999 F.3d at 1336; *Texas*, 491 U.S. at 404.

35. Neither State nor Intervenor Defendants contest that the record demonstrates Plaintiffs' intent to communicate a pro-voting message through the entire absentee ballot application mailer, *see* Pls. Exs. 26, 27, 313, 320; Trial Tr. 4.15AM 67:3-9, 67:12-68:1, 78:1-5, 78:18-23, 92:14-16, 93:13-16, 98:22-99:2,

101:5-10 (Lopach); Trial Tr. 4.15PM 129:9-11, 138:25-139:5, 139:12-15 (Lopach); Trial Tr. 4:15PM 234:1-8 (Trent), by enclosing personalized absentee ballot applications pre-filled with the recipient's name and address as they appear in the voter file, Trial Tr. 4.15AM 79:12-14, 79:21-23, 79:25-80:1, 81:24-82:1, 96:10-14, 97:13-16, 99:5-8 (Lopach); Trial Tr. 4.15PM 256:3-5 (Lopach), and by sending multiple waves of these absentee ballot application mailers to eligible Georgians, Trial Tr. 4.15AM 69:3-7, 75:5-8, 88:7-9 (Lopach); Trial Tr. 4.15PM 161:11-12 (Lopach); Pls. Exs. 36, 66.

36. But Defendants mischaracterize Eleventh Circuit law articulating how a court should assess whether a reasonable observer in viewing the conduct would understand it to convey some sort of message. *See, e.g.*, Intervenor Defs. PFOFCOLs ¶¶ 15-42; State Defs. PFOFCOLs ¶¶ 74, 75, 77-78. The Eleventh Circuit has identified several factors to assist with this assessment, including (1) whether the conduct accompanies speech; (2) whether the activity will be open to all; (3) whether the activity takes place in a traditional public forum; (4) whether the activity addresses an issue of public concern; and (5) the history of a particular symbol or type of conduct. *Burns*, 999 F.3d at 1343-45; *FNB*, 901 F.3d at 1242-44; *see also* Order on Motion for Summary Judgment, ECF No. 179 at 21-22; *see also* Pls. PCOLs ¶ 26.

37. Intervenor Defendants do not mention that these factors are neither exhaustive, nor that Plaintiffs do not need to show that all factors are present. *Compare* Intervenor Defs. PFOFCOLs ¶ 14 *with Burns*, 999 F.3d at 1346, Order on Motion for Summary Judgment, ECF No. 179 at 21, *and* State Defs. PFOFCOLs ¶ 76.

38. State Defendants' characterization of the opinion in *NetChoice* is disingenuous. *See* State Defs. PFOFCOLs ¶ 77-78. In *NetChoice*, the Eleventh Circuit analyzed the validity of a Florida law that sought to moderate the content of social media platforms. In determining which test applied, the Eleventh Circuit had to decide whether to apply the line of cases applying strict scrutiny to "protect[] exercises of 'editorial judgment,'" *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974), or cases to "protect[] inherently expressive conduct," *FNB*, 901 F.3d at 1240. *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1210 (11th Cir. 2022). Notably, the court held that because "Social-media platforms exercise editorial judgment that is inherently expressive," either line of cases could apply to trigger scrutiny of the challenged law under the First Amendment. *Id.* at 1213. The court decided to apply the *Miami Herald* line of cases because it decided that the conduct at issue was more "closely analogous to the editorial judgments that the Supreme Court recognized in *Miami Herald*, *Pacific Gas*, *Turner*, and *Hurley*." *Id.* As such, it was unnecessary to

engage in a full-throated *Food Not Bombs* analysis where strict scrutiny was already triggered.

39. Rather than the social media content moderation at issue in *NetChoice*, *see* State Defs. PFOFCOLs ¶ 78, here, the protected activity is more closely analogous to the food-sharing events in *Food Not Bombs*, because Plaintiffs are engaging in an activity that "is an act of political solidarity meant to convey the organization's message." *Cf. FNB*, 901 F.3d at 1238. The restriction in *NetChoice*, on the other hand, involved the regulation of a commercial speaker whose speech was not solely focused on sharing a political message. *See generally NetChoice, LLC*, 34 F.4th at 1203.

40. Despite State Defendants' efforts to distinguish Plaintiffs' activities from conduct that courts have found to be protected, *see* State Defs. PFOFCOLs ¶ 118, personalizing an absentee ballot application is much like the food sharing events deemed expressive in *Food Not Bombs*. For instance, in both activities a diverse range of interests converged to hear a common message; namely, food sharing at a public park to hear about issues related to homelessness, and communication via mail to hear about the importance of voting absentee. Here, the fact that groups comprising a diverse range of viewpoints engage in this form of communication via the mail "in and of itself, has social implications." *FNB*, 901 at 1242. The personalization of the application conveys to the recipient that the mailer

is targeted to that person, Trial Tr. 4.15AM 97:13-16, 99:5-8 (Lopach); Trial Tr. 4.15PM 256:4-5 (Lopach), and as evidenced by Plaintiffs' unsubscribe requests, the applications are perceived as such, *see* Pls. Ex. 95.

41. In *Schwab*, the district court noted that "[b]y personalizing the mail ballot applications, plaintiff engages in expressive conduct which is distinguishable from distributing blank absentee ballot applications." 671 F. Supp. 3d at 1244. The district court "reject[ed] defendants' invitation to disaggregate the application and plaintiff's other voter engagement materials," where there was no legal basis in doing so. *Id.* There, as here, the personalization of the application is a communicative element not present in the distribution of blank applications, such that *Lichtenstein*, on which State Defendants rely, *see* State Defs. PFOFCOLs ¶ 120, is less analogous and readily distinguishable.

42. The other cases that State Defendants cite are similarly distinguishable from the present case. *See* State Defs. PFOFCOLs ¶ 121-122. *Democracy N. Carolina v. N. Carolina State Bd. of Elections* did not involve personalized absentee ballot application mailers. 590 F. Supp. 3d 850, 857 (M.D.N.C. 2022). Likewise, *Feldman v. Arizona Secretary of State's Office* involved the *collection* of absentee ballots, not the mailing of personalized absentee ballot application. 843 F.3d 366, 392 (9th Cir. 2016). And neither case engaged in the fulsome analysis of expressive conduct required by the Eleventh Circuit in *Burns* and *Food Not Bombs*. *Compare*

Feldman, 843 F.3d 366 (9th Cir. 2016), *and Democracy N. Carolina*, 590 F. Supp. 3d 850 (M.D.N.C. 2022), *with FNB*, 901 F.3d at 1242-43.

43. Plaintiffs' mailers clearly satisfy the test for expressive conduct under applicable Eleventh Circuit precedent—State Defendants' proposed conclusion to the contrary is without merit. *See* State Defs. PFOFCOLs ¶ 79.

44. State Defendants' assertion that "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" is demonstrably false. State Defs. PFOFCOLs ¶ 111. Plaintiffs' evidence showing the presence of all five *Food Not Bombs* factors establishes that a reasonable person would understand that some message is being conveyed by sending a personalized absentee ballot application mailer. *See infra* Part III(B)(1)(a)-(e). Additionally, Plaintiffs provided other evidence demonstrating the same. *See* Pls. Ex. 95; Trial Tr. 4.15PM 155:11-14, 160:3-8 (Lopach). For example, Plaintiffs' unsubscribe requests—as well as the purported voter statements concerning third party absentee ballot application mailers received by State Defendants—indicate that the recipient understood a message, albeit a message that they did not like. Trial Tr. 4.17AM 22:17-23:6, 26:14-23, 30:2-14, 75:22-76:17 (Watson); Defs. Exs. 33, 25, 59; Pls. Exs. 95, 348 at 69-71. Furthermore, Plaintiffs have established that almost 640,000 voters acted on Plaintiffs' message and applied to vote using applications they received from

Plaintiffs during the 2020 and 2021 election cycle. Trial Tr. 4.15AM 69:24-70:1 (Lopach).

45. State Defendants incorrectly characterize what evidence Plaintiffs needed to present to satisfy the *FNB* factors. *See* State Defs. PFOFCOLs ¶ 112. Plaintiffs need not provide testimony from a voter demonstrating that they understood a specific message because they provided ample evidence showing that a reasonable observer would understand a message.[4] *Compare Burns*, 999 F.3d at

[4] While Defendants provide no support for their insinuation that testimony of a single Georgia voter was required, they also provide no guidance as to whether a single voter's testimony would be sufficient or whether there is some threshold number of Georgia voters required to give their lay opinion.

In fact, requiring such an approach would be at odds with how such a "reasonable person" analysis is conducted. *Cf. Consol Pennsylvania Coal Co., LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 941 F.3d 95, 111-12 (3d Cir. 2019) ("[W]hether someone acted reasonably is typically a question for the finder of fact, at least as long as 'reasonableness' is within the factfinder's common knowledge and experience."); *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 580 (3d Cir. 2003) ("A reasonable jury could conclude that [Prison Health Service] personnel were negligent absent expert testimony. . . . While laypersons are unlikely to know how often insulin-dependent diabetics need insulin, common sense—the judgment imparted by human experience—would tell a layperson that medical personnel charged with caring for an insulin-dependent diabetic should determine how often the diabetic needs insulin."); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) ("Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . , and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.")

1339 (analyzing comments from town halls as relevant) *with* Pls. PFOFs ¶¶ 152, 257, 262 and Pls. PCOLs ¶¶ 33, 76, 98 (analyzing unsubscribe requests and voter comments to the Secretary of State as relevant). Indeed, the *FNB* court does not reference any specific individual indicating whether they understood a message from plaintiff's food-sharing activities apart from the words on plaintiff's banners or literature. Instead, the court focused on what a "reasonable person" would infer from plaintiff's handing out of food. *FNB*, 901 F.3d at 1242-43. As such, evidence of what specific individuals inferred from Plaintiffs' distribution of absentee ballot application mailers is not necessary to find that Plaintiffs' activity in this case constitutes expressive conduct.

a. First *Food Not Bombs* Factor

46. The first *FNB* factor asks whether the conduct in question accompanies speech, which in *FNB* was satisfied by distributing literature and setting up banners. *FNB*, 901 F.3d at 1242-44; *Burns*, 999 F.3d at 1342, 1344-45. Intervenor Defendants improperly attempt to collapse this factor into the second and third *FNB* factors, Intervenor Defs. PFOFCOLs ¶¶ 15, 20, 27, but each is a distinct consideration.

47. State Defendants' description of Plaintiffs' mailers is incomplete. *See* State Defs. PFOFCOLs ¶ 83, 91. Plaintiffs mail personalized absentee ballot applications accompanied by their personalized cover letters—cover letters State Defendants have conceded are core political speech. *See* Def. Mot. for Summ. J.,

ECF No. 149-1 (acknowledging that "Plaintiffs' ability to explain how to request and cast an absentee ballot or to send messaging that expresses VPC/CVI's advocacy for absentee voting and encourages voters to apply to vote absentee" through their cover letters is core political speech) (quotation marks omitted); State Defs. PFOFCOLs ¶ 125; *see also supra* ¶ 12.

