

In the
United States Court of Appeals
for the Eleventh Circuit

THE NEW GEORGIA PROJECT; REAGAN JENNINGS;
CANDACE WOODALL; AND BEVERLY PYNE,
Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of
State of Georgia and the Chair of the Georgia State Election
Board; and REBECCA N. SULLIVAN, DAVID J. WORLEY,
MATTHEW MASHBURN, and ANH LE, in their official
capacities as Members of the Georgia State Election Board,
Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Georgia, Atlanta Division.
No. 1-20-CV-01986 — Eleanor Ross, *Judge*

**APPELLANTS' REPLY IN SUPPORT OF MOTION TO
STAY INJUNCTION PENDING APPEAL**

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, counsel for Defendants-Appellants hereby certify that the certificate of interested persons contained in their initial brief is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, with the following additions:

1. Attorney General's Office of Oklahoma: Counsel for Amicus Curiae States.
2. Arkansas, State of: Amicus Curiae.
3. Arizona, State of: Amicus Curiae.
4. Consovoy McCarthy, PLLC: Counsel for Amicus Curiae Georgia Republican Party and Republican National Committee.
5. Florida, State of: Amicus Curiae.
6. Georgia Republican Party, Inc.: Amicus Curiae.
7. Idaho, State of: Amicus Curiae.
8. Indiana, State of: Amicus Curiae.
9. Kansas, State of: Amicus Curiae.
10. Kentucky, State of: Amicus Curiae.
11. Louisiana, State of: Amicus Curiae.

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13. Michael Best & Friedrich LLP: Counsel for Amicus Curiae Georgia Republican Party and Republican National Committee.
14. Mississippi, State of: Amicus Curiae.
15. Missouri, State of: Amicus Curiae.
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22. Republican National Committee: Amicus Curiae.
23. Tennessee, State of: Amicus Curiae.
24. Texas, State of: Amicus Curiae.
25. South Carolina, State of: Amicus Curiae.
26. South Dakota, State of: Amicus Curiae.
27. West Virginia, State of: Amicus Curiae.

CORPORATE DISCLOSURE STATEMENT

Counsel for Appellants certify that Appellants are individuals, sued in their official capacities as representatives of State government entities. Counsel for Appellants further certify that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

/s/ Josh Belinfante
Josh Belinfante

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INTRODUCTION

As plaintiffs across the country have sought to delay states' longstanding election day deadlines, citing the COVID-19 pandemic, the Supreme Court and circuit courts have repeatedly stayed preliminary injunctions extending ballot receipt deadlines. Just yesterday, the Seventh Circuit Court of Appeals stayed a Wisconsin district court order requiring absentee ballots returned after the election to be counted if postmarked on or before election day. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-2835 and 20-2844 (7th Cir. Sept. 27, 2020).

The same relief is warranted here. The election in Georgia is *already underway*, with absentee ballots being returned by voters. And the district court's "relief"—changing the deadline for election officials to receive absentee ballots in 17 of 159 counties and requiring those counties to assess the postmark on each absentee ballot returned after election day—is a recipe for confusion and delay. *See, e.g., Gallagher v. New York State Board of Elections*, 20 Civ. 5504 (AT), 2020 WL 4496849 at *7-8 (S.D.N.Y. Aug. 3, 2020) (noting six-week delay tabulating absentee ballots due to postmark inconsistencies). The district court arbitrarily extended the Election Day Deadline by three days. Doc. 134 at 69-70. Furthermore, the district court's order requires the 17 counties to comply with an unmanageable postmark standard—

requiring acceptance of absentee ballots postmarked by Election Day with “any type of imprint applied by the postal service to indicate the location and date the postal service accepts custody of a piece of mail.” Doc. 134 at n.34. Yet the record demonstrates that the Election Day Deadline has not burdened absentee voters during COVID-19 any more than during the pre-pandemic era, and that burden is minimal. Because the state officials here have strong arguments that Georgia’s decades-old election day deadline for absentee ballots remains perfectly constitutional, and to avoid the serious problems created by the district court’s order, this Court should stay the district court’s preliminary injunction pending appeal.

