Multiple Documents

Part	Description
1	Main Document
2	Statement of Material Facts

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

VOTEAMERICA, *et al.*,

Plaintiffs,

v.

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

Defendants,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

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

STATE DEFENDANTS' REPLY
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In opposing the State Defendants' motion for summary judgment, Plaintiffs again ignore that this Court has already rejected nearly every argument they advance. True, a decision on a preliminary-injunction motion is not necessarily binding on the Court when the record has developed to show that a different result is appropriate. The complication for Plaintiffs, however, is their inability to identify *any* new evidence that requires a different result. Thus, there is still no evidence that two of the provisions Plaintiffs challenge—the Prefilling Prohibition and the Anti-Duplication Provision—affect Plaintiffs' speech. Rather, Plaintiffs remain free to communicate their pro-absentee voting message to as many Georgia voters as they wish. And, because of the State's well-demonstrated interests in minimizing voter confusion and ensuring efficient elections, these provisions satisfy any level of scrutiny.

Similarly, Plaintiffs have identified no evidence raising a genuine dispute about the fact that the Disclaimer Provision simply requires Plaintiffs to include an accurate disclaimer on any absentee-ballot application they send. And the record lacks any evidence to dispute that this provision supports the State's interests in minimizing voter confusion and ensuring efficient elections.

Plaintiffs' remaining claims are equally doomed. It remains undisputed that Plaintiffs send their mailings to strangers, which dooms their freedom-of-

association claims. Their reliance on far-fetched hypotheticals is similarly fatal to their overbreadth challenge. And Plaintiffs have conceded that summary judgment is appropriate on their vagueness claim. Pls.' Opp'n at 39 n.19 [Doc. 159].

Accordingly, the Court should enter summary judgment for the State Defendants on all of Plaintiffs' claims.

ARGUMENT

Each challenged provision survives any level of scrutiny. The Prefilling Prohibition and the Anti-Duplication Provision regulate conduct, not speech, and satisfy both rational-basis and *Anderson-Burdick* review. Also, while the Disclaimer Provision affects Plaintiffs' speech, it survives both *Anderson-Burdick* review and exacting scrutiny. The challenged provisions also do not unconstitutionally limit Plaintiffs' freedom of association, as the record shows they send their absentee-ballot applications only to strangers. Finally, Plaintiffs' overbreadth claims fail because the challenged provisions largely leave Plaintiffs' speech untouched, and Plaintiffs rely on pure speculation about potential overbroad applications.

I. The Prefilling Prohibition and the Anti-Duplication Provision Regulate Conduct, not Speech.

Plaintiffs begin by insisting that the Prefilling Prohibition and the Anti-

Duplication Provision burden "protected speech" and "expressive conduct." [Doc. 159 at 4]. But this Court has already rejected that argument, finding that neither provision "implicate[s] Plaintiffs' First Amendment rights." Order at 38, 44–45 [Doc. 131]. The same is true today: Sending or prefilling an absentee-ballot application is not core political speech, is not intertwined with Plaintiffs' cover letter, and is not expressive.

1. In a renewed attempt to disguise conduct as speech, Plaintiffs again turn to the Supreme Court's decisions in *Meyer v. Grant*, 486 U.S. 414, 421 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191–92 (1999), noting that the Supreme Court held that courts must allow the "unfettered interchange of ideas" and guard against "hindrances to political conversations." [Doc. 159 at 5]. While true, those statements are irrelevant, as the record shows that it is Plaintiffs' *cover letters* that communicate their pro-absentee voting message, not the applications themselves.[1] And, as this Court already held ([ECF No. 131] at 17–21), Plaintiffs may continue disseminating their ideas through the documents that contain their message—the cover

[1] Citing *Meyer,* 486 U.S. at 423–24, for example, Plaintiffs claim (at 23–24) that SB 202 limits their ability to advocate their cause in the way they consider most effective and diminishes the "total quantum of speech." These arguments fail for the same reasons listed above—sending pre-filled absentee-ballot applications is conduct, not speech.

letters. Sending the applications, however, is not part of that speech.[2]

Plaintiffs are equally misguided when they again say that sending an absentee-ballot application is protected because it is "[c]onveying information and personalizing [an] application[]." [Doc. 159 at 6]. But Plaintiffs' authority doesn't remotely support that proposition: *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), addressed a law that prohibited the sale of pharmacy records *if* those records would be used for marketing purposes. *Id.* at 557. And on that basis the Supreme Court held that the statute unlawfully targeted "speech with a particular content." *Id.* at 564. Moreover, *NetChoice, LLC v. Attorney General* addressed the right of internet companies to decide the information allowed on their websites. 34 F.4th 1196, 1203 (11th Cir. 2022) (subsequent history omitted). Unsurprisingly, Plaintiffs offer no explanation for why these cases with substantially different facts have any bearing on this case.[3]

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[2] Plaintiffs also suggest (at 11) that collecting and delivering completed voting materials is different from persuasion and distribution. But, as this Court has recognized, the challenged provisions regulate only *distribution*, which "do[es] not embody core political speech." [Doc. 131 at 20]. Plaintiffs can "engage in [persuasion] as often as—and in whatever form—that they desire." *Id.*

[3] Plaintiffs' reliance (at 6 n.2) on other out-of-circuit authority is equally misguided. Plaintiffs cite *Barker v. Hazeltine*, 3 F. Supp. 2d 1088 (D.S.D. 1998), and *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999), *aff'd* 531 U.S. 510 (2001), to suggest that ballots can have speech elements. But neither case says as much. Instead, they involved laws that forced candidates to endorse term

At the same time, Plaintiffs attempt to ignore the *relevant* Supreme Court authority. Although Plaintiffs relegate their response to a footnote (at 6 n.2), they cannot avoid the Supreme Court's decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), holding that groups lack the "right to use the ballot itself to send a particularized message" or as a "forum[] for political expression." *Id.* at 363. Just as ballots elect candidates, absentee-ballot applications apply for absentee ballots. Thus, Plaintiffs cannot avoid *Timmons*' holding, which confirms that Plaintiffs' activity is not core political speech.

2. Nor is there any merit in Plaintiffs' attempt to convert non-expressive conduct—sending applications—into expressive conduct by merely mentioning the applications in the cover letter. [Doc. 159 at 14]. It is difficult to conceive of a clearer example of what the Supreme Court in *Rumsfeld v. FAIR* meant when it held that a regulated party could not turn conduct "into 'speech' simply

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limits on pain of being identified on ballots as being against them. *Barker*, 3 F. Supp. 2d at 1092; *Gralike*, 191 F.3d at 915. The issue in these cases was the sanction for failing to adopt a state-mandated viewpoint. None of the content- and viewpoint-neutral provisions Plaintiffs challenge here is remotely comparable to the compelled viewpoints in *Gralike* and *Barker*. For the same reasons, *U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999), does not help Plaintiffs. There, the Tenth Circuit invalidated a rule prohibiting the use of customer data without the customer's permission in all but a narrow subset of cases. Here, the opposite is true—Plaintiffs can use voter information however they want, including to "target" voters, with only limited exceptions: they cannot prefill absentee-ballot applications or send duplicate applications.

by talking about it." 547 U.S. 47, 66 (2006).[4]

Plaintiffs also err (at 15–16) in invoking the principle that the First Amendment does not allow the government to restrict "some First Amendment activity simply because it leaves other … activity unimpaired." (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000)). That proposition has no bearing here, as the Prefilling Prohibition and the Anti-Duplication Provision do not restrict *any* First Amendment activity.

Nor do Plaintiffs gain anything by citing (at 13) the Supreme Court's decision in *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988), which addressed the "component parts of a single speech." As this Court explained already, the cover letter and the absentee-ballot applications "can exist and be sent without the other." [Doc. 131 at 21]. Thus, reliance on *Riley*'s "single speech" language adds nothing.[5]

Like the relevant authority, the facts also cut against Plaintiffs as

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[4] Contrary to Plaintiffs' argument (at 15), the fact that Intervenors also discussed their conduct in their mailers or that they addressed an absentee-ballot application in their expressive letters is irrelevant. For Intervenors, as for Plaintiffs, sending an unsolicited pre-filled application, an unsolicited application without a disclaimer, and sending an unsolicited application to a voter that has already requested a ballot are now violations of Georgia law.

[5] For this same reason, namely that the letter and application are severable, this Court (at 20–21) has already rejected Plaintiffs' reliance on *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

nothing in the record suggests that the cover letters and applications are intertwined. Rather, Plaintiffs point to a few documents that explain their goal of "convinc[ing] a selected voter that engaging in the electoral process through absentee voting is trustworthy and easy, using a calculated message and personalized resources." [Doc. 159 at 14]. But whatever Plaintiffs' *goal*, the applications are easily separable from the cover letters that accompany them. [Doc. 131 at 21]. And Plaintiffs offer no good reason why the Court was wrong to reject these arguments previously.

3. Finally, even apart from the cover letters, Plaintiffs suggest (at 9–13) that the applications themselves convey a message about the importance of absentee voting. Plaintiffs already advanced this argument, and the Court correctly rejected it.[6] [Doc. 131 at 25–26].

Plaintiffs now point (at 9) to over 663,500 Georgians' having submitted one of Plaintiffs' applications in 2020, suggesting that this shows that voters *must* have understood a message from Plaintiffs' sending applications. But Plaintiffs overlook a flaw in this argument—each of these voters received an application *and* Plaintiffs' personalized cover letter. And, as discussed, that

[6] Plaintiffs handpick (at 9) a few statements from SB 202's sponsor suggesting that sending an absentee ballot application is First Amendment activity, but this Court has already rightly rejected that argument. [Doc. 131 at 38, 44–45].

letter discussed the importance and ease of applying to vote absentee and urged the recipients of their mailers to do so. It is nothing but rank speculation to suggest that voters understood that message from the absentee-ballot application alone. And, of course, speculation will not do. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) ("Speculation does not create a *genuine* issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment.") (quotation marks omitted).