48. Both Defendants misrepresent the relevance of explanatory speech in this analysis. *See* Intervenor Defs. PFOFCOLs ¶ 13; State Defs. PFOFCOLs ¶ 71. Importantly, "conduct [does not] lose[] its expressive nature just because it is also accompanied by other speech." *FNB*, 901 F.3d at 1243-44. In *Food Not Bombs*, the Eleventh Circuit clarified that the relevant inquiry is "whether the explanatory speech is necessary for the reasonable observer to perceive a message from the conduct." *Id.* at 1244. Where explanatory speech is not necessary to understand the activity intended to express *some* message, as is the case here (as sending mail is synonymous with conveying a message), then the fact of the existence of explanatory speech "adds nothing of legal significance to the First Amendment analysis." *Id.*

49. Indeed, where the expressiveness of conduct is not dependent on the accompanying printed or spoken words, even if those words are helpful to clarify the specific message being conveyed, their presence enhances rather than diminishes the expressiveness of the conduct. *See id*. at 1242, 1244 (finding that inclusion of banners and the distribution of literature during events added context indicating the

specific expressive nature but was unnecessary for an observer to infer some message from the sharing of food).

50. Plaintiffs have demonstrated that the full package of Plaintiffs' mailers—including the carrier envelope, cover letter, personalized application, and return envelope—both together and separately constitute Plaintiffs' speech. *See* Trial Tr. 4.15AM 67:12-68:1, 78:1-5, 78:16-23, 93:7-16, 98:22-99:2, 101:5-10 (Lopach).

51. Notably, the entirety of Plaintiffs' mailers uses written words—including the prefilled voter information on the enclosed application—to convey that voting is easy and that the particular recipient should engage in the voting process. *Id.*; *see also* Pls. Exs. 26, 318. Defendants' assertions that the personalized applications that Plaintiffs send is not expressive thus lacks merit. *See* State Defs. PFOFCOLs ¶ 68; Intervenor Defs. PFOFCOLs ¶ 42.

52. State Defendants' efforts to slice and dice Plaintiffs' mailers, *see* State Defs. PFOFCOLs ¶¶ 68, 88, 91, falls flat. The record demonstrates that each component of the mailer is speech, and that each component also works together to convey Plaintiffs' full message.

53. Because Plaintiffs' mailing of absentee ballot applications is accompanied by speech, Factor One weighs in favor of finding that Plaintiffs' mailing of pre-filled absentee ballot applications is expressive conduct.

b. Second *Food Not Bombs* Factor

54. The second *FNB* factor asks, as Intervenor Defendants acknowledge, *see* Intervenor Defs. PFOFCOLs ¶ 20, whether the activity is open to all. *FNB*, 901 F.3d at 1242-44; *Burns*, 999 F.3d at 1344-45. While Plaintiffs do not send their mailers to every Georgian, nor do they send them to a "small subset[]." *Contra* State Defs. PFOFCOLs ¶ 126; *see* Trial Tr. 4.15AM 58:20-23 (Lopach); Pls. Ex. 69 (The New American Majority represents 4.8 million Georgians). Although some Georgians have specifically asked Plaintiffs not to send mailers to them, *see* Pls. Ex. 95, the act of sending absentee ballot applications is nevertheless open to everyone. Under State Defendants' logic, the court in *FNB* should have asked whether the plaintiffs shared food with every single person in the community, as opposed to those who were in a specific park during a particular time period. *See* State Defs. PFOFCOLs ¶ 126. Understandably, that is not what the *FNB* court asked. 901 F.3d at 1242 (noting the invitation for only those "who are present"). Similarly, partisan campaign mail, which is undeniably core political speech, is not considered non-expressive simply because it only goes to certain registered voters.

55. Thus, the second factor is getting at the Eleventh Circuit's observation in *Burns* that "expressive conduct conveys no message unless someone sees it." 999 F.3d at 1343. It is undeniable that, at minimum, hundreds of thousands, if not millions, of Georgians have seen Plaintiffs' message. Trial Tr. 4.15AM 69:8-16,

69:22-70:1, 70:22-23 (Lopach); Trial Tr. 4.15PM 155:11-14, 160:3-8 (Lopach); Pls. Exs. 41, 42.

56. Regardless of State Defendants' misinterpretations of the second *Burns* factor, the record makes clear that Plaintiffs' activities are open to all. First, Plaintiffs send their applications to subsets of the public, but that does not mean their mailings are not directed at the public. Rather, Plaintiffs wish to expand participation in absentee voting specifically and the electoral process more generally so that all eligible members of the public can participate, and they do so by specifically encouraging certain groups of voters that may otherwise be less able to participate than others. *See* Trial Tr. 4.15AM 51:17-19, 21-22, 59:10-15, 59:20-60:2, 60:5-7 (Lopach); Trial Tr. 4.15PM 152:19-24, 186:13-187:4 (Lopach).

57. Second, Georgia has no-excuse absentee voting, so all Georgia voters may vote absentee. Trial Tr. 4.18AM 29:11-22 (Evans); *see also* O.C.G.A. §§ 21-2-385(d)(1), 21-2-216(a), 21-2-381, 21-2-385, 21-2-380; Stipulated Facts ¶¶ 14, 21. This means that all Georgia voters may "fill[] and mail[]" absentee ballot applications if they wish to vote absentee, contradicting Intervenor Defendants' assertions. *See* Intervenor Defs. PFOFCOLs ¶ 23.

58. Third, the act of distributing absentee ballot applications is also open to the public. All members of the public are permitted to access the official absentee ballot application on the SOS' website or at a county election office, and they may

distribute that application to other individuals so long as they comply with state law. *See generally* O.G.C.A. § 21-2-381; *see also* Trial Tr. 4.16PM 235:12-24, 236:1-3 (Germany); Stipulated Facts ¶ 22. Further, the state's voter file is publicly available for purchase, so anyone can access a list of eligible voters if they would like to distribute applications on a larger scale. Trial Tr. 4.18AM 16:24-17:7 (Evans).

59. Fourth, many groups have taken advantage of this opportunity to engage in political speech and expressive conduct and send absentee ballot applications in the mail to Georgia voters, including Intervenor Defendants and other political parties and campaigns. Trial Tr. 4.16PM 255:14-16, 258:13-16, 261:20-262:7 (Germany); *see also, e.g.*, Trial Tr. 4.15PM 193:14-21, 202:8-15 (Lopach); Pls. Exs. 99, 35-A.

60. Finally, the number of voters who have received Plaintiffs' mailers is significant—in 2020, Plaintiffs mailed 83 million absentee ballot application mailers nationally and 9.6 million absentee ballot application mailers in Georgia. Trial Tr. 4.15AM 69:20-23, 70:22-23 (Lopach).

61. Because Plaintiffs' conduct is in fact open to all, the second *Food Not Bombs* factor weighs in support of finding that they engage in expressive conduct, undermining Intervenor Defendants' argument to the contrary. *See* Intervenor Defs. PFOFCOLs ¶¶ 23-26.

c. Third *Food Not Bombs* Factor

62. Defendants also misstate the test for the third *Food Not Bombs* factor. *See* State Defs. PFOFCOLs ¶ 127; Intervenor Defs. PFOFCOLs ¶ 27. *Food Not Bombs* asked not only whether the activity took place in a traditional public forum, but also whether the activity occurred in a place "historically associated with the exercise of First Amendment rights." *FNB*, 901 F.3d at 1242 (internal quotation marks and citations omitted); *see also Burns*, 999 F.3d at 1344.

63. Intervenor Defendants' assertion that mail has been held not to be a public forum misses the point. Intervenor Defs. PFOFCOLs ¶ 29. As Plaintiffs have explained, even locations that are not traditional public forums can point toward a finding of expressive conduct if they are "historically associated with the exercise of First Amendment rights," as postal mail undeniably is. *See Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 737 (1970); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 146 (1943). Thus, Defendants' arguments that mail has not been found to be a traditional public forum are immaterial. *See* State Defs. PFOFCOLs ¶ 128; Intervenor Defs. PFOFCOLs ¶¶ 29-30. Further, the use of mail to convey a political message has a long history. George Washington, Third Annual Address to Congress (October 25, 1791), *available at* University of California-Santa Barbara, American Presidency Project, https://www.presidency.ucsb.edu/documents/third-annual-address-congress-0; George Washington, Fourth Annual Address to Congress

(November 6, 1792), *available at* University of California-Santa Barbara, American Presidency Project, https://www.presidency.ucsb.edu/documents/fourth-annual-address-congress-0.

64. Because Plaintiffs' activity takes place in the mail, which is "historically associated with the exercise of First Amendment rights," the third *Food Not Bombs* factor weighs in favor of finding that Plaintiffs' mailing of absentee ballot applications is expressive conduct.

d. Fourth *Food Not Bombs* Factor

65. The fourth *Food Not Bombs* factor asks whether the activity addresses a matter of public concern. *FNB*, 901 F.3d at 1242.

66. State Defendants incorrectly attempt to narrow the fourth *Food Not Bombs* factor by arguing that the operative question is whether the matter of public concern is specific to the individual recipient receiving the message, rather than whether the matter communicated is of public concern more generally. *See* State Defs. PFOFCOLs ¶ 129. This is a disingenuous attempt to escape the undisputed fact that voting is a matter of public concern.

67. *Food Not Bombs* and *Burns* are not as limited as State Defendants claim. In *Food Not Bombs*, the court found that "that the local discussion regarding the City's treatment of the homeless is significant because it provides background for FLFNB's events," *FNB*, 901 F.3d at 1242-43. Likewise, in *Burns*, the court

determined that "there is no evidence that residential midcentury modern architecture was a public concern of the town that was workshopped by the town council or reported by the local news." *Burns*, 999 F.3d at 1344. In neither case was the matter of public concern being considered specific to the individual recipient, as State Defendants suggest. *See* State Defs. PFOFCOLs ¶ 129.

68. Intervenor Defendants agree with Plaintiffs that the analysis turns on whether there has been "public discussion" of the issue. Intervenor Defs. PFOFCOLs ¶ 33.

69. However, Intervenor Defendants incorrectly argue that the specific expressive conduct must be the issue of public discussion. Intervenor Defs. PFOFCOLs ¶¶ 34-35. But the *Food Not Bombs* court did not ask whether the public discussed passing out food in a park, but whether there was "local discussion regarding the City's treatment of the homeless." 901 F.3d at 1242-1243. Similarly in *Burns*, the Court did not consider whether the public discussed Mr. Burns' home specifically, but whether "residential midcentury modern architecture" was an issue of "public concern." 999 F.3d at 1344.

70. Here, voting writ-large, and more specifically voting absentee, are issues of concern to Georgia's public. Trial Tr. 4.18AM 69:6-17 (Evans); Trial Tr. 4.17AM 65:8-11 (Watson); Trial Tr. 4.15PM 133:23-134:4 (Lopach); *accord* Trial Tr. 4.16PM 225:11-226:1, 265:2-8, 263:22-264:7, 271:16-272:19, 275:25-276:5

(Germany); *see also* Pls. Exs. 321, 35-A, 99. These were especially issues of concern during 2020, when many were concerned about how to safely vote during the COVID-19 pandemic. Trial Tr. 4.16PM 263:22-264:7, 269:2-12, 269:23-270:2 (Germany); Pls. Ex. 39 at 2.

71. But even if Intervenor Defendant's interpretation of the law was correct that the specific conduct at issue needed to be discussed publicly, such discussion of civic organizations and campaigns encouraging absentee voting happened in Georgia. Trial Tr. 4.17AM 22:17-23:8, 26:14-25, 30:2-16, 75:22-76:17 (Watson); Defs. Exs. 33, 25, 59; Pls. Ex. 348 at 69-71.