ARGUMENT

I. The district court lacks jurisdiction.

A. Plaintiffs’ alleged injuries are neither traceable to nor redressable by State Defendants.

Plaintiffs try to brush away their standing problem by arguing that State Defendants’ have broad powers over election administration in Georgia, and thus Plaintiffs’ asserted injuries must be traceable to and redressable by State Defendants. *See Resp.* at 16-17. But Plaintiffs, similar to the district court, mistakenly rely on the general statutory powers of State Defendants in O.C.G.A. §§ 21-2-31 and 21-2-50 for the proposition that “[t]hey are responsible for promulgating and enforcing

uniform state election policy, *to which all counties are subject.*” *Id.* (emphasis in original); *see also* Doc. 134 at 19-20. Those powers do not mean an injunction against the officials can provide redress under the circumstances of this case.

County election boards are the only officials who can provide the redress Plaintiffs seek. Under Georgia law, county boards are responsible for receiving absentee ballots, which they are directed by statute not to open if received after the Election Day Deadline. O.C.G.A. § 21-2-386(a)(1)(F). Although Georgia law grants State Defendants various powers related to elections,¹ they are not responsible for receiving or counting absentee ballots. And although the Secretary is the “chief election official” in Georgia, the law does not contemplate (or even authorize) any role for the Secretary in receiving absentee ballots. *See* O.C.G.A. §§ 21-2-31; 21-2-50. Indeed, State Defendants would need to sue a county board to enforce the Election Day Deadline, which underscores the lack of relevant authority over the county election officials. *See* O.C.G.A. § 21-2-32(a); *see also Jacobson v. Florida Secretary of State*, No. 19-14552, 2020 WL 5289377 at *11 (11th Cir.

¹ O.C.G.A. § 21-2-31(authority to promulgate rules and regulations, to investigate violations of election laws, and recommend changes to election laws); O.C.G.A. § 21-2-50(a) (authority to determine forms for ballots, sufficiency of nomination petitions, conduct training of county superintendents, and perform other administrative duties).

Sept. 3, 2020) (“[t]hat the Secretary must resort to judicial process if the Supervisors fail to perform their duties underscores her lack of authority over them.”). In short, just as in *Jacobson*, any injury Plaintiffs might incur based on the Election Day Deadline is not one that is either traceable to or redressable by State Defendants, because they do not control nonparty county elections officials in this context.

Plaintiffs assert that “State Defendants can instruct counties on the extended Deadline,” Resp. at 17, but this similarly fails to establish their injuries are redressable via an injunction against State Defendants. Georgia counties “are not ‘obliged ... in any binding sense ... to honor an incidental legal determination [this] suit produce[s].” 2020 WL 5289377 at *33 (quoting *Lewis v. Governor of Ala.*, 944 F.3d 1287 at 1302 (11th Cir. 2019)). A judgment against State Defendants does not bind the county boards, and “any persuasive effect a judicial order might have upon the [142 county boards], as absent nonparties who are not under [State Defendants’] control, cannot suffice to establish redressability.” *Jacobson*, 2020 WL 5289377 at *12. Because Plaintiffs lacked standing to seek an injunction against the State Defendants or against the 142 nonparty county boards, a stay of the injunction pending appeal is warranted.

B. Plaintiffs' claim presents a nonjusticiable political question.

Similar to standing, Plaintiffs largely fail to address the political question doctrine in their response. Resp. at 17-19. Plaintiffs claim that the question here is inherently manageable and justiciable because the district court's order grants a "modest remedy." Resp. at 18-19. But Plaintiffs fail to address what judicially discernible and manageable standards exist to adjudicate a claim challenging the Election Day Deadline during a pandemic.