Thus, Plaintiffs fail to show that a voter receiving an absentee-ballot application alone would understand that mailing to be any kind of message, whether "a pro-absentee voting message" or otherwise. [Doc. 131 at 25]. As this Court found previously, the message that Plaintiffs intend to send "is not necessarily intrinsic to the act of sending prospective voters an application form." *Id.* Now, as before, Plaintiffs' need to include "explanatory speech" to send some sort of message remains "strong evidence" that the mailing of an absentee-ballot application is not "so inherently expressive" as to qualify for First Amendment protection. *Id.* at 23 (quoting *Rumsfeld*, 547 U.S. at 66).

4. For each of these reasons, Plaintiffs once again fail to meet their "obligation," as the Supreme Court requires, to "demonstrate that the First Amendment even applies" to their pre-filled absentee-ballot applications or their duplicate mailings. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S.

288, 293 n.5 (1984). Rather, as this Court correctly recognized, "the Prefilling and Anti-Duplication Provisions do not implicate Plaintiffs' First Amendment rights." [Doc. 131 at 38]. They merely regulate Plaintiffs' conduct.

II. The Prefilling Prohibition and the Anti-Duplication Provision Survive Both First Amendment and *Anderson-Burdick* Scrutiny.

Because the Prefilling Prohibition and Anti-Duplication Provision regulate conduct, not speech, they are subject only to rational basis review, which, as Plaintiffs implicitly recognize, they easily survive. State Defs.' Mem. of Law in Supp. of Mot. Summ. J. at 14–15 [Doc. 149-1]. Plaintiffs nonetheless insist that these provisions are subject to strict scrutiny.[7] But whatever standard this Court applies, be it rational-basis review, the *Anderson-Burdick* framework it applied previously, or strict scrutiny, the provisions survive.

1. As Plaintiffs concede, *Anderson-Burdick* scrutiny applies to laws that burden a constitutional right. *Compare* [Doc. 149-1 at 15 n.5] *with* [Doc. 159 at 28]. But Plaintiffs fail to mount much of any argument as to why the Prefilling Prohibition and the Anti-Duplication Provision fail *Anderson-Burdick* scrutiny. Rather, as the Court already held, Plaintiffs have not shown that the "magnitude of the alleged injury" was "severe." [Doc. 131 at 38].

[7] Because the Prefilling and Anti-Duplication Provisions only regulate conduct, *see* [Doc. 131 at 26], they are not content- or viewpoint-based.

Even after discovery, moreover, the record lacks any evidence suggesting that the Prefilling Prohibition or the Anti-Duplication Provision are unreasonable ways to achieve the State's goals. Rather, all evidence points the other way. Plaintiffs do not dispute that SB 202 allows them to send voters who have not yet requested a ballot an absentee-ballot application—an option they used at least once in 2022. Lopach Depo. 162:4–19 [Doc. 162]. Nor is there any dispute that Plaintiffs may communicate to Georgia voters as often as they wish through letters and other forms of communication. PI Hr'g Tr. 45:19–46:8 [Doc. 149-9] ("Day 2 Tr."). That the challenged provisions regulate Plaintiffs' conduct while leaving their avenues for speech open is reason enough for this Court to conclude, once again, that the burdens imposed by the Prefilling Prohibition and the Anti-Duplication Provision are not severe, and therefore satisfy *Anderson-Burdick* review.

2. Rather, Plaintiffs devote their argument (at 30–39) to again asking this Court to apply strict scrutiny. But even if that were appropriate, which it is not, the Prefilling Prohibition and the Anti-Duplication Provision survive.

In their opposition, Plaintiffs attempt to downplay the significance of the State's compelling interest in reducing voter confusion, suggesting (at 32) that the State only received a small number of "tips referenc[ing] purportedly incorrect voter information" and "tips … from former Georgia voters who report

receiving applications despite having moved out of state." But other than criticizing the number of reports received, Plaintiffs do not engage the fact that voters reported their complaints to the State. Rather, Plaintiffs attempt to sidestep this evidence by asking the Court to ignore the reports as hearsay. The law is not on Plaintiffs' side, as the Eleventh Circuit confirms: "[A]n out-of-court statement admitted to show its effect on the hearer is not hearsay," and, at the very least, these voter complaints are admissible for that reason. *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015).[8]

That is precisely why the State identified the many voter complaints—they show that individuals expressed confusion to the State, which caused the State to respond. *Kraft Gen. Foods, Inc. v. BC-USA, Inc.*, 840 F. Supp. 344, 347–48 (E.D. Pa. 1993) (admitting evidence of confusion under Rule 803(3)). Indeed, Plaintiffs do not dispute that State election officials were forced to take these calls and respond to these emails, which required a significant amount of time. Moreover, Plaintiffs ignore the evidence showing that, in 2020, voters cancelled 40,694 absentee-ballot applications that had been submitted.

[8] This Court can also consider voter concerns about potential fraud or confusion about whether they were receiving duplicate ballots, *see* Germany Decl. ¶ 42 [Doc. No. 113-2]; Day 2 Tr. 20:3–5, under the exceptions for hearsay for then-existing mental states under Rule 803(3).

[Doc. 149-1 at 6]. This further demonstrates that voters were confused about what they were submitting when they submitted absentee-ballot applications. Ultimately, whether any particular voter's prefilled application was incorrect or duplicative—or whether the voters were *actually* confused—is irrelevant. *See Morris Jewelers, Inc. v. Gen. Elec. Credit Corp.*, 714 F.2d 32, 33–34 (5th Cir. 1983); *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 252 & n.11 (3d Cir. 1999). What matters is that election officials had to field "so many calls," Mashburn Depo. 83:16–84:14 [Doc. 165], and respond to so many written complaints.

In any event, the dispute about the accuracy or admissibility of voter statements is misguided, as even Plaintiffs' witness conceded that they had previously sent absentee-ballot applications with incorrectly pre-filled information, Lopach Depo. 129:14–21, and that recipients complained and asked to no longer receive such mailings. PI Hr'g Tr. 84:13–24 [Doc. 149-6] ("Day 1 Tr."); Lopach Depo. 102:19–103:12, 153:15–154:5 [Doc. 162].[9] Thus, it is undisputed that organizations like Plaintiffs sent incorrect applications to

[9] Further, Plaintiffs' own exhibits submitted in opposition to summary judgment sufficiently establish that voters have complained about pre-filling errors and duplicate applications. *See* Pls.' Ex. 17.

Georgia voters and that those voters complained.[10]

Plaintiffs are wrong to assert (at 36–38) that the Prefilling Prohibition and the Anti-Duplication Provision are not narrowly tailored. Plaintiffs assert, for example, that the Prefilling Prohibition fails narrow tailoring just because any incorrect information on a prefilled absentee-ballot application comes from the voter file, which they admit (at 37–38) will "lead to occasional incorrect addresses." But that does not speak to tailoring at all. Whatever the source of the incorrect information, the State opted to prohibit the actions most closely related to the complaints received—incorrectly prefilled applications.

Plaintiffs are also wrong in alleging (at 36–37) that the Anti-Duplication Provision is not narrowly tailored because it still allows them to send duplicate mailings to voters that have not already applied. But this just confirms that the State targeted a narrow set of conduct, thereby ensuring that the provision is narrowly tailored. While the State could have prohibited all such mailings,

[10] Plaintiffs also err in arguing (at 33) that the State did not have any compelling interest in these provisions because they did not target fraud. But Plaintiffs ignore that the State was responding to voter concerns that Plaintiffs' practices could permit voter fraud. *See, e.g.*, Mashburn Depo. 85:10–18 [Doc. 165]. And, because of its effect on voter confidence, acting to prevent the perception of fraud is a compelling purpose. *See, e.g., Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020).

it instead targeted only the conduct that led to complaints.

Finally, Plaintiffs argue (at 38–39) that these provisions fail strict scrutiny because it would be less restrictive for the State simply to explain the matter to the public through a press release. Unsurprisingly, there is no evidence in the record to suggest that a simple press release would adequately respond to voter concerns or would even reach every voter confused by mailers from third parties and concerned about the possibility of fraud.

Accordingly, whatever standard the Court applies, the Prefilling Prohibition and Anti-Duplication Provision survive, because they were enacted to serve important government interests in promoting efficient elections and voter confidence, while also being tailored to further those interests.

III. The Disclaimer Provision Does Not Unconstitutionally Burden or Compel Plaintiffs' Speech.

As with the Prefilling Prohibition and the Anti-Duplication Provision, Plaintiffs identify no evidence showing that the Disclaimer Provision is unconstitutional. In fact, Plaintiffs admit that they "do not challenge the portion of the Disclaimer that requires [them] to disclose themselves (and not the government) as the sender." [Doc. 159 at 20]. Instead, they only challenge the part of the disclaimer that requires them to say that the absentee-ballot application they include with their mailer is not a government publication—a

statement that their own expert confirmed is "true." Day 1 Tr. 215:23–216:16.

Once again, Plaintiffs mostly rely (at 5–6, 19–22) on *McClendon v. Long*, 22 F.4th 1330 (11th Cir. 2022), and *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), to support their challenge to the Disclaimer Provision. But neither helps Plaintiffs. Indeed, this Court already rejected Plaintiffs' claim (at 21) that the Disclaimer Provision forces Plaintiffs to convey the government's message. As the Court explained, "pretermitting Plaintiffs' contention that the first statement of the Disclaimer is factually incorrect, the Disclaimer says nothing (whether complementary or contradictory) regarding the pro-absentee voting message Plaintiffs wish to convey." [Doc. 131 at 32]. For that reason, "the manner of speech compelled … is quite different from the manner of speech compelled in cases like *McClendon* … and *NIFLA*" where "the plaintiffs were required to convey the government's own message." *Id.* Although Plaintiffs maintain that these cases compel a different result, they identify no evidence to support a different conclusion. Accordingly, whether the Court applies *Anderson-Burdick* review or strict scrutiny, the Disclaimer Provision survives.