72. Finally, both Defendants cannot escape the fact that whether a specific individual decides to vote has implications for the public, *see* State Defs. PFOFCOLs ¶ 129, because that individual is voting in a public election. *See, e.g.*, Pls. Exs. 26, 27, 318, 321. Either way, Plaintiffs' absentee ballot application mailers address a matter of public concern.

e. Fifth *Food Not Bombs* Factor

73. Again, Defendants impermissibly attempt to narrow the fifth *Food Not Bombs* factor by ignoring the fact that Plaintiffs' activity constitutes sending out political mailers and focusing instead on whether distributing an absentee ballot application, on its own, has been understood to convey a message for the millennia. State Defs. PFOFCOLs ¶ 130; Intervenor Defs. PFOFCOLs ¶¶ 37-39. Yet this

maneuver does not have any grounding in the case law. *Food Not Bombs* held that "the history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it." 901 F.3d at 1243.

74. The record demonstrates that sending political mailers has clear historical, symbolic importance. Trial Tr. 4.16AM 85:23-25, 87:5-19 (Green); *see, e.g.*, Pls. Exs. 26, 27, 35-A, 99, 318, 321. Plaintiffs' mailers, indisputably political mailers, follow the long tradition of sending mail to persuade the public to take action. Defendants' cabined interpretation of Plaintiffs' activity therefore falls flat. *See* State Defs. PFOFCOLs ¶ 130.

75. Because the activity conducted by Plaintiffs—sending out political mailers—has clear historical and symbolic performance, the fifth *Burns* factor weighs in favor of finding that Plaintiffs engage in expressive conduct.

76. Ultimately, Defendants try and fail to dodge Plaintiffs' overwhelming evidence of the presence of all five *Food Not Bombs* factors by inventing a new interpretation of the factors that is unmoored from the case law. But Plaintiffs' have established that their absentee ballot application mailers are clearly expressive conduct.

2. Plaintiffs' Activities Are Core Political Speech

77. As a threshold matter, Defendants misarticulate the First Amendment doctrine. The inquiry into whether Plaintiffs' mailers are core political speech informs the decision to apply strict scrutiny, *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), and is not a threshold inquiry about whether the First Amendment applies. As Plaintiffs demonstrate *supra*, *see* Part III(A), and have argued previously, there is no question that Plaintiffs' mailers constitute pure speech. *See* PCOLs ¶ 7-8.

78. State Defendants wrongly contend that even if Plaintiffs' conduct is expressive, it is not core political speech. State Defs. PFOFCOLs ¶ 132. Despite this, Defendants have previously admitted that Plaintiffs' direct mail "get out the vote" activities and even parts of their absentee ballot application mailers are core political speech. Trial Tr. 4:15PM 233:22-25 (Trent), 234:1-8 (Trent); Def. Mot. for Summ. J., ECF No. 149-1; *see also* State Defs. PFOFCOLs ¶¶ 131, 139 (citing *Lichtenstein v. Hargett*, 83 F.4th 575, 586 (6th Cir. 2023) for the proposition that "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 . . . .'"). Defendants' current position is untethered from the case law and at odds with this Court's findings at summary judgment. *See* Order on Motion for Summary Judgment, ECF

No. 179 at 24-25 (citing *Meyer v. Grant*, 486 U.S. 414, 421 (1988), and *VoteAmerica v. Schwab*, 671 F. Supp. 3d 1230, 1248-49 (D. Kan. 2023)).

79. State Defendants present an improperly narrow interpretation as to the scope of core political speech. *See* State Defs. PFOFCOLs ¶ 133. The Supreme Court has broadly understood core political speech to include expression about "public issues and debate on the qualifications of candidates." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Indeed, "[t]he First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* (internal quotation marks omitted). There is no support for State Defendants' assertion that core political speech excludes expressive conduct. In fact, the case law supports the opposite, for "Constitutional protection for freedom of speech does not end at the spoken or written word." *FNB*, 901 F.3d at 1240 (citing *Texas v. Johnson*, 491 U.S. at 404). The leading expressive conduct case, *Texas v. Johnson*, involved core political speech. *See* 491 U.S. at 411 (referring to the conduct as "politically charged expression"); *accord Bode v. Kenner City*, 303 F. Supp. 3d 484, 502 (E.D. La. 2018) (applying strict scrutiny to city charter amendment that prohibited government employees from engaging in any "political activity"); *Watters v. Otter*, 981 F. Supp. 2d 912, 921 (D. Idaho 2013) (applying strict scrutiny to administrative rules where "much of the expressive conduct the rules target is core First Amendment speech,"

including "gatherings like protest assemblies" and "marches on the Capitol Mall and around the Statehouse").

80. And contrary to State Defendants' assertions that core political speech "must also involve a one-one-one [*sic*] communication," its protection is not conditioned on whether Plaintiffs' speech is interactive or if someone speaks back. *See* State Defs. PFOFCOLs ¶¶ 134, 138. Such an incorrect "face-to-face interaction" rule would be directly contrary to *McIntyre*, in which the Supreme Court applied core political speech protections to anonymous leafletting. *See McIntyre*, 514 U.S. at 337-39, 344-48; *see also supra* ¶ 79 (citing cases that did not involve one-one communication).

81. State Defendants' attempt to distinguish mass petition circulation from Plaintiffs' direct mailers is untenable. *See* State Defs. PFOFCOLs ¶ 136. In *Meyer,* the speech at issue involved sending out large numbers of paid volunteers to knock door-to-door to collect signatures relating to a public issue. 486 U.S. at 421-23. This is not meaningfully different from Plaintiffs' activities of sending out large numbers of mailings targeted at specific individuals to communicate their view and seek the recipients' engagement with a public issue. *See, e.g.*, Pls. Exs. 41, 42.

82. Like in *Meyer*, Plaintiffs directly contact voters to solicit and encourage their participation in the political process. Trial Tr. 4.15AM 52:5-9, 63:11-14, 67:3-7 (Lopach). And in some instances, individuals unsubscribe and express

countervailing ideas to the ones expressed to them by Plaintiffs. *See* Pls. Ex. 95 ("I do not agree with you encouraging people to vote by mail – VOTE IN PERSON"). Despite that and similar to *McIntyre*, Plaintiffs' mailers reach voters apart from face-to-face interaction. Trial Tr. 4.15AM 69:13-16 (Lopach), 69:20-70:1 (Lopach); Pls. Exs. 41, 42, 95. Wherever it falls between *Meyer* and *McIntyre*, Plaintiffs' activity is core political speech.

83. State Defendants' reliance on *Lichtenstein* is misplaced. *See* State Defs. PFOFCOLs ¶ 236. While the *Lichtenstein* court may have found that the Tennessee law challenged in that case was constitutional, the record here does not support such a finding. The Tennessee law banned distribution of absentee ballot applications in a state where only certain voters are eligible to vote by absentee ballot, thus the state's interests are necessarily different, as was the court's weighing of them against the law's infringements on the speakers' rights. *Lichtenstein*, 83 F.4th at 580, 600.

84. State Defendants attempt to sidestep that Plaintiffs' communications are undeniably core political speech by arguing that their communications are nonpartisan and do not relate to an issue *on* a ballot. *See* State Defs. PFOFCOLs ¶ 137. But neither of those are necessary requirements for core political speech. Plaintiffs send multiple personalized absentee ballot applications to engage with the public issue of the importance of voting, and "[e]ncouraging others to vote or engage in the political process is the essence of First Amendment expression." Order on

Motion for Summary Judgment, ECF No. 179 at 24. That Plaintiffs' communications are nonpartisan does not take them outside of the realm of core political speech.

85. Even *Lichtenstein* recognized that a message concerning voting and the ability to vote by absentee ballot involved core political speech. 83 F.4th at 586. Moreover, as the *Schwab* court noted, the distribution of personalized absentee ballot applications—targeted at the specific voter with a specific message—is distinctly communicative from the distribution of blank absentee ballot applications. 671 F. Supp. 3d at 1244. And the personalization of applications is much like door knocking in that it involves speaking to a specific individual in their homes.

IV. THE CHALLENGED PROVISIONS BURDEN PLAINTIFFS' SPEECH AND EXPRESSIVE CONDUCT

86. Plaintiffs' speech is burdened by the Challenged Provisions. Due to the risk of civil and criminal liability, Plaintiffs can only send one absentee ballot application mailer at the beginning of the absentee ballot request window. *See* O.C.G.A § 21-2-381(a)(3)(A)-(B); Trial Tr. 4.15AM 103:8-12 (Lopach); Trial Tr. 4.15PM 127:25-128:3, 144:19-22, 146:14-17, 147:5-6, 147:14-18, 149:14-18, 149:24-150:6, 151:3-10, 167:1-2 (Lopach). Further, Plaintiffs generally distribute personalized absentee ballot applications but have stopped doing so in Georgia after SB 202 went into effect. *See* Pls. Exs. 313, 319, 320, 321; Trial Tr. 4.15AM 84:17-19, 84:21-85:3 (Lopach); Trial Tr. 4.15PM 127:22-24, 140:2-4, 146:7-17, 153:12-

14, 160:22-24 (Lopach). These forced changes to their mail program mean that they are not able to engage in their protected speech in its most effective form, and they are limited in terms of when, to whom, and how much they may speak. Trial Tr. 4.15PM 127:20-128:6 (Lopach).

87. That Plaintiffs sent a follow-up letter in 2022 does not negate that their speech is burdened. Indeed, in 2022, when Plaintiffs were prevented from sending personalized absentee ballot applications by the Prefilling Prohibition, Plaintiffs' first wave of mailers in Georgia returned a response rate below the national average, Trial Tr. 4.15PM 158:18-22 (Lopach), demonstrating that because of the Prefilling Prohibition, Plaintiffs' communications were less effective. Trial Tr. 4:15AM 84:21-85:3 (Lopach); Trial Tr. 4:15PM 146:7-17 (Lopach); *cf.* State Defs. PFOFCOLs ¶¶ 99, 100.

88. Similarly, that Plaintiffs received responses from a single wave of absentee ballot application mailers sent early in the application cycles months before the election does not negate that the Mailing List Restriction forces Plaintiffs to reduce their speech and forgo sending a second wave of mailers, which Mr. Lopach testified produced meaningful additional responses in the other states where Plaintiffs run their absentee application program and send two waves. Trial Tr. 4:15AM 84:21-85:3 (Lopach); Trial Tr. 4:15PM 146:7-17, 158:20-22 (Lopach); *cf.* State Defs. PFOFCOLs ¶¶ 99, 100.

89. State Defendants mischaracterize Plaintiffs' ability to comply with the Mailing List Restriction. State Defs. PFOFCOLs ¶¶ 206-207. For one, State Defendants posit that the Safe Harbor would "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." State Defs. PFOFCOLs ¶ 206. But this interpretation is not clear by the face of the statue, and Plaintiffs cannot rely on State Defendants' litigation position to shield them from criminal and civil liability. Even accepting State Defendants' interpretation, five days is still not a meaningful safe harbor for a statewide program of Plaintiffs' size and quality control. Plaintiffs printing process and removal of voters who have already requested a ballot cannot be compressed to five days. *See* Trial Tr. 4.16AM 25:20-26:5, 26:11-13, 30:15-18, 30:19-31:4, 32:15-33:3, 33:11-18, 33:19-25, 36:17-23, 67:9-12 (Hesla).

90. As Plaintiffs have stated, the safe harbor provision is anything but straightforward, and the five-day window does not make compliance with the Mailing List Restriction feasible. The State administers the five-day grace period in a way that is technologically complicated, essentially requiring a daily check of the list and comparison to prior versions to determine when an individual was added to the list. Trial Tr. 4.17 PM 157:17-158:3, 162:5-11 (Grimmer); Trial Tr. 4.18AM

26:11-15 (Evans). State Defendants' contrary assertions defy evidence in the record. *See* State Defs. PFOFCOLs ¶¶ 202, 208, 209, 254.

