UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NEW GEORGIA PROJECT; et al., *Plaintiffs*, v. Brad RAFFENSPERGER, in his official capacity as the Georgia Secretary of State; et al., *Defendants*, REPUBLICAN NATIONAL COMMITTEE; et al., *Intervenor-Defendants*.	No. 1:21-cv-1229-JPB

INTERVENORS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

To avoid duplicative briefing, Intervenors will limit this reply to Plaintiffs' First Amendment claims. Replies are not "necessary" in this Court, L.R. 7.1(C), and Plaintiffs' other claims are addressed in Intervenors' opening briefs, the relevant parts of the State's briefs, and Intervenors' replies in the related cases. *See, e.g.*, Intvrs.' Reply in *AAAJ* (addressing *Anderson-Burdick*); Intvrs.' Reply in *AME* (addressing absentee voting); Intvrs.' Reply in *NAACP* (addressing §2 and intentional discrimination). Intervenors join and incorporate all those arguments. As for the First Amendment claims, Plaintiffs' attempts to rehabilitate their legally defective allegations are unpersuasive. This Court should dismiss Counts III and IV with prejudice (as well as Count IV in *AME*, Count V in *NAACP*, and Count V in *CBC*).

ARGUMENT

Plaintiffs raise two First Amendment claims. In Count III, Plaintiffs contend that SB 202 was enacted with the intent to discriminate or retaliate against Democratic voters. (No other plaintiff in any of the other cases makes this argument.) In Count IV, Plaintiffs contend that SB 202's gift-giving ban prohibits expressive conduct in a traditional public forum. (The plaintiffs in *NAACP*, *AME*, and *CBC* also raise this claim.)

These claims fail. There is no such thing as a claim for implicit partisan discrimination. And Plaintiffs are incorrect about what the gift-giving ban regulates, where it applies, and whether it's reasonable. While Plaintiffs are eager to point out when they think Intervenors' arguments cannot be resolved at the

pleading stage, they are noticeably quiet about the propriety of resolving these purely legal arguments. Because Intervenors' arguments are correct, this Court should dismiss the First Amendment claims with prejudice.

I. SB 202 cannot violate the First Amendment on the theory that it's intended to discriminate or retaliate against Democrats.

Count III of Plaintiffs' amended complaint might be the most tenuous claim in any of the eight cases challenging SB 202. Count III alleges that SB 202 was motivated by partisan discrimination—that the legislature's goal was to retaliate against Democrats for their "electoral success" and to hamper "Democrats' future ability to support and elect their preferred candidates." Opp. (Doc. 75) 16. The Eleventh Circuit's decision in *Hubbard* squarely forecloses that theory. And Plaintiffs' attempts to distinguish *Hubbard* are themselves foreclosed.

Hubbard holds that plaintiffs "cannot bring a free-speech challenge" to a facially neutral statute on the ground that "the lawmakers who passed it acted with a constitutionally impermissible purpose." *In re Hubbard*, 803 F.3d 1298, 1312 (11th Cir. 2015). The teacher's union in *Hubbard* alleged that a statute forbidding the collection of dues "violates the First Amendment" because the legislature's purpose was to "retaliate against [the union] for its political speech on education policy." *Id.* at 1301. The Eleventh Circuit rejected that claim—just as similar claims had been rejected "many times" before. *Id.* at 1312 (collecting cases). Under the *O'Brien* rule, it is a general "'principle of constitutional law'" that "courts cannot 'strike down an otherwise constitutional statute on the basis of an alleged illicit motive.'" *Id.* (quoting *United*

States v. O'Brien, 391 U.S. 367, 383 (1968)). This general rule has some exceptions (*e.g.*, protected classes, bills of attainder, ex post facto laws); but outside of those narrow exceptions, the general rule controls. *Id.* at 1312 n.14; *F.O.P. Hobart Lodge No. 121, Inc. v. City of Hobart*, 864 F.2d 551, 554 (7th Cir. 1988).

