UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE GEORGIA SENATE BILL 202	Master Case No.: 1:21-MI-55555-JPB
THE NEW GEORGIA PROJECT, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No.: 1:21-cv-01229-JPB

NGP PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

State Defendants and Intervenors (collectively, "Defendants") refuse to grapple with the clear language of this Court's prior orders, and instead propose a series of conflicting rationales for extending the Food and Water Ban into the Supplemental Zone (the "Supplemental Zone Ban"), bolstered by their questionable gloss on binding precedent. But despite Defendants' attempt to replace the well-settled legal standards with something more to their liking, this Court already found that Plaintiffs' line relief activities are expressive conduct; the Food and Water Ban is a content-based regulation of speech; and the Supplemental Zone Ban cannot survive modified strict scrutiny. These findings were correct when the Court made them, and they remain correct today.

Defendants' equitable arguments fare no better. While at times it appears unclear whether Defendants are accusing Plaintiffs of moving too quickly or too slowly; or whether Defendants are sure that the Supplemental Zone Ban will require enforcement next year, or sure that it will not, Plaintiffs are nonetheless entitled to relief. Plaintiffs seek an injunction far in advance of the next election in which they intend to support and encourage voters enduring long lines. Because nothing requires federal courts to altogether forfeit their power to enter injunctions in voting rights cases—especially where Plaintiffs merely seek to enjoin law enforcement from

punishing Plaintiffs' exercise of constitutional rights—there could be no time better for the requested injunction than now.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their claim.

Just as this Court held in its previous analysis of these same issues, Plaintiffs are likely to prevail on the merits of their constitutional challenge to SB 202's Supplemental Zone Ban.

A. Defendants offer no persuasive reason to reverse this Court's legal analysis.

This Court has already discussed—at length—the legal standard applicable to Plaintiffs' challenge to the Supplemental Zone Ban. *See* Order ("2022 Order") at 24–56, No. 1:21-mi-55555-JPB (Aug. 18, 2022), ECF No. 241. *First*, the Court found that Plaintiffs' line relief activities "constitute expressive conduct protected by the First Amendment." *Id.* at 33. In response, Defendants parrot the exact same arguments that the Court considered and rejected in its prior order. *Compare* State Defs.' Opp'n to Pls.' Mots. for Prelim. Inj. ("State Br.") at 13, No. 1:21-mi-55555-JPB (June 15, 2023), ECF No. 578 (arguing record does not reflect single, unified message conveyed by Plaintiffs' line relief), *and id.* at 14 (arguing line relief is not inherently expressive if accompanied by other statements), *with* 2022 Order at 31 (finding "the common thread [in the record] is that voters understand that line

warming activities are intended to support and encourage voters"), *and id.* (reiterating Eleventh Circuit precedent holding that "conduct does not lose its expressive nature simply because it is accompanied by other speech").

Boxed in by the Court's clear findings and conclusions, State Defendants resort to distorting the record. By selectively quoting from a declaration, they suggest that Jauan Durbin received "encouragement and support" from organizations providing line relief that was somehow entirely separate from the "water and snacks" that were provided. State Br. at 14. But the declaration makes clear that the water and snacks were integral to the encouragement and support that Durbin experienced. *See* Durbin Decl. ¶ 6, No. 1:21-mi-55555-JPB (May 17, 2023), ECF No. 547-9 ("As I mentioned in my previous declaration, I was fortunate to receive encouragement and support from various organizations that provided me with water and snacks while I waited in 2.5 to 3 hour long lines to vote in the 2018 general election.").

State Defendants also incorrectly suggest that the Eleventh Circuit's clear language in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale* ("*FLFNB I*"), 901 F.3d 1235, 1242 (11th Cir. 2018), was somehow superseded by a subsequent appeal in that case. *See* State Br. at 13–14 (citing *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale* ("*FLFNB II*"), 11 F.4th 1266 (11th Cir. 2021). This is

nonsense. The language that State Defendants point to in *FLFNB II* about the fact-based nature of expressive food-sharing is merely summarizing a holding from *FLFNB I*, *see* State Br. at 14 (citing *FLFNB II*, 11 F.4th at 1292); *cf. FLFNB II*, 11 F.4th at 1292 (summarizing *FLFNB I*, 901 F.3d at 1242). *FLFNB II* did not revisit or revise *any* of *FLFNB I*'s holdings. In fact, the court made a point of saying just the opposite. *See* 11 F.4th at 1266 (recognizing *FLFNB I* "binds us under both the law of the case doctrine and our court's prior precedent rule") (citations omitted). Further, *FLFNB II* was decided a year before this Court issued its 2022 order, and therefore does not reflect any change in the law. Thus, *FLFNB II* provides no reason to depart from this Court's prior analysis.[1]