The district court was asked to substitute the state's deadline for Plaintiffs' preference. Determining which deadline is better involves questions of policy with no judicially manageable standards. *See Coalition for Good Governance v. Raffensperger*, No. 1:20-cv-1677-TCB, 2020 WL 2509092, at *1, *3 (N.D. Ga. May 14, 2020) (citing *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) and *Jacobson v. Florida Secretary of State*, No. 19-14552, 2020 WL 2049076, at *18 (11th Cir. Apr. 29, 2020) (William Pryor, J., concurring)). Plaintiffs sought a seven-day extension of the Election Day Deadline, (Doc. 57-1), and the district court ordered a three-day extension of the deadline, (Doc. 134)—an arbitrary extension given the number of absentee ballots returned more than three days after Election Day, (Doc. 59-1 at 19). Further demonstrating the lack of any standard, the percentage of absentee ballots returned late in the June 2020 Primary was lower than in the

pre-COVID-19 era—only 0.6% of absentee ballots in 2020 were not counted as late (7,281 late ballots of over 1.1 million absentee ballots cast) compared to 0.7% in 2014, 1.2% in 2016, and 1.6% in 2018. *See* Doc. 59-1 at 4-5.

Trying to determine ballot receipt deadlines in such circumstances requires the court to fashion an arbitrary deadline that would not result in every late-received vote being counted. *See DCCC v. Ziriak*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576 at *8-10 (N.D. Okla. Sept. 17, 2020) (denying preliminary injunction seeking extension of absentee ballot receipt deadline). Because there are no discernable and manageable standards to decide what date is the appropriate deadline (if not Election Day), the issue is a nonjusticiable political question.

II. State Defendants are likely to succeed on the merits.

A. The district court erred in finding that the Election Day Deadline severely burdens voters.

The plaintiffs are wrong that the burden on voters must be weighed only as to the voters who actually miss the relevant deadline. Resp. at 20-21. If the severity of the burden is considered only as to voters unable to vote absentee, then courts would always find a severe burden on the right to vote absentee. *See Memphis A. Phillip Randolph Institute v. Hargett*, No. 3:20-cv-00374, 2020 WL 5412126, at *26 (M.D. Tenn. Sept. 9, 2020) (“If strict scrutiny was warranted based on the

simple reality that precluding certain people from voting absentee might naturally prevent some of them from voting at all because they are unable to vote in-person, then strict scrutiny would always be applied to laws limiting (through, for example, eligibility criteria or deadlines) the ability to vote absentee.”). But this is not the case, as the Election Day Deadline applies to all absentee voters. *See* O.C.G.A. § 21-2-386(a)(1)(F).

As noted, the percentage of absentee voters in the 2020 June Primary whose absentee ballots were rejected as late was less than in elections prior to the pandemic, evidencing a minimal burden caused by the Election Day Deadline. *Supra* Section I.B. Moreover, the State provides alternatives that significantly reduce any burden on absentee voters caused by the Election Day Deadline. Voters can avert possible issues with mail delays by requesting an absentee ballot up to 180 days before Election Day. O.C.G.A. § 21-2-381(a)(1)(A). Because voters can receive absentee ballots as early as 49 days prior to Election Day, voters can timely complete and return their absentee ballot to ensure it arrives before the Election Day Deadline. *See* O.C.G.A. § 21-2-384(a)(2).

Georgia voters can return their absentee ballots through the mail, a drop box, or by hand-delivery, or vote early in-person. *See* O.C.G.A. § 21-2-385; Ga. Comp. R. & Regs. 183-1-14-0.6-.14. Voters may even vote

in person after requesting and receiving their absentee ballot, so long as they properly cancel their absentee ballot. See O.C.G.A. § 21-2-388.

With several options to ensure absentee ballots are timely returned, “voters who fail to ensure timely return of their ballots should not blame the law for their inability to vote.” *Ziriox*, 2020 WL 5569576, at *18 (citing *Thomas v. Andino*, No. 3:20CV1552, 2020 WL 2617329, at *26 (D.S.C. May 25, 2020)). “An absentee voter is responsible for acting with sufficient time to ensure timely delivery of her ballot, just as a voter intending to vote in-person must take appropriate precautions by heading to the polls with a sufficient cushion of time to account for traffic, weather, or other conditions that might otherwise interfere with their ability to arrive in time to cast a ballot.” *Id.*

Any deadline “will invariably burden some voters ... for whom the earlier time is inconvenient,” but these burdens are assessed in light of “a state's legitimate interest in providing order, stability, and legitimacy to the electoral process.” *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018). As the Sixth Circuit observed, a “generally applicable deadline that applied to all would-be absentee voters would likely survive the *Anderson-Burdick* analysis, even if it resulted in disenfranchisement for certain ... individuals.” *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020). The record does not support a finding that the Election Day Deadline imposes a severe burden on

voters, and because the State has “strong” and “important” interests in the Election Day Deadline, the challenged law is not unconstitutional under the *Anderson-Burdick* test.