Plaintiffs claim that the *O'Brien* rule doesn't apply to statutes that regulate speech, *see* Opp. 17-18 & n.7, but this argument cannot help Plaintiffs. SB 202 doesn't regulate speech either. The ban on gift-gifting regulates conduct. *See* Mot. (Doc. 73-1) 16-17; *infra* II. And regulations of voting are not analyzed as regulations of speech. The "First Amendment provides no greater protection" for voting rights than the Fourteenth, and cases involving regulations of "protected First Amendment activity" are "inapposite" to regulations of "voting rights." *Hand v. Scott*, 888 F.3d 1206, 1212-13 (11th Cir. 2018); *accord Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019). Plaintiffs thus get the Eleventh Circuit's decision in *Hand* exactly backwards. The court did not hold that voting laws with partisan intent "*can* violate the First Amendment." Opp. 16 (emphasis added). It supposed these laws "*might* violate the First Amendment," but concluded "that is not an easy argument to sustain in the face of controlling case law." 888 F.3d at 1212 (emphasis added).

In fact, Plaintiffs concede that one type of voting law cannot be invalidated for intentional partisan discrimination: redistricting maps. *See* Opp. 16. In gerrymandering cases, partisanship is a "permissible intent"; partisan motives are a "defense" to charges of racial motives. *Rucho*, 139 S. Ct. at 2503; *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017). Plaintiffs insist that redistrict-

ing cases are "unique," Opp. 16, but the Eleventh Circuit rejected that same argument in *Jacobson v. Florida Secretary of State*. *See* 974 F.3d 1236, 1264-65 (11th Cir. 2020). More recently, the Supreme Court held that "partisan motives" did not undermine two routine voting laws—a strange conclusion if partisan motives made those laws *unconstitutional* under the First Amendment. *Brnovich v. DNC*, 141 S. Ct. 2321, 2349 (2021). All these cases thoroughly discredit the notion "that a legislature cannot take politics into account when making decisions that affect voting." *Luft v. Evers*, 963 F.3d 665, 670-71 (7th Cir. 2020).

Even if SB 202 regulated speech, the *O'Brien* rule would still bar Plaintiffs' claim. In *Hubbard*, the Eleventh Circuit "agree[d]" that the *O'Brien* rule applies to "facially constitutional statutes *generally*." 803 F.3d at 1313 (emphasis added). That includes "free-speech" cases. *Id.* at 1312-13 (citing, *e.g.*, *Int'l Food & Beverage Sys. v. City of Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986)). The Eleventh Circuit has applied *O'Brien* to regulations of nude dancing, *see Int'l Food*, 794 F.2d at 1525, and *O'Brien* itself upheld a ban on protestors burning their draft cards, *see* 391 U.S. at 369, 376-86.

What matters is not what the law regulates, but whether it is constitutional except for the plaintiff's assertion of a "retaliatory motive that [the] lawmakers had when passing [it]." *Hubbard*, 803 F.3d at 1313. SB 202 is facially constitutional: Its provisions are "generally applicable" to all voters, *id.* at 1314, and the legislature provided "'valid neutral justifications'" for it that are unrelated to partisanship or viewpoint, *Jacobson*, 974 F.3d at 1265; *Common*

Cause/Ga. v. Billups, 554 F.3d 1340, 1355 (11th Cir. 2009). Nor do Plaintiffs' allegations of partisan motives make SB 202 "content based" or "viewpoint based." *Hill v. Colorado*, 530 U.S. 703, 724 (2000). Instead, Plaintiffs' claim "is precisely the challenge that *O'Brien*, and [the Eleventh Circuit] decisions following it, foreclose." *Hubbard*, 803 F.3d at 1313.

