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

PLAINTIFF'S RESPONSE REGARDING NOTICE OF SUPPLEMENTAL AUTHORITY

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Plaintiffs respectfully submit this response to State Defendants' Notice of Supplemental Authority, ECF No. 258. Contrary to the State Defendants' argument, *VoteAmerica v. Schwab* does not support judgment in their favor. 121 F.4th 822

(10th Cir. 2024). State Defendants' Notice buries the crucial holdings of the Tenth Circuit's decision: that Plaintiffs' prefilled absentee ballot applications are speech protected by the First Amendment, and Kansas' Prefilling Prohibition infringed on that speech. *Id.* at 838. Throughout this case, Defendants' primary argument has been that the challenged provisions do not infringe First Amendment expression. *See, e.g.*, State Defs. PFOFCOLs ¶¶ 68-79; Trial Tr. 4:15AM 33:8-11, 15-18; Trial Tr. 4:18PM 177:8-11. The Tenth Circuit wholesale rejected that theory, holding, "the prefilled application . . . is First Amendment speech." *VoteAmerica*, 121 F.4th at 834. In fact, in *VoteAmerica v. Schwab*, the Tenth Circuit made multiple findings supporting Plaintiffs' claims that Georgia's Absentee Ballot Restrictions unconstitutionally infringe on Plaintiffs' protected speech. And while the Tenth Circuit suggested that intermediate scrutiny *may* apply to Kansas' Prefilling Prohibition,[1] strict scrutiny should still apply to Georgia's Absentee Ballot Restrictions.

First, the Tenth Circuit found that Kansas' Prefilling Prohibition was a content-based restriction on Plaintiffs' speech. That is dispositive of the level of scrutiny in this Circuit. While the Tenth Circuit held that strict scrutiny may not

[1] "Unless, for the reasons identified above, the district court determines again that the Prohibition must be reviewed under strict scrutiny, it should apply intermediate scrutiny." *Id*. at 851-52.

apply in the context of the Kansas restriction,[2] the Eleventh Circuit has very clearly articulated that when a law infringes on political speech and is content based, strict scrutiny applies. *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1277-80 (11th Cir. 2024) (content based restrictions are "presumptively invalid" and, can only "be upheld if they are 'narrowly tailored to serve compelling state interests'") (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)); *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021) ("*Food Not Bombs II*") ("regulation based on the content of the expression must withstand the additional rigors of strict scrutiny"); *Taylor v. Palmer*, No. 21-14070, 2023 WL 4399992, at *3 (11th Cir. July 7, 2023); *see also* Order on Motion for Summary Judgment, ECF No. 179 at 23-25. Indeed, even State Defendants acknowledged this requirement in their post-trial briefing. *See* State Defs. PFOFCOLs ¶ 220.

Second, while the Tenth Circuit considered only briefing made at summary judgment, *VoteAmerica*, 121 F.4th at 842, this Court has the benefit of a full trial

[2] The Tenth Circuit denied that *Meyer*'s requirement of strict scrutiny turns on whether a plaintiff subjectively believes the most effective means of their advocacy is infringed on. *VoteAmerica*, 121 F.4th at 844 (citing *Meyer v. Grant*, 486 U.S. 414 (1988)). Plaintiffs disagree with the Tenth Circuit's interpretation, but whether or not the Tenth Circuit's interpretation of *Meyer* is correct that prefilling is the most effective means of communicating Plaintiffs' message is not just Plaintiffs' "subjective belief" here, but a finding supported by objective testing and studies. *Id.*; Pls. PFOFs ¶¶ 191-92, 216, 218, 221-22, 224-27, 235-38.

record demonstrating Plaintiffs' mailers are speech and "characteristically intertwined" with their expressive message. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Here, the record contains well-developed evidence of the interconnected nature of Plaintiffs' mailers. Pls. PFOFs ¶¶ 117-18, 120, 126, 136-38, 199, 201-02, 206. Together, the pieces of Plaintiffs' mailers communicate their most effective pro-mail voting message to the particularly selected mailer recipient, with the mailed components referencing and reinforcing the mailer's collective message. *Id*. This Court should follow the Supreme Court's direction and "refuse[] to separate the component parts of" speech "from the fully protected whole." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988).

Thirdly, the challenged provisions of S.B. 202 are fundamentally more restrictive than the provision of Kansas law considered by the Tenth Circuit that infringed on Plaintiffs' speech, here limiting significantly more of Plaintiffs' speech.[3] S.B. 202 limits the number of people to whom Plaintiffs can speak, categories of people to whom Plaintiffs can speak (newly registered voters), when Plaintiffs can speak, and even how Plaintiffs speak to voters. Pls. PFOFs ¶¶ 8-9, 28, 117-18, 193-94, 290-91, 294, 298-303. By "[e]liminating [several] avenue[s] of

[3] The State of Kansas agreed to a permanent injunction against another provision challenged by Plaintiffs that prohibited out-of-state entities like Plaintiffs from sending their absentee ballot application mailers to Kansas voters. *VoteAmerica*, 121 F.4th at 831 n.3.

political discourse," S.B. 202's restrictions limit the overall quantum of speech and thereby warrant strict scrutiny. *VoteAmerica*, 121 F.4th at 846.

Moreover, the Tenth Circuit agreed that where, as here, a restriction "discriminat[es] against VPC's viewpoint," it should be subject to strict scrutiny.[4] *VoteAmerica*, 121 F.4th at 851; Pls. PFOFs ¶¶ 113-114; Pls. COLs ¶ 82. Such discrimination is present here because Georgia's Ballot Application Restrictions were enacted to curtail the pro-mail voting advocacy efforts of third-party organizations, including Plaintiffs. *See* Pls. Ex. 79 at 25-29, 36-37, 45; Trial Tr. 4:16PM 175:19-22, 176:2-6, 185:4-8, 254:15-20 (Germany). In fact, Defendants admitted as much at trial, stating "these two provisions were enacted as part of S.B. 202 [because of] absentee ballot application tactics used by organizations like the plaintiffs." Trial Tr. 4:18PM 195:7-10.

Overall, the Tenth Circuit decision undeniably supports a finding by this Court that (1) mailing prefilled absentee ballot applications is speech; and (2) Georgia's Ballot Application Restrictions infringe on Plaintiffs' speech. Further, for the foregoing reasons, the Tenth Circuit decision does not undercut the reasons why this Court should apply strict scrutiny here. And even were intermediate scrutiny

[4] The Tenth Circuit explained that evidence of an improper purpose or justification for the statutory provision would subject Kansas' Prohibition to strict scrutiny. *VoteAmerica*, 121 F.4th at 834. If the district court found "evidence regarding whether the purpose or justification for the Prohibition was to suppress speech favoring mail voting," strict scrutiny would be justified. *Id*. at 851, 852.

applicable to Georgia's prefilling prohibition, it does not survive that test. Pls. Response to State Defs. PFOFCOLs, ECF. No. 247 at 66-77. The record demonstrates that the Prefilling Prohibition does not further the State's claimed interests and "the means chosen are [] substantially broader than necessary to achieve the government's interest." *Food Not Bombs II*, 11 F.4th at 1295; Trial Tr. 4:18PM 161:19-165:9.

Accordingly, this Court should grant judgment in the Plaintiff's favor and declare Georgia's Absentee Ballot restrictions unconstitutional.

Respectfully submitted this 16th day of December, 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: December 16, 2024

/s/ Alice Huling
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