

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

IN RE GEORGIA SENATE BILL 202	Master Case No. 1:21-MI-55555-JPB
<p>SIXTH DISTRICT OF THE AFRICAN METHODIST EPISOCPAL CHURCH, <i>et al.</i>,</p> <p style="text-align: center;"><i>Plaintiffs,</i></p> <p style="text-align: center;">v.</p> <p>BRIAN KEMP, Governor of the State of Georgia, in his official capacity, <i>et al.</i>,</p> <p style="text-align: center;"><i>Defendants,</i></p> <p>REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i>,</p> <p style="text-align: center;"><i>Intervenor-Defendants.</i></p>	Civil Action No.: 1:21-CV-01284-JPB
<p>GEORGIA STATE CONFERENCE OF THE NAACP, as an organization, <i>et al.</i>,</p> <p style="text-align: center;"><i>Plaintiffs,</i></p> <p style="text-align: center;">v.</p> <p>BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, <i>et al.</i>,</p> <p style="text-align: center;"><i>Defendants,</i></p> <p>REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i>,</p> <p style="text-align: center;"><i>Intervenor-Defendants.</i></p>	Civil Action No.: 1:21-CV-01259-JPB

**COUNTY DEFENDANTS’¹ CONSOLIDATED BRIEF IN RESPONSE TO
THE AME AND GEORGIA NAACP PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION**

INTRODUCTION

County Defendants do not take a position on the constitutionality or legality of the statute Plaintiffs challenge, O.C.G.A. § 21-2-414(a), but this Court should deny the AME and Georgia NAACP Plaintiffs’² Motion for Preliminary Injunction (“Motion”) against the County Defendants because Plaintiffs cannot establish the four requisites for injunctive relief. As County Defendants earlier explained in their motions to dismiss,³ Plaintiffs lack standing to assert their claims against County Defendants, including this request for preliminary injunctive relief, because their alleged injuries arising out of the enforcement of criminal penalties for “line warming”⁴ pursuant to O.C.G.A. § 21-2-414(a) cannot be redressed by injunctive relief against County Defendants, and are not traceable to any conduct by County Defendants.⁵ Election officials and members of the county boards of registration

¹ A list of all County Defendants is included as an appendix to this filing.

² The named plaintiffs in *Georgia State Conference of the NAACP et al. v. Raffensperger et al.*, Case No. 21-cv-01259-JPB and *Sixth District of the African Methodist Episcopal Church et al. v. Kemp et al.*, Case No. 1:21-CV-01284-JPB.

³ *Georgia State Conference of the NAACP*, [Doc. 52]; *Sixth District of the African Methodist Episcopal Church*, [Doc. 90].

⁴ Also referred to as “line relief.”

⁵ In the Court’s Orders denying the County Defendants’ Motions to Dismiss, the Court noted that the Plaintiffs need only show that an injunction against the County Defendants would address *some* of Plaintiffs’ alleged injuries. *Georgia State Conference of the NAACP*, [Doc. 64]; *Sixth District of the African Methodist*

and elections have no role in the enforcement of criminal penalties. Moreover, Plaintiffs cannot show irreparable harm, that a balance of equities weigh in their favor or that injunctive relief against County Defendants is in the public interest. Accordingly, a grant of injunctive relief against County Defendants is improper and should be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Shortly after Senate Bill 202 (“SB 202”) was passed and became effective on March 25, 2021, several lawsuits were filed against the State of Georgia, its Governor and Secretary of State, members of the State Election Board, and election officials and members of 14 county boards of registration and elections challenging provisions contained in SB 202, including a provision criminalizing line relief gifts to electors.⁶ Despite being named as defendants to these actions, neither the county boards nor the election officials have any authority regarding the enactment of voting legislation in the State of Georgia, nor do they have any discretion over whether to follow the laws passed by the Legislature. Rather than limiting their lawsuit to the

Episcopal Church, [Doc. 110]. Although the Court found that Plaintiffs had standing against the County Defendants for their lawsuits as a whole, the current motion seeking injunctive relief related to only the criminal penalties for violating the line warming ban is different. Plaintiffs have not shown that the County Defendants can address their alleged injuries resulting from the criminalization of line warming.

⁶ Based on the similarities between litigation and consensus among the parties, six cases were consolidated on December 23, 2021.