91. Mr. Evans testified that there is no straightforward way for Plaintiffs and similar groups to determine when a record indicating that a county has received and processed a person's absentee ballot application has been made publicly available. *See* Trial Tr. 4.18AM 23:24-25:20, 26:3-18, 97:13-18, 98:15-18, 102:24-103:3 (Evans). Thus, Plaintiffs cannot easily ensure that they are in compliance with the five-day grace period, and contrary to State Defendants' assertion, the five-day grace-period provision provides Plaintiffs little, if any, protection.

92. Ms. Hesla testified that Plaintiffs implement measures to make sure that voters who have died, moved to a new state, already voted, or already requested an absentee ballot are excluded from Plaintiffs' mailings to minimize voter confusion. *See, e.g.*, Trial Tr. 4.16AM 32:9-33:18, 34:5-35:14, 49:17-50:4 (Hesla); *cf.* State Defs. PFOFCOLs ¶ 197. These measures take at least six days, making it impossible for Plaintiffs to comply with the five-day grace period set out by SB 202. *See id.* at 32:9-33:18 (Hesla).

93. Ms. Hesla testified that Mission Control works with union printers and has extensively researched which union printers are able to undertake mailing projects at the volume that Plaintiffs need. Trial Tr. 4.16AM 11:17-12:3 (Hesla). Mission Control has only been able to identify two such printers. *See id*. No

testimony or evidence in the record supports State Defendants' assertion that Plaintiffs would be able to comply with the Mailing List Restriction if they worked with non-union printers. *See id.* at 10:13-17, 11:15-12:3, 54:9-16 (Hesla). Nothing in the records suggests that the timelines and processes that Ms. Hesla described would differ dramatically if Plaintiffs and Mission Control worked with non-union printers. *See id*. State Defendants' argument that Plaintiffs would be able to comply with the Mailing List Restriction if they were open to non-union printers is completely unsupported by evidence in the record. *See* State Defs. PFOFCOLs ¶ 248.

94. Ms. Hesla testified that inline printing is the best method of printing for Plaintiffs' work because it minimizes the cost per piece for high-volume projects and reduces the risk of error. Trial Tr. 4.16AM 15:1-19, 16:14-17:5, 38:16-39:14 (Hesla). Thus, inline printing plays an integral part in ensuring that Plaintiffs can communicate their personalized message to the number of voters they wish to and can effectively convey their desired message to those voters. State Defendants' suggestion that Plaintiffs could easily do away with inline printing ignores these facts. *See* State Defs. PFOFCOLs ¶ 249.

95. Whether Arena can print or remove mailings from their mail stream has no bearing on whether Plaintiffs, with a completely different printing operation, can do the same within five days. *See* State Defs. PFOFCOLs ¶¶ 140, 251, 252. Moreover, Arena is a seamless entry firm while Mission Control is not, meaning that

Plaintiffs' mailers must be sent to a national distribution center and then to post offices while Arena functions as a postal facility itself. *See* Trial Tr. 4.16AM 26:21-27:4, 68:15-18 (Hesla); Trial Tr. 4.17PM 169:19-170:7 (Waters). And Arena does not personalize their mailers to the same extent that Plaintiffs do. *Compare* Pls. Exs. 26, 27 (Plaintiffs' personalized mailers) *with* Pls. Ex. 35A (Arena's mailers). As Mr. Waters testified, all of these factors can affect the printing timeline of a direct mail program. Trial Tr. 4.17PM 194:13-16 (Waters). Ms. Hesla credibly testified that Plaintiffs cannot reduce their printing or mailing timeline. See Trial Tr. 4.16AM 30:15-31:8, 33:19-25, 36:24-37:3, 67:9-12 (Hesla).

96. State Defendants are also incorrect that the Mailing List Restriction does not make Plaintiffs' operations more costly. *See* State Defs. PFOFCOLs ¶ 140. Indeed, State Defendants' assertions ignore the evidence at trial, which showed that compliance with the Mailing List Restriction is prohibitively expensive for Plaintiffs without making significant reductions to their mailer program and communications. Trial Tr. 4.16AM 37:11-18, 38:2-10 (Hesla); *see also* State Defs. PFOFCOLs ¶¶ 140, 247.

97. Brandon Waters, a partner at Arena, testified that he has never been involved with Plaintiffs' printing process, Trial Tr. 4.17PM 166:17-20, 192:19-22 (Waters), so he would not know how or whether the increase cost per unit would be offset by the decreased cost of postage for Plaintiffs. On the other hand, Ms. Hesla

testified to the myriad ways Plaintiffs, her client, would suffer increased costs as a result of attempting compliance with the Mailing List Restriction to send a second wave of mailers. Trial Tr. 4.16AM 37:11-38:10 (Hesla).

98. State Defendants vastly oversimplify the complicated steps that would be required to comply with the Mailing List Restriction and make no attempt to address how long that compliance process would take for a mailing program of Plaintiffs' scope and whether the printing and mailing process can functionally occur within five days after cross checking the lists. State Defs. PFOFCOLs ¶¶ 205, 209. And even if Plaintiffs could meet the constraints imposed by this restriction, whether by mailing a single wave at the beginning of the application or by drastically changing how and what they create, State Defendants do not dispute that the Mailing List Restriction requires Plaintiffs to significantly alter how they express their pro-absentee voting message to their identified recipients. *See* Trial Tr. 4.16AM 47:15-49:13 (Hesla).

99. State Defendants also disingenuously claim that because the Mailing List Restriction on its face does not prohibit Plaintiffs from sending mailers to new registrants, it therefore does nothing to so prohibit Plaintiffs in practice. State Defs. PFOFCOLs ¶ 205. In an attempt to escape the Mailing Lists Restriction's obvious flaws, State Defendants incorrectly state that the restriction "does not prohibit sending applications to newly registered voters" because Plaintiffs can simply check

their lists against the state's absentee voter file. *Id*. As Plaintiffs have stated, Plaintiffs have no way of knowing if a new registrant has signed up to vote absentee because the voter file is always changing so Plaintiffs would not know whether the new or newly moved voter has also already signed up to vote by mail. Trial Tr. 4.15PM 153:15-24 (Lopach). As a result, Plaintiffs may only speak to new voters who register between when Plaintiffs create their mailing lists for their two waves of absentee ballot application mailings—as well as other voters who move and update their registration information during that time—if they are able to send a second wave of mailers later in the election cycle. *See* Trial Tr. 4.15PM 152:25-153:8 (Lopach).

V. THE CHALLENGED PROVISIONS FAIL ANY LEVEL OF SCRUTINY

A. Strict Scrutiny Is the Appropriate Level of Scrutiny

100. As this Court has recognized, election laws that infringe on free speech rights are subject to strict scrutiny, rather than a balancing test. Order on Motion for Summary Judgment, ECF No. 179 at 24, 25; *see generally Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *VoteAmerica v. Schwab*, 671 F. Supp. 3d 1230 (D. Kan. 2023); *cf.* State Defs. PFOFCOLs ¶ 66. And while State Defendants contend that the General Assembly could have "entirely prohibited third parties from sending absentee-ballot

applications to any Georgia voters," State Defs. PFOFCOLs ¶ 227, the General Assembly understood they could not do so, as it would infringe on third parties' First Amendment rights. *See* Pls. Ex. 79 at 116; Trial Tr. 4.16PM 278:18-279:13 (Germany).

101. State Defendants agree that if the Ballot Application Restrictions implicate core political speech or are content based, then strict scrutiny must apply. *See* State Defs. PFOFCOLs ¶ 220. Because the Ballot Application Restrictions do so, *see supra* Part III(B)(2), and are not narrowly tailored to serve a compelling governmental interest, they fail to pass strict scrutiny. *See infra* Part V(B)-(C).

B. Defendants Have Failed to Establish A Nexus Between the Challenged Provisions and Purported State Interests

102. Defendants have not provided evidence that the provisions at issue further their state interests. In general, State Defendants offer the prevention of "incorrect information" on the absentee ballot application form, voter fraud, voter confusion, and increasing election administration as government interests. State Defs. PFOFCOLs ¶¶ 142, 145, 222, 227.

103. But none of these interests are satisfied by the Ballot Application Restrictions. The interests identified by the state may be compelling in the abstract, but they have not demonstrated that those interests are furthered by the challenged provisions, nor have they shown that the provisions are narrowly tailored. *See* State

Defs. PFOFCOLs ¶¶ 142, 145, 222; *Zeller v. The Fla. Bar*, 909 F. Supp. 1518, 1525 (N.D. Fla. 1995) (citing *Meyer*, 486 U.S. at 426-27). On the other hand, Plaintiffs have provided significant evidence that neither challenged provision actually furthers those interests. *See infra* Part V(B)(1)-(2); *see also* State Defs. PFOFCOLs ¶¶ 142, 145, 222.

1. The Challenged Provisions Do Not Prevent Voter Confusion and Concerns About Fraud

104. State Defendants agree that voter fraud is "rare." State Defs. PFOFCOLs ¶ 167. As it pertains to the State interest in preventing fraud, State officials testified about the numerous safeguards in place to prevent voter fraud and that those safeguards successfully ensured a secure and accurate election in 2020, notwithstanding unfounded voter concerns about voter fraud. *See* State Defs. PFOFCOLs ¶¶ 145, 146, 168, 230.

105. State Defendants' assertion that the distribution or prefilling of absentee ballot applications can lead to voter fraud is not supported by the evidence. *Compare* State Defs. PFOFCOLs ¶ 167 *with* Trial Tr. 4.17AM 41:21-42:2, 43:1-4, 50:7-17, 52:10-55:23, 58:1-62:22, 84:5-19, 84:22-25, 86:13-17 (Watson); Pls. Exs. 122-25, 127, 140, 142, 143, 261. Contrary to State Defendants' representations, Mr. Germany never said that it was possible for someone who received a prefilled application for another individual to engage in voter fraud. State Defs. PFOFCOLs

¶ 167. In fact, Mr. Germany testified that "there are processes in place that, assuming they're all followed, then that would not be able to happen." Trial Tr. 4.16PM 187:19-25 (Germany). Mr. Evans testified that "egregious human error" would be required for an individual to receive – let alone cast – more than one ballot in an election. Trial Tr. 4.18AM 87:7-20 (Evans).

106. State Defendants point to a single purported example of potential voter fraud, for which they have laid no foundation. State Defs. PFOFCOLs ¶ 167. Not only do they provide essentially no specifics about this alleged incident, but they provide no evidence that it was caused by a prefilled absentee ballot application, let alone one provided by Plaintiffs. Trial Tr. 4.16PM 188:1-7 (Germany). Crucially, State Defendants do not say whether the voter *intentionally* submitted an application despite knowing that they were not eligible, which is required to constitute voter fraud.[5] *See id.*; State Defs. PFOFCOLs ¶ 167. Further, that a county election official identified the incident through their official duties demonstrates how Georgia's

[5] State Defendants employ the term "voter fraud" as political rhetoric with no recognition of what "voter fraud" actually requires. Accidents, for example, are not fraudulent. *But see* State Defs. PFOFCOLs ¶ 167. That State Defendants shroud all instances of mistake under the auspice of voter fraud only shows that State Defendants fail to identify any cognizable connection between voter fraud and Plaintiffs' communications.

current processes are successful in identifying improperly cast ballots and preventing voter fraud. Trial Tr. 4.16PM 187:24-188:7 (Germany).

107. Plaintiffs, on the other hand, demonstrate that the Ballot Application Restrictions do nothing to prevent voter fraud. Pls. PFOFs ¶¶ 84, 249, 263-266, 268.

