SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH; et al.,

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v.

Brian KEMP, in his official capacity as Governor of the State of Georgia; et al.,

Respectfully submitted,

Dated: July 12, 2021 /s/ $T \quad R. G$

SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH; et al., , v. Brian KEMP, in his official capacity as Governor of the State of Georgia; et al., , REPUBLICAN NATIONAL COMMITTEE; et al., .	No. 1:21-cv-1284-JPB

Nearly two weeks before Intervenors were granted intervention, Plaintiffs amended their complaint. Doc. 83, Order (June 4, 2021). The deadline to file "any required response" to the amended complaint was the later of "14 days" or "the time remaining to respond to the original pleading." Fed. R. Civ. P. 15(a)(3). Because Intervenors were not yet parties, it was un-

"[i]t is … not the right to vote that is at stake … but a claimed right to receive absentee ballots"—which is not a constitutional right. , 394 U.S. at 807. As the Fifth Circuit has explained, the Constitution is not violated "unless … the state has 'in fact absolutely prohibited' the plaintiff from voting." , 961 F.3d at 404. And "permit[ting] the plaintiffs to vote in person" on election day, as Georgia does, "is the exact opposite of 'absolutely prohibit[ing]' them from doing so." ; , 977 F.3d 608, 611 (7th Cir. 2020) ("[U]nless a state'

When Intervenors raised this same point in , the Eleventh Circuit agreed. Amicus Br. of RNC & GAGOP, 2020 WL 5757920, at *4 (11th Cir. Sept. 23) ("Georgia's Election Day deadline does not implicate the right to vote at all."), 976 F.3d at 1281 ("Georgia's Election Day deadline does not implicate the right to vote at all."). In that case, the Eleventh Circuit stayed a preliminary injunction against Georgia's deadline for returning mail ballots. That deadline, the Eleventh Circuit explained, "does not implicate the right to vote at all" because "Georgia has provided numerous avenues" to vote, including "in person on Election Day." 976 F.3d at 1281. So too here.

In short, the "fundamental right to vote" is "the ability to cast ballot"—"not the right to do so in a voter's preferred manner." , 977 F.3d at 613 (emphasis added). To the extent that Plaintiffs challenge SB 202's regulations of absentee voting and other nontraditional methods, their claims fail as a matter of law.

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, 553 U.S. at 206-07 (Scalia, J., concurring in the judgment) (analyzing other precedents).

The categorical approach makes good sense. Given inevitable differences in voters' circumstances, every voting requirement "affects different voters differently." at 205. But those different effects are not different "burdens" imposed by a generally applicable law; they "are no more than the different of the single burden that the law uniformly imposes on all voters." The Constitution does not prohibit mere disparate impacts. at 207 (citing , 426 U.S. 229, 248 (1976)). Holding otherwise would imply that every voting requirement in every State is subject to invalidation whenever any voter's personal, idiosyncratic circumstances make that requirement particularly difficult. The Constitution does not tell courts to inject

fail where the statute has a 'plainly legitimate sweep,'" so courts must focus on an election law's "broad application to all … voters." 553 U.S. at 202-03 (op. of Stevens, J.). That an election law imposes "an unjustified burden on some voters," the lead opinion reiterated, cannot "invalidate the entire statute." at 203; at 198-200 (evaluating the burden on "most voters" and explaining that an unjustified burden on "a few voters" is "by no means sufficient"). As a court recently explained in another case involving Intervenors, a plaintiff cannot maintain a facial challenge "based only on burdens tied to the peculiar circumstances of individual voters." , 2021 WL 1175234, at *8.

Yet Plaintiffs challenge SB 202 on its face. They ask this Court to enjoin Defendants from giving "any effect" to the challenged provisions. Am. Compl. 132. They do not ask for as-applied relief for any "particular persons." , 819 F.3d 384, 386 (7th Cir. 2016). Even if that kind of relief were permissible—and it isn't, , 553 U.S. at 208 (Scalia, J., concurring in the judgment))—organizational plaintiffs like these lack standing to seek as-applied relief, , 974 F.3d 408, 421-22 (3d Cir. 2020). Plaintiffs thus seek to do what the law forbids: invalidate an election law for " voters" because it allegedly "imposes 'excessively burdensome requirements' on voters." , 905 F.3d 553, 558 (8th Cir. 2018). That kind of claim "is not plausible" and should be "dismissed with prejudice." , 2021 WL 1175234, at *8, *12.