As with the other provisions, Plaintiffs do not engage the record. Rather, they again ask the Court (at 32) to *ignore* the record, erroneously arguing that voter complaints are inadmissible hearsay. Once more, because this Court can

consider the voter complaints both for their effect on election officials or for their truth under well-established exceptions to the rule against hearsay, nothing is left of Plaintiffs' attempt to challenge the Disclaimer Provision.

Indeed, this Court has already found a "substantial relation" between the "language of the Disclaimer and the state's interests in reducing voter confusion and ensuring the effective and efficient administration of its elections" and a sufficiently tailored, "reasonable" fit. [Doc. 131 at 46–47]. That is all that is required in cases involving "compelled disclosure requirements." *Ams. for Prosperity Found. v. Becerra*, 141 S. Ct. 2373, 2383, 2385 (2021). Accordingly, the Court should also enter summary judgment for the State on Plaintiffs' challenge to the Disclaimer Provision.

IV. The Challenged Provisions do not Implicate Plaintiffs' Freedom of Association.

Plaintiffs' freedom-of-association claims fare no better. Once again, Plaintiffs ignore this Court's prior conclusion that the challenged provisions do not "restrict their associational rights" because "Plaintiffs send application forms to strangers whose information they obtain from the state's voter roll." [Doc. 131 at 28]. Nothing has changed since then.

Through discovery, Plaintiffs did not marshal any evidence showing that they sent applications to anyone other than strangers whose information they

obtained from a third-party vendor. Lopach Depo. 90:18–20, 118:9–119:4 [Doc. 162]. Rather, Plaintiffs largely argue that their freedom-of-association claims survive even when they try to associate with strangers.

But that flouts governing law. As the Supreme Court has explained, the First Amendment association doctrine protects only "join[ing] in a common endeavor" or engaging in "collective effort on behalf of shared goals." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 622 (1984). But sending unsolicited applications to strangers lacks any such "common" or "collective" work. That is likely why nearly everyone to whom Plaintiffs send their applications either ignores them or asks Plaintiffs to stop sending them. Pls.' Ex. 21 [Doc.159-21] (showing a vanishingly low response rate); Pls.' Ex. 17 at 20–21, 26 [Doc. 159-17] ("Stop sending these bloody letters"; "Stop this immediately"; "NEVER MAIL ME AGAIN OR ELSE!"; "JUST STOP!!"; "ENOUGH ALREADY!!").

Plaintiffs similarly have no answer to this Court's prior conclusion that the "circumstances here are more akin to those in" *City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989). [Doc. 131 at 28]. There, the Court "declined to find associational rights for strangers who merely patronized a dance club and were not engaged in any type of joint advocacy." [Doc. 131 at 28]. The record here demonstrates even *less* associational activity than in *Stanglin*. Rather than "patron[izing] … the same business establishment," *Stanglin*, 490 U.S. at 24,

this case involves Georgians receiving unsolicited applications from Plaintiffs without taking *any* steps to associate together or with Plaintiffs.[11]

Ignoring that precedent, Plaintiffs focus (at 27) on two out-of-circuit district court cases—*VoteAmerica v. Schwab*, 576 F. Supp. 3d 862 (D. Kan. 2021), and *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706 (M.D. Tenn. 2019)—that they believe compel a different result. Neither is persuasive. In *VoteAmerica*, the state defendants did "not dispute that the restrictions"—which included a *complete ban* on non-residents mailing absentee-ballot applications to Kansas voters—"hinder[ed] plaintiffs' right to associate." 576 F. Supp. 3d at 869, 875. Here, there is no such prohibition. And, in *League of Women Voters*, the plaintiffs challenged provisions of Tennessee law that required them to register and receive training before they could engage in voter registration activities. 400 F. Supp. 3d at 710. Neither *VoteAmerica* nor *League of Women Voters* engaged with what the Supreme Court and this Court have recognized as dispositive—that the voters being reached were strangers

[11] Plaintiffs' passing reliance (at 18) on *NAACP v. Button*, 371 U.S. 415 (1963), is no different. There is no evidence that any recipient of Plaintiffs' unsolicited mailings seeks to "*begin* an association." Plaintiffs' reliance (at 18) on *Healy v. James*, 408 U.S. 169 (1972), is equally unavailing. That case involved a state college's decision to deny a student club formal recognition—effectively prohibiting the student club from organizing on campus at all. In contrast, Plaintiffs are not prohibited from associating with Georgia voters.

to the organization. [Doc. 131 at 28]. Thus, just as before, Plaintiffs' associational rights are not implicated by any of the challenged provisions.

V. The Challenged Provisions are not Overbroad.

Plaintiffs' overbreadth claim deserves the same fate as the claims discussed above. As noted, Plaintiffs have no response to the Court's earlier conclusion that neither the Prefilling Prohibition nor the Anti-Duplication Provision regulates speech. [Doc. 131 at 25–26, 38]. For that same reason, Plaintiffs cannot meet the high bar of showing overbreadth.

In fact, Plaintiffs hardly even dispute that summary judgment should be entered for the State on their overbreadth claim. To begin, they concede that the Anti-Duplication Provision is not overbroad. *See* [Doc. 159 at 39] (arguing only that "[t]he Disclaimer and the Prefilling Prohibition are … overbroad"). But even when addressing the Disclaimer Provision and the Prefilling Prohibition, Plaintiffs fail to identify any evidence supporting their claim.

For the Disclaimer Provision, Plaintiffs argue (at 40) only that it must be overbroad because it would require a disclaimer on absentee-ballot applications sent to neighbors or family members. But Plaintiffs fail to offer *any* explanation for why this renders the provision overbroad. Rather, the State's interest in ensuring that recipients know the source of any unsolicited absentee-ballot application would apply equally to each circumstance Plaintiffs

identify. Perhaps that is why Plaintiffs do not identify any authority for their argument that that the Disclaimer Provision is unconstitutionally overbroad.

Plaintiffs also argue in passing (at 40) that the Prefilling Prohibition is overbroad because it "applies even when the personalized information is accurate and drawn from the State's own voter file," or because some county election officials may "prefer prefilled applications." But the record shows that, irrespective of the source, prefilled applications in Georgia have contained errors and caused confusion. And the State responded with the Prefilling Provision, which promotes efficiency and voter confidence. Considering that the Supreme Court has stated that the overbreadth doctrine should be applied "only as a last resort," *New York v. Ferber*, 458 U.S. 747, 769 (1982) (citation omitted), Plaintiffs have not come close to demonstrating that it applies here.

CONCLUSION

In sum, there is no evidence that the challenged provisions violate the First Amendment. Plaintiffs are free to communicate their pro-absentee-voting message to Georgia voters. The challenged provisions merely regulate conduct that led to voter confusion and additional work for election administrators in a way that is narrowly tailored—if that were even required—to further several of the State's compelling interests. The Court should enter summary judgment for the State Defendants.

Respectfully submitted this 28th day of February, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(C).

/s/Gene C. Schaerr
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VOTEAMERICA, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No.: 1:21-CV-1390-JPB

STATE DEFENDANTS' RESPONSE TO
PLAINTIFFS' STATEMENT OF ADDITIONAL MATERIAL FACTS

Pursuant to Local Rule 56.1(B)(3), State Defendants respond to the Plaintiffs' additional material facts:

1. All registered Georgia voters are eligible to vote absentee by mail. O.C.G.A. § 21-2-380.

Response: Undisputed, subject to the voter satisfying all other applicable requirements for requesting and voting an absentee ballot.

2. To vote absentee by mail in Georgia, a voter needs to submit a request for an absentee mail ballot to their election office. O.C.G.A. § 21-2-381(a)(i)(A).

Response: Undisputed.

3. A voter can apply using the Secretary's online portal, O.C.G.A. § 212-381(a)(1)(C)(ii), or by submitting an application form, a copy of which is available on the Secretary's website. *Id.* Ga. Comp. R. & Regs. 183-1-14-.12; Ex. 12, 2021 Georgia Absentee Ballot Application.

Response: Undisputed.

4. Despite their eligibility, some Georgia voters with disabilities may be unable to exercise their right to vote by absentee mail ballot if they cannot receive necessary assistance with obtaining, filling out, and submitting their absentee ballot application. *See* Laura Nwogu, *Barriers to the ballot: Georgia voters with disabilities working to improve access to the polls*, SAVANNAH MORNING NEWS (Nov. 1, 2022), https://www.savannahnow.com/story/news/politics/elections/2022/11/01/ga-voters-disabilities-fight-against-obstacles-voting-election-2022/10499428002/.

Response: This paragraph contains Plaintiffs' characterization of the cited news report, not a statement of fact, to which no response is required.

5. Additionally, many Georgia voters do not have reliable internet and cannot access the form online. *See, e.g.*, Ledyard King and Mike Stucka, *'Digital divide': In Georgia, many still lack broadband access*, THE AUGUSTA CHRONICLE (July 7, 2021),

https://www.augustachronicle.com/story/news/2021/07/07/gdabroadband-local-ga-naug/47205331/. Approximately 265,822 Georgia residents do not have a computer at home. U.S. Census Bureau, 2021 American Community Survey (5-Year Estimates).

Response: This paragraph contains Plaintiffs' characterization of the cited news report, not a statement of fact, to which no response is required.

6. Even Georgians who do have reliable internet access may not have access to a printer. *See* Ex. 10, June 10, 2022 Prelim. Inj. Hrg. ("6/10/22 PI Tr.") 37:16-20; Ex. 2, Dep. Of Blake Evans ("Evans Tr.") 55:15-56:16.

Response: Disputed, but immaterial. The cited testimony from Day 2 of the preliminary-injunction hearing does not support the claim for which it is cited, and the cited testimony from the Evans Deposition addresses only what would happen to a hypothetical voter who lacks a printer.

