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

VOTEAMERICA; 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; REBECCA SULLIVAN, in her official capacity as Vice Chair of the State Election Board; and DAVID WORLEY, MATTHEW MASHBURN, and ANH LE, in their official capacities as members of the STATE ELECTION BOARD, Defendants.	Case No. 1:21-cv-01390-JPB Judge J.P. Boulee

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

This lawsuit challenges three specific provisions of SB 202 that unconstitutionally infringe on Plaintiffs' First Amendment rights of speech and association. Defendants have moved to dismiss the complaint on two grounds: lack of standing and failure to state a claim (ECF No. 40-1) ("Br."). Based on the factual allegations of the Complaint, the motion should be denied in its entirety.

FACTUAL BACKGROUND

Plaintiffs VoteAmerica, Voter Participation Center ("VPC"), and Center for Voter Information ("CVI") are nonprofit, nonpartisan organizations that engage in political expression by encouraging eligible Georgians to vote absentee and providing them with resources to do so. *See* Compl. (ECF No. 1) ¶¶ 10, 17, 26–27. The Georgia General Assembly enacted SB 202 in response to increased voter turnout in the 2020 and 2021 Georgia elections heralded as "secure, reliable, and efficient." *Id.* ¶¶ 4, 56. SB 202 radically transforms Georgia's elections to increase burdens on voters and others engaged in the political process; it was enacted not to improve election administration but to suppress turnout. *Id.* ¶¶ 7, 56–61.

Plaintiffs challenge three provisions of SB 202 dealing with the distribution of absentee ballot applications: (1) a prohibition on personalizing absentee ballot applications to registered voters ("Prefilling Prohibition"), *id.* ¶¶ 8, 74–85; (2) a misleading disclaimer that Plaintiffs are required to attach to any absentee ballot application that they distribute ("Disclaimer Provision"), *id.* ¶¶ 8, 64–73; and (3) a

$100 penalty for every application sent to an individual who has already requested, received, or cast an absentee ballot and a corresponding obligation to monitor certain lists to ensure that such duplicate applications are not distributed ("Mailing List Restriction") (together, "Ballot Application Restrictions"), *id.* ¶¶ 8, 86–103. Plaintiffs are direct targets of the Ballot Application Restrictions, which restrict their ability to communicate with and persuade Georgians to vote and will effectively shut down their absentee ballot programs in Georgia. *Id.* ¶¶ 9, 25, 39–40, 42–43, 63.

Prefilling Prohibition. SB 202 prohibits Plaintiffs from sending any absentee ballot applications that are "prefilled" with the elector's required information. *Id.* ¶ 74. This prohibition applies broadly, regardless of whether the voter solicits the application and affirmatively fills out the application online. *Id.* ¶ 76. The Prefilling Prohibition infringes on Plaintiffs' speech and associational rights by directly restricting the content of Plaintiffs' communications; interfering with Plaintiffs' models for voter engagement, assistance, and association; and reducing the efficacy of Plaintiffs' speech. *Id.* ¶ 75.

For example, VoteAmerica's key resource for civic engagement in Georgia is an interactive web tool allowing electors to provide their personal information to prepare a ballot application with their provided information (which is later sent to them) and to sign up for further voter engagement communications from

VoteAmerica. *Id.* ¶¶ 18–20. More than 48,000 Georgians interacted with this web tool during Georgia's 2020-21 elections, and nearly 150,000 presently receive VoteAmerica's educational emails and reminder text messages. *Id.* ¶ 21. SB 202 eliminates one of VoteAmerica's critical tools for association and political speech by prohibiting prefilled applications. *Id.* ¶ 81. VPC and CVI utilize direct mail programs to send mass mailers to their target demographics with resources for eligible voters to submit voter registration applications and absentee ballot applications. *Id.* ¶ 28. The mailers include ballot applications prefilled with information from the voter's registration records. *Id.* ¶ 32. Both VPC and CVI include a cover letter with every absentee ballot application that explains the organization's mission, contains instructions for submitting the application, and communicates a message persuading the voter to request and cast an absentee ballot. *Id.* ¶ 31. In 2020, VPC and CVI sent over nine million absentee ballot applications in Georgia, over half a million of which eligible voters then submitted to receive their ballot. *Id.* ¶ 32. Based on VPC and CVI's experience and research, voters are more likely to submit an application that is already partially prefilled with their information. *Id.* ¶ 41. If VPC and CVI are required to send blank applications, the effectiveness of their programs will be severely curtailed. *Id.* ¶¶ 41, 82.