Second, this Court found in its 2022 Order that the Food and Water Ban "is a content-based regulation of speech." 2022 Order at 41. Intervenors appropriately decline to relitigate this issue, while State Defendants offer a perfunctory copy-and-paste of arguments the Court has already considered and rejected. *Compare* State

[1] The only new authority that Defendants offer is *League of Women Voters of Florida, Inc. v. Florida Secretary of State*, 66 F.4th 905 (11th Cir. 2023), *pet. for reh'g filed* (11th Cir. May 18, 2023). That case did not involve an explicit food and water ban, and it did not involve a supplemental zone. It merely addressed Florida's prohibition on voter solicitation within 150 feet of a polling place. *Id.* at 920. Plaintiffs in this action are not seeking to enjoin Georgia's analogous ban on voter solicitation within 150 feet of a polling place, which predates SB 202. *See* O.C.G.A. § 21-2-414(a).

Br. at 16–18 (analogizing to *Renton v. Paytime Theatres, Inc.*, 475 U.S. 41 (1986)), *with* 2022 Order at 38 (distinguishing *Renton*). State Defendants suggest the "full record" requires overhauling this analysis, but they provide new citations to only three cursory paragraphs from Ryan Germany's second declaration. State Br. at 17 (citing Second Germany Decl. ¶¶ 21, 22, 28, No. 1:21-mi-55555-JPB (June 15, 2023), ECF No. 578-3). The first cited paragraph merely quotes from Mr. Germany's first declaration, which was already in the record and considered by the 2022 Order. *See* Second Germany Decl. ¶ 21. The second cited paragraph speculates that voters' alleged complaints about intimidation could also apply in the Supplemental Zone. *Id.* ¶ 28. The merits of that contention aside, it does nothing to respond to, let alone rebut, the Court's recognition that regulating speech for its emotive impact on voters is inherently contest-based. *See* 2022 Order at 39. And the third cited paragraph simply summarizes the Supplemental Ban's requirements. *See* Second Germany Decl. ¶ 28. Thus, the full record is consistent on this point with the 2022 record, and the same legal framework should govern.

B. The Supplemental Zone Ban does not satisfy modified strict scrutiny.

This Court subjected the Food and Water Ban to "modified strict scrutiny," which requires a statute to be necessary to serve compelling state interests and to be narrowly tailored so as not to "significantly impinge on constitutionally protected

rights." 2022 Order at 51. Because it is "improbable that a limitless Supplemental Zone would be permissible," *id.* at 55, and because "[i]n practice, the Supplemental Zone could easily extend thousands of feet away from the polling station (and across private property) given the documented hours-long lines that voters at some polling locations have experienced," *id.*, the Court determined that the Food and Water Ban, when applied in the Supplemental Zone, "fails the second prong of the strict scrutiny test and is an unconstitutional regulation of expressive conduct," *id.* at 56. This analysis remains just as true today.

1. The Supplemental Zone Ban is not narrowly tailored to the State's interest in mitigating voter intimidation.

Defendants' confused objections to the Court's findings misunderstand the caselaw and misapply the evidence. As they tell it, "a voter *anywhere* in line is 'captive' to someone approaching them." State Br. at 10. And because they say the state's interest is in protecting voters—not "buildings"—Defendants contend there is no basis for limiting the Food and Water Ban to a reasonable perimeter around the polling place. Intervenors' Opp'n to Pls.' Prelim. Inj. Mots. ("Interv. Br.") at 6, No. 1:21-mi-55555-JPB (June 15, 2023), ECF No. 579. This view of the government's power to regulate the political conduct of private individuals, backed by the threat of prison time, is astonishing. By characterizing every interaction with voters as potentially intimidating, and by disclaiming any geographic limits on the

government regulator's reach, Defendants would unscrew the gates that have held back every would-be censor who insists that the only way to achieve political peace is to suppress political speech.