7. Even for voters with access to the internet and a printer, the online absentee ballot application portal provided by the Georgia Secretary of State is not available for every election, *see* Ex. 18, Government Communications and Voter Email Alerts, CDR00112588, and has crashed during the absentee voting period. *See, e.g.,* Joe Ripley, *Georgia voters finding dead links when trying to request absentee ballots*, 11ALIVE (Mar. 16, 2022), https://www.11alive.com/article/news/local/georgia-absentee-ballot-applicationswebsite-problems/85-d714dfd9-21b3-4fce-a2e0-dd2cb9c0c639.

Response: Undisputed that the absentee-ballot application portal has not always been available for every election in the past. Otherwise, this paragraph contains Plaintiffs' characterization of the cited news report, not a statement of fact, to which no response is required.

8. Additionally, the State does not always update its website with the most current version of the absentee ballot application. *See, e.g.,* Ex. 18, GAVA00050768. As a result, voters may inadvertently submit absentee ballot application forms which are no longer valid, creating confusion for the voter and county election officials and resulting in rejections of applications from otherwise eligible voters. *E.g.,* Ex. 18, GA_VA00038511.

Response: Disputed. The cited portion of the record does not support the allegation that the website does not always have the most current version of the absentee-ballot application. Nor does the cited portion of the record support the claim that the State's website would lead voters to inadvertently submit prior absentee-ballot applications, as it is referring to an application found on a third-party website. *See* Pls.' Ex. 18, GA_VA00038512.

9. Because of some voters' lack of access and other voters' general confusion with the absentee voting process, many Georgia voters rely on third party application distribution to register to vote and submit an absentee ballot application. Evans Tr. 56:13-57:10; *see also* Ex. 9, June 9, 2022 Prelim. Inj. Hrg. ("6/9/22 PI Tr.") 36:16-20.

Response: Disputed. Nothing in the cited portion of the record supports Plaintiffs' claim about lack of access and general confusion, nor does it support their characterization that Georgia voters "rely on third party application distribution."

10. The absentee ballot application has numerous fields and spans two pages. *See* Ex. 12, 2021 Georgia Absentee Ballot Application.

Response: Undisputed

11. As a result, voters often forget to fill in parts of the application when they submit it. Evans Tr. 220:16-221:4; Ex. 18, GA-VA00038834, GA_VA00024557. County election officials have complained to the state that voters will submit applications that leave the election date blank, for example. *Id.* at GAVA00038834. This can result in applications being rejected. Evans Tr. 219:4-222:6; Ex. 18, GA_VA00024557, GA-VA00051968.

Response: Undisputed that there have been reports of missing information in absentee ballot applications, which can be rejected. The remainder of this paragraph contains Plaintiffs' characterization of the record, not statements of fact, to which no response is required.

12. Kevin Rayburn, Deputy Elections Director for the Georgia Secretary of State, requested that Plaintiffs prefill their application forms with the election date in 2020. Ex. 15, Decl. of Thomas Lopach and Attached Exhibits at 52.

Response: Undisputed.

13. In at least one instance, Cherokee County requested permission from the state to fill out the missing information of the voter, because there were so many instances of

voters submitting incomplete absentee ballot applications. Ex. 18, GAVA00038834. Under the advice of Defendants, they rejected applications which contained incomplete information, because they did not have the authority to fill the application with the election date and county. *Id.* at GA_VA00024557, GAVA00051968.

Response: Disputed in part, but immaterial. The cited source, GAVA00038834, addresses pre-filling "an election date or the county" and thus does not support the claim that Cherokee County requested permission to fill in information "of the voter." Another cited source, GA_VA00024557, involved rejecting any requests for absentee-ballots that were submitted on the pre-SB 202 form and does not say anything about the authority of counties to fill in empty information. The final cited source, GAVA00051968, refutes Plaintiffs' claim that applications were "rejected" at the "advice of Defendants." *See* GAVA00051968 ("Just for the record, I don't think your statement that, 'in the past, your office has advised that applications should be rejected if there are any defects' is accurate.").

14. In another instance, Bartow County requested guidance about whether to reject applications where the voter did not fill in the election date. *Id.* at GAVA00038671. As the county election official noted, "I used to get around this by prefilling it on my application, but I can't do that anymore," because of SB 202. *Id.*

Response: Undisputed.

15. Under SB 202, voters applying for an absentee ballot using the application form are now required to provide a wet signature even if they otherwise fill out their

application online, so at some point the voter must have a physical document to sign and submit, whether in hard or scanned copy. *See* O.G.C.A. § 212-381(C)(i); Evans Tr. 54:18-55:14.

Response: Undisputed.

16. The state's voter file and absentee voter file, which provide the data used by both Georgia officials and third-party civic organizations to pre-populate application forms, Lopach Tr. 90:18-91; 6/10/22 PI Tr. 63:14-19, also contains errors and duplicate entries. 6/10/22 PI Tr. 65:4-7; Evans Tr. 77:9-14; Ex. 18 at GAVA00052395.

Response: Undisputed.

17. When an individual submits an absentee ballot application, the application is not always processed contemporaneously. *See* Evans Tr. 129:2-25, 131:1-9; 6/10/22 PI Tr. 123:19-124:1. As a result, voters have expressed confusion when they have submitted an application but that submission is not reflected on the State's online ballot tracking system. *See*, *e.g.*, Ex. 18, GA-VA00000628, GA-VA00048462.

Response: Undisputed that absentee-ballot applications are "not always processed contemporaneously." Undisputed that some voters have contacted election officials when the submission of their absentee ballot application is not reflected on the online ballot tracking system. Plaintiffs' characterization of those communications as "confusion" is not a statement of fact supported by the cited record. To the extent that Plaintiffs suggests that the State Defendants are involved with the processing of absentee-ballot applications, there is nothing in the cited sources to support that suggestion.

18. When absentee ballot applications are not processed contemporaneously, the absentee voter file will not reflect a full account of the voters who have already submitted an absentee ballot. *See* Evans Tr. 129:2-25, 131:1-9; 6/10/22 PI Tr. 123:19-124:1.

Response: Disputed in part. It is undisputed that the absentee voter file will not reflect that a voter has applied for an absentee ballot if the application has not been processed. To the extent that Plaintiffs suggests that the State Defendants are involved with the processing of absentee-ballot applications, there is nothing in the cited sources to support that suggestion.

19. Plaintiffs Voter Participation Center ("VPC") and Center for Voter Information ("CVI") are sister 501(c)(3) and 501(c)(4) organizations, respectively. Ex. 15 at 2-3 ¶¶ 2-7.

Response: Undisputed.

20. VPC and CVI are nonpartisan, nonprofit organizations with a mission to encourage the political participation of historically underrepresented groups, such as young people, people of color, and unmarried women, by providing them with voter registration, early voting, vote by mail, and get-out-the-vote resources and information. Ex. 15 at 2-3 ¶¶ 2-7; Lopach Tr. 28:4-10.

Response: Undisputed.

21. Plaintiffs further their mission by educating, assisting, and convincing historically disenfranchised communities to vote absentee by utilizing their resources. Ex.

15 at 3-4 ¶¶ 7-10; Lopach Tr. 28:4-10. They attempt to reduce transaction costs for voters to help assist voters to participate in the electoral process, in particular by mail voting. Ex. 24, Mar. 21, 2022 Expert Report of Dr. Donald Green, at 3-8; Ex. 26, June 16, 2022, Amended Expert Rebuttal Report of Dr. Donald Green, at 8-14; 6/10/22 PI Tr. 206:5-212:3, 238:10-12; Ex. 27, Dep. of Dr. Donald Green ("Green Tr.") 78:19-82:4.

Response: Undisputed.

22. VPC and CVI have designed and implemented direct mail programs to share their pro-voting and pro-absentee mail voting message and resources with eligible, registered voters nationwide, including Georgia. Ex. 15 at 4 ¶ 12.

Response: Undisputed.

23. The core message of Plaintiffs' absentee voting mailer is that it is reliable, easy, beneficial, and trustworthy. Ex. 15 at 3-4 ¶¶ 7-10. In the ongoing debate about absentee voting, VPC and CVI believe that they can use their effective absentee ballot application communications to persuade Georgians to further engage in the democratic process and trust absentee voting to do so. Ex. 15 at 3-4, 6, 28 ¶¶ 7-10, 17, 63.

Response: Undisputed that Plaintiffs express their views about absentee voting in the cover letter they send to potential voters. The absentee-ballot application itself (Pls.' Ex. 15 at 36–40) does not include any such message.

24. Plaintiffs exist for the purpose of engaging in political speech and expressive conduct to disseminate their core viewpoint that all eligible voters should participate in the

political process, that voting should be easy and accessible, and that absentee voting is safe, beneficial, and secure. Ex. 15 at 3-4, 6, 28, 31 ¶¶ 7-10, 17, 63, 68.

Response: Undisputed.

25. Plaintiffs communicate their pro-absentee voting message by mailing communications conveying personalized absentee ballot applications to eligible, registered voters. 6/9/22 PI Tr. 42:14-43:2.

Response: Undisputed that Plaintiffs express their views about absentee voting in the cover letter they send to potential voters. The absentee-ballot application itself (Pls.' Ex. 15 at 36–40) does not include any such message.

26. Plaintiffs' objective is to encourage these specific recipients to submit an absentee ballot application and vote absentee. Ex. 15 at 5, 6, 8, 26-28 ¶¶ 15, 17, 22, 60-63; *see*, *e.g.*, Ex. 15 at 36-39, 40-45.

Response: Undisputed that Plaintiffs express their views about absentee voting in the cover letter they send to potential voters. The absentee-ballot application itself (Pls.' Ex. 15 at 36–40) does not include any such message.

27. Plaintiff VPC sends its mailers to registered people of color, unmarried women, and young people. Lopach Tr. 86:11-17.

Response: Undisputed.

28. Plaintiff CVI sends its mailers to individuals who are modeled to share the organization's values of wanting to see people of color, unmarried women, and young

people participate in elections at proportionate rates as the general population. Lopach Tr. 86:18-87:1.