Disclaimer Provision. If Plaintiffs "send" absentee ballot applications to

voters, SB 202 requires them to use the official Secretary of State ("SOS") absentee ballot application form *but also* include the following misleading disclaimer on the face of that form:

> This is NOT an official government publication and was NOT provided to you by any governmental entity and this is NOT a ballot. It is being distributed by [insert name and address of person, organization, or other entity distributing such document or material].

Id. ¶ 64. This compelled speech is inherently misleading and will be confusing to voters. *Id.* ¶ 66. SB 202 requires use of an official government form that includes the official SOS seal and is titled "Application for *Official* Absentee Ballot." *Id.*; *see also id.* at Ex. 1. Yet it also requires a "prominent" disclaimer on the same form stating that it is "NOT an official government publication." *Id.* ¶ 66. This disclaimer appears to have been designed to, and will, dissuade voters from using absentee ballot application forms distributed by Plaintiffs by leading voters to believe the form is illegitimate—thereby undermining Plaintiffs' speech. *Id.* ¶ 67.[1]

Mailing List Restriction. Finally, SB 202 restricts *to whom* Plaintiffs can send absentee ballot applications by prohibiting Plaintiffs from sending applications to individuals who have "already requested, received, or voted an absentee ballot"—

[1] In addition, SB 202 requires the disclaimer to be printed in "sufficient" font size and with "reasonable" color contrast but does not explain these ambiguous requirements—leaving Plaintiffs to guess whether their disclaimer satisfies the law, thereby subjecting them to the risk of sanctions or other penalties. *Id.* ¶ 65.

even if the individual affirmatively *solicits* the new application. *Id.* ¶ 87, 89. Failure to comply with this restriction can result in a fine of up to $100 "per duplicate application." *Id.* ¶ 87. SB 202 requires Plaintiffs to compare their distribution lists with "the most recent information available" regarding which electors have requested, received, or voted an absentee ballot and remove such electors. *Id.* ¶ 90.

While there is a safe harbor for entities that rely on information made available by the SOS within five business days before the applications are mailed, it does nothing to relieve the burden on Plaintiffs. *Id.* ¶ 90. Preparing a large volume mailing—how VPC and CVI communicate—takes at least 20 days from when a list is provided to the printing vendor until the mailing is sent. *Id.* ¶¶ 37, 95. It is therefore logistically impossible for VPC and CVI to both comply with SB 202's five-day safe-harbor provision and submit their orders to the printer on time. *Id.* ¶¶ 40, 97. And manually checking millions of already-paid-for mailers against the State's list after printing would be cost-prohibitive. *Id.* ¶ 98. As for VoteAmerica, because electors themselves solicit the applications, VoteAmerica would have to develop an algorithm to cross-reference submitted information against the list provided by the SOS and reject requests for applications accordingly. *Id.* ¶¶ 23, 100. The risk of accidentally sending duplicative ballots is prohibitively expensive based on the scale of the Plaintiffs' operations and the drastically increased cost per mailer—a potential

increase per application of 30,000 percent for VoteAmerica and 25,000 percent for VPC/CVI. *Id.* ¶¶ 24–25, 42–43.

LEGAL STANDARD

A complaint is sufficiently pled where it includes "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations and citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable[.]" *Id.* The court must take the alleged facts and "draw all reasonable inferences in the plaintiff's favor." *PBT Real Estate, LLC v. Town of Palm Beach*, 988 F.3d 1274, 1286 (11th Cir. 2021).

A motion to dismiss for lack of standing under Rule 12(b)(1) can be either a facial or factual challenge. *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). A challenge is facial when it does not rely on evidence extrinsic to the complaint. *Id.* at 1233. When the challenge is facial, "the plaintiff has safeguards similar to those retained [on] a Rule 12(b)(6) motion" and "the court must consider the allegations in the plaintiff's complaint as true." *Id.* (internal quotations and citations omitted).