Governor, the Secretary of State, and the State Election Board (“State Defendants”)⁷ as the parties responsible for the enactment and enforcement of the provisions of SB 202, Plaintiffs have named an arbitrarily selected set of county defendants.

On May 25, 2022, plaintiffs in two of the cases, *Georgia State Conference of the NAACP et al. v. Raffensperger et al.*, Case No. 21-cv-01259-JPB and *Sixth District of the African Methodist Episcopal Church et al. v. Kemp et al.*, Case No. 1:21-CV-01284-JPB, filed a motion for a preliminary injunction requesting that the Court enjoin defendants⁸ from enforcing the line relief ban in O.C.G.A. § 21-2-414, which imposes criminal penalties on individuals that “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”... “[w]ithin 150 feet of the outer edge of any building within which a polling place is established” or “[w]ithin 25 feet of any voter standing in line to vote at any polling place.”⁹ The line relief ban seeks to prevent conduct often referred to as “line warming,” which is the provision of water, food, and more recently, hand sanitizer and facial coverings, to voters waiting in line to cast their vote. Plaintiffs allege that the imposition of criminal penalties upon people who

⁷ And district attorneys, where applicable.

⁸ The named defendants in the *Georgia State Conference of the NAACP* and *Sixth District of the African Methodist Episcopal Church* cases.

⁹ O.C.G.A. § 21-2-414(a), (f).

offer gifts to voters while waiting in line to cast their vote restricts verbal speech and expressive conduct. *See* Motion, Doc. 171-1, p. 2.

Similar to other challenged provisions of SB 202, county elections officials and members of the county board of registrations and elections have no control over the implementation of a statutory line warming ban or enforcement of criminal penalties for violation of the same. Accordingly, as detailed below, Plaintiffs cannot demonstrate the four requisites for injunctive relief, and their Motion should be denied.

ARGUMENT AND CITATION OF AUTHORITY

Because temporary restraining orders and preliminary injunctions are such extraordinary and drastic remedies, courts may not grant this type of relief “unless the movant clearly established the ‘burden of persuasion’ as to the four requisites.” *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (quoting *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989)). Plaintiffs must demonstrate: (1) they have a substantial likelihood of success on the merits of their claims; (2) they will likely suffer irreparable harm in the absence of an injunction; (3) that the balance of equities tips in Plaintiffs’ favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008). The extraordinary nature of the relief sought by Plaintiffs is heightened in the context of elections,

because of the public interest in orderly elections and the integrity of the election process. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5, 127 S.Ct. 5 (2006).

Plaintiffs are not entitled to the preliminary injunction they seek because they cannot show they have a substantial likelihood of success on the merits of their claims, nor can they show irreparable harm in the absence of injunctive relief, a balancing of equities in their favor, or that injunctive relief against County Defendants is in the public interest.

I. Plaintiffs have not shown a likelihood of success on the merits or that they face irreparable harm as a result of County Defendants' conduct.

As detailed in County Defendants' Motion to Dismiss, which are incorporated by reference,¹⁰ Plaintiffs have not provided enough evidence that they have standing to seek injunctive relief against the County Defendants related to the line warming ban. To establish standing, in addition to demonstrating an injury-in-fact, Plaintiffs must also show a "causal connection between [their] injury and the challenged action of the defendant—i.e., the injury must be fairly...trace[able] to the defendant's conduct..." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) (internal quotes removed). "The plaintiff bears the burden of establishing each element." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1268 (11th Cir. 2019). "Article III standing requires that the plaintiff's injury be 'fairly traceable' to the defendant's

¹⁰ *Georgia State Conference of the NAACP*, [Doc. 52]; *Sixth District of the African Methodist Episcopal Church*, [Doc. 90].

actions and redressable by relief against *that* defendant.” *Jacobson*, 974 F.3d 1236, at 1256 (citing *Lewis*, 944 F.3d at 1298, 1301). Nowhere in the Motion for Preliminary Injunction do Plaintiffs explain how their alleged injuries are traceable to the actions of County Defendants.