Response: Undisputed.

29. The purpose of Plaintiffs' mailers is to convince its specific, carefully selected voters that engaging in the electoral process through absentee voting is trustworthy and easy. Ex. 15 at 3-4, 6, 9 ¶¶ 7-10, 12, 17, 24.

Response: Undisputed that Plaintiffs express their views about absentee voting in the cover letter they send to potential voters. The absentee-ballot application itself (Pls.' Ex. 15 at 36–40) does not include any such message.

30. Plaintiffs' absentee ballot application mailers include a cover letter, a personalized application, and postage-paid return envelope addressed to the recipient's county election office. Ex. 15 at 36-39, 40-45; Ex. 16.

Response: Undisputed.

31. Plaintiffs' cover letter identifies the organization as the sender and provides instructions for unsubscribing should the recipient so choose, references the enclosed, personalized application, and contains instructions for submitting the absentee ballot application. Ex. 15 at 6 ¶ 17; *Id*. at 36-39, 40-45; Ex. 16.

Response: Undisputed.

32. Plaintiffs also personalize their applications with prefilled voter information from the State's voter file to indicate the specific recipient should complete the application and make it easier for elections workers to process. 6/9/22 PI Tr. 44:12-45:1. *See also* Ex.

15 at 36-39, 40-45; Ex. 16. In 2020, Plaintiffs also printed step-by-step instructions on the back of the personalized applications. *See also* Ex. 15 at 36-39, 40-45.

Response: Undisputed that, before SB 202, Plaintiffs personalized their applications with voter information, including incorrect information, and that Plaintiffs included "step-by-step instructions."

33. Plaintiffs include the postage paid envelope so that the recipient does not need to pay to apply for an absentee ballot and so their application is sent to their correct elections office. 6/9/22 PI Tr. 45:24-46:7. *See also* Ex. 15 at 36-39, 40-45.

Response: Undisputed.

34. Plaintiffs believe that absentee voting by mail "is one of the best ways to ensure a robust democracy." Ex. 15 at 3 ¶ 8; *see also* Lopach Tr. 28:4-10.

Response: Undisputed.

35. In the ongoing debate about absentee voting, Plaintiffs' mailer communications take a strong stance in favor of absentee voting by including personalized applications and expressing, for example, that "Your vote matters," "Voting by mail is EASY," it "keeps you healthy and safe," and ensures that "[y]our privacy is protected. Ex. 15 at 36-39, 40-45.

Response: Undisputed that Plaintiffs express their views about absentee voting in the cover letter they send to potential voters. The absentee-ballot application itself (Pls.' Ex. 15 at 36–40) does not include any such message.

36. Plaintiffs distribute their personalized applications at the height of election season, when debates over the safety and reliability of absentee voting are most salient. Lopach Tr. 146:2-11.

Response: Undisputed that Plaintiffs distributed absentee-ballot applications during the election season. The remainder of this paragraph includes Plaintiffs' characterization, to which no response is required.

37. Plaintiffs' communications list their organization's name and contact information in several locations and include a prominent and specific disclaimer that they are "not affiliated with state or local election officials." Ex. 15 at 36-39, 40-45.

Response: Undisputed.

38. Plaintiffs personalize their absentee ballot applications with the voters' information to build relationships with voters and advocate for increased absentee voting in Georgia among segments of the population who are underrepresented in the political process. Ex. 15 at 3-4, 26-27 ¶¶ 7-10, 61.

Response: Undisputed that, before SB 202, Plaintiffs included pre-filled and often incorrect information on applications. The remainder of this paragraph contains characterization of the record, rather than statements of fact, to which no response is required. State Defendants further respond that Plaintiffs sent their mailings to strangers who have not expressly requested receiving any mail from Plaintiffs. Moreover, recipients routinely ask Plaintiffs to stop sending such mailings. Pls.' Ex. 17 at 20–21, 26 ("Stop sending these bloody letters"; "Stop this immediately"; "NEVER MAIL ME AGAIN OR

ELSE!"; "JUST STOP!!"; "ENOUGH ALREADY!!").

39. Specifically, Plaintiffs use their effective personalized absentee application communications as outreach to build greater association with a specific group of voters and then further engage them in the political process with future mailers. Ex. 15 at 9, 10, 13 ¶¶ 24, 26, 34.

Response: Undisputed that this is how Plaintiffs characterize their actions, but the record reflects that Plaintiffs sent their mailings to strangers who have not expressly requested receiving any mail from Plaintiffs. Moreover, recipients routinely ask Plaintiffs to stop sending such mailings. Pls.' Ex. 17 at 20–21, 26 ("Stop sending these bloody letters"; "Stop this immediately"; "NEVER MAIL ME AGAIN OR ELSE!"; "JUST STOP!!"; "ENOUGH ALREADY!!").

40. Plaintiffs' mailers alleviate the confusion caused by Georgia's complicated application process because the personalized application helps to ensure that the voter does not submit an incomplete or inaccurate application. Ex. 15 at 8 ¶ 22; *see also* 6/9/22 PI Tr. 55:14-22, 65:11-15; *compare* Ex. 18, GA-VA00052394 (voter did not input his full registered name including suffix when he applied via the Secretary's online portal and was sent an absentee ballot bearing his deceased grandfather's name and suffix).

Response: Plaintiffs' characterization of the application process as "complicated" is not a statement of fact and thus no response is required. And Plaintiffs' characterization of how a "personalized applications helps" a voter is not a statement of fact and thus no response is required.

41. Some voters are opposed to absentee voting and therefore do not want to receive a communication promoting voting by mail and containing an application for an absentee ballot. *See e.g.*, Ex. 18, GA-VA00061955, GA-VA00061911.

Response: The cited portions of the record do not support Plaintiffs' statement that referenced voters are "opposed to absentee voting." But undisputed that many voters request Plaintiffs to stop sending absentee-ballot application mailings. See Pls.' Ex. 17.

42. The personalized applications include words chosen by VPC/CVI— specific names from the voter rolls and the associated addresses—written on a page. Ex. 15 at 36-39, 40-45.

Response: Disputed. The information required for an absentee-ballot application is not chosen by VPC/CVI, but rather required by law. O.C.G.A. § 21-2-381(a)(1)(C)(i).

43. The information prefilled in Plaintiffs' absentee ballot application mailers is drawn from the voter registration records generated by the State. Ex. 15 at 5, 26-28 ¶¶ 15, 60-62.

Response: Disputed but immaterial, as Plaintiffs obtain information from third-party vendors, rather than directly from the State. Lopach Depo. 90:14-91:16 [Doc. 162].

44. Plaintiffs only ever intend to send absentee ballot application mailers to voters who have not yet submitted an absentee ballot application. 6/9/22 41:2442:11, 71:19-25, 90:15-19; Ex. 15 at 10, 11 ¶ 27, 31. Sending an absentee ballot application to a voter who has already submitted an application creates unnecessary costs for Plaintiffs, and

does not achieve their mission of encouraging voter participation among underrepresented populations. Ex. 15 at 10, 11 ¶ 26, 27, 29.

Response: Disputed, but immaterial, as Plaintiffs' *intention* does not change the fact that Plaintiffs have repeatedly sent duplicate applications. *See* Pls.' Ex. 17 at 23–25 (reporting that dozens of voters opted out of Plaintiffs' mailers because they were "Already registered"); Lopach Depo. 155:21–156:3 ("Q: … [H]as VPC or CVI received any feedback from state election officials about duplicate applications being sent to voters in their state? A: Yes.") [Doc. 162].

45. Plaintiffs use a unique scannable barcode on the return envelope for absentee ballot applications included in their mailers to track effective engagement with potential voters and deepen their association with them through further targeted communications. Ex. 15 at 7 ¶ 20; Lopach Tr. 67:1-6.

Response: Undisputed that Plaintiffs include a barcode on the applications they send to strangers.

46. This barcode also tracks which voters have already submitted an absentee ballot application to an elections office. Lopach Tr. 67:1-6.

Response: Undisputed that Plaintiffs are able to track when a voter has returned an application Plaintiffs sent.

47. Plaintiffs also provide robust unsubscribe opportunities for recipients who no longer wish to receive communications from VPC and CVI which help to ensure that VPC and CVI's communications are going to the correct recipients and to voters who are

interested in having further connection and communication with VPC and CVI on electoral engagement issues. Lopach Tr. 101:22, 102:1-12.

Response: Undisputed.

48. To further prevent duplicative mailers, Plaintiffs hire third party vendors to retrieve the list of registered voters from the States, including Georgia. 6/9/22 PI Tr. 44:19-22; Lopach Tr. 120:21-122:3. The third-party vendor then undergoes a process of narrowing the list of voters by checking the list against the National Change of Address database and against a list of deceased individuals in the state. Lopach Tr. 135:16-136:3.

Response: Undisputed.

49. Plaintiffs also make periodic requests for updated voter records from Georgia state election officials before initiating a mailer program. Ex. 15 at 10 ¶ 27; Ex. 15 at 46-74.

Response: Undisputed.

50. Preparing bulk mailings takes several weeks in total and at least 20 days from when VPC and CVI provide their recipient list to the printing vendor until the message is mailed. Ex. 15 at 12, 24 ¶¶ 32, 56.

Response: Undisputed that Plaintiffs work with printers who state that this timeframe is required, but the record reflects that other printers can do the same project in fewer days. Day 2 Tr. 138:5–12 (Waters).

51. Plaintiffs' absentee voting mailer communications—including the cover letter, pre-stamped and pre-addressed envelope, instruction sheet, and the personalized absentee ballot application—cost about 39 cents per mailer to produce. Ex. 15 at 11 ¶ 29.

Response: Undisputed.

52. In 2018 and 2020, Plaintiffs sent multiple waves of absentee ballot application mailers to Georgia voters. Lopach Tr. 41:5-42:11.