When considering a motion under Rule 12(b)(6), "[a] court is generally limited to reviewing what is within the four corners of the complaint." *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1329 n.7 (11th Cir. 2006). Conclusory arguments

that ignore the allegations in the complaint do not support dismissal.[2] *See Deeb v. Saati*, No. 1:17-cv-21204-KMM, 2017 WL 8890872, at *1 (S.D. Fla. Nov. 8, 2017).

ARGUMENT

I. Plaintiffs Have Standing to Challenge the Ballot Application Restrictions in SB 202.

Defendants' argument that Plaintiffs lack an injury-in-fact[3] ignores the allegations in the Complaint and conflates standing and merits arguments. Plaintiffs are the "object of the [government] action . . . at issue," leaving "little question that [it] has caused [them] injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992). Plaintiffs sufficiently allege standing under several independent theories: the credible threat of SB 202's enforcement chills their speech; they must divert substantial resources to comply with SB 202's onerous requirements; and SB 202 impairs their speech by impairing their programs.

A. Plaintiffs Are Directly Subject to SB 202's Restrictions.

Plaintiffs establish injury-in-fact because they are the subject of SB 202's restrictions on their speech and association. Plaintiffs "can bring a pre-enforcement suit when [they] 'ha[ve] alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there

[2] For example, the Defendants' "factual" assertion regarding Georgia's voting laws are based on a website outside the pleadings. Br. at 1.

[3] Defendants challenge only injury-in-fact and do not contest that Plaintiffs have alleged causation and redressability. *See* Br. at 3.

exists a credible threat of prosecution.'" *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017) (en banc) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 166 (2014)). When a plaintiff challenging a regulation is the subject of its enforcement, "there is ordinarily little question that the [government's] action or inaction *has caused him injury*[.]" *Lujan*, 504 U.S. at 561–62 (emphasis added).

Plaintiffs allege that they have communicated with Georgians about absentee voting and mailed them personalized ballot applications, a protected First Amendment activity they intend to continue but for SB 202's Ballot Application Restrictions. Compl. ¶¶ 24, 42. Thus, threatened enforcement of SB 202 constitutes a First Amendment injury—period. *See Driehaus*, 573 U.S. at 159; *Wollschlaeger*, 848 F.3d at 1304. That any prosecution or enforcement would not occur until the effective date of SB 202 does not diminish the credible threat that Plaintiffs face. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988). The State has not disavowed its intention to enforce the statute, and "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Wollschlaeger*, 848 F.3d at 1304 (applying *Driehaus*, 573 U.S. at 166). Indeed, the injury of SB 202's threat of enforcement is "self-censorship; a harm that can be realized even without an actual prosecution." *Am. Booksellers*, 484 U.S. at 393. Plaintiffs sufficiently plead injury because SB 202 directly targets their speech, and

they face a credible threat of enforcement that chills their speech.[4]

For example, Plaintiffs suffer injury because the Mailing List Restrictions prevent the mailing of *any* ballot applications without risking substantial fines. Defendants' assertion that this risk is "speculative" belies the allegations in the Complaint, which must be taken as true.[5] Plaintiffs estimate how much each $100 penalty would increase their cost per mailer. Compl. ¶¶ 24, 42. Plaintiffs also allege that SB 202's five-day safe harbor provision would not prevent liability for inadvertent duplications, *id*. ¶¶ 92–93, 158, and does nothing to relieve Plaintiffs' injury as it takes weeks for them to submit, print, and send their mailers. *Id.* ¶¶ 37, 39–40, 95–99. Because of the threat of enforcement, Plaintiffs may have no choice but to cease their operations in Georgia. *Id*. ¶ 9.

B. SB 202 Requires Plaintiffs to Divert Resources.

Defendants incorrectly assert that Plaintiffs do not sufficiently plead diversion of resources, but Plaintiffs clearly demonstrate "what activities, if any, might be impaired by the . . . decision to allocate additional resources" because of SB 202.

[4] Defendants do not dispute that Plaintiffs have standing based on their substantial overbreadth claims. Nor could they because that doctrine "allows [Plaintiffs] to mount a facial challenge to provisions of the law at issue]" that directly harm them. *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273 (11th Cir. 2006).

[5] Because Defendants state no extrinsic evidence to contest standing, theirs is a facial challenge treated like a motion under Rule 12(b)(6). *See Stalley*, 524 F.3d at 1233.

Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1250 (11th Cir. 2020).