Count III thus fails to state a claim. While Plaintiffs insist that *Hubbard* did not rule out their claim "as a matter of law," Opp. 17, that's exactly what *Hubbard* did, *see* 803 F.3d at 1312 ("What we are saying is that, as a matter of law, the First Amendment does not support the kind of claim [made] here"). True, *Hubbard* was reviewing a denial of legislative privilege, not "a 12(b)(6) motion." Opp. 17. But the Eleventh Circuit noted that its decision resolved "the same issue" that the district court had "ruled on in denying [an earlier] motion to dismiss," and it urged the district court to "revisit" that denial in light of its opinion. 803 F.3d at 1313-15. That advice was sound. Because allegations of intentional partisan discrimination (even if true) do not present "a cognizable First Amendment claim," *id.* at 1313, Count III should be dismissed at the pleading stage.

II. The gift-giving ban does not violate the First Amendment because it reasonably regulates conduct in a nonpublic forum.

Plaintiffs effectively concede that they cannot bring a facial challenge to SB 202's ban on gift-giving. They admit that the ban is constitutional in several applications: gifts of "money," gifts "inside the polling place," gifts intended to "solicit[] votes" or "campaign," and gifts with "commercial" purposes. Opp. 25, 23. While Plaintiffs invoke the overbreadth doctrine, these many lawful

applications illustrate that the gift-giving ban is not overbroad because it has a "'plainly legitimate sweep.'" *Horton v. City of St. Augustine*, 272 F.3d 1318, 1332 (11th Cir. 2001). Plaintiffs also don't dispute that overbreadth plays no role if the ban regulates conduct, or if it regulates speech in a nonpublic forum. *See* Mot. 17-20 (citing *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006); and *Hodge v. Talkin*, 799 F.3d 1145, 1171 (D.C. Cir. 2015)). Because it does one or the other, the gift-giving ban is constitutional both on its face and as applied.*

A. The gift-giving ban regulates conduct, not speech.

Speech might *accompany* the distribution of food and drink, but Plaintiffs wisely do not rely on that incidental speech to support their claim. SB 202 bans only the gift-giving itself. *See* O.C.G.A. §21-2-414(a). Plaintiffs remain free to *say* whatever they want. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 391-92 (5th Cir. 2013); *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 770, 773 (M.D. Tenn. 2020). While Plaintiffs' speech might be more effective when paired with gifts, that fact does not make the gift-giving speech. *Lichtenstein*, 489 F. Supp. 3d at 773; *Steen*, 732 F.3d at 392 n.5. Gift-giving is pure conduct. And when a law bans conduct, it can also ban offers to engage in that conduct, conspiracies to engage in that conduct, and the speech needed to perform that

* Plaintiffs also concede that they cannot bring an as-applied challenge on behalf of their members. *See* Opp. 24. That concession is important for Plaintiffs' constitutional right-to-vote claim. The organizational plaintiffs are not voters, and the individual plaintiffs do not allege that they cannot vote unless third parties bring them food and water. Plaintiffs thus must prove that the gift-giving ban *facially* violates the constitutional right to vote—a high bar that they do not attempt to clear.

conduct. *See United States v. Williams*, 553 U.S. 285, 298 (2008); *FAIR*, 547 U.S. at 62.

Plaintiffs instead argue that distributing food and drink is *itself* speech. But conduct is not speech unless it is "inherently expressive." *FAIR*, 547 U.S. at 66. While the conduct need not express a narrow, succinctly articulable message, it still must express *a message*. *See Bar-Navon v. Brevard Cty. Sch. Bd.*, 290 F. App'x 273, 276 (11th Cir. 2008) (message must be "'identifiable'"). There must be a "great likelihood" that "the particular conduct" conveys a message to the average viewer. *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1347 (11th Cir. 2021); *accord FAIR*, 547 U.S. at 66 (message must be "'overwhelmingly apparent'"). This test is not supposed to be a low bar: An "expansive" definition of expressive conduct would allow a "limitless variety of conduct" to be labeled speech, since it's "possible to find some kernel of expression in almost every activity a person undertakes." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991) (cleaned up); *see Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 n.5 (1984) (rejecting the notion that "all conduct is presumptively expressive" and placing the burden on the plaintiff to prove that conduct is speech). An individual might "express his disapproval of the Internal Revenue Service by refusing to pay his income taxes," but that fact does not subject the entire tax code to First Amendment scrutiny. *FAIR*, 547 U.S. at 66.

