**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| THE NEW GEORGIA PROJECT, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*,<br><br>Defendants. | Civil Action No. 1:21-cv-01229-JPB |

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT GAMMAGE'S MOTION TO DISMISS**

## INTRODUCTION

Polling place lines are infamous in Georgia, stretching five hours, eight hours, even ten hours long.[1] To ease the burden of these unconscionable delays, Plaintiffs New Georgia Project (NGP), Black Voters Matter Fund (BVMF), and Rise distribute food and water at Georgia polling locations, including in Fulton County. In response, the General Assembly has acted aggressively—not to eradicate the scourge of voting lines, regrettably, but to prevent organizations like Plaintiffs from providing nonpartisan, nondisruptive humanitarian aid to all comers. Specifically, recently-enacted SB 202 *criminalizes* any offering of food or drink to any elector near a polling place.

The dilemma this provision forces on Plaintiffs—forego speech and expressive conduct protected by the First Amendment, or risk prosecution—demands judicial redress. Accordingly, Plaintiffs brought this action to enjoin

[1] *See* Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait in Line for Hours? Too Few Polling Places*, NPR (Oct. 17, 2020), available at https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl (reporting five hour lines); Lawyers' Committee for Civil Rights Under Law, *Our Broken Voting System and How to Repair It* (2013), available at https://866ourvote.org/wp-content/uploads/2020/10/EP2012-FullReport.pdf (reporting eight hour lines); *More Than 10-Hour Wait and Long Lines as Early Voting Starts in Georgia*, The Guardian (Oct. 12, 2020), available at https://www.theguardian.com/us-news/2020/oct/13/more-than-10-hour-wait-and-long-lines-as-early-voting-starts-in-georgia (reporting ten hour lines).

prosecutors, including Defendant Keith Gammage in his official capacity as Solicitor General of Fulton County, from enforcing SB 202's ban on Plaintiffs' line relief activities. The Solicitor now challenges this Court's jurisdiction, arguing the live controversy required by Article III does not exist because he *might not* prosecute Plaintiffs for any violations, yet he is unwilling to disclaim any intent to enforce the line relief ban. That equivocation is no relief from the speech-chilling effects of SB 202, and it certainly cannot divest this Court of jurisdiction. Federal courts routinely adjudicate pre-enforcement challenges to the constitutionality of new statutes, even when the threat of prosecution is substantially less than it appears here. The Solicitor's motion to dismiss should be denied.

## BACKGROUND

NGP, BVMF, and Rise support voters and other individuals at polling places by distributing food and water, both directly and in partnership with other organizations. *See* Am. Compl. ¶¶ 17, 20-24, 99. They plan to continue these activities in Fulton County, among other areas in Georgia, as long as burdensome lines persist. *See id.* ¶¶ 25, 187. Under SB 202, however, they will risk serious criminal penalties for doing so. The new law makes it unlawful to "give, offer to give, or participate in the giving of any money or gifts, including, but not limited to, food and drink, to an elector" standing in line to vote. SB 202 § 33, Reg. Sess. (Ga.

2020). Violators "shall be guilty of a misdemeanor." O.C.G.A. § 21-2-414(f).

In Fulton County, misdemeanor prosecutions are Solicitor Gammage's responsibility. *See* O.C.G.A. § 15-18-66. As he explains in his motion to dismiss, the decision whether to prosecute "generally rests entirely in his discretion." Mot. at 6 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). The Solicitor correctly notes that he has not made any public statement suggesting how he will exercise that discretion, Mot. at 6, and he has not otherwise provided any binding assurances that Plaintiffs' line relief activities will be permitted in Fulton County. Instead, he highlights that "[t]hroughout his tenure as Solicitor General, Defendant Gammage has diligently and effectively prosecuted violations of the laws of the State of Georgia and Fulton County." *Id.*

Plaintiffs seek declaratory and injunctive relief to guarantee that their efforts in support of Georgia voters will not result in arrest, fines, or jail time. Am. Compl. at 65-66.

## LEGAL STANDARD

Where, as here, a motion under Rule 12(b)(1) facially attacks the legal sufficiency of a complaint's allegations in support of subject matter jurisdiction, the complaint's allegations are "taken as true," *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990), and "general factual allegations of injury resulting from the

defendant's conduct" are sufficient, *Worthy v. City of Phenix City*, 930 F.3d 1206, 1214 (11th Cir. 2019).

Courts apply the ripeness doctrine—which tests whether a live controversy exists for the Court's adjudication—"most permissively in the First Amendment context." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010). "[I]t is well-established that 'an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences. In such an instance, the injury is self-censorship.'" *Id.* at 1254 (quoting *Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001)) (alteration adopted).

## ARGUMENT

### I. Plaintiffs have standing because their intention to continue line relief activities prohibited by SB 202 incurs a credible threat of persecution.

The Solicitor's argument that Plaintiffs' claims are unripe until he announces an intention to prosecute violations of SB 202 contradicts settled precedent. "Case law from both the Supreme Court and [the Eleventh Circuit] is clear: because we must afford special protection for the exercise of constitutional rights, a plaintiff does not always need to risk prosecution to obtain preventative relief when his or her exercise of a constitutional right at stake." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1251 (11th Cir. 2012). "Instead, a plaintiff with the exercise of a

constitutional right at stake may seek declaratory or injunctive relief prior to the challenged statute's enforcement" where a "credible threat of prosecution exists based on the circumstances" *Id.* at 1251-52.