Response: Undisputed that Plaintiffs sent multiple duplicate applications to Georgia voters in 2018 and 2020.

53. In the 2020 election alone, Plaintiffs sent more than 9.6 million communications to registered Georgia voters. Ex. 15 at 9 ¶ 23. These messages urged registered Georgia voters to participate, described the absentee voting process as easy and secure, and guided voters through that process by including absentee ballot applications. *Id.*; *id.* at 36-39, 40-45.

Response: Undisputed that Plaintiffs sent multiple duplicate applications to Georgia voters in 2020.

54. Plaintiffs sent these communications in several waves, finding that doing so was the most effective way to convey their message and to persuade and engage voters. *Id.* at 13, 23, 33 ¶¶ 34, 54, 71.

Response: Undisputed that Plaintiffs sent multiple duplicate applications to Georgia voters and that Plaintiffs believe this was an effective way to convey their message.

55. Plaintiffs also tested messaging to voters that relied on including a personalized application to "call attention to the fact that the voter was explicitly chosen to receive the application by mail." Ex. 13, Ex. B to Diaz Decl., Sept. 14, 2020 VPC/CVI Memo, at 38. Plaintiffs provided the personalized application to "provide[] an exclusive voter experience" and express their belief that the particular voter to whom VPC/CVI sent its mailer should participate in the democratic process through absentee voting. *Id.*

Response: Undisputed that Plaintiffs communicate their message through a cover letter which references an accompanying application.

56. More than 663,500 Georgians submitted the application distributed by Plaintiffs during the 2020 election cycle. Lopach Decl. ¶ 23. This includes 575,000 Georgia voters who submitted applications in the November 2020 general election, and 88,500 voters who submitted applications in the January 2021 runoff election. Ex. 15, 9 ¶ 25.

Response: Undisputed.

57. Plaintiffs likewise associate with other organizations to assist them with also mailing their absentee ballot applications to voters. Lopach. Tr. 147:20-148:20.

Response: Undisputed.

58. Specifically, Plaintiffs work with national and state-based organizations to follow up with the voters to whom Plaintiffs have sent an absentee ballot application mailer. Lopach. Tr. 147:20-148:20; 6/9/22 PI Tr. 47:15-23. Plaintiffs work with organizations to follow up with voters via door-knocking, text message, and phone calls. Lopach. Tr. 147:20-148:20.

Response: Undisputed.

59. Plaintiffs have worked with organizations including the Georgia NAACP to send its absentee ballot application mailers to Georgia voters. *E.g.,* Ex. 25.

Response: Undisputed

60. Before mailing their communications in 2020, Plaintiffs also corresponded with Georgia election officials to coordinate, provide notice, and solicit feedback for Plaintiffs to implement. Ex. 15, 15-21 ¶¶ 40-50; *id.*, 52-74.

Response: Undisputed.

61. In 2018, Plaintiffs sent their absentee ballot application mailers to Chris Harvey, Deputy Elections Director for the Secretary of State, to receive feedback regarding their prefilled absentee ballot application mailer. *Id.*, 46-48. Mr. Harvey did not see any issues with the mailer. *Id.*

Response: Undisputed

62. In 2020, Plaintiffs again sent their absentee ballot application mailer to the Secretary of State's Office. *Id.*, 52-62. Kevin Rayburn, Deputy Elections Director for the Secretary of State, noted that Plaintiffs' applications "look[] accurate when compared to [Georgia's] state request form." *Id.*, 53. Mr. Rayburn also requested that Plaintiffs additionally prefill the election date on the form. *Id*.

Response: Undisputed.

63. In 2022, Plaintiffs again notified the Secretary of State of their intent to send absentee ballot application mailers ahead of the November 2022 elections. Ex. 16. Plaintiffs

made several inquiries to the Secretary of State's Office in their attempt to comply with SB 202. Ex. 22.

Response: Undisputed.

64. During the 2020 primaries, Defendant Raffensperger's office sent prefilled applications to every active registered voter in the state in response to the COVID-19 pandemic. 6/10/22 PI Tr. 63:14-21.

Response: Undisputed.

65. Defendants also issued guidance to county election officials regarding the issuance of unsolicited absentee ballot applications by the State during the 2020 primaries. Ex. 18, GA-VA00048570.

Response: Undisputed.

66. Defendants received criticism about sending unsolicited, prefilled ballot applications to every Georgia voter, including allegations about voter fraud. *E.g.,* Ex. 18, GA-VA00061955, GA-VA00061911.

Response: Undisputed.

67. In response to that criticism, Secretary of State Brad Raffensperger lauded his decision to "direct[] our office to send absentee ballot applications to all active voters," which he stated would "further protect voters and poll workers from the continuing threat from COVID-19, and take pressure off of early voting and polling locations." *Id*.

Response: Undisputed that Plaintiffs accurately quote the cited record.

68. Secretary Raffensperger also noted that the absentee ballot applications would be "pre-populated with voter data but have a barcode for the counties to be able to quickly lookup and process them. *Id*.

Response: Undisputed that Plaintiffs accurately quote the cited record.

69. As Ryan Germany testified, there were several benefits to prefilling the application before sending to Georgia voters, including the ease on election administrators "to read generally when something is typed." 6/10/22 PI Tr. 64:1-5.

Response: Undisputed.

70. The Intervenor-Defendants also sent mailers with prefilled absentee ballot applications in 2020. Ex. 13, 14-25.

Response: Undisputed.

71. The Intervenor-Defendants' mailers in 2020 conveyed a similar message to Plaintiffs. For example, one of Intervenor-Defendants' mailers contained the message "Absentee voting is a safe and secure way to guarantee your voice is heard." *Id.* at 19.

Response: Undisputed.

72. Intervenors collectively sent more waves of mailers than Plaintiffs. Plaintiffs sent five waves of absentee ballot mailers in 2020. 6/9/22 Tr. 38:6-10. Intervenors sent seven absentee ballot application mailers in 2020. Ex. 13 at 11.

Response: Undisputed.

73. Arena designed mailers on behalf of the Intervenor Georgia Republican Party in 2020. *See, e.g.,* Ex. 3, Dep. of Brandon Waters ("Waters Tr."), 39:16-19, Waters Dep. Ex. 1. Brandon Waters, CEO of Arena, noted that the mailers it designed on behalf of Intervenors "were all ordered to say not absentee vote in particular, the importance of voting, and if you can't vote at your poling location, to vote absentee." Waters Tr. 45:4-11. Mr. Waters confirmed that the entire mailer package—including the application, cover letter, and return envelope—was intended to convey the speech of the client for whom the mailer is sent. *Id.* 34:1535:9; 44:11-18.

Response: Undisputed that Mr. Waters said the quote attributed to him. Disputed that Mr. Waters "confirmed that the entire mailer package … was intended to convey the speech." Waters Depo. 35:5–9 [Doc. 161] ("The other components are the application and a return mechanism if there are multiple devices. So those are documents I would not say are intended to influence someone's vote. They're merely forms.").

74. Mr. Waters also noted that including the absentee ballot application "makes [the mailer] more effective." *Id.* 45:17-22. Arena prefills its applications "to reduce the error rate and make it faster for people to fill out the application [and] by prefilling it, it only allows that individual to submit the application." *Id.* 46:12-17.

Response: Undisputed.

75. Plaintiffs are able to persuade Georgia voters to act on their message because Plaintiffs' effective communications are successful at reducing transaction costs for voters

to participate in the electoral process. 6/9/22 PI Tr. 43:15-20; 44:1245:1, 45:24-46:7, 206:18-207:3, 208:14-209:7; 6/10/22 PI Tr. 64:1-6. The Restrictions undermine Plaintiffs' ability to convey their message by reducing Plaintiffs' ability to convince voters through reducing transaction costs. 6/9/22 PI Tr. 64:9-22.

Response: The first sentence of this statement contains Plaintiffs' characterization of its actions, not a statement of facts, to which no response is required. The final sentence consists of a legal conclusion, not a statement of fact, to which no response is required.

76. On March 25, 2021, SB 202 was enacted. 2021 Georgia Laws Act 9 (S.B. 202). It became effective on July 1, 2021. *Id.*

Response: Undisputed.

77. SB 202 includes a Prefilling Prohibition, O.C.G.A. § 21-2381(a)(1)(C)(ii), a Mailing List Restriction, O.C.G.A. § 21-2-381(a)(3)(A), and a Disclaimer Provision, O.C.G.A. § 21-2-381(a)(1)(C)(ii) (collectively the "Ballot Application Restrictions").

Response: Undisputed.

78. Plaintiffs' entire communication is an intertwined package that, as a whole, is necessary to convey Plaintiffs' message. 6/9/22 PI Tr. 42:14-21; *see also* Green Tr. 78:19-82:4; Ex. 24 at 3-6.

Response: Undisputed that this is how Plaintiffs characterize their mailing, but Plaintiffs' message appears only in its cover letters. *See* Pls.' Ex. 15 at 36–40.

79. Plaintiffs would not be able to convey the same message through their cover letters alone, which say for example, "I have sent you the enclosed absentee ballot application to make requesting a ballot easy." Ex. 15 at 37; *see also id.* at 38, 42; Waters Tr. 44:7-10.

Response: Undisputed that Plaintiffs may not be able to reference an enclosed absentee-ballot application, but Plaintiffs cite no evidence to show that they cannot "convey the same message" in support of absentee voting.

80. SB 202's Prefilling Prohibition prohibits sending any absentee ballot applications that are "prefilled with the electors' required information." O.C.G.A. § 21-2-381(a)(1)(C)(ii).

Response: Undisputed.

81. Failure to comply with the Prefilling Prohibition can result in criminal prosecution, including misdemeanor and felony charges. *See* O.C.G.A. §§ 21-2-598; 21-2-562(a).

Response: Undisputed.

82. A personalized absentee ballot application prefilled with a specific voter's information drawn from the State voter file is a key component of Plaintiffs expressing their belief that the particular recipient should participate in the electoral process and request an absentee ballot. Ex. 15 at 5, 8, 26-30 ¶¶ 15, 22, 60-66.