Distributing food and drink near a polling place is not inherently expressive. Confirming the point, even the plaintiffs in these various cases cannot agree on what message they are sending: Plaintiffs think it's support for "the

democratic process"; others think it's "every vote matters"; others think it's "thank you"; and still others think it's a statement about human "dignity." Opp. 20; *CBC*-Opp. 4; *NAACP*-Opp. 23 n.9; AME-Opp. 23. Giving someone food or water could also mean "You look thirsty/hungry," "It's hot/cold outside," "We'd like to get rid of these extras," "Come visit our church sometime," "Would you like to buy some water?", "Try a free sample of this brand," or "Vote for my candidate." A recipient cannot tell which of these messages is being expressed without additional speech—a telltale sign that the conduct is "not … inherently expressive." *FAIR*, 547 U.S. at 66. Recipients "would understand the distribution … as merely a means to carry out an otherwise-conveyed message"—"something like 'vote!' or 'voting is important.'" *Lichtenstein*, 489 F. Supp. 3d at 767. But without that extra speech, a recipient could only "speculate" what "discernible message" is being expressed by the "mere act" of distributing food and drink. *Id.* at 767-68.

Rather than expression, distributing food and drink accomplishes a utilitarian goal: it gives thirsty people drink and hungry people food. As Plaintiffs admit in their amended complaint, they do this so that voters will "stay in line and vote"; people who are hungry or thirsty, the logic goes, might leave the line early. *E.g.*, Am. Compl. (Doc. 39) ¶¶20-25, 53. While Plaintiffs believe that their conduct facilitates voting, "facilitating voting" is "not … communicating a message." *Feldman v. Ariz. Sec'y of State's Off.*, 840 F.3d 1057, 1084 (9th Cir. 2016). That's true even if Plaintiffs' conduct is "the product of deeply held personal belief," has "social consequences," and "discloses" their approval of voting

(or their disapproval of lines). *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126-27 (2011). Giving each voter a $100 bill also facilitates voting and discloses approval of the franchise (probably better than food and drink); yet Plaintiffs deny that doling out cash is inherently expressive. *See* Opp. 23, 25.

In fact, courts have held that far more direct methods of facilitating voting are not expressive conduct. Collecting and returning absentee ballots is not speech. *See Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018). Neither is collecting and returning voter-registration applications. *See Voting for Am.*, 732 F.3d at 391 & n.4. Plaintiffs do not contend that these cases are wrongly decided. *See* Opp. 21. But the groups in those cases also argued that their actions "convey a message of support for voting, voters, and the democratic process." Opp. 20; *see, e.g.*, *Knox*, 907 F.3d at 1181; *Feldman*, 840 F.3d at 1083; *Lichtenstein*, 489 F. Supp. 3d at 767. Plaintiffs cannot explain why providing food and water to people waiting in line communicates this message but literally helping people vote does not.

While Plaintiffs rely heavily on the Eleventh Circuit's decision in *Food Not Bombs*, that decision cuts strongly against them. Agreeing with the Ninth Circuit, the Eleventh Circuit explained that the expressive nature of "'food distribution'" can only be "'decided in an as-applied challenge.'" *Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 901 F.3d 1235, 1241 (11th Cir. 2018) (quoting *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006)). That's because, as the Ninth Circuit explained, food distribution is *not* "on its face an expressive activity." *Santa Monica Food*

Not Bombs, 450 F.3d at 1032; *accord Ft. Lauderdale Food Not Bombs*, 901 F.3d at 1242 ("simply eating together in the park" is not expressive); *id.* at 1243 ("a picnic" is not expressive). The Eleventh Circuit concluded that certain "food sharing events" were expressive only after considering "five contextual factors." *Ft. Lauderdale Food Not Bombs*, 901 F.3d at 1242; *Burns*, 999 F.3d at 1343 (discussing *Ft. Lauderdale Food Not Bombs*); *accord Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2019 WL 10060265, at *7 (S.D. Fla. Aug. 16) (explaining that "the Eleventh Circuit … did not hold that food sharing generally is expressive conduct" and that, "[b]y itself, food sharing … is not an inherently expressive act").