The Complaint alleges that VoteAmerica will need to divert resources away from existing programs towards designing an application that complies with the Disclaimer Provision. Compl. ¶ 20, 22. VoteAmerica would also have to siphon funds from its limited programmatic budget to cover the costs of developing an algorithm to ensure that its platform complies with the Mailing List Restriction. *Id.* ¶ 23. Compliance with SB 202's restrictions will be so costly that VoteAmerica will have to drain resources from almost all its Georgia programs. *Id.* ¶ 25.

VPC and CVI also allege that continuing to operate an absentee ballot application program in compliance with SB 202 would divert staff and money from other activities, impairing communications with Georgia voters and implementation of their program. Compl. ¶¶ 9, 39–43, 96–98. For example, SB 202 will force VPC and CVI to manually check millions of already printed absentee ballot applications against the State's absentee list before mailing. *Id.* ¶¶ 40, 95–99. The cost of compliance would prevent VPC and CVI from communicating the persuasive cover letters currently included in every mailer that encourages voting and explains their organizations. *Id.* ¶¶ 37–43, 98. In sum, *all* Plaintiffs suffer an injury-in-fact because they will be forced to divert scarce resources from specific programs to counteract SB 202, reducing the scope of their communications and derailing their missions.

C. SB 202 Undermines Plaintiffs' Ability to Speak with Voters.

Plaintiffs also sufficiently allege that SB 202 will decrease the efficacy of their communications. Compl. ¶¶ 6, 41. Muting Plaintiffs' messaging directly impairs their speech. *See Meyer v. Grant*, 486 U.S. 414, 420 (1988); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999).

The Complaint alleges that the Prefilling Prohibition and Mailing List Restriction will significantly mute Plaintiffs' political speech and communications with voters because—based on experience and internal research—their communications regarding voter participation are more effective when the applications are prefilled with voters' personalized information and sent in successive waves. Compl. ¶¶ 31, 41–42. Likewise, the Disclaimer Provision will mute Plaintiffs speech by forcing them to communicate an inaccurate message that undermines the integrity of their communications. *Id.* ¶ 67. Moreover, Defendants' suggestion that the First Amendment injury is "marginal" is both wrong and irrelevant. *See Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987) ("There is no minimum quantitative limit required to show injury").

II. Plaintiffs' Challenges to SB 202 State Valid Claims for Relief.

A. SB 202 Violates the First Amendment.

While SB 202 fails under *any* standard, the correct level of review is strict scrutiny because the Ballot Application Restrictions are content-based and infringe

on core political speech. *Id.* ¶¶ 111–21, 133. They abridge Plaintiffs' free speech and associational rights and compel Plaintiffs to communicate the State's speech with no substantial justification. *Id.* ¶¶ 104–21.

1. *SB 202 Infringes Plaintiffs' Freedom of Speech*

First, Plaintiffs allege that all three of the challenged Ballot Application Restrictions are content-based limitations on speech. Content-based restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (internal citation omitted). A law is content-based if it "applies to particular speech because of the topic discussed," or if it defines the "category of covered documents . . . by their content." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). The challenged Ballot Application Restrictions apply to Plaintiffs only because of the topic they discuss and the content of the covered documents—namely, applications for absentee ballots. *See* Compl. ¶¶ 75, 83, 116–17. Each Ballot Application Restriction separately restricts how and to whom Plaintiffs can communicate about absentee ballot applications. Such restrictions are subject to strict scrutiny.

Second, the *Meyer-Buckley* exacting scrutiny framework applies because the Ballot Application Restrictions abridge Plaintiffs' core political speech by "diminish[ing] the amount of speech by making it more difficult or expensive to

speak." *Bailey v. Callaghan*, 715 F.3d 956, 969 (6th Cir. 2013) (citing *Meyer*, 486 U.S. at 424). Restrictions curtail political speech rights when they (1) "reduc[e] the total quantum of speech on a public issue" by limiting "the number of voices who will convey [the speakers'] message" and "the size of the audience they can reach," *Meyer*, 486 U.S. at 422–23; or (2) restrict the speaker's "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing," *id.* at 424. Such restrictions are subject to exacting (or strict) scrutiny and must be narrowly tailored to further a compelling government interest. *Id.* at 428; *Buckley*, 525 U.S. at 202; *see also Tenn. State Conference of the NAACP v. Hargett*, 420 F. Supp. 3d 683, 701 (M.D. Tenn. 2019) (applying strict scrutiny).