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Less than two weeks ago—but more than a month after Plaintiffs filed their amended complaint—the Supreme Court decided . A landmark decision, was "the first time" that the Court applied sectiona83.9a024 0 0 54 143

common in 1982, the size of any racially disparate impact, the other available ways to vote, and the strength of the State's interests. at *12-13.

While 's list is nonexhaustive, the Court stated several subrules that courts "must" follow:

1. Courts "must tolerate 'the usual burdens of voting.'" at *12. "Mere inconvenience" never violates section 2.
2. When section 2 was amended in 1982, States required "nearly all voters to cast their ballots in person on election day." This history, as well as the current laws

First, the challenged parts of SB 202 impose nothing beyond the "'usual burdens of voting.'" , 2021 WL 2690267, at *12. All elections have rules: There is nothing unusual about requiring Georgians to register, present one of the several permissible forms of ID, apply for a ballot, timely request and return a ballot, find their assigned precinct, stand in line, and the like.

at *16, *18 (nothing unusual about having to "identify one's own polling place," "travel there," "mak[e] a trip to the department of motor vehicles," or make other similar trips to a mailbox, post office, drop box, or election office). Plaintiffs do not allege otherwise. They instead assume that even slight burdens must be justified by sufficient state interests. , Am. Compl. ¶¶248, 250-59, 264-70, 273-74. But Plaintiffs put the cart before the horse: Burdens that are "[m]ere inconvenience[s]" do not implicate section 2 in the first place.

, 2021 WL 2690267, at *12.

Second, nearly all of Plaintiffs' challenges involve

Third, Plaintiffs make no effort to quantify "the size" of any racially disparate impacts or "compar[e]" them in any "meaningful" sense. at *13. Plaintiffs mostly just assert, in conclusory terms, that disparate impacts will occur. , Am. Compl. ¶¶22-23, 279, 282, 285, 287, 290, 297, 319, 324. When they provide numbers, they inflate them with the kind of statistical fallacies that rejected. 2021 WL 2690267, at *17, *13; , Am. Compl. ¶¶24, 275, 280-81, 284, 286, 292. Or they allege disparate impacts based on preexisting disparities in employment, wealth, and education—precisely what deemed insufficient. 2021 WL 2690267, at *16; , Am. Compl. ¶¶24, 25, 277-78, 280-81, 286, 288-89, 292, 293, 298, 301, 322, 325-28. These disparities are not Georgia's fault. , 768 F.3d at 753. And allegations that "minorities [a]re 'generically' more likely than non-minorities to make use of" certain voting practices do not allege a disparity at all. , 2021 WL 2690267, at *19 n.19.

Fourth, Plaintiffs focus on how each provision of SB 202 burdens a particular method of voting, without considering the State's "entire system." at *13. Georgia makes it easy to vote. , 976 F.3d at 1281; at 1286 (Lagoa, J., concurring). With no-excuse absentee voting and a generous early-voting period, Georgia is in the top tier of all States for ease of voting.

, Ga. Sec'y of State, bit.ly/3AD0Adq (citing

, Ctr. for Election Innovation & Rsch. (Apr. 12, 2021)). Voters who cannot vote absentee can vote early or on election day, and vice versa. Plaintiffs

do not allege that any Georgians, let alone most Georgians, are unable to use at least of these options after SB 202. That allegation would be self-evidently implausible.

Fifth, Plaintiffs misstate "the strength of the state interests" behind the challenged laws. , 2021 WL 2690267, at *13. Plaintiffs assume that Georgia cannot act to prevent voter fraud unless fraud is already widespread in the State. , Am. Compl. ¶¶18, 213, 221-24, 228, 285, 290. But the "risk of voter fraud [is] real," even if Georgia has "had the good fortune to avoid it"; and the "prevention of fraud" is a "strong and entirely legitimate state interest." , 553 U.S. at 196 (op. of Stevens, J.); , 2021 WL 2690267, at *20, *13. It thus "go[es] without saying" that Georgia can "take action to prevent election fraud without waiting for it to occur and be detected within its own borders." , 2021 WL 2690267, at *20. Georgia can also take prophylactic steps to improve its election procedures, restore voter confidence, and prevent intimidation and coercion. Section 2 is not preclearance by another name: Sovereign States can reform their voting laws without first getting permission from Plaintiffs or federal courts. , 963 F.3d at 674. Plaintiffs' results-based claim under section 2 should be dismissed.