On voting days, every qualified and registered adult is a potential voter. If the state can truly overcome strict scrutiny by invoking these voters' purported "interest in being left alone," State Br. at 10, and if that interest truly has no logical connection "to zones around *polling places*," Interv. Br. at 6, then the First Amendment's command has been reduced to a suggestion. A campaign volunteer offers a supporter a ride to the polls? Criminalize it, lest the driver remind the voter to support down-ballot candidates. An ice cream shop hangs a picture of a famous patron running for office? Tear it down on election day, lest a "captive" observer in line be forced to condition her treat on observing unbalanced propaganda. In fact, if a state maintains an interest in silencing electioneering aimed at voters preparing to vote, why not criminalize the publication of newspaper endorsements on election day, or any other attempt to persuade a voter on election day to vote for or against any candidate? Because the temptation to regulate political speech can be irresistible, several states tried to do exactly that—until federal courts declared that this petty paternalism is irreconcilable with the Constitution. *See Mills v. State of Ala.*, 384 U.S. 214 (1966) (striking down Alabama's ban on election day editorials and observing, "[i]t is

difficult to conceive of a more obvious and flagrant abridgment" of the First Amendment); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138, 1145 (D.N.D. 2012) (enjoining North Dakota's ban on election day electioneering because it was "not limited to conduct in and around the polls").

As much as Defendants resist the obvious implication, *of course* state restrictions on election-related speech can be justified only in close proximity to the polling place itself. In *Burson v. Freeman*, 504 U.S. 191 (1992), the Supreme Court upheld "the minor geographic limitation" of Tennessee's ban on the direct solicitation of votes within a 100-foot buffer around the polling place because, it accepted, the "last 15 seconds before [Tennessee's] citizens enter the polling place should be their own." *Id.* at 210. This was not because Tennessee had an interest in protecting buildings, but because of its interest in securing privacy for the act of voting that would imminently occur within. *Id.* Voting is not similarly imminent for voters stuck in interminable lines, which is, after all, precisely why Plaintiffs seek to provide relief.

And contrary to Intervenors' material literalism, it is common for behavioral expectations to be set in relation to buildings even if the motivations are about something other than brick and mortar. Houses of worship regularly include an inner sanctuary where the strictest reverence and solemnity are observed; an outer

fellowship hall for more informal conversation and banter; and perhaps a playground on the property outdoors where children can run and shout. Same with a courthouse. Just outside the walls, activists march and chant. Indoor hallways require indoor voices. And once the courtroom is gaveled to order—silence.

Because a state's regulation of core political speech can be justified only within a polling place's penumbra, the relevant question is how far that speech-free buffer can extend. Defendants' suggestion of *no limits* is a nonstarter. *See id*. at 210 (explaining "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden"); 2022 Order at 55 (applying *Burson* and recognizing "it is improbable that a limitless Supplemental Zone would be permissible"). But the State has, in fact, supplied the answer, at least for these purposes.[2] Georgia law makes clear that beyond the 150-foot buffer zone, electioneering is permitted in a manner directly at odds with the purported interests in neutrality and serenity. While there is a parallel ban on

[2] Defendants do not—because they cannot—contend that any of Plaintiffs' line relief activities have actually been partisan. Instead, their conception of the regulatory interest appears to be that voters might mistakenly perceive the line relief as electioneering, or less scrupulous organizations might use line relief to evade the prohibition on polling place electioneering. Whether this hypothetical conflation of line relief and electioneering can justify treating line relief *as* electioneering remains disputed. *See*, *e.g.*, *Brown v. City of Pittsburgh*, 586 F.3d 263, 279 (3d Cir. 2009) ("[T]he layering of two types of prophylactic measures is substantially broader than necessary to achieve [the government's] interests.") (cleaned up).

electioneering within 25 feet of a voter standing in line, electioneering—unlike delivering water and snacks—does not have to occur within arm's length to be effective (or disruptive). Anyone who has voted in person can spot the boundary of the 150-foot buffer zone on election day because suddenly the grass blooms with campaign signs, activists shout their endorsements, even candidates themselves may appear to wave and plead one last time for support from the observers (a captive audience, as State Defendants remind) waiting in line to vote. If the voting process can endure that kind of raucous, explicitly partisan campaign activity away from the polling place, surely it will not be troubled by a pastor distributing bottles of water in the same area. *See, e.g.*, Billy Honor First Decl. ¶ 6, No. 1:21-mi-55555-JPB (June 3, 2022), ECF No. 185-5; Billy Honor Second Decl. ¶¶ 10–11, No. 1:21-mi-55555-JPB (May 17, 2023), ECF No. 547-6; Christopher Johnson Second Decl. ¶¶ 2, 5, No. 1:21-mi-55555-JPB (May 17, 2023), ECF No. 547-8.