Indeed, the Motion for Preliminary Injunction is bereft of any factual allegations tying Plaintiffs’ alleged future injuries arising out of the line warming ban to the conduct of County Defendants. Plaintiffs do not even attempt to explain why the particular counties named were named as defendants in these lawsuits, much less how those counties are responsible for the enforcement of criminal penalties for the line warming ban in O.C.G.A. § 21-2-214(a). Accordingly, because Plaintiffs have failed to clearly articulate in their Motion how their claimed injuries are traceable to and redressable by County Defendants, they have not carried their burden of demonstrating standing to sue the counties with respect to the line warming ban, let alone entitlement to injunctive relief.

Similarly, the absence of an injunction of the County Defendants’ actions as they relate to O.C.G.A. § 21-2-414(a) cannot cause irreparable harm because County Defendants do not have the ability to enforce criminal penalties under the law. Therefore, Plaintiffs have not shown irreparable harm sufficient to justify injunctive relief against the County Defendants.

II. The balance of equities does not favor Plaintiffs, nor is injunctive relief against the 14 County Defendants in the public interest.

Election systems in the United States must avoid “arbitrary and disparate treatment to voters.” *Bush v. Gore*, 531 U.S. 98, 107, 121 S. Ct. 525, 531 (2000). If this Court grants the relief Plaintiffs seek in their Motion, elections officials in 14 counties will be subject to an injunction, while elections officials in 145 other counties will not.¹¹ Plaintiffs have failed to show how an order enjoining 14 sets of County Defendants from enforcing the line relief provisions will redress their alleged injuries, when 145 other Georgia counties would not be subject to the Court’s order.

While Plaintiffs named 14 county boards of registrations as defendants in the Amended Complaints challenging multiple sections of SB 202, [Doc. 83 ¶ 22 and ¶¶ 97-133], few Plaintiffs¹² described themselves as being restricted to working with, or advocating for, their members or voters in only the counties served by the 14 County Boards named as Defendants. To the contrary, a majority of Plaintiffs assert that they engage in statewide voter outreach. Presumably, Plaintiffs would be

¹¹ That County Defendants do not have authority to enforce the criminal penalties of the line warming ban does not mean they would be unaffected by the entry of an injunction requested by Plaintiffs. Instead, an injunction entered against County Defendants would create a risk of confusion statewide among county elections officials as to their obligations with respect to line warming activity.

¹² Georgia Muslim Voter Project and Galeo Latino Community Development Fund, Inc. (substantially in Gwinnett County).

concerned with the alleged impact of the line warming ban on the voters statewide and would seek to prevent its enforcement beyond the jurisdiction of the 14 county boards named herein.

However, the election officials in 145 other Georgia counties are not parties to this action and, therefore, would not be "obliged...in any binding sense...to honor an incidental legal determination [this] suit produce[s]." *Jacobson*, 974 F.3d at 1256. "[I]t must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury. Any persuasive effect a judicial order might have upon the [other county election officials], as absent nonparties...cannot suffice to establish redressability." *Id.* at 1254; *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) ("If courts may simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees, then redressability will always exist.").

Therefore, Plaintiffs' decision to seek injunctive relief against elections officials in 14 counties, but not election officials in 145 other counties, or any county law enforcement officials, could lead to "arbitrary and disparate treatment to voters in its different counties," *Bush v. Gore*, 531 U.S. 98, 107, 121 S. Ct. 525, 531 (2000), with 14 counties bound by an order from this Court and the remaining 145 counties following existing law. *See also Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1381 (S.D. Fla. 2004) (error not to join other county election officials). In other words,

granting Plaintiffs the relief they seek would lead to different rules for elections in different parts of the state, based solely on Plaintiffs' choice over which counties to sue in this particular case. Thus, Plaintiffs undermine their own claims of imminent "injury," "redress," or "equal protection" by leaving out the other counties which would prolong any uniform implementation or enforcement of any order issued by this Court. Accordingly, the equities do not favor making the kinds of changes Plaintiffs propose with the parties before the Court.

CONCLUSION

This Court should deny Plaintiffs' Motion because they have failed to demonstrate entitlement to injunctive relief against County Defendants.

Respectfully submitted this 24th day of June, 2022.

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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 the font type of Times New Roman and a point size of 14.

Dated: June 24, 2022

/s/ Irene B. Vander Els

Irene B. Vander Els

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2022, I electronically filed the foregoing COUNTY DEFENDANTS' CONSOLIDATED BRIEF IN RESPONSE TO THE AME AND GEORGIA NAACP PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

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