The contextual factors in *Food Not Bombs* illustrate why Plaintiffs' conduct is not expressive. *See Burns*, 999 F.3d at 1343-47 (deeming other conduct not expressive because the factors in *Ft. Lauderdale Food Not Bombs* were mostly absent). Most obviously, Plaintiffs are not engaged in the *sharing* of food or drink. *Cf.* Opp. 21. They do not break bread with voters, or "invite all who are present" to "share [a] meal at the same time." *Ft. Lauderdale Food Not Bombs*, 901 F.3d at 1242. Their unilateral distributions bear no resemblance to the "history" of "sharing meals with others" that "dates back millennia." *Id.* at 1243. Nor do Plaintiffs allege that they "distribute literature" with their food and drink, or that they even *identify* themselves through tables, banners, badges, logos, or anything else. *Burns*, 999 F.3d at 1344. As a captive audience, voters standing in line are a tempting target for many groups—campaigners, businesses, proselytizers, activists, and more. Without more information,

voters have no idea why someone is offering them food or drink. Unlike public parks, polling places are not hubs of First Amendment activity; and unlike the homeless, voters are not an identifiable group with a well-known need for free food and drink. *Cf. Ft. Lauderdale Food Not Bombs*, 901 F.3d at 1242-43.

In sum, SB 202 regulates only the act of giving voters gifts. Even as applied to Plaintiffs, the mere act of distributing food and drink does not communicate a message that would be "'overwhelmingly apparent'" to voters without additional explanation. *FAIR*, 547 U.S. at 66. The gift-giving ban thus does not implicate the First Amendment at all (and Plaintiffs wisely do not argue that the ban fails rational-basis review).

B. Even if the gift-giving ban regulated speech, it would satisfy First Amendment scrutiny.

Even if distributing food and drink were speech, Plaintiffs do not explain how they get to "strict scrutiny." Opp. 22. Best-case scenario, Plaintiffs admit, is that the gift-giving ban prohibits expressive "*conduct* in a traditional public forum." Opp. 21 (emphasis added). But when a regulation of expressive conduct is content neutral, it "need only satisfy the 'less stringent" standard from *O'Brien*." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality op.). Namely, it need only "'promote[] a substantial government interest that would be achieved less effectively absent the regulation.'" *FAIR*, 547 U.S. at 67.

The gift-giving ban readily satisfies *O'Brien*. Preventing intimidation and undue influence are important state interests that would be achieved less effectively without a prophylactic ban. *See* Mot. 19. Plaintiffs' "proposed alternative methods" of achieving the State's goals "are beside the point" under the

O'Brien standard. *FAIR*, 547 U.S. at 67; *accord Clark*, 468 U.S. at 299. That's especially true because Plaintiffs remain free to *explicitly* say whatever messages they believe distributing food and drink *implicitly* communicates. *See Ft. Lauderdale Food Not Bombs*, 2019 WL 10060265, at *9.

The gift-giving ban is not "content-based." Opp. 22. For starters, the law "merely restrict[s] a general type of conduct that is not inherently expressive." *Ft. Lauderdale Food Not Bombs*, 2019 WL 10060265, at *7. The law prohibits "the giving of *any* money or gifts" near a polling place. O.C.G.A. §21-2-414(a) (emphasis added). Even if that general ban incidentally reached expressive conduct in some instances, it is "content neutral" because it is "not directed at the contextual factors that make food [distribution] expressive." *Ft. Lauderdale Food Not Bombs*, 2019 WL 10060265, at *7; *accord City of Erie*, 529 U.S. at 290. The ban on meal sharing at issue in *Food Not Bombs* was ultimately upheld, after all. *See* 2019 WL 10060265, at *6-10.