Because the Supplemental Zone does not protect queuing voters from being exposed, even against their will, to partisan pressure and influence, the State must demonstrate some particular (compelling) interest in preventing face-to-face encounters. But as Defendants admit again and again, the Supplemental Zone Ban *does not restrict face-to-face encounters*. *See* State Br. at 18 (conceding "Plaintiffs may still say whatever they wish to voters, even voters in line"); *id.* at 19 (conceding

Ban "does not limit [Plaintiffs'] ability to approach and speak with voters"); *id.* at 26 (noting State's own witnesses agree that Ban "does not actually prohibit anyone from approaching a voter in line, or engaging a voter in conversation while they stand in line"). The State's interest in maintaining the Food and Water Ban in the Supplemental Zone, then, must identify some harm from the distribution of ponchos or pretzels or drink to voters waiting in lines that have grown longer than 150 feet from the polling place, and that harm must be different from the problem of subjecting voters to unwanted personal interactions (which is permitted). They cannot do so.

2. The Supplemental Zone Ban is not narrowly tailored to the State's interest in efficient election administration.

The only other interest that Defendants suggest in defense of the Supplemental Zone Ban is one of efficient election administration. *See* State Br. at 11. Clear rules are "important when conducting elections," State Defendants explain, "as county officials undertake 'hundreds of tasks' each day during an election." *Id.* (quoting Second Germany Decl. ¶ 26). Thus, they conclude, "establishing a bright-line rule that county officials can easily implement" could have some advantages. *Id.* at 3. These arguments doom the Supplemental Zone Ban. Whatever its other problems, the 150-foot Buffer Zone is clear to officials, voters, and third parties because it emanates from a fixed point—the edge of the polling place building—that can be

visibly marked for easy monitoring and compliance. The Supplemental Zone, in contrast, is the opposite. As the voting line stretches, constricts, meanders, and winds over the course of the voting period, the Supplemental Zone moves in tandem. Unlike the Buffer Zone, which needs to be measured only once in the morning, the Supplemental Zone requires tape-measurer-toting enforcement teams to patrol up and down both sides of the line, far from the polling place where they are needed most, to ensure that voters toiling in line walk the full 25 feet to receive relief items.

Requiring voters to make this walk further undermines the purported interest in smooth election administration. Rather than maintaining a fixed and orderly line, the Supplemental Zone Ban requires Plaintiffs to shout their offerings from 25 feet away, and for hungry and thirsty voters to leave the polling place line, potentially wait in a different line for their snack or drink, then find and attempt to return to their position in the polling place line, and negotiate any conflicts about whether their spot was properly held. This back-and-forth is likely to be especially fraught for voters in lines that persist after the official poll-closing times, as any departure from the line could jeopardize their right to vote at all. Thus, the Supplemental Zone Ban exacerbates, rather than mitigates, election administration concerns.[3]

[3] State Defendants also decry any rule that "would [impose] different protections for voters depending on where they are in line." State Br. at 15. That supposed nightmare

State Defendants lead their brief with an explanation from State Election Board member Matt Mashburn that "'the practice of giving out food and drinks got out of hand in recent years, with taco bars, buffets and snack stands set up at polling places,' even though 'there's not supposed to be any interaction between virtually anyone and the voters and poll workers.'" State Br. at 4 (cleaned up); *see also* Interv. Br. at 5 (decrying "food trucks"). The Supplemental Zone Ban, however, does not restrict taco bars, buffets, snack stands, or food trucks—all of which must be assembled some distance from the polling place line as a matter of course—and it does not prohibit interactions between anyone and voters or poll workers. It simply burdens the First Amendment rights of organizations like Plaintiffs that wish to provide nonpartisan items of support and encouragement to voters stuck in painfully long election lines.

3. The Supplemental Zone Ban significantly impinges on Plaintiffs' constitutional rights.

As the Court already found, "imposing the Food, Drink and Gift Ban in the Supplemental Zone is unreasonable and significantly impinges on Plaintiffs' constitutional rights." 2022 Order at 56. Defendants respond by complaining about

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is precisely what SB 202 already requires: voters near the front of the line are surrounded by a 150-foot buffer; voters outside of that buffer are surrounded by a 25-foot Supplemental Zone. SB 202, § 33.

this Court's legal analysis and ignoring the plain text of the statute.