108. Next, in claiming that challenged provisions reduce voter confusion and concerns about voter fraud, State Defendants repeatedly invoke inadmissible hearsay by assuming the truth of the matters asserted by purported voter statements made to the Secretary of State's office, statements which are not reliable or substantiated. *See* State Defs. PFOFCOLs ¶¶ 145-148; 150-53, 162-63, 177, 184, 194-96.[6] State Defendants also invoke complaints related to election mail that did not include

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[6] For example, in State Defs. PFOFCOLs ¶ 145, State Defendants write "prefilled applications often included incorrect information, which led voters to complain." Similarly, in State Defs. PFOFCOLs ¶ 147, State Defendants write that a Fulton County voter "received a VPC mailing with her correct first and last name but with the incorrect middle name," and that "[i]f the voter had submitted the incorrectly prefilled application, her county elections office would have had issues processing her application." In State Defs. PFOFCOLs ¶ 150, State Defendants write that a voter "received a fourth absentee-ballot application from VPC at his home address with someone else's name and 'a different preprinted address.'" Despite these purported voter complaints being unverified, State Defendants assume the accuracy of the alleged experiences noted in them and put them forward for the truth of those alleged experiences (i.e., that the individual complainants really did receive multiple applications from Plaintiffs or prefilled applications with incorrect information). This is a classic example of inadmissible hearsay being relied upon for the truth of the matter asserted.

absentee ballot applications as justification for their restrictions on distributing absentee ballot applications. *See, e.g.*, State Defs. PFOFCOLs ¶¶ 146, 163. Such unverifiable concerns cannot justify serious restrictions on First Amendment Activity. And while "[a] trial judge sitting without a jury is entitled to even greater latitude concerning the admission or exclusion of evidence," Defs. PFOFCOLs ¶ 65 (internal quotation omitted), a court sitting as factfinder must still disregard inadmissible hearsay.

109. Setting aside these problems with State Defendants' use of the unverified voter emails, State Defendants have failed to connect the volume of unverified complaints or any issues they purport to concern with prefilling absentee ballot applications or sending absentee ballot applications to voters who have already requested a ballot. *See* State Defs. PFOFCOLs ¶ 168; Trial Tr. 4.17AM 17:20-22, 41:21-42:2, 43:1-4, 50:7-17, 52:10-55:23, 58:1-62:22, 68:10-17, 68:18-22 (Watson); Pls. Exs. 140, 142, 122-25, 127, 143, 261. In 2020, Georgia received 195 purported voter complaints regarding absentee ballot applications. *See* Pls. Exs. 347, 348. Eighty-seven of them came from voters who requested, but never received an absentee ballot. *Id.* By comparison, only 18 referenced distribution of absentee ballot applications by a third party. *Id*. Of the complaints that reference a third party, only two relate to a prefilled absentee ballot application. Def. Exs. 24, 25; *cf.* State Defs. PFOFCOLs ¶ 144.

110. State Defendants claim, but have provided no evidence, that the distribution of applications creates perceptions of fraud in a meaningful way, State Defs. PFOFCOLs ¶ 195, particularly when divorced of a climate of misinformation in which public officials, such as the then-President of the United States, made repeated, unfounded claims of voter fraud related to absentee voting. Trial Tr. 4.16PM 234:1-4, 267:3-6, 271:16-24, 272:4-11, 275:25-276:10 (Germany); Trial Tr. 4.17AM 34:13-24, 65:5-7, 67:15-18, 68:10-17 (Watson); Pls. Exs. 39, 64; *cf.* State Defs. PFOFCOLs ¶ 188.

111. State Defendants have also not provided evidence that, as they assert, voters have greater confidence in the electoral system as a result of these provisions. *See* State Defs. PFOFCOLs ¶ 166. To the contrary, their witnesses admitted that significant lack of confidence in the election results in 2020 was caused by dis- and misinformation, including what was being circulated by elected officials. Trial Tr. 4.16PM 272:4-7, 272:8-11, 274:24-275:3, 267:3-6, 266:19-267:7, 271:20-24 (Germany); Pls. Exs. 39, 64. Mr. Germany also discussed how they were not fully successful in counteracting those narratives, despite spending significant time and effort attempting to do so. Trial Tr. 4.16PM 271:25-272:22 (Germany). Similarly, Mr. Evans testified that despite his office devoting time and resources to combat misinformation and communicate to the public that the election was secure and

accurate, portions of the population still do not have confidence in the 2020 election results. Trial Tr. 4.18AM 69:6-23 (Evans).

112. Defendants have also not provided substantiated evidence that voters were confused by the receipt of absentee ballot applications. State Defendants assert that voters believed they needed to submit each application to be able to vote at all, *see* State Defs. PFOFCOLs ¶ 194, but there is no evidence that this was tied to receipt of application mailers informing the recipient they need not submit the application if they have already applied. *See* Pls. Exs. 26, 27, 321; Trial Tr. 4.15AM 94:9-18 (Lopach). And to the extent a voter did believe this, there is no evidence that it is not sufficiently addressed by the revised Disclaimer Provision.[7] Trial Tr. 4.16PM 223:19-224:3, 224:13-19, 280:12-14 (Germany).

113. For instance, Mr. Evans testified that voters expressed confusion about whether a document was an absentee ballot application or the absentee ballot itself, regardless of whether it was pre-filled or not. Trial Tr. 4.18AM 88:12-20 (Evans); *see also* State Defs. PFOFCOLs ¶ 195. Mr. Evans further testified that nothing in

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[7] The Disclaimer Provision requires all third parties to note that a ballot application has not been sent by a governmental entity. *See* O.C.G.A. § 21-2-381(a)(1)(C)(ii). Plaintiffs initially challenged this provision, but dismissed their claims once the State changed the language of the provision and alleviated Plaintiffs' First Amendment concerns. *See infra* ¶ 137.

SB 202 prevents voters from confusing absentee ballot applications with absentee ballots. Trial Tr. 4.18AM 71:22-72:2 (Evans).

114. Similarly, while State Defendants point to incidents in which people allegedly forgot they already submitted an application, State Defs. PFOFCOLs ¶¶ 177, 184, there is no evidence such incidents were due to the receipt of third-party absentee ballot applications. Trial Tr. 4.18AM 102:16-19 (Evans). Likewise, State Defendants' assertion that voters who already submitted their application "are also the ones most likely to be confused by receiving another application, as they may worry that their initial applications were not accepted" does not suffice to show that those voters were confused by Plaintiffs' mailers. State Defs. PFOFCOLs ¶ 245.

115. Rather, alleged voter concerns that voters received an additional application because there was something wrong with their original application may have been informed by other reasons. *See* State Defs. PFOFCOLs ¶ 196. For example, especially in the June 2020 primary election, voters submitted absentee ballot applications but did not receive them. *See* Pls. Exs. 347 & 348; Trial Tr. 4.17AM 74:12-21, 75:5-12 (Watson). Additionally, voters may have applied for an absentee ballot 180 days out before the election, but absentee ballots were only sent out months later, which may have led some voters to be concerned something had gone wrong with their application and submit a second one. Trial Tr. 4.16PM 240:2-19, 241:10-14 (Germany).

2. The Challenged Provisions Do Not Further Efficient Election Administration

116. Defendants also provide no evidence that their purported goals of efficient election administration are furthered by the Challenged Provisions. State Defendants assert that cancelled or duplicate applications submitted in 2020 stemmed from third-party applications, *see* State Defs. PFOFCOLs ¶¶ 180, 233, but Mr. Evans actually testified that he had no knowledge as to what proportion of canceled ballots in 2020 involved voters who had received multiple applications from third-party organizations. Trial Tr. 4.18AM 102:16-19 (Evans). And, to the extent the State is relying on data from 2020, Mr. Germany and Mr. Evans both testified that 2020 was an outlier in many ways, due to the pandemic and the rampant misinformation that circulated during and after the election. Trial Tr. 4.18AM 66:3-5, 101:23-102:3, 69:6-17 (Evans); Trial Tr. 4.16PM 255:23-256:4, 269:9-12, 267:3-6, 271:20-24 (Germany); Pls. Exs. 39, 64. Moreover, many voters may have cancelled their ballots after the election because they ultimately did not vote. *See* Trial Tr. 4.16PM 230:10-19 (Germany).

117. State Defendants' assertion that "reducing voter confusion makes it more likely that voters will correctly submit their ballots" does not suffice to demonstrate that voters have cancelled their ballots as a result of receiving one of Plaintiffs' mailers. *Cf.* State Defs. PFOFCOLs ¶ 166.

118. Indeed, State Defendants have agreed that increases in cancelled or duplicate applications in 2020 could have been caused by other factors, including changing perceptions during the pandemic, large numbers of people who did not receive their ballots in the 2020 primary, the large gap between when individuals could start applying for a ballot and when they would actually receive one, among other reasons. Trial Tr. 4.16PM 240:8-19, 241:10-14, 275:4-6, 263:22-264:7 (Germany); *cf.* State Defs. PFOFCOLs ¶ 166. The record also irrefutably demonstrates that there was generally a significant increase in the awareness and use of absentee voting in 2020. Trial Tr. 4.16PM 256:18-24 (Germany); Trial Tr. 4.18AM 66:9-23 (Evans); Pls. Ex. 146. But contrary to State Defendants conjecture, State Defs. PFOFCOLs ¶ 176, there is no evidence that increase in absentee voting was a result of Plaintiffs' mailing prefilled applications as opposed to efforts by Georgia voters to safely vote during a worldwide pandemic. Trial Tr. 4.16PM 256:18-24 (Germany); Trial Tr. 4.18AM 66:9-23 (Evans); Pls. Ex. 146.

119. And while State Defendants assert that addressing duplicate or cancelled applications is time consuming or complex, State Defs. PFOFCOLs ¶¶ 179, 182, 183, the record demonstrates otherwise. State Defendants' own witnesses have testified that handling duplicate applications takes virtually no time at all, and cancelling an absentee ballot application is not "complicated." Trial Tr. 4.18AM 101:6-13 (Evans). Mr. Evans testified that none of the steps involved in canceling

an absentee ballot was complicated and that voters can cancel their ballots before going to a polling place. *Id.* at 101:6-13, 102:8-15 (Evans); *cf.* State Defs. PFOFCOLs ¶ 183.

120. As it pertains to prefilling, State Defendants' assertion that the distribution of prefilled applications made Georgia's electoral system less efficient, State Defs. PFOFCOLs ¶ 233, is unsupported by the evidence. Mr. Evans could not testify as to how many cancelled ballots (if any) resulted from prefilled applications. Trial Tr. 4.18AM 102:16-19 (Evans).

121. State Defendants misleadingly claim that the prefilling prohibition targets incorrectly prefilled applications. State Defs. PFOFCOLs ¶¶ 147, 148, 224. Yet while State Defendants put forward unverified voter statements about receiving incorrectly prefilled applications, State Defs. PFOFCOLs ¶¶ 146, 147, they provide no evidence—or even citation—as to how frequently prefilled applications received or submitted by individuals had incorrect information. State Defendants' reliance on complaints that officials in another state allegedly received about incorrectly addressed VPC mailings is misplaced, as these mailings concerned voter registration and not voting by mail. *See* Trial Tr. 4.18AM at 100:3-9 (Evans); State Defs. PFOFCOLs ¶ 158.

122. Ms. Hesla testified that Plaintiffs take extra precautions to avoid situations in which Plaintiffs' personalized mailers are printed, packaged, and

addressed incorrectly. *See, e.g.*, Trial Tr. 4.16AM 32:9-33:18, 34:5-35:14, 49:17-50:4 (Hesla). Plaintiffs implement these measures because they believe that any possible errors that might cause confusion among voters detract from the pro-vote-by-mail message that they seek to convey. *See id.*; *cf.* State Defs. PFOFCOLs ¶ 159.