As courts frequently recognize, the "credible threat of prosecution" standard is "quite forgiving." *N.H. Right to Life Pol. Action Cmte. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996). Indeed, the threat of prosecution is presumptively credible where it is apparent that plaintiffs' intended conduct will violate a statute's terms. *See, e.g.*, *GeorgiaCarry.Org*, 687 F.3d at 1252 (recognizing credible threat of prosecution where plaintiff has "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement"); *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 452 (6th Cir. 2014) (recognizing credible threat of prosecution where candidate wished to engage in various campaign activities, "all of which the Code restricts").

Conduct that violates a criminal ban incurs a credible threat of prosecution even where there is no indication that a prosecutor intends to enforce the challenged provisions. *See, e.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (holding fear of prosecution was credible, even though challenged criminal penalty provision had never been applied to plaintiffs' proposed conduct, where statute "on its face" proscribed the proposed conduct); *Doe v. Bolton*, 410

U.S. 179, 188 (1973) (holding physicians had standing to challenge abortion statutes, "despite the fact that the record does not disclose that any of them has been prosecuted, or threatened with prosecution," because "[t]he physician is the one against whom these criminal statutes directly operate"); *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 778 (8th Cir. 2019) (holding "when a course of action is within the plain text of a statute, a 'credible threat of prosecution' exists" even if the challenged provision has not previously been enforced).

Plaintiffs allege a credible threat of prosecution because they intend to participate in the very line relief activities that are now prohibited by SB 202. *Compare* Am. Compl. ¶¶ 17, 20-25, 99, 187 *with* SB 202 § 33. This case is therefore unlike *Younger v. Harris*, 401 U.S. 37, 41-42 (1971), where the Supreme Court determined certain plaintiffs did not allege a live controversy because there was no indication that California's Criminal Syndicalism Act would be interpreted to criminalize their intended peaceful, nonviolent activity. Here, in contrast, there is no doubt SB 202 prohibits Plaintiffs' intended activity; in fact, it appears the Bill's ban on line relief was enacted precisely to prohibit any repetition of Plaintiffs' efforts in the recent elections. *See* SB 202 § 2(13) (justifying line relief ban on basis of "groups approaching electors while they waited in line" in 2020).

## II. The Solicitor's ambiguous statements about his enforcement plans do not deprive Plaintiffs of standing.

Conspicuously, the Solicitor does not deny that Plaintiffs allege their intention to engage in activities that will violate SB 202, nor does he deny that enforcement of SB 202 will violate rights secured to Plaintiffs by federal law. Instead, he argues that "Plaintiffs have made no showing that Defendant Gammage has threatened to prosecute anyone for violating the SB 202 provision prohibiting individuals from delivering food or water to voters waiting in line." Mot. at 5-6. Of course, Plaintiffs need not make any such showing to survive a facial attack on their pleadings. *See Worthy*, 930 F.3d at 1214. And active threats of prosecution are not required to challenge a new law. *See Doe*, 410 U.S. at 188. Quite the contrary: courts recognize a live controversy persists even where defendants affirmatively represent that statutory violations *will not be prosecuted*.

In *Solomon v. City of Gainesville*, 763 F.2d 1212 (11th Cir. 1985), for example, the owner of a pizza parlor challenged the constitutionality of an ordinance, enforceable by the city manager, that made it illegal for him to display a nude illustration above his restaurant. Even though "the Gainesville City Commission, by motion, instructed its City Manager to discontinue any and all prosecutorial action now and in the future with regard to the sign at issue," the Eleventh Circuit held the petitioner had standing to pursue his challenge because the city commission

remained free to change its position in the future. *Id.* at 1213.

Similarly, in *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486 (11th Cir. 1993), a judicial candidate challenged campaign rules enforced by the Florida Bar and the Judicial Qualifications Commission. Those defendants represented to the court that the challenged rules could not be applied constitutionally to the plaintiff's proposed campaign speech. *Id.* at 1494. Still, the Eleventh Circuit determined a live controversy existed because the defendants maintained "the discretion to change [their] policy regarding the interpretation and enforcement of" the challenged rules. *Id.*; *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (holding city's repeal of challenged provision did not preclude judicial review because city could later reenact the provision); *United Food & Com. Workers Int'l Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 429 (8th Cir. 1988) (recognizing live controversy even though law enforcement defendants submitted affidavits disavowing any "present plan" to enforce challenged provisions because their position "could well change"); *Wilson v. Stocker*, 819 F.2d 943, 946-47 (10th Cir. 1987) (recognizing live controversy even though defendant attorney general had taken no action to enforce the statute against plaintiff "because the official represents the state whose statute is being challenged as the source of injury"); *Phillips v. Penn. Higher Educ. Assistance Agency*, 657 F.2d 554, 569-70

(3d Cir. 1981) (recognizing live controversy even though defendant agency maintained it had no intention to resume challenged activity).

Thus, even if the Solicitor had publicly disavowed any intention to prosecute violations of SB 202—which he has not—those representations would not deprive this Court of jurisdiction. But rather than renounce future prosecutions, the Solicitor emphasizes to the Court that he "has diligently and effectively prosecuted violations of the laws of the State of Georgia and Fulton County." Mot. at 6. This is precisely why Plaintiffs named him as a Defendant in this action. The possibility of criminal prosecution is a grave threat, and one that SB 202 aims directly at Plaintiffs. Until this Court permanently enjoins that peril, Plaintiffs' constitutional rights are not secure.

**CONCLUSION**

For the foregoing reasons, the Motion to Dismiss should be denied.

Respectfully submitted, this 28th day of June, 2021.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a point size of 14.

Dated: June 28, 2021.

s/ *Uzoma N. Nkwonta*
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 28, 2021, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Dated: June 28, 2021.

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