Georgia's Buffer Zone is already more than twice the area of the zone upheld in *Burson*. *See* NGP Br. in Supp. of Renewed Prelim. Inj. Mot. ("NGP Br.") at 7, No. 1:21-mi-55555-JPB (May 17, 2023), ECF No. 547-1. In finding that Georgia's additional Supplemental Zone significantly impinges on Plaintiffs' constitutional rights, this Court recognized that other courts have also struck down buffer zones that were significantly larger than that in *Burson*. *See* 2022 Order at 55 (citing *Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004), and *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015)). State Defendants suggest that both of these cases are "inapposite," but they conspicuously address only *Russell*. State Br. at 20–21. Had they afforded *Spear* a closer read, they might have appreciated the Sixth Circuit's admonition that it is "dubious at best that this so-called right to be left alone, which under [Supreme Court precedent] has peculiar application to the home, should be extended to those approaching polls, *especially where the* Burson *Court did not do so*." 356 F.3d at 661 (emphasis in original). *Contra* State Br. at 10 (quoting Mashburn's invocation of voters' "interest in being left alone").

State Defendants purport to distinguish *Russell*, in turn, on the basis that the buffer zone at issue there extended 300 feet from the polling place, and the challenge was brought by a business located near a polling place. State Br. at 20–21. These

"distinctions," however, weigh in Plaintiffs' favor. Unlike the Kentucky law reviewed in *Russell*, Georgia's Supplemental Zone does not stop at 300 feet from the polling place—if the line stretches 400, 500, 1,000 feet, or longer, Georgia's ban extends every additional inch and yet another 25 feet still. And far from businesses with primarily commercial interests, Plaintiffs here are nonprofit civic organizations whose very mission is to support voters with the sorts of line relief that Georgia has criminalized. *See, e.g.*, Mary-Pat Hector First Decl., No. 1:21-mi-55555-JPB (June 3, 2022), ¶¶ 4–6, ECF No. 185-3.

Intervenors, in turn, propose that the Supplemental Zone Ban will not significantly impinge on Plaintiffs' constitutional rights because Plaintiffs' fears that the Supplemental Zone will extend the Food and Water Ban limitless distances from the polls are "unfounded" and "hypothetical." Interv. Br. at 10. They should read the statute. SB 202 applies a fixed 150-foot buffer zone, and further bans the provision or food or water "[w]ithin 25 feet of any voter standing in line to vote at any polling place." SB 202, § 33. Because there is no limit on how many people may be standing in line to vote, there necessarily is no limit on how far the Supplemental Zone may extend.

Intervenors' analysis suffers additional flaws. They argue that the Supplemental Zone Ban will not significantly impinge Plaintiffs' constitutional

rights because there may not be a "substantial number" of polling place lines extending outside the 150-foot Buffer Zone, Interv. Br. at 10; *see also* State Br. at 7 (anticipating long lines will be "rare"). First, their premise is wrong. *See* 2022 Order at 55 (recognizing "the documented hours-long lines that voters at some polling locations have experienced"); Rodden Rep. at 36, Ex. 1 (documenting long waits of up to three hours at some early voting sites for the 2022 runoff elections).

Second, their proposed doctrine is wrong too. The relevant inquiry is not whether a ban on speech frequently applies, but rather, when the ban *does apply*, whether it is frequently likely to violate the Constitution. *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (recognizing a law may violate the First Amendment where "a substantial number of its *applications* are unconstitutional") (emphasis added). Under Intervenors' novel theory, a law that criminalized "criticizing the President on July 4th" would not significantly impinge any constitutional rights because an event that occurs only once a year is, admittedly, somewhat rare. But such a law would obviously flunk any constitutional test because every *application* of that ban would shamelessly violate the First Amendment. Similar principles apply here. When the Supplemental Zone is triggered, rarely or not, the Food and Water Ban will silence core political speech. And it will do so when Plaintiffs' interest in expressive conduct that encourages voters to endure long

lines will be at its zenith—because, by definition, the lines will have grown long—and when the State's interest in protecting the voting process will be at its nadir—because, by definition, individuals stuck in long lines will not soon be voting. Thus, Defendants have failed to identify any flaw in this Court's prior finding that Plaintiffs are likely to succeed on the merits of their challenge to the Supplemental Zone Ban.