Response: Undisputed that Plaintiffs have previously included a personalized application in their mailings. Plaintiffs' statement that including that application is a "key component" of their message is a characterization to which no response is required.

83. Plaintiffs believe that personalizing their absentee applications is the most effective means of conveying their message that voting absentee is easily completed, beneficial, and accessible. *Id.* at 28 ¶¶ 63-64.

Response: Undisputed that this is Plaintiffs' belief.

84. Based on Plaintiffs' experience and research, voters are more likely to submit an application per Plaintiffs' messaging when it is personalized with their prefilled information. *Id.* at 8, 26-27 ¶¶ 22, 61; Lopach Tr. 113:9-13.

Response: Undisputed.

85. As Plaintiffs' expert Dr. Donald Green further observed based on his review of quantitative studies and extensive experience in the field, Plaintiffs belief in the benefits of personalizing applications is also empirically justified in the public literature. Green Tr. 90:4-91:1, 164:16-166:17; 6/10/22 PI Tr. 209:20-214:22, 232:24-236:1, 271:17-24; Ex. 24 at 4-6, 8-9; Ex. 26 at 8-13.

Response: Undisputed that Dr. Green so testified.

86. Studies on the positive effects of reducing transaction costs for voters are widely accepted in academic scholarship. Ex. 24 at 3-8; Ex. 26 at 8-13; 6/10/22 PI Tr. 206:5-212:3, 238:10-12; Green Tr. 78:19-82:4; *see also* Ex. 28, Dep. of Dr. Justin Grimmer

("Grimmer Tr.") 64:9-66:3 (summarizing decreasing transaction costs result from recent study in Colorado). And a specific study on the practice of distributing personalized absentee voting applications—the Hans Hassell study— shows that there was a 25% increase in effectiveness compared to distributing a generic or blank absentee application. 6/10/22 PI Tr. 212:11-214:22, 233:11-236:1; Ex. 26 at 9.

Response: Undisputed that there have been studies that address decreasing transaction costs. Disputed that the Hans Hassell study "shows that there was a 25% increase in effectiveness" as the cited materials do not support that claim. As Dr. Grimmer noted in his report, the difference was not statistically significant at standard levels. *See* Grimmer Rep. ¶ 34 [Doc. 113-4]. This dispute, however, is immaterial.

87. Plaintiffs also know that neatly typing the voters' information from the voter file leads to fewer erroneous rejections when election officials receive the application. Ex. 15 at 8, 26-27 ¶¶ 22, 61; Evans Tr. 158:9-22 (noting that applications with typed voter information, like Plaintiffs' personalized applications, are "generally easier" for election officials who no longer need to "interpret or read handwriting"); 6/10/22 PI Tr. 64:1-5 (Mr. Germany noting the same).

Response: Disputed. The quoted portion of the record refers to typed information generally, rather than "typ[ed] … information from the voter file."

88. Plaintiffs' belief in the benefits of prefilling is also justified by complaints from county election officials, who constantly receive absentee ballot applications with

missing information. Ex. 18, GA-VA00038834. This can result in applications being rejected. *Id.*, GA_VA00024557, GA-VA00051968. *See*, *also*, Ex. 15 at 52-54.

Response: Disputed but immaterial. The claim that county election officials "constantly" complained is unsupported by Plaintiffs' citation to a single page in the record. Undisputed that applications with missing information can be rejected.

89. SB 202's Mailing List Restriction restricts to whom Plaintiffs can mail their communications by prohibiting Plaintiffs from distributing applications to individuals who appear on the State's absentee voting file as having "already requested, received, or voted an absentee ballot." O.C.G.A. § 21-2-381(a)(3)(A); Evans Tr. 243:4-14.

Response: This paragraph contains a legal conclusion, not statements of fact, to which no response is required.

90. The Mailing List Restriction provides a limited exemption from liability for third party distributions that rely on data provided by the State within five business days of the application being mailed. O.C.G.A. § 21-2-381(a)(3)(A).

Response: This paragraph contains a legal conclusion, not statements of fact, to which no response is required.

91. Failure to strictly comply with the Mailing List Restriction can result in fines of up to $100 "per duplicate application" sent and potential criminal penalties, including a misdemeanor with a sentence of confinement of up to 12 months. O.C.G.A. §§ 21-2-381(a)(3)(B), 21-2-598, 21-2-603, 21-2-599.

Response: This paragraph contains a legal conclusion, not statements of fact, to which no response is required.

92. The State's absentee voter file is populated by information entered into the State's voter database and is updated roughly every 24 hours with information newly input to the database. Evans Tr. 45:10-46:10, 47:6-21.

Response: Undisputed.

93. Counties have varied practices for inputting absentee ballot application information into the voter database and are able to backdate information entered after the fact. *Id.* 73:4-14.

Response: Undisputed.

94. Thus, the State's absentee voter file may not always include an accurate account of every voter who has submitted an absentee ballot application at a given date. *Id.* 129:2-25, 131:1-9; 6/10/22 PI Tr. 123:19-124-1.

Response: Undisputed.

95. To comply with the Mailing List Restriction, Plaintiffs must continuously compare their distribution lists with Georgia's constantly changing absentee voter list and remove any electors from their distribution lists who appear to have already requested a ballot. O.C.G.A. § 21-2-381(a)(3)(A); Ex. 15 at 21-26 ¶¶ 51-60.

Response: Undisputed that Plaintiffs must compare their mailing list with the absentee voter list.

96. For each specific wave of communications, Plaintiffs require at least six weeks to finish, and at least 20 days from print order to mailing. Ex. 15 at 10 ¶ 32. Specifically, Plaintiffs must retrieve the data from the State; filter the data to their target audiences and remove voters based on deceased status, change of address, and the absentee voter file; and begin the printing orders that in 2020 resulted in a total of over 83 million absentee ballot application mailers being sent nationwide. *Id.*at 9-10 ¶¶ 23, 32.

Response: Undisputed that Plaintiffs have opted to use printers that state such time is required, but the record reflects that other printers can do the same project in fewer dates. Day 2 Tr. 138:5–12 (Waters).

97. To comply with SB 202, anyone who applied for an absentee ballot application between the three to four intervening weeks between data retrieval and any printing would need to be identified and their mailer manually pulled from the printing order. 6/9/22 PI Tr. 59:2-4, 61:2-15; Ex. 20, Apr. 6, 2021 Mission Control Memo, at 2.

Response: Undisputed that this would be required if Plaintiffs continue to use the printers they have selected, but the record reflects that other printers can do the same project in fewer dates. Day 2 Tr. 138:5–12 (Waters).

98. Plaintiffs hired a consultant to examine their ability to comply with the Mailing List Restriction and were told it would be logistically impossible for Plaintiffs to complete the data collection, printing, and mailing process within SB 202's five-day allowance. 6/9/22 PI Tr. 57:23-58:2, 60:1-62:17; Ex. 20 at 2; Ex. 15 at 12, 24 ¶¶ 33, 56.

Response: Undisputed.

99. Manually checking millions of already-printed and paid-for mailers against the State's constantly-changing list would be cost-prohibitive. Ex. 15 at 2526 ¶¶ 58-59; 6/9/22 PI Tr. 61:10-63:14.

Response: Undisputed that Plaintiffs claim that checking mailers manually would be cost prohibitive. To the extent that Plaintiffs are suggesting that they must manually check "already-printed and paid-for mailers," that is unsupported by the cited materials and, in any event, the record reflects that other printers can automate the process of list scrubbing. Day 2 Tr. 137:14–138:12 (Waters).

100. Plaintiffs have concluded that the only means by which they can continue their absentee voting operations in Georgia under the Mailing List Restriction is to send a single wave of communications to voters during the first five days of Georgia's absentee voting window. Ex. 15 at 22-25 ¶¶ 53-57.

Response: Undisputed that this is Plaintiffs' conclusion, but Plaintiffs have not identified evidence that this is "the only means."

101. Plaintiffs have substantially reduced their communications with Georgia voters to comply with the Mailing List Restriction as a result. As of October 14, 2022, Plaintiffs sent a total of 1,205,162 absentee ballot application mailers to Georgia voters; 1,006,798 sent by VPC and 198,364 sent by CVI. Ex. 21, VPC and CVI 2022 Absentee Ballot Application Mailer Data, P-0360, P-0363. In 2020, VPC sent 8,565,683 absentee

ballot application mailers to Georgia voters, and CVI sent 897,628. Ex. 11, Pls' Amended Responses and Objections at 4. As of October 14, 2022, only 40,992 voters were assisted by the Plaintiffs in the November 2022 elections, compared to 575,000 voters in November 2020. Ex. 21, P-0360, P-0363.

Response: Undisputed.

102. Plaintiffs decided to send only one wave of communications because the risk of criminal and civil penalties for each individual instance of even an inadvertent violation of the Mailing List Restriction threatens to wipe out their organizations. 6/9/22 PI Tr. 63:2-6, 209:20-214:22, 232:24-236:1, 271:17-24, 278:13- 21, 280:10-22; Ex. 26 at 14-16; Ex. 24 at 9-11; Green Tr. 90:13-91:1, 165:18-166:17.

Response: Undisputed.

103. Plaintiffs' ability to convey their message is also much less effective when they can only send one mailer communication and only at the very beginning of the election cycle. 6/9/22 PI Tr. 70:20-25; Ex. 15 at 13 ¶ 34.

Response: Disputed but immaterial. *See* Lopach Depo. 147:12–19 (testifying that "earlier waves were more efficient" because "[m]any people will respond to the first wave they receive") [Doc. 162].

104. Plaintiffs know that sending follow-up communications to voters who have not already engaged with Plaintiffs' prior mailer and may have misplaced or disregarded the initial mailing, as well as sending communications closer to the actual election when

voters are more inclined to be thinking about voting, is more effective at persuading voters to participate through absentee voting. 6/9/22 PI Tr. 69:20-70:10.