Plaintiffs' direct communications to Georgia voters—including mailers, texts, and emails—constitute core political speech because they encourage Georgians to engage in the political process by voting absentee and provide them with the necessary information and resources to do so. Compl. ¶¶ 20–21, 108–09. These communications advocate a "matter of societal concern that Plaintiffs have a right to discuss publicly without risking sanctions or other penalties." *Id.* ¶ 109 (citing *Meyer,* 486 U.S. at 421). "[C]ommunication of information" to voters is the type of "interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 422 & n.5 (internal citation

omitted). Indeed, because the decision to vote "implicates political thought and expression," *Buckley*, 525 U.S. at 195–96, Plaintiffs' speech encouraging absentee voting goes to the heart of the First Amendment's protections and warrants strict scrutiny review. *See, e.g.*, *Hargett*, 420 F. Supp. 3d at 699.

Plaintiffs sufficiently plead that the Prefilling Prohibition curtails Plaintiffs' political speech with Georgians. VoteAmerica only sends prefilled applications to voters who solicit such applications and agree to receive further persuasive communications about voting. Compl. ¶ 19. VPC and CVI send prefilled applications to eligible voters and include persuasive messages, resources, and information to help those voters. *Id.* ¶ 28. The prefilled applications are the most effective method of communicating with Plaintiffs' audiences. *Id.* ¶ 41; *accord* *Meyer*, 486 U.S. at 424. Contrary to Defendants' assertions, the minimal exception allowing relatives to assist voters with absentee ballot applications does not relieve the abridgment of *Plaintiffs'* political speech because the law still curtails their First Amendment activity. As Plaintiffs allege, the Prefilling Prohibition would shutter Plaintiffs' core political speech and cannot satisfy strict scrutiny. *See* Compl. ¶¶ 24, 42, 111, 117.

The Mailing List Restriction also curtails core political speech. If Plaintiffs inadvertently mail a duplicate application, they incur a $100 fine. *Id.* ¶¶ 24, 42. These

communications—including absentee ballot applications, instructions for submitting the application, and a cover letter identifying Plaintiffs and their missions and urging the recipient to vote absentee—are core political speech, and fining Plaintiffs for communicating that speech is a direct and improper ban. *Id.* ¶ 113. Among other deficiencies, it imposes a fine on every duplicate application despite the prohibitive cost to Plaintiffs or whether it is sent at the voter's request. *See id.* ¶ 114.

As Plaintiffs allege, the magnitude of the fines would automatically increase Plaintiffs' costs per mailer from pennies to hundreds of dollars, an increase of about 30,000 and 25,000 percent for VoteAmerica and VPC/CVI, respectively. *Id*. ¶¶ 24, 42. The expense of developing new technology and processes to avoid the penalties is also significant; VPC and CVI would need to devote staff to hand check each mailer after they are already printed, while VoteAmerica would need to devote more staff hours to develop a new platform to check against the Secretary's list of voters before providing a voter with an application he or she solicited. *Id.* ¶¶ 23, 98.

Likewise, the Disclaimer Provision abridges Plaintiffs' political speech. It requires Plaintiffs to state on any absentee ballot application that it is not provided by the government, even though the application is the government-mandated form. Compl. ¶¶ 64–67. This requirement is misleading. By mandating that Plaintiffs both use the official government form *and* inaccurately state that it is not an official form,

the Disclaimer Provision gives the false impression that Plaintiffs' communications are illegitimate. *Id.* ¶¶ 66–68. This obscures Plaintiffs' message and reduces its credibility, resulting in voters not using Plaintiffs' mailers or needlessly questioning the veracity of their speech. *See id*. ¶ 111. It thus "reduc[es] the total quantum of speech on a public issue" by limiting "the number of voices who will convey [Plaintiffs'] message." *See Meyer*, 486 U.S. at 422–23.