B. The district court erred in finding that the Election Day Deadline violates procedural due process of voters.

To support a procedural due process claim, Plaintiffs must show they have been deprived of a liberty interest and that such deprivation was committed under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999); *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). Unlike an absentee ballot that is rejected for failing to meet a signature requirement or other informational requirement, an absentee ballot that is received after the Election Day Deadline is not counted, and the voter is notified that the ballot was returned too late to be counted. *See* O.C.G.A. § 21-2-386. Alleged postal delays and COVID-19 are not actions of the State, and because voters do not have a constitutional right to vote absentee or return their ballots after the election, there is no erroneous deprivation of a liberty interest. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It does not follow, however, that the right to vote in any manner. . .[is] absolute.”); *Coalition for Good Governance*, 2020 WL 2509092, at *3 (blaming COVID-19, not the State, for election issues).

Voters are provided notice of the deadline, which is included in the instructions that accompany every absentee ballot. [Doc. 91-3 at ¶ 5]. Absentee voters are also expected to understand the rules governing absentee voting, as “[e]very citizen is presumed to know the law.” *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507, (2020); see also *Thomas v. Andino*, 2020 WL 2617329, at n.25. (“it is reasonable to expect a voter, who is voting by absentee ballot, no matter the reason, to familiarize themselves with the rules governing that procedure—especially when those procedures are provided.”). The notice of the Election Day Deadline provided to every absentee voter coupled with the timing and methods for returning absentee ballots minimize any risk of erroneous deprivation.

Accordingly, and as further set forth in the motion, State Defendants are likely to prevail on the merits of the procedural due process claim. A stay of the preliminary injunction is thus appropriate.

III. The remaining factors favor a stay.

For the reasons stated in State Defendants’ motion, the remaining *Nken* factors favor a stay. See *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (noting that enjoining “the State from conducting this year’s elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm the State.”). Plaintiffs urge this Court to overlook *Purcell* because it involved an appellate court reversing a

district court three weeks before election day. Resp. at 27. However, the *Purcell* principle applies to all lower federal courts. See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (*RNC*). Moreover, Plaintiffs fail to acknowledge that, although election day itself is a few weeks away, the current election is *already underway*. And as the Supreme Court recognized in *Purcell*, the risk of voter confusion and consequent incentive not to vote only increases as an election draws closer. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (*per curiam*); accord *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (compiling cases in which the Supreme Court stayed injunctions involving voting requirements fifty-two, forty, and thirty-three days before election day).

Lower courts continue to decline to enjoin election-day-deadline claims similar to Plaintiffs' claim in this case based on *Purcell*. See, e.g., *Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 WL 5591590, at *20 (D.S.C. Sept. 18, 2020) (“the court declines to enjoin the Election Day Cutoff claim based on concerns outlined in *Purcell* and *Republican National Committee* ... [the] General Election is close enough in time to warrant concern, as it stands only forty-seven days away.”). And lower court orders extending election day deadlines for absentee ballots continue to be stayed by appellate courts. See, e.g., *Bostelmann*, Nos. 20-2835 and 20-2844 (7th Cir. Sept. 27, 2020) (staying Wisconsin district

court order extending absentee ballot deadline). Because courts “should ordinarily not alter the election rules on the eve of an election,” *RNC*, 140 S. Ct. at 1207, much less when an election is already ongoing, this Court should grant State Defendants’ motion and stay the district court’s order pending appeal.

CONCLUSION

For the reasons above, this Court should stay the district court’s preliminary injunction pending appeal.

Respectfully submitted this 28th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 2,527 words as counted by the word-processing system used to prepare the document.

Respectfully submitted this 28th day of September, 2020.

/s/ Josh Belinfante
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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2020 I served this Reply by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

Respectfully submitted this 28th day of September, 2020.

/s/ Josh Belinfante
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