II. The remaining factors weigh heavily in Plaintiffs' favor.

Equitable considerations also weigh in favor of granting the requested injunction. As the Court has already determined, "Plaintiffs have carried their burden to show that they would suffer irreparable harm" if enforcement of the Food and Water Ban is permitted in the Supplemental Zone because "the lost opportunity for expression cannot be remedied after the fact." 2022 Order at 59. Defendants offer only two equitable arguments that are not already covered by the merits discussion, and neither is persuasive.

A. Plaintiffs properly seek a pre-enforcement injunction.

State Defendants' assertion that Plaintiffs are not entitled to a preliminary injunction because (1) they "fail to identify any pending or threatened enforcement of the law," State Br. at 31, and (2) they did not name as defendants every prosecutor in the state, *id.* at 31, n.11, demonstrates a striking unfamiliarity with basic standing

doctrine. As the Court explained in its Order Denying Motions to Dismiss, "The danger of prosecution is credible and supports standing where the government has not disavowed prosecuting persons who violate the challenged legislation." Order at 11 ("Dec. 9, 2021 Order"), No. 1:21-cv-01229-JPB (Dec. 9, 2021), ECF No. 86 (citing *Holder v. Humanitarian L. Project*, 561 U.S. 1, 16 (2010)); *cf.* NGP Br. at 8–9 (cataloging evidence that prosecutors have not disavowed prosecutions of the Food and Water Ban).

And what about the need to sue officials across every county in Georgia, even in counties where Plaintiffs do not operate? This Court has patiently refuted that notion as well. *See* Dec. 9, 2021 Order at 15–16 (highlighting lack of "any authority" supporting Defendants' argument and explaining why *Bush v. Gore*, 531 U.S. 98 (2000), the only case Defendants cite for this proposition, is "easily distinguishable").

B. *Purcell* does not preclude relief.

Defendants' final gambit (as has become the case nearly whenever plaintiffs show a state election regulation violates federal law) is to invoke *Purcell v. Gonzalez*, 549 U.S. 1 (2006), playing it as a kind of trump card that can nullify the Constitution's requirements at any time. Literally, at any time. *Purcell* warned that a court of appeals decision overturning a district court order "just weeks before an

election" could "result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. Similarly, in *Merrill v. Milligan*, 142 S. Ct. 879 (2022), Justice Kavanaugh, writing for himself and Justice Alito, opined that an injunction voiding a state's entire congressional districting map—with no alternative at hand—seven weeks before voting was to begin violated this *Purcell* principle, and he outlined factors that he would consider when evaluating "an injunction issued close to an election." *Id.* at 880–81 (Kavanaugh, J., concurring). By their own terms, these cases do not apply here.

Defendants completely brush aside the "close to an election" proviso—which is, to be clear, the entire basis for the cautionary principle—and posit instead that *Purcell* prohibits *any* injunction that would effect a change in election rules. *See* State Br. at 32–33 (arguing "election officials have been trained on [SB 202's] requirements for several years and have implemented them in several elections," and therefore enjoining the Food and Water Ban would "strip Georgia elections of the clarity that has governed for two years"). It is true, as State Defendants observe, that an injunction for the 2024 elections "would mean that a different standard will govern upcoming elections in 2023 than will be in place for elections in 2024." *Id.* at 33. But this simple tautology—a change will be a change—does not eviscerate a

federal court's authority to ever enjoin unconstitutional state election laws.[4]

Precisely because Plaintiffs are not requesting an injunction close to an election, they have not unduly delayed renewing their motion. For their contrary argument, Defendants rely on *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016), where the court recognized that a plaintiff who endured an alleged trademark infringement for five months before seeking an injunction was not entitled to preliminary relief. *See* State Br. at 30–31; Interv. Br. at 12. Intervenors also cite *Adventist Health Sys./Sunbelt, Inc. v. HHS*, 17 F.4th 793 (8th Cir. 2021), where hospital plaintiffs waited a year, until days before a new policy's scheduled implementation, to challenge the policy, *see id.* at 796, and *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam), where plaintiffs waited to challenge Maryland's 2011 congressional districting map until 2017—six years, and three election cycles later, *id.* at 1944. None of those cases resemble this one.