To justify SB 202's ban and curtailment of political speech, Defendants recite generic interests in election administration that other courts have deemed adequate to justify different election laws under the *Anderson-Burdick* test. Br. at 7 (citing *Greater Birmingham Ministries v. Ala. Sec'y of State*, 992 F.3d 1299, 1319 (11th Cir. 2021); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008)). But merely reciting generic interests untied to the regulations at issue is insufficient to satisfy the First Amendment; "a State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (internal quotation and citations omitted).[6]

Moreover, Defendants' contention that Plaintiffs "have not disputed

[6] Even in the *Anderson-Burdick* context, which Defendants incorrectly seek to apply here, mere recitations of generally valid state interests are insufficient. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1322 (11th Cir. 2019).

Georgia's compelling interests in enacting SB 202's absentee ballot application provisions," Br. at 7, again ignores the Complaint.[7] Plaintiffs provide factual support to dispute any compelling interest, including statements from Georgia House Speaker David Ralston opposing providing every voter with an absentee ballot because it would "certainly drive up turnout." *Id.* ¶ 59. And Defendant Raffensperger acknowledged that "[a]t the end of the day many of these bills are reactionary to a three-month disinformation campaign that could have been prevented." *Id.* Moreover, Defendants have admitted that no problems with the administration or integrity of the 2020 election justify the abridgment of speech here. *Id.* ¶¶ 4, 85. At this stage, Plaintiffs' well-pleaded allegations must be taken as true.

Even if the State could cite a sufficiently compelling interest, the Ballot Application Restrictions are not narrowly tailored. Each contested provision is both over- and under-inclusive. *Id.* ¶¶ 118–20. The ban on prefilling applications, for example, would prevent VoteAmerica from providing prefilled applications even when the voters seek assistance and voluntarily share their information. *Id.* ¶¶ 19, 83–85. The Mailing List Restriction restricts even instances when the voter solicits

[7] "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," a basic First Amendment principle. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (internal citation omitted). Defendants cannot, particularly at the motion to dismiss stage, shift the burden to Plaintiffs of proving the governmental interests that Georgia could proffer.

a subsequent application, and the safe harbor component does not relieve the overbearing encumbrances on Plaintiffs' speech. *Id.* ¶¶ 88–89, 91–102. Finally, the Disclaimer Provision forces Plaintiffs to deliver incorrect statements to voters when the State could achieve its goals by less restrictive means—such as through a separate disclaimer statement not attached to the form. *Id.* ¶¶ 73, 140. Moreover, Georgia already satisfies any such interests by prohibiting fraudulent absentee ballot applications and requiring election officials to avoid errors in the system. *Id.* ¶ 84. SB 202 fails the exacting scrutiny required by *Meyer-Buckley*.

The *Anderson-Burdick* balancing test, which Defendants incorrectly invoke, applies to challenges to election laws "on the basis that the scheme violates the prohibition against undue burdens on the right to vote[.]" *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019). Here, the *Meyer-Buckley* standard applies because Plaintiffs challenge content-based restrictions that abridge third-party organizations' political speech under the First Amendment. *Meyer*, 468 U.S. at 422–24; *see also Buckley*, 525 U.S. at 207, 210–13 (Thomas, J., concurring) (delineating the applicable standards); *McIntyre*, 514 U.S. at 34 (same); *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000) (same).

Moreover, the *Anderson-Burdick* standard turns on the severity of the burden: "the more a challenged law burdens the right to vote, the stricter the scrutiny to

which we subject that law." *Lee*, 915 F.3d at 1319 (internal citation omitted). The Ballot Application Restrictions' burdens are severe because they abridge core political speech, *see Buckley*, 525 U.S. at 208 (Thomas, J., concurring), and because Plaintiffs plausibly allege that the contested provisions will force them to entirely shut down operations in Georgia, *see* Compl. ¶¶ 22–25, 39–43.[8] In sum, Plaintiffs sufficiently plead that SB 202 violates the First Amendment because the Ballot Application Restrictions are content-based, abridge Plaintiffs' core political speech, and impose severe burdens not narrowly tailored to any legitimate state interest.

2. *SB 202 Infringes on Plaintiffs Freedom of Association*

The Defendants wrongly claim that the Ballot Application Restrictions do not implicate Plaintiffs' associational rights because Plaintiffs do not associate to engage with voters on "commonly held views." Br. at 13. But associations need not gather "for the 'purpose' of disseminating a certain message" to merit First Amendment protection; they "must merely engage in expressive activity that could be impaired[.]" *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000).