Response: Undisputed that this is Plaintiffs' opinion about their mailings. But Plaintiffs have not provided evidence to substantiate their opinion.

105. SB 202's Disclaimer Provision requires third parties that disseminate absentee ballot applications, like Plaintiffs, to use the official government form that includes the Secretary of State seal and is titled "Application for Georgia *Official* Absentee Ballot." O.C.G.A. § 21-2-381(a)(1)(C)(ii) (emphasis added); Ex. 13 at 59-61.

Response: This paragraph contains a legal conclusion, not statements of fact, to which no response is required.

106. SB 202's Disclaimer Provision requires Plaintiffs to stamp a "prominent" disclaimer on the official absentee ballot application form, designed and published by the Secretary of State, which must state:

> 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. O.C.G.A. § 21-2-381(a)(1)(C)(ii); Ex. 13 at 59-61.

Response: Undisputed.

107. Failure to include this language can result in criminal penalties. O.C.G.A. §§ 21-2-598, 21-2-603, 21-2-599.

Response: Undisputed.

108. The disclaimer required by SB 202 makes Georgia an outlier among the States. Only Kansas requires a disclaimer on the applications distributed by third parties at all similar to Georgia, though its disclaimer is closer to a traditional disclosure requirement and does not mandate misleading information. K.R.S. 251122(k).

Response: To the extent this paragraph contains legal conclusions, not statements of fact, no response is required. Moreover, Plaintiffs cite no evidence to substantiate their claim that Georgia is "an outlier among the states."

109. Plaintiffs reasonably believe that the required disclaimer will confuse voters and make them reluctant to use the forms that Plaintiffs provide, which defeats the purpose of their communications. Ex. 15 at 30-32 ¶¶ 67-69; *see* Ex. 26. at 2-8; 6/10/22 PI Tr. 217:14-220:22, 228:12-16, 244:13-19, 254:1-6; Green Tr. 123:15-22, 160:2-162:7, 165:8-17; Ex. 24 at 6-8.

Response: Undisputed that this is Plaintiffs' opinion, but the cited portions of the record do not show anything other than a single voter who expressed confusion after being presented with leading questions.

110. The qualitative study conducted by Plaintiffs' expert, Dr. Green, demonstrated that, upon reading the form with the required disclaimer included, there are real-life instances of Georgia voters who are dissuaded from using the form and "would just throw it in the trash . . . [b]ecause it is not an official government publication." Ex. 24, at 8; Green Tr. 123:13-126:9, 150:3-151:15. This is even more true given the Disclaimer

is juxtaposed next to a warning about voter fraud, which will multiple the adverse effects on both Plaintiffs and voters. *See* 6/10/22 PI Tr. 218:23-220:22, 254:1-6; Green Tr. 157:6-162:7; Ex. 26 at 6-7.

Response: Undisputed that a single potential voter made the cited statement after being presented with leading questions. Accordingly, disputed that this would apply to "Georgia Voters."

111. Even Defendants have expressed confusion about whether the Disclaimer Provision applies to conduct beyond mailings and suggested that it in fact does. Ex. 18 at GA_VA00055527.

Response: Disputed but immaterial given Plaintiffs' decision to abandon their vagueness claim. Nothing in the cited source supports Plaintiffs characterization that Defendants "have expressed confusion." Instead, Defendants merely discussed whether the Disclaimer Provision applied to particular conduct.

112. The Secretary of State's office attempted to "fix the disclaimer," GAVA00050750, because the current language is "not able to get across everything you want to perfectly." 6/10/22 PI Tr. 122:4-11.

Response: Undisputed

113. If the Disclaimer simply required the sender's contact and a statement that the mailer did not come from the State, Plaintiffs would not have challenged it. See 6/10/2022 PI Tr. 220:23-221:9.

Response: Disputed but immaterial. Plaintiffs asked for an injunction of the entire disclaimer and only asked for a "more tailored injunction" as a fallback. Day 2 Tr. 219:25–220:11.

114. Plaintiffs seek to remove recipients from their mailing list that have already requested, received, or submitted an absentee ballot in a manner that is feasible with the timelines and logistics for their communication campaigns, the needs and restrictions of industry-leading vendors, the limits of the information available to VPC/CVI, and the timing demands of the election cycle. Ex. 15 at 10, 19, 24 ¶¶ 26-27, 47, 56; *see also* Ex. 24 at 11.

Response: Undisputed.

115. Defendants' witness Mr. Evans testified that duplicate applications are "not too terribly uncommon" and the process for dealing with them is "not that long." *See* Evans Dep. 71:18-72:2, 85:18-86:5.

Response: Disputed in part. It is undisputed that duplicate applications are "not too terribly uncommon." The full quote from Mr. Evans provides: "I think for one single duplicate application, it's not -- you know, not that long." Evans Depo. 85:22–23 [Doc. 160]. To the extent that Plaintiffs are using that quote to imply that the process for dealing with the cumulative time of resolving all duplicate applications that are received by the state—rather than the time for dealing with "one single duplicate application"—is "not that long," it is unsupported by the cited source.

116. The Secretary's office runs and participates in trainings for their own and county election officials that cover mail voting, including things like processing duplicate applications. Evans Tr. 78:6-79:2; Ex. 18, GA-VA00041544.

Response: Undisputed.

117. Additionally, many of Defendants' cited complaints state explicitly that the voter has not and does not plan to apply to vote absentee, meaning the Mailing List Restriction does not prohibit those voters from receiving duplicate mailers. *See*, *e.g.*, Defs.' Ex. H at 4, 15, 21, 22, 27; *see also* 6/10/2023 PI Tr. 72:13-73:2; Evans Dep. 242:20-243:1.

Response: Plaintiffs' characterization of a voter's intention is not a statement of fact supported by the record, and thus no response is required. Undisputed that the Anti-Duplication Provision does not prohibit Plaintiffs from sending those voters duplicate mailers.

118. Plaintiffs identify themselves on mailers to Georgia voters. *E.g.,* Ex. 15 at 36-39, 40-45; Ex. 16 at P-0371, P-0380.

Response: Undisputed.

119. Plaintiffs' distribution of personalized absentee applications did not put an undue strain on election officials. Complaints regarding ballot applications are resolved relatively quickly within the Secretary of State's office, without the need to open an investigation. Ex. 5, Dep. of Frances Watson ("Watson Tr.") 66:1016. Indeed, the complaints regarding ballot applications received by the Secretary of State's Investigations

Division were not even considered a "set priority" for the Secretary of State's Office. Watson Tr. 76:10-19. County election officials *prefer* to prefill applications, because doing so reduces the number of applications that they have to process with missing information, which often requires following up with the individual voters to complete the application. Ex. 18, GA-VA00038833; *Id*. at GA_VA00024557, GA-VA00051968; 6/10/22 PI Tr. 122:4-11.

Response: Disputed that the cited portions of the record support Plaintiffs' statement. Even if any individual complaint is resolved quickly, the record shows that resolving *numerous* complaints is time consuming. Watson Depo. 90:3–19 [Doc. 163]. Indeed, nothing in the cited source, Watson Depo. 66:10–16, supports the claim that complaints are solved "relatively quickly" or that election officials do not start an "investigation." To the contrary, the cited source says that they do not generate a "case file." But subsequent lines make clear that election officials do "take[] up a lot of time" doing "threshold" "investigative work" related to those complaints. Watson Depo. 66:18–67:5.

120. The Ballot Application Restrictions increased confusion with respect to the disclaimer, *see* 6/9/22 PI Tr. 215:10-219:20, 225:18-227:3; 6/10/22 PI Tr. 95:120, which requires third parties to state "This is NOT a government form" on an official government form. Ex. 13 at 59-61.

Response: Disputed that the Disclaimer Provision requires third parties to state "This is NOT a government form," and the cited exhibit does not support that claim. Also, the cited portions of the record do not show anything other than a single voter who expressed confusion after being presented with leading questions.

121. Reducing the ability of third-party civic organizations, such as Plaintiffs, to fill gaps left by election officials in informing and assisting voters on how to participate in the electoral process through absentee voting, *see, e.g.,* Evans Tr. 56:13-57:10, will increase the burdens on election officials. *See* Ex. 8, Dep. of Milton Kidd ("Kidd Tr.") 70:21-71:2.

Response: Disputed, as the first citation does not support the claim for which it is cited and says nothing to suggest that the State has "reduc[ed] the ability of third-party civic organizations … to fill gaps left by election officials." The second citation does not support the claim that the Challenged Provisions would "increase the burdens on election officials" as it merely reflects the thoughts of a single election official before SB 202 was enacted.

122. Both state and county election officials issue press releases and other public statements to promote the integrity of the absentee voting process and explain the role civic engagement groups play in that process. Ex. 18, GA_VA00052835; GA_VA00055527.

Response: Undisputed.

123. Pre-SB 202, Plaintiffs were already criminally prohibited from inputting a "fraudulent entry" on any application. O.C.G.A. § 21-2-562.

Response: This paragraph contains a legal conclusion, not statements of fact, to which no response is required

124. Defendants' investigator with the Elections Division has never seen any evidence of voter fraud in connection with a ballot application distributed by a third party. Watson Tr. 189:23-190:4, 191:3-13.

Response: Disputed in part. To the extent that Plaintiffs are relying on the cited source to suggest that there has never been fraud in connection with a ballot application distributed by a third party, it is unsupported by the cited source.

125. Georgia's election systems were already designed to identify and discard duplicate applications submitted to election officials before SB 202. Evans Dep. 142:3-9; 145:17-18. *See* O.C.G.A. § 21-2-381 (2019) (describing the process for processing absentee ballot applications before SB 202 was enacted); *compare with id.* § 21-2-381 (2021) (retaining process for identifying absentee ballot applicants).

Response: Disputed, as none of the cited sources supports the claim for which they were cited, but immaterial.

Respectfully submitted this 28th day of February, 2023.

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