If the gift-giving ban regulates speech at all, then it is a "time, place, or manner" regulation. Food and drink can be distributed, just not at a certain place (near polling places) at a certain time (during voting); and whatever message the distribution communicates can still be uttered, just not in a certain manner (via food and drink). *See Clark*, 468 U.S. at 294-95. Time, place, or manner regulations are quintessential content-neutral laws. *See McCullen v. Coakley*, 573 U.S. 464, 479 (2014).

Even setting all that aside, Plaintiffs are mistaken that the gift-giving ban applies in "a traditional public forum." Opp. 23. The question is not what

the regulated areas are in the abstract, but what they are "on Election Day." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018). Courts are free to conclude that, on election day, "the parking lots and walkways leading to the polling places are nonpublic forums." *United Food & Com. Workers Loc. 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004). As the Supreme Court explained in *Minnesota Voters*, its decision in *Burson* did not resolve "whether the public sidewalks and streets *surrounding* a polling place qualify as a non-public forum." *Id.* Justice Scalia, who provided the fifth vote in *Burson*, persuasively documented the long tradition in this country of treating those areas as nonpublic forums. *See Burson v. Freeman*, 504 U.S. 191, 214-16 (1992) (Scalia, J., concurring in the judgment). A majority of the Court cited his opinion approvingly in *Minnesota Voters*, stressing that States have long restricted speech "in *and around* polling places on Election Day." 138 S. Ct. at 1883 (emphasis added). This Court can and should hold that these areas are nonpublic forums on election day.

The analysis does not change for the 25-foot zone around voters standing in line. *See* O.C.G.A. §21-2-414(a)(3). When that zone is not already inside the polling place or the 150-foot buffer zone, *see* §21-2-414(a)(1)-(2), it will almost always be in an area that is designated by, and directly connected to, the polling place. Nothing prevents the State from creating buffer zones that are tied to people, rather than places. *See, e.g.*, *Hill*, 530 U.S. at 728-29 (upholding an 8-foot buffer zone around people entering medical facilities). Georgia's zones are appropriate given "the special governmental interests surrounding …

polling places," the need for a "bright-line prophylactic rule" in this context, and the fact that the ban imposes no limit on Plaintiffs' ability to "communicate [their] message through speech." *Id.*; *see* Mot. 19. "Special problems" might arise in unusual circumstances, but those cases should "be worked out as the statute is applied"—not in a preenforcement suit based on Plaintiffs' speculative fears. *Hill*, 530 U.S. at 730.

Assuming the gift-giving ban regulates a nonpublic forum, Plaintiffs do not argue that the law is viewpoint-based, and they make little effort to argue that the law is "unreasonable." The Supreme Court's decision in *Minnesota Voters* doesn't help them. *Cf.* Opp. 23-24. The Court found Minnesota's ban on "political" apparel unreasonable because it was not "capable of reasoned application." 138 S. Ct. at 1892. Georgia's gift-giving ban does not have that problem: Its terms are plain and easy to apply, and Plaintiffs do not argue that they aren't. The Court's decision in *Minnesota Voters*, which "d[id] not pass on the constitutionality of laws that [we]re not before [it]," in no way suggests that SB 202 is unreasonable. *Id.* at 1891.

CONCLUSION

This Court should dismiss Plaintiffs' amended complaint with prejudice.

Respectfully submitted,

Dated: August 9, 2021

/s/ *Tyler R. Green*

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with Local Rule 5.1(B) because it uses 13-point Century Schoolbook.

/s/ *Tyler R. Green*

CERTIFICATE OF SERVICE

On August 9, 2021August 9, 2021, I e-filed this document on ECF, which will serve everyone requiring service.

/s/ *Tyler R. Green*