Plaintiffs plead that SB 202's absentee ballot restrictions will prevent

[8] Moreover, the *Anderson-Burdick* burden and benefit calculation is a fact-intensive inquiry not typically susceptible to resolution on a motion to dismiss. *See Green Party of Georgia v. Georgia*, 551 F. App'x 982, 984 (11th Cir. 2014) (applying *Bergland v. Harris*, 767 F.2d 1551, 1553–55 (11th Cir. 1985)); *accord Soltysik v. Padilla*, 910 F.3d 438, 448–49 (9th Cir. 2018) ("*Anderson*/*Burdick*'s means-end fit framework" should not become "ordinary rational-basis review").

Plaintiffs from associating with Georgia voters by eliminating Plaintiffs' mailer programs—their primary methods of associating with Georgians to encourage them to vote in upcoming elections—and curtailing their online offerings. *See* Compl. ¶¶ 18–21, 126–29. Plaintiffs also associate with partner organizations that amplify their message with their web tools. *Id.* ¶ 19. Like the communication in *Boy Scouts*, the associational right is impaired here because Plaintiffs are actively engaged in that "expressive activity" with Georgia voters and partner organizations that "could be impaired" by SB 202's enforcement. 530 U.S. at 655.

SB 202 also prevents Plaintiffs from persuading voters to action, a plain abridgment of their association rights. The "[f]ree trade in ideas means free trade in the opportunity to persuade to action." *NAACP v. Button*, 371 U.S. 415, 437 (1963). Plaintiffs allege that the Ballot Application Restrictions prevent them from associating with Georgia voters to persuade them to vote by absentee ballot. Compl. ¶ 124–30. For example, VPC and CVI allege that the Prefilling Prohibition prevents their most effective method of persuading voters to participate in elections. *Id.* ¶ 41. VoteAmerica alleges that they obtain permission from voters to communicate about upcoming elections through the prefilled application program. *Id.* ¶ 19. Plaintiffs allege that these programs allow them to establish a relationship with Georgians for future association around civic engagement issues, but the Ballot Application

Restrictions impede them from doing so. *Id.* ¶ 127–28. Thus, like the invalid restriction in *NAACP v. Button*, SB 202 precludes Plaintiffs from associating with voters to persuade them to vote in upcoming elections. *See* 371 U.S. at 421, 434.

3. *SB 202 Unconstitutionally Compels Plaintiffs' Speech*

Defendants argue that the Disclaimer Provision is not compelled speech because it does not "alter the content of the Plaintiffs' speech." *See* Br. at 16. But the Disclaimer Provision is not content-neutral; it changes the content of the document by adding a false disclaimer. *See McIntyre*, 514 U.S. at 345. The First Amendment does not allow the State to force Plaintiffs to convey its message, much less one that is misleading and confusing to voters. *See* Compl. ¶¶ 136–38.

"A law that compels individuals to speak a particular message by following a government-drafted script . . . is a content-based regulation of speech and, therefore, presumptively unconstitutional." *Tenn. State Conference of the NAACP v. Hargett*, 441 F. Supp. 3d 609, 633 (M.D. Tenn. 2019) (citing *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*")); *contra Zauderer v. Off. of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (upholding commercial disclaimer disclosing nonpolitical, accurate information). SB 202 requires a disclosure that the absentee ballot application is not a government form—but it *is* a government form that Plaintiffs must use. *See* Compl. ¶¶ 64–70, 136–38. This compels Plaintiffs to provide misleading information that undermines

their message. *Id.* ¶¶ 136–38.

Because the disclaimer is incorrect, the Disclaimer Provision cannot achieve its goals—ostensibly to distinguish between private and government distributors. *Compare id*. ¶¶ 140–41 (outlining why the form fails to achieve any discernable goals) *with NIFLA*, 138 S. Ct at 2375; *see also Hargett*, 441 F. Supp. 3d at 633. The confusion arising from the Disclaimer Provision will foreseeably cause voters to discard the form under the mistaken assumption that it is invalid. Compl. ¶ 67. There is no legitimate interest in compelling this speech or in depressing absentee voter turnout, and the State can more narrowly serve any of its interest by making its own communications to Georgians. *Id.* ¶¶ 139–42.