Plaintiffs seek to provide relief for voters in Georgia elections that have been and remain plagued by long lines—namely, primary, general, and runoff elections

[4] State Defendants footnote the suggestion that maybe Plaintiffs are requesting an injunction close to an election because, after all, various special elections can be held throughout the year, including this summer. *See* State Br. at 32 n.12. But State Defendants solve their own riddle in the next breath—Plaintiffs do not seek an injunction for these elections, so Defendants' opposition remains simply to the fact that an injunction will require a change, not to a change that must quickly be implemented before an election. *See id.*

for statewide races. *See* Rodden Sur-Rebuttal Rep. at 16, Ex. 2. Since SB 202's enactment in 2021, Georgia has experienced one statewide election cycle, in 2022, and Plaintiffs sought relief in advance of those elections. *See* NGP Pls.' Mot. for Prelim. Inj., No. 1:21-mi-55555-JPB (June 3, 2022), ECF No. 185. The next statewide race is the presidential primary scheduled for March 2024. By filing *ten months* before this date, Plaintiffs acted with reasonable diligence to ensure there is time for any change in policy to be implemented (unlike the plaintiffs in *Adventist Health Systems*). And they have not willingly endured any injury (unlike the plaintiffs in *Wreal* and *Benisek*) because there were no statewide elections held in the interim between the December 2022 conclusion of the previous election cycle, which was governed by the Court's 2022 Order, and Plaintiffs' renewal of their motion in May 2023.[5] As *Benisek* makes clear, the relevant measurement for undue delay in the election law context is to count the number of relevant elections that plaintiffs have waited before asserting their claims. *See* 138 S. Ct. at 1944. Here, that number is zero.

[5] Plaintiffs had to wait until the 2022 election cycle concluded to renew their motion because, as Intervenors argued at the July 18, 2022, preliminary injunction hearing, "when the election cycle you're in is not even over yet, you cannot get a preliminary injunction typically for the next election because your harm is not imminent enough to justify that extraordinary relief." Hearing Tr. at 249:24–250:2, No. 1:21-mi-55555-JPB (Aug. 9, 2022), ECF No. 234.

Purcell is further inapplicable here for the additional reason that Plaintiffs are seeking to enjoin prosecutors from enforcing a criminal prohibition. To Plaintiffs' knowledge, *Purcell* has never been applied in this context, for good reason. Prosecutors are law enforcement agents, not election administrators, and it cannot be that the State may convict and imprison individuals for political expression that a federal court deems to be constitutionally protected merely because the expression occurs shortly before an election. If Plaintiffs could raise their First Amendment defense to a post-arrest prosecution—which cannot be in doubt—they necessarily retain the right to seek a pre-enforcement injunction. As the Eleventh Circuit explained in *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1251 (11th Cir. 2012), "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 [is] at stake." *Id.* at 1251. "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." *Id.* at 1251–52. That is what Plaintiffs have done here.

Zooming out, Defendants' haphazard collection of arguments cannot be the law because their own internal contradictions are irreconcilable. On one page,

Defendants would have Plaintiffs wait to request an injunction until election lines actually stretch into the Supplemental Zone, *see, e.g.*, State Br. at 31; on another, they decry that a motion filed ten months before the election is too soon, *see, e.g.*, *id.* at 33, Interv. Br. at 14. They propose, on the one hand, that election lines encroaching outside the Buffer Zone are so unlikely that there is little chance that Plaintiffs will be affected by the Supplemental Zone Ban at all, *see, e.g.*, State Br. at 28, Interv. Br. at 10; meanwhile, they insist that enforcing the Supplemental Zone Ban is essential to protect "the *entire* voting line" from Plaintiffs' activities, State Br. at 26. Defendants extoll the need for a fixed, "bright-line rule that county officials can easily implement," State Br. at 3; yet they balk at Plaintiffs' challenge to a fluctuating censorship zone far from the polling place doors. And so on. Such gratuitous goalpost-shifting is good evidence that their defenses cannot survive the simple application of settled doctrine. This Court applied that doctrine to the Supplemental Zone Ban last summer and correctly concluded that it violated Plaintiffs' constitutional rights, 2022 Order at 56, and that Plaintiffs would suffer irreparable injury absent an injunction, *id.* at 59. Now that the next statewide election is sufficiently distant, that injunction should be entered.

CONCLUSION

For these reasons, Plaintiffs' Motion should be granted.

Respectfully submitted this 29th day of June, 2023,

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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 29, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2023, 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 29, 2023

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