123. And contrary to State Defendants' insinuation, there is no indication or evidence that the purported incorrect mailings received by individuals did not in fact match the State voter file. *See* State Defs. PFOFCOLs ¶¶ 147, 152, 160. As Plaintiffs have explained, they prefill their absentee ballot applications with voter information from the voter file. Trial Tr. 4.15AM 81:24-82:1, 96:10-14 (Lopach). Thus, if there is an inaccuracy in a prefilled application, it may indeed reflect an inaccuracy in the voter file—which is helpful information for voters to receive and election officials to be alerted to if they would like to correct such inaccuracies. *Id.*

124. Indeed, Mr. Evans' testimony regarding "incorrect information on an application," and cited by State Defendants to insinuate that prefilled applications undermine electoral efficiency, State Defs. PFOFCOLs ¶ 172, was actually in reference to instances when the information entered on the application did not match the information listed for the voter in the voter file. Trial Tr. 4.18AM at 100:18-101:5 (Evans). Thus, Plaintiffs' prefilling applications with information drawn from the state voter file can make it less likely that the prefilled applications that they have mailed to Georgia voters contain incorrect information. Trial Tr. 4.15AM 81:24-

82:7, 96:10-14 (Lopach); Trail Tr. 4.15PM 173:8-12, 171:22-172:6 (Lopach) (Plaintiffs remove voters that have moved from their absentee ballot application mailers recipient list); *see also* Trial Tr. 4.18AM 61:21-62:17 (Evans) (testifying that, in such cases where a voter's name and address had not in fact changed, prefilling an application with the information listed for a voter in the voter file could be "helpful" for the voter); Pls. Ex. 15.

125. Similarly, State Defendants allege that prefilled applications lead to less engagement with the application and eventual cancellation of an absentee ballot. *See* State Defs. PFOFCOLs ¶ 178. This is entirely speculative—State Defendants introduced no evidence that voters are any more likely to engage with a blank application than a pre-filled one. Plaintiffs would prefill the available voter information that is required for election officials to process an application, Trial Tr. 4.16PM 212:10-15 (Germany), and the election date as was requested by the Secretary's office. Pls. Ex. 15. The voter is nevertheless required to "engage with" the form by providing the remaining personal information that is not publicly available and by providing a wet signature. *See, e.g.*, Pls. Exs. 26, 27; Trial Tr. 4.15AM 79:21-23, 79:25-80:1, 96:10-12, 96:17-20 (Lopach); Trial Tr. 4.16PM 242:20-243:3 (Germany); *see also* Stipulated Facts ¶ 19. In fact, Mr. Evans's testimony supports Plaintiffs' contention that prefilling absentee ballot applications

in fact *increases* the likelihood that a person will complete an absentee ballot application. *See* Trial Tr. 4.18AM 90:12-21 (Evans).

126. Rather than making election administration less efficient, there is substantial evidence that prefilling applications makes it more efficient. *See supra* ¶ 124; Trial Tr. 4.17PM 174:22-175:10 (Waters); Pls. Ex. 28 at 9; *accord* Pls. Ex. 30; Pls. Exs. 15, 50. Plaintiffs have shown that the distribution of applications is helpful to voters because it makes it easier for them to request absentee ballots. Trial Tr. 4.16AM 23:13-24:3 (Hesla); Trial Tr. 4.15AM 60:1, 66:19-67:2 (Lopach); Trial Tr. 4.16PM 242:20-243:3 (Germany). Additionally, prefilled applications are helpful to both voter and election official, and if correct, make processing applications more efficient, contrary to State Defendants' assertions. *See* State Defs. PFOFCOLs ¶ 186.

127. Finally, while State Defendants posit that responding to complaints diverted investigators from "other important responsibilities," State Defs. PFOFCOLs ¶ 169, Ms. Watson testified that answering complaints is "just part of [the] job." Trial Tr. 4.17AM 65:2-4, 66:17-20 (Watson). Ms. Watson also testified that many such complaints could be screened quickly. Trial Tr. 4.17AM 67:4-9 (Watson).

C. Defendants Have Failed to Show that the Challenged Provisions Are Narrowly Tailored

128. Defendants have failed to show that the Challenged Provisions are narrowly tailored, which requires that the means chosen by the state are the least restrictive means of achieving its desired policy goals. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Despite State Defendants' assertions, *see* State Defs. PFOFCOLs ¶ 225, just because there are *more* restrictive means the State could have used to achieve its desired policy goals does not mean that the means chosen by the state are the least restrictive means of doing so sufficient to pass strict scrutiny.

1. The Prefilling Prohibition Is Not Narrowly Tailored

129. State Defendants misdescribe the scope and effect of the prefilling prohibition, and in doing so, make clear that the prefilling prohibition is not narrowly tailored. *See* State Defs. PFOFCOLs ¶¶ 227, 229, 234. As written and enforced by the State, the prefilling prohibition does not "eliminat[e] all incorrectly prefilled applications," it eliminates all prefilled applications, correctly or incorrectly prefilled. O.C.G.A. § 21-2-381(a)(1)(C)(ii); Trial Tr. 4.15AM 81:24-82:1, 96:10-14 (Lopach); Trial Tr. 4.18AM 62:4-16 (Evans). Rather than targeting the incorrect prefilling of applications that the state points to as the source of most of its concerns, it is a blanket ban on prefilling even accurate information derived from the state's

own voter registration file. *Id*. This is overinclusive, sweeping in far more expressive conduct than is necessary to address any issues arising from errors or mistakes in pre-filled applications.

130. Further, State Defendants claim that this provision prevents the "unauthorized" use of personal information. *See* State Defs. PFOFCOLs ¶ 224. Yet there is no unauthorized use of personal information at issue in this case, as Plaintiffs use information from the voter file which is made publicly available by the State. Trial Tr. 4.18AM 16:24-17:7 (Evans).

131. State Defendants assert that voters are confused about why their personal information is publicly available, improperly relying on purported voter complaints as proof that the sender was confused without any foundation to do so. *See* State Defs. PFOFCOLs ¶¶ 224, 227; *see also supra* ¶ 108. Nevertheless, any such confusion, to the extent it exists, does not inherently arise from prefilled applications so much as a general lack of understanding that the voter registration file is publicly available. Trial Tr. 4.16PM 182:12-15 (Germany). The State cannot address voters' lack of awareness that their registration information is publicly available by restricting Plaintiffs' protected speech and expression.

2. The Mailing List Restriction Is Not Narrowly Tailored

132. State Defendants allege that the Mailing List Restriction was included in SB 202 in response to alleged voter confusion about receiving duplicate

applications but put forward no evidence that it achieves this alleged purpose in any meaningful way. *See* State Defs. PFOFCOLs ¶¶ 192, 246. Plaintiffs, by contrast, have shown that the Mailing List Restriction is both over- and under-inclusive, fatal to its ability to survive heightened scrutiny. *Contra* State Defs. PFOFCOLs ¶ 246.

133. The Mailing List Restriction is underinclusive, *contra* State Defs. PFOFCOLs ¶ 239, because it does not, as the State suggests, address alleged or purported voter confusion or concerns arising from receiving multiple absentee ballot applications. As State Defendants' witnesses testified, the provision does not prevent (1) all voters from receiving multiple applications during the first five days of the application period, (2) those voters who have submitted an absentee ballot application receipt of which is not entered into the State system from receiving multiple applications, and (3) those who have not applied for an absentee ballot—including those who never intend to—from receiving multiple applications. Tr. 4.18AM 23:1-8, 69:25-70:7, 70:13-25 (Evans); Trial Tr. 4.17AM 72:7-18, 76:23-25 (Watson); Defs. Ex. 53; Pls. Ex. 348 at 85. Finally, those on the rollover list can still receive multiple applications, at least for the first five days of the application cycle, as the absentee voter file does not specify who is a rollover voter.[8] *See* Pls. Ex. 25.

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[8] Defendants claim Mr. Lopach was incorrect that Plaintiffs did not have access to the rollover list but provide no support or basis for their assertion that Plaintiffs did have access. *See* State Defs. PFOFCOLs ¶ 204.

134. State Defendants have also put forward no evidence that the Mailing List Restriction meaningfully reduces duplicate applications submitted to county officials, as they allege. *See* State Defs. PFOFCOLs ¶¶ 199, 244. State Defendants' witnesses testified that it is still possible for voters to submit duplicate absentee ballot applications to their county election office, regardless of the Mailing List Restriction. Trial Tr. 4.18AM 71:14-21 (Evans). There are many reasons why an individual might submit a duplicate application absent receipt of a duplicate application from a third-party group. *See supra* ¶ 115. State Defendants' baseless assertion that the Mailing List Restriction may "eliminate" duplicate applications is not serious and without any evidence.

135. State Defendants' assertion that the Mailing List Restriction allows compliance with minimal effort is belied by the evidence. State Defs. PFOFCOLs ¶ 247. Ms. Hesla's testimony made clear that the State could not have considered the actual logistics and timing of mass mailings in crafting the Mailing List Restriction, resulting in a provision that Plaintiffs and Mission Control cannot in fact comply with given the complexities and quality control required of their work. *See* Trial Tr. 4.16AM 24:15-21, 30:15-31:8, 33:19-25, 36:24-37:4 (Hesla). Even setting aside the six weeks needed to prepare for printing, *see id.* at 24:15-26:20 (Hesla), the time needed to upload and process the data suppression file and then print the mailings amounts to approximately seven days, exceeding the five-day grace period provided

by SB 202, *see id.* at 30:15-31:4 (Hesla) (explaining that the data suppression file is uploaded at the last possible moment—three days before printing begins); 33:19-25 (Hesla) (explaining that a two-million-piece mailing project takes approximately four days to print). Plaintiffs and Mission Control *then* need approximately ten days to ship the mailers to voters. *See id.* at 36:24-37:4 (Hesla). Ms. Hesla's testimony makes it readily apparent that the State did not consider the logistical details of undertaking the type of mass mailing projects that Plaintiffs implement.

3. There Are Less Restrictive Alternatives Available to State Defendants

136. Despite State Defendants' assertions, State Defs. PFOFCOLs ¶ 255, Plaintiffs have provided ample evidence of less restrictive alternatives that would address the issues State Defendants claim are solved with the Challenged Provisions.

137. For instance, the Disclaimer Provision alerts voters to the fact that an absentee ballot application is not a ballot and explains who sent the application. O.C.G.A. § 21-2-381(a)(1)(C)(ii)-(iii); *see* Pls. Ex. 7 at 40; Trial Tr. 4.16PM 280:12-14 (Germany). This remedies any alleged voter confusion about whether an application is an application or a ballot, as well as whether it must be submitted in order for them to vote. Plaintiffs no longer challenge this provision because the legislature revised the language. *See* State Defs. PFOFCOLs ¶ 201. Similarly, SB 202's requirement that third parties only distribute the absentee ballot application

form designed and published by the Secretary of State further effectuates the asserted state interests of easing election administration and reducing the potential for voter confusion. Trial Tr. 4.16PM 254:11-14 (Germany); *see also* Pls. PCOLs ¶ 132. And still other alternatives are imaginable, such as adding a scienter requirement for violations of the Mailing List Restriction or requiring consultation with the Secretary of State's office. *See* Trial Tr. 4.18PM 199:20-200:9 (Huling).