B. SB 202 is Substantially Overbroad.

The Ballot Application Restrictions are substantially overbroad because their "broad sweep . . . result[s] in burdening innocent associations," *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), and risks "punishment of constitutionally protected conduct," *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

Defendants contend that Plaintiffs fail to state a claim of substantial overbreadth. Br. at 18–19. But Defendants' concessions establish the plausibility of Plaintiffs' allegations. First, Defendants do not dispute that the Disclaimer Provision applies to "any application for an absentee ballot sent to any elector by any person or entity," regardless of whether it is solicited. Compl. ¶¶ 69, 147. No other

disclaimer provision in the nation is this broad. *Id*. ¶ 148. Its very existence will cause Plaintiffs to "refrain from constitutionally protected speech." *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1303–04 (11th Cir. 2017).

Second, Defendants concede that the Prefilling Prohibition is problematic "where the absentee ballot application is solicited by the voter and the voter herself provides Plaintiffs with the required prefilled information," but claim that the number of people in this category is "highly speculative." Br. at 20. But this describes VoteAmerica's model precisely, which was used by more than 48,000 Georgia voters in 2020-21. Compl. ¶ 19, 21. Defendants ignore Plaintiffs' other allegations about the Prefilling Prohibition's substantial overbreadth, such as its ban on VoteAmerica sending a prefilled application and necessary information to disabled voters who request the application and assistance. *See id.* ¶¶ 76–77, 149.

Third, Defendants claim the overbreadth of the Mailing List Restriction is inconsequential by recycling their argument that Plaintiffs' precluded activities are not protected. Br. at 21. But again, Plaintiffs' communication with voters is core political speech. *See supra* Part II.A. Defendants then concede that there may be "over-inclusiveness" in the Mailing List Restriction. Br. at 22. Plaintiffs allege that the Mailing List Restriction over-inclusively prohibits sending subsequent applications to voters who solicit them for any number of valid reasons, including

voters who legitimately need a new application. *See* Compl. ¶¶ 88–89, 150–51. This restriction imposes a fine for "any [successive] message" for any reason, which "burdens substantially more speech than necessary to further the [State's] interests." *FF Cosmetics*, 866 F.3d at 1304. As such, Plaintiffs sufficiently plead overbreadth.

C. SB 202 is Unconstitutionally Vague.

The Ballot Application Restrictions are unconstitutionally vague. "When speech is involved, rigorous adherence to [specificity] requirements is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012) (internal citations omitted). All three provisions require Plaintiffs and others that wish to "send" absentee ballot applications to make disclaimers and refrain from certain speech. Compl. ¶¶ 64, 70, 78, 88, 156–58. Relying on dictionaries, Defendants contend that the word "send" is ostensibly unambiguous because it only means conveying by hard copy. Br. at 22. Defendants reach this purported single meaning by skipping over seven Merriam-Webster definitions and excising the full Cambridge Dictionary definition: "to cause something to go from one place to another, *especially by mail or email*" (emphasis on omission). In doing so, Defendants prove Plaintiffs' point: the word "send" could refer to *any* method of conveyance. Compl. ¶ 156. This vagueness compels Plaintiffs to guess whether the Ballot Application Restrictions apply beyond postal mail to other methods of conveying their speech. *Id*. The uncertainty fails to give reasonable

notice of what is prohibited and chills speech by leading reasonable readers to alter their conduct based on different conclusions. *Id*. ¶ 159. This is especially problematic because even inadvertent violations could result in sanctions, which are not mitigated by a cap on liability or a scienter requirement. *See City of Chicago v. Morales*, 527 U.S. 41, 42 (1999).

Defendants also contend that other aspects of the Disclaimer Provision and Mailing List Restriction are not vague, Br. at 23, again bypassing the Complaint. Among other allegations, Plaintiffs plead that SB 202 vaguely requires the disclaimer to be "of sufficient font size to be clearly readable by the recipient," with no other guidance about what font specifications meet the requirements. Compl. ¶¶ 65, 156; *see also Hargett*, 441 F. Supp. 3d at 629–31. These ambiguities invite arbitrary enforcement and violate Plaintiffs' First and Fourteenth Amendment rights because Plaintiffs must guess and self-censor to comply with the law. *Id.* ¶ 156–58.

CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss.

Respectfully submitted this 1st day of June, 2021.

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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 1, 2021.

/s/ Robert B. Remar
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