The test for discriminatory intent under section 2, the Fourteenth Amendment, and the Fifteenth Amendment is "the same." , 39 F.3d 1494, 1520 (11th Cir. 1994) (en banc). While did not alter that test, it made important holdings that illustrate why Plaintiffs' allegations fall

short. The key question, explained, is whether "the legislature as a whole" acted with racist intent—not individual legislators. 2021 WL 2690267, at *22. And "partisan motives are not the same as racial motives." Neither are "'sincere'" beliefs, even if "'mistaken,'" about the existence of fraud or the wisdom of election reforms. at *21-22.

Plaintiffs have not plausibly alleged that SB 202 was enacted with racist intent. , , 140 S. Ct. 1891, 1915-16 (2020) (resolving a claim of intentional discrimination at the motion-to-dismiss stage). Courts are "reluctan[t] to speculate about a state legislature's intent." , 992 F.3d at 1324 n.37. Here, the only reliable evidence of purposes are the formal legislative findings that the majority voted on and included in SB 202. According to those findings, SB 202

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Plaintiffs contend that various provisions of SB 202 violate Title II of the ADA. Am. Compl. ¶¶349-60. But if voting is a public "service[], program[], or activity[]," then the challenged provisions cannot violate Title II unless they "exclude[]" disabled persons from voting "by reason of [their] disability." 42 U.S.C. §12132. As the word "exclude" suggests, "'mere difficulty in accessing a benefit is not, by itself, a violation of the ADA.'" , 2021 WL 471187, at *8 (M.D. Ala. Feb. 9).

Plaintiffs are nonprofit corporations, not disabled persons, so they cannot bring an as-applied challenge to SB 202. , 974 F.3d at 421-22. Plaintiffs instead must allege that the challenged provisions are

invalid under the ADA. To win a facial challenge, Plaintiffs "'must establish that no set of circumstances exists under which the [challenged provision] would be valid.'" ,
23 F. Supp. 2d 941, 951 (E.D. Wis. 1998).

Plaintiffs come nowhere close to pleading a plausible facial challenge. As explained, the challenged provisions impose no more than the "'usual burdens'" of voting. , 2021 WL 2690267, at *18. The complaint never alleges whether or how these usual burdens become prohibitively difficult for disabled persons. Nor could the complaint plausibly allege what it needs to for a facial challenge: that the challenged provisions make voting too difficult for disabled voters, no matter their qualifying disability, access to assistance, or other life circumstances. Georgia gives voters many ways to cast a ballot, after all. It

is difficult to imagine person who could, for example, place an absentee ballot in a drop box but not a mailbox, vote in person but only if provide them food and water, or take advantage of in-person early voting yet be unable to get an ID and vote absentee. Am. Compl. ¶358. Plaintiffs certainly don't identify anyone. Plus

protect "conduct," even though most conduct is "'in part initiated, evidenced, or carried out by means of language.'" , 547 U.S. 47, 62 (2006). The act of giving someone money or gifts is just that—an act. While banning that act will impose "incidental" burdens on speech, that unsurprising fact "hardly means that the law should be analyzed as one regulating … speech rather than conduct." ; , 553 U.S. 285, 298 (2008) (laws regulating offers or conspiracies to engage in unlawful acts regulate conduct, not speech).

While the First Amendment does protect "expressive conduct," SB 202 regulates only the nonexpressive parts of gift-giving. Conduct does not become expressive "'

given inside the polling place, and food and water that are intended to influence voters—that doom Plaintiffs' facial claim. And because the gift-giving ban is a reasonable regulation of a nonpublic forum, a separate overbreadth analysis is not appropriate. , 799 F.3d 1145, 1171 (D.C. Cir. 2015). This claim, too, should be dismissed.

This Court should dismiss Plaintiffs' amended complaint with prejudice.

Respectfully submitted,

Dated: July 12, 2021 /s/

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/s/

On July 12, 2021, I e-filed this document on ECF, which will serve everyone requiring service.

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