138. Overall, the record demonstrates that under the appropriate legal analysis, Plaintiffs' absentee ballot application mailers are pure speech and expressive conduct, and the Ballot Application Restrictions are content-based restrictions on core political speech. As a result, strict scrutiny is triggered. Order on Motion for Summary Judgment, ECF No. 179 at 24, 25. Because State Defendants have failed to demonstrate a nexus between their asserted compelling interests and the Ballot Application Restrictions, as well as that the restrictions are narrowly tailored to any compelling interest as they are both over- and underinclusive, they cannot be upheld. *Contra* State Defs. PFOFCOLs ¶ 67.

D. The Challenged Provisions Do Not Withstand Any Level of Scrutiny

139. State Defendants incorrectly assert that a lower level of scrutiny should apply to the Ballot Application Restrictions. *See* State Defs. PFOFCOLs ¶ 214. Strict scrutiny must apply for the reasons Plaintiffs have demonstrated above.

140. State Defendants' assertion, made with no citation or explanation, that if Plaintiffs' sending personalized absentee ballot applications throughout the election cycle is expressive, it is then subject to intermediate-scrutiny review is wrong. State Defs. PFOFCOLs ¶¶ 257, 259. "When the conduct regulated depends on—and cannot be separated from—the ideas communicated," as is the case here, "a law is functionally a regulation of speech." *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1278 (11th Cir. 2024). And as this Court noted at Summary Judgment, where protected First Amendment activity constitutes core political speech, its limitation is subject to strict scrutiny. Order on Motion for Summary Judgment, ECF No. 179 at 23-25; *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 207 (1999); *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002). The record makes clear that Plaintiffs send personalized applications, in multiple waves when permitted, to urge recipients' participation in the political process, and as such constitute core political speech restriction of which requires strict scrutiny. *Meyer*, 486 U.S. at 421; *Schwab*, 671 F. Supp. 3d at 1248-49.

141. Additionally, the state "may not regulate speech based on its substantive content or the message it conveys." *Taylor v. Palmer*, No. 21-14070, 2023 WL 4399992, at *3 (11th Cir. July 7, 2023) (citation and internal quotation marks omitted). State Defendants state without argument or explanation, that the Ballot Application Restrictions are not content-based regulations. *See* State Defs.

PFOFCOLs ¶¶ 257, 266, 273. The Ballot Application Restrictions dictate the content that Plaintiffs are prohibited from including in their messages and constrict the timing when Plaintiffs can speak, Trial Tr. 4.15AM 84:21-85:3, 93:23-94:6 (Lopach); Trial Tr. 4.15PM 127:22-24, 132:12-13, 133:8-12, 140:2-4, 149:14-18, 160:22-24, 146:7-17 (Lopach); Trial Tr. 4.16PM 175:15-22 (Germany), thereby "inhibit[ing] communication with voters about proposed political change and eliminat[ing] voting advocacy by plaintiffs . . . based on the content of their message." *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 888 (D. Kan. 2021). They are impermissibly "premised on the message a speaker conveys," *In re Georgia SB 202*, No. 1:21-mi-55555-JPB, 2022 WL 3573076, at *13-14 (N.D. Ga. Aug. 18, 2022), and hinge explicitly on the content of their communications. Their enforcement necessarily requires examination of "the content of the message" Plaintiffs' mailers convey in order to know whether the law has been violated and "[l]aws that cannot be justified without reference to the content of the regulated speech," require strict scrutiny. *Honeyfund.com*, 94 F.4th at 1277-80 (internal quotations omitted). Further, "the category of covered documents is defined by their content," because the Restrictions apply "only [to] those publications containing speech designed to influence the voters in an election" and therefore must be subject to strict scrutiny. *McIntyre*, 514 U.S. at 345-46. Where, as here, the state has made a content-based restriction on speech, the state cannot hide behind the veil of a lesser scrutiny.

142. Under any level of scrutiny, however, Plaintiffs demonstrated at trial that there is no nexus between the Ballot Application Restrictions and the "important or substantial governmental interest" that they purport to address, and the restrictions they place on speech are far more than "incidental" and are certainly "greater than is essential" to further the government's goals. *Contra* State Defs. PFOFCOLs ¶ 257, 260.

1. The Challenged Provisions Cannot Survive *O'Brien* Intermediate Scrutiny

143. When not contemplating core political speech, the Eleventh Circuit has recognized that "a content-neutral regulation of expressive conduct is subject to intermediate scrutiny," specifically the *United States v. O'Brien* test. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021) ("*Food Not Bombs II*"). This test requires content-neutral regulations to be "narrowly drawn to further a substantial governmental interest unrelated to the suppression of free speech." *Id.* (internal citations and quotation marks omitted). This is not the applicable test here, however, because as previously discussed the Ballot Application Restrictions are not content-neutral and they infringe upon Plaintiffs' core political speech. *See supra* Part III(B)(2).

144. Even considered under *O'Brien* intermediate scrutiny as State Defendants suggest, *see* State Defs. PFOFCOLs ¶¶ 259-61, the Challenged

Provisions cannot survive for the record demonstrates they do not actually "further[]" the claimed state interests and their restriction is certainly "greater than is essential." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see supra* Part V(B).

145. Contrary to State Defendants' out-of-hand assertion that Plaintiffs may still send all the applications they wish to those who haven't already applied, *see* State Defs. PFOFCOLs ¶ 262, the record makes it quite clear how and why that is not so. Plaintiffs cannot comply with the Mailing List Restriction other than to send a single wave of absentee ballot applications at the beginning of the absentee ballot application cycle for fear of facing steep penalties for inadvertent non-compliance. *See supra* Part IV. This prevents Plaintiffs from communicating at all with voters who registered or updated their registration after their initial mailing for fear of incurring steep and significant liability. *Id*. The Prefilling Prohibition similarly restricts how Plaintiffs may express their pro-absentee voting message by banning Plaintiffs' preferred means of communicating their pro-absentee voting message. Trial Tr. 4.15AM 97:13-16, 99:5-8 (Lopach); Trial Tr. 4.15PM 256:4-5 (Lopach).

146. State Defendants' reliance on *Lichtenstein* to argue that the Ballot Application Restrictions withstand *O'Brien* intermediate level scrutiny is misplaced. State Defs. PFOFCOLs ¶ 263. Tennessee's laws governing absentee voting in that state differ from Georgia's, *see supra* ¶ 83, and so too must consideration of the challenged restrictions. State Defendants quote *Lichtenstein* to insinuate that the

Ballot Application Restrictions reduce confusion for Georgia voters. State Defs. PFOFCOLs ¶ 263. The confusion contemplated in *Lichtenstein* pertained to which Tennessee voters were eligible to vote absentee, not a relevant question for Georgia voters. And Defendants provide no evidence that the eighteen purported voter complaints concerning third party distribution of absentee ballots outweighed the number of voters who had questions about or difficulty with absentee voting that were addressed by Plaintiffs' mailers, despite hundreds of thousands of Georgia voters receiving Plaintiffs' message. *See supra* ¶¶ 13, 60.

147. State Defendants also cite *Lichtenstein* to assert that "under the expressive-conduct test, alternative methods are beside the point." State Defs. PFOFCOLs ¶ 264 (quotations omitted). But State Defendants fail to acknowledge that, in its *Lichtenstein* decision, the Sixth Circuit is not implementing the robust expressive conduct analysis laid out by the Eleventh Circuit which requires narrow tailoring where "the means chosen are not substantially broader than necessary to achieve the government's interest." *Food Not Bombs II* at 1295. Under this requisite Eleventh Circuit analysis applied to this case, Plaintiffs' evidence of alternative, less restrictive methods that nevertheless further the purported state interest is indeed relevant. *See supra* Part V(C)(3) (discussing less restrictive alternatives).

148. State Defendants claim that there is "no stopping point" if strict scrutiny applies to analysis of the Ballot Application Restrictions. State Defs. PFOFCOLs ¶

265. Such a claim in this case, where one of the three provisions originally challenged by Plaintiffs is no longer at issue after the legislature revised the statute to be more narrowly tailored, is not serious. Pls. PFOFs ¶¶ 4, 10, 96, 274. Clearly Plaintiffs did in fact identify a stopping point. In fact, the record notes multiple recent times when other less restrictive alternatives aimed at streamlining the distribution of absentee ballot applications have been developed and implemented in Georgia without warranting First Amendment litigation. Pls. PFOFs ¶¶ 94, 95.

149. Finally, that some other states have not implemented no-excuse absentee voting is of no concern to the questions presented in this case. *See* State Defs. PFOFCOLs ¶ 265. Georgia permits all its registered voters to vote absentee, and Plaintiffs seek to encourage and enable as many Georgians as possible to avail themselves of that opportunity. And where other state legislatures have similarly sought to curtail third parties' ability to express just such a pro-absentee voting message, those laws have been challenged. *See VoteAmerica v. Schwab*, 671 F. Supp. 3d 1230 (D. Kan. 2023); *Lichtenstein v. Hargett*, 83 F.4th 575 (6th Cir. 2023); *Priorities USA v. Nessel*, 628 F. Supp. 3d 716 (E.D. Mich. 2022); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020); Complaint, *Alabama State Conference of the NAACP v. Marshall*, No. 2:24-CV-420-RDP (N.D. Ala. Apr. 4, 2024).

2. The Challenged Provisions Cannot Survive Time, Place, and Manner Intermediate Scrutiny

150. State Defendants again misstate the applicable First Amendment standard when they argue that if the Plaintiffs' speech is implicated and the Ballot Application Restrictions are content-neutral, they trigger time, place, and manner intermediate-scrutiny. State Defs. PFOFCOLs ¶ 266. Firstly, as previously noted, *supra* ¶ 101, if Plaintiffs' speech is implicated (which it is), then the Court must consider whether it is core political speech, and if so, strict scrutiny applies. Order on Motion for Summary Judgment, ECF No. 179 at 23 (citing *Buckley*, 525 U.S. at 207). Secondly, the Ballot Application Restrictions are not content neutral. *See supra* ¶ 141. Finally, State Defendants fail to acknowledge that time, place, and manner intermediate scrutiny and *O'Brien* intermediate scrutiny "substantially overlap," and both require "narrow tailor[ing]" to a "substantial" or "significant" governmental interest. *Food Not Bombs II*, 11 F.4th at 1292.

151. Even if time, place, and manner intermediate scrutiny were the appropriate test, Defendants have not met it. Firstly, State Defendants fail to note that a time, place, or manner restriction must be "justified without reference to the content of the regulated speech," *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1287 (11th Cir. 1999), which is not possible here where State Defendants' justifications pertain specifically to voters' receipt of absentee ballot

applications from third parties. Trial Tr. 4.16PM 179:6-19, 179:25-180:2, 180:13-19, 187:7-10, 188:15-18, 216:9-13, 217:11-218:16, 220:9-18, 225:4-226:5, 226:18-227:3 (Germany). Secondly, State Defendants have not demonstrated the requisite narrow tailoring to the state's purported "substantial" or "significant governmental interest . . . leav[ing] open ample alternative channels for communication of the information." *Food Not Bombs II*, 11 F.4th at 1292 (11th Cir. 2021) (internal quotations omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 781 (1989).

152. On this point, it is notable that in *Ward*, prior to the implementation of the regulation requiring use of the city's sound amplification technology, the plaintiff was notified of the purported state interest in curtailing significant noise pollution and provided the opportunity to perform using its own technology in a way that addressed the issue. *Id.* at 785. However, the plaintiff failed to do so without triggering significant noise complaints. *Id.* Here, however, the record demonstrates that Plaintiffs were not contacted by the State about the purported concerns prompting the Ballot Application Revisions. Trial Tr. 4.15PM 165:21-25 (Lopach); *accord* Pls. Ex. 15; *see also* Pls. Exs. 18, 19, 24, 25. Additionally, while the *Ward* regulation was enjoined, the *Ward* plaintiffs seemingly failed to take any curative steps, demonstrating that the state interest could not be achieved absent the regulation. 491 U.S. at 787-88. Here, by contrast, the record demonstrates that Plaintiffs have taken numerous steps of their own volition to improve their pro-

absentee ballot application outreach, Pls. Exs. 66, 172; Trial Tr. 4.15PM 171:18-173:23; 174:17-175:3, 230:20-24 (Lopach); Trial Tr. 4.15AM 87:2-15 (Lopach); Trial Tr. 4.16AM 24:22-26:11 (Hesla), and the state has provided no evidence that its purported concerns are still relevant, to the extent they ever were. Under time, place, and manner intermediate scrutiny, the Ballot Application Restrictions cannot "burden substantially more speech than is necessary," or "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. State Defendants have not demonstrated that this is satisfied. *See* State Defs. PFOFCOLs ¶¶ 269-271.

153. State Defendants' attempt to analogize the Ballot Application Restrictions to the time, place, and manner regulations in *Club Madonna, Inc. v. City of Miami Beach* misses the mark. State Defs. PFOFCOLs ¶¶ 267, 272. In *Club Madonna* the Eleventh Circuit considered a city ordinance requiring that nude strip clubs check age and work eligibility of employees to prevent against underage dancers who were potentially victims of human trafficking. 42 F.4th 1231 (11th Cir. 2022). There, the Eleventh Circuit found that while "the law [did] not regulate speech on its face," it nevertheless "raise[d] First Amendment concerns" as it involved the suppression of expressive conduct, specifically nude dancing. *Id.* at 1243. Firstly, it must be noted that the contemplated nude dancing was not political in nature, and not akin to Plaintiffs' speech encouraging democratic participation at

issue here. Secondly, the *Club Madonna* record made clear that the ordinance was passed to prevent human trafficking of a type that was shown to have already occurred at clubs in the city, and included requirements shown to be necessary to achieve that important state interest. *Id.* at 1246-47. Here, the record has demonstrated that the Ballot Application Restrictions are not similarly necessary to any identified state interest. *See supra* Part V(C)(3). Finally, the *Club Madonna* ordinance set repetitive log-in and log-out requirements relating to the "where or when" of the dancing, but not "how" the performers must dress or what they must where. *Id.* at 1245. The Ballot Application Restrictions, by contrast, dictate "how" Plaintiffs' must express their message by prohibiting use of personalized applications and second communications. Trial Tr. 4.15PM 127:22-24, 140:2-4, 160:22-24, 130:20-131:1, 132:21-23, 132:12-13, 133:8-12 (Lopach) (Plaintiffs can no longer prefill); Trial Tr. 4.15PM 146:14-17, 147:5-6, 147:14-18, 149:14-18 (Lopach); Trial Tr. 4.15AM 93:23-94:6 (Lopach); Pls. Ex. 318 (Plaintiffs can no longer send a second wave of mailers).

154. State Defendants additionally misconstrue the time, place, and manner intermediate scrutiny standard when claiming that the Ballot Application Restrictions do not focus on "subject matter." State Defs. PFOFCOLs ¶¶ 273-74. Unlike the "placement" regulation contemplated in *One World One Family*, the Prefilling Prohibition does not regulate the physical location of the speaker, but

rather concerns the specific "subject matter" of Plaintiffs' message, the personalized absentee ballot application included as part of their mailing. Specifically, the Restrictions prohibit what Plaintiffs believe to be their most effective method of communicating that the recipient of their mailer should engage with the absentee ballot application form itself. Trial Tr. 4.15AM 100:19-101:11, 79:12-14 (Lopach); Trail Tr. 4.15PM 256:4-5 (Lopach).

155. Similarly, while State Defendants may assert that the Mailing List Restriction merely regulates timing, they then go on to describe how it proscribes to whom Plaintiffs can speak. *See* State Defs. PFOFCOLs ¶¶ 275, 276. As the record makes plain, it is the prohibition of sending an application to one who has already submitted an application, regardless of any steps taken to avoid such an occurrence, with which Plaintiffs cannot practically comply without incurring significant risk of financial and legal penalty. *See* Pls. PFOFs ¶¶ 8-9. Thus, the Mailing List Restriction regulates "how" Plaintiffs can conduct their pro-absentee voting communications program. Pls. Ex. 318; Trial Tr. 4.15AM 93:23-94:6 (Lopach); Trial Tr. 4.15PM 146:14-17, 147:5-6, 147:14-18, 149:14-18 (Lopach).

3. The Challenged Provisions Cannot Survive Rational Basis Review

156. State Defendants improperly rely on the *New Georgia Project v. Raffensperger* to assert that the Ballot Application Restrictions are "only subject to

rational-basis review." State Defs. PFOFCOLs ¶ 214. But the *New Georgia Project v. Raffensperger* court held only that "collecting ballots is not expressive conduct." 484 F. Supp. 3d 1265, 1300-01 (N.D. Ga. 2020). The court in that case considered conduct wholly distinct from the communications at issue here, and State Defendants' reliance solely on a case contemplating that different conduct speaks volumes, as numerous courts have found the distinction between distributing and assisting with absentee ballot applications or analogous voter registration applications to be a meaningful one when considering First Amendment implications. *See Democracy N.C.*, 476 F. Supp. 3d at 224; *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 389-90 (5th Cir. 2013) ("accept[ing]" that "some voter registration activities involve speech—'urging' citizens to register; 'distributing' voter registration forms; [and] 'helping' voters to fill out their forms"); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706 (M.D. Tenn. 2019); *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862 (D. Kan. 2021); *League of Women Voters of Mo. v. Missouri*, No. 20AC-CC04333, at 22-30 (Cole Cnty. Cir. Ct. Oct. 24, 2022). This is because "[s]oliciting, urging and persuading the citizen to vote [is] the canvasser's speech," regardless of whether returning a voter's completed ballots or applications is or is not. *Steen*, 732 F.3d at 390.

157. Indeed, for these reasons, even application of *Anderson-Burdick* analysis would still determine that heightened scrutiny applies—not rational basis

review—because the Restrictions severely burden Plaintiffs' speech, *see supra*, Part IV, and burdens on core political speech are per se severe. *Buckley*, 525 U.S. at 207 (Thomas, J., concurring); *see also League of Women Voters*, 400 F. Supp. 3d at 725 n.9 (observing in similar circumstances that *Anderson-Burdick* "is just another road to strict scrutiny"); *VoteAmerica*, 576 F. Supp. 3d at 887-88 (similar). And "a law severely burdens" rights under *Anderson-Burdick* "if it discriminates based on content instead of neutral factors." *Harriet Tubman Freedom Fighters Corp. v. Lee*, 576 F. Supp. 3d 994, 1003 (N.D. Fla. 2021) (quoting *Citizens for Legis. Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998)).

158. Even applying rational basis review, State Defendants mischaracterize the standard, for while it is deferential, it is not meaningless. *See* State Defs. PFOFCOLs ¶¶ 215-17. Rather, the standard empowers a court to proscribe the "outer limits of a legislature's power" where a statute is "not [] rationally related to a legitimate government interest." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001). Despite State Defendants' assertion to the contrary, such is the case here.

159. State Defendants mistakenly assert that the evidence demonstrates that the Ballot Application Restrictions were passed related to abstract assertions of the state's interest in election administration, decreasing voter confusion, or increasing confidence in Georgia's elections. State Defs. PFOFCOLs ¶ 218. But they failed to actually prove as much. State Defendants rely on testimony that the provisions came

about as a result of significant voter confusion and concerns, but at trial could not present evidence of the motivating voter confusion and concerns beyond a few purported voter complaints, none of which were verified by the purportedly confused or concerned voters. *See* Pls. Exs. 347, 348; *see also supra* ¶ 108. The record also made clear that state election officials recognize that many of the purported voter complaints they receive are "meritless" or more "general vents" than anything substantive that require state action or constitute a meaningful state interest. Trial Tr. 4.16PM 234:1-4 (Germany); Trial Tr. 4.17AM 34:13-24, 65:5-19 (Watson). Further, State Defendants have not identified any substantiated case of voter fraud referred to the Attorney General resulting from a third party distributing multiple absentee ballot applications. Trial Tr. 4.17AM 41:21-42:2, 43:1-4, 50:7-17, 52:10-55:23, 58:1-62:22 (Watson); Pls. Exs. 122-25, 127, 143, 261, 140, 142. Nor did State Defendants point to any evidence that third-party distribution of absentee ballot applications led to any individuals receiving a duplicate ballot or attempting to vote a second time. *Id*. The record also lacks any evidence linking Plaintiffs' mailers or any third-party absentee ballot application distribution to voters' submission of duplicate applications to election officials in recent elections as opposed to other causes such as new absentee voters during the height of COVID-19 or a general fear about receiving their absentee ballot in time. *Cf*. Pls. PFOFs ¶¶ 239-48, 254-66. Moreover, even if third-party mailers did result in the submission of duplicative

applications in 2020, the procedure for election officials to process duplicate applications is uncomplicated, Trial Tr. 4.18AM 101:9-12 (Evans), and the record demonstrates that applications pre-filled with information from the voter registration rolls can facilitate smooth election administration. *See supra* ¶ 124; Trial Tr. 4.17PM 174:22-175:10 (Waters); Pls. Ex. 28 at 9; *accord* Pls. Ex. 30; Pls. Exs. 15, 50.

160. Finally, it is undisputed that Plaintiffs changed their programming from 2020 to 2022 and going into 2024, having changed their data vendor and reduced the number of waves of mailers that they send to voters. Trial Tr. 4.15AM 68:18-69:2, 70:21-71:1, 69:3-7, 88:7-9, 84:21-85:3, 86:9-20 (Lopach); Trial Tr. 4:15PM 146:7-17 (Lopach); Pls. Ex. 36 at 2. In response to Plaintiffs' showing of a revised and streamlined mailing program, State Defendants have presented no evidence that voter confusion arose from Plaintiffs' mailers in 2022. *See* Pls. Exs. 347, 348. As such, State Defendants' have not made a showing that the Ballot Application Restrictions bear even a rational basis. *See* State Defs. PFOFCOLs ¶ 219.

VI. CONCLUSION

161. State Defendants are wrong to contend that the Ballot Application Restrictions "allow alternative channels of expression for Plaintiffs," and therefore should be upheld. State Defs. PFOFCOLs ¶ 276. That Plaintiffs might send blank applications, only once at the beginning of the election cycle, is not an "alternative channel," as State Defendants suggest, so much as a forced departure from Plaintiffs'

preferred and long-developed way of communicating their pro-absentee voting message to underrepresented populations. *See supra* Part IV. What is more, State Defendants' additional suggestions that Plaintiffs instead send congratulatory correspondence to those who have already voted or "share another message," State Defs. PFOFCOLs ¶ 276, gets to the heart of the issue in this case—State Defendants may not force Plaintiffs to stop expressing their chosen pro-absentee voting message in favor of a different voting-adjacent message more palatable State Defendants. As State Defendants here suggest, the Ballot Application Restrictions serve to do just that, and as such, are unconstitutional. Therefore, the Court should enjoin the restrictions and enter judgment in Plaintiffs' favor.

Respectfully submitted this 14th day of June, 2024.

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CERTIFICATE OF SERVICE
AND COMPLIANCE WITH LOCAL RULE 5.1

I hereby certify that I have this date electronically filed the within and foregoing, which has been prepared using 14-point Times New Roman font, with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

Dated: June 14, 2024

/s/ Alice Huling
Alice Huling
Counsel for Plaintiffs