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

STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE FOOD, DRINK, AND GIFT BAN

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INTRODUCTION

Plaintiffs fail to support their challenges to SB 202's Food, Drink, and Gift Ban ("Gift Ban") with any competent evidence. In fact, they concede two of their claims right out of the gate, ignoring State Defendants' motion [Doc. 762] with respect to Plaintiffs' claims under the Voting Rights Act and the Americans with Disabilities Act. Accordingly, they have "waived [those] claims by failing to brief them, failing to respond to the [State's] motion for summary judgment, and failing to bring to the court's attention evidence that supported their claims." *A.L. v. Jackson Cnty. Sch. Bd.*, 635 F. App'x 774, 787 (11th Cir. 2015). Summary judgment should therefore be entered for State Defendants on each of those claims.

Plaintiffs fare no better in their attempt to avoid summary judgment on their First, Fourteenth, and Fifteenth Amendment challenges to the Gift Ban. For their First Amendment claim, Plaintiffs challenge the Gift Ban's application to both the 150-foot Buffer Zone surrounding the polling place, and the extension of that same limitation to the area within 25 feet of a voting line that has extended outside the Buffer Zone (the "Supplemental Zone"). For their Fourteenth and Fifteenth Amendment claims, Plaintiffs challenge only the Gift Ban's application to the Supplemental Zone. However, while Plaintiffs discuss these two zones as though they are different, the State's interests are

the same, and the Gift Ban is better understood as a restriction around the voting line—a restriction that is well within constitutional bounds.

Indeed, for each of their remaining claims, Plaintiffs fail to identify any *genuine* issues of *material* fact that would allow a reasonable factfinder to conclude that the Gift Ban violates the Constitution. *See Cohen v. United Am. Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996) (quoting Fed. R. Civ. P. 56(c)). Instead, Plaintiffs rely on incorrect legal standards and immaterial facts in their attempt to push those claims to trial. However, the Eleventh Circuit emphasizes that summary judgment serves an important gatekeeping function "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 714 F.3d 1234, 1237 (11th Cir. 2013) (quoting *Camp Creek Hosp. Inns, Inc. v. Sheraton Franchise Corp.,* 139 F.3d 1396, 1400 (11th Cir. 1998)). It is thus "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy[,] and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). And the Court should grant summary judgment for State Defendants on these remaining claims because Plaintiffs have not carried their burden of identifying any material facts in dispute.

ARGUMENT

Plaintiffs' claims under the Fourteenth and Fifteenth Amendments fail because the Gift Ban is amply supported by important State interests, and Plaintiffs have failed to identify any disputed facts suggesting that the Gift Ban imposes any burden that outweighs those interests. For their First Amendment claim, Plaintiffs have failed to demonstrate that they are engaged in expressive conduct when they approach voters in line to hand them things of value. But even if they were engaged in expressive conduct, the undisputed facts confirm that the Gift Ban furthers compelling State interests. And there is no dispute that the Gift Ban is sufficiently tailored to further those important interests. Accordingly, summary judgment should be entered for State Defendants on each of these claims.

I. The Gift Ban Does Not Violate the Fourteenth or Fifteenth Amendments.

Through their Fourteenth and Fifteenth Amendment claims, Plaintiffs challenge only the ban on gift-giving in the Supplemental Zone. *See* Opp. to Mots. for Summ. J. at 24 ("Opp.") [Doc. 823]. However, this portion of the Gift Ban is a quintessential "mechanic[] of the electoral process" that must be upheld under the *Anderson-Burdick* framework. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). That "flexible" framework, which Plaintiffs do not dispute applies here, Opp. at 24, requires the Court to weigh the

"character and magnitude of the asserted injury against the precise interests put forward by the State." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009) (cleaned up).

The record is already replete with undisputed evidence showing that State Defendants have identified several interests supporting the Gift Ban, and, as a matter of law, that identification is not a matter of factual dispute. *See id.* Indeed, the record shows that the Gift Ban furthers the State's interest in increasing voter confidence, reducing the burden on election officials, streamlining the elections process, protecting voters and polling places from disruptions, and promoting uniformity in voting. And nothing in the record shows a significant burden on the Plaintiffs beyond the mere vagaries of life. The Gift Ban must therefore be upheld.

A. Plaintiffs have failed to provide any evidence disputing the many state interests that support the Gift Ban.

To withstand a constitutional challenge to this provision, State Defendants need do no more than "identify the interests that [they] seek[] to further by [their] regulation." *Common Cause*, 554 F.3d at 1353 (cleaned up) (confirming that the state in an election-law challenge is not required to "prove" its state interests). The State bears no "evidentiary showing or burden of proof" on this issue. *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983)). Nor must courts "discuss any record evidence in support of [the state's]

stated interests." *Id.* (citing *Anderson*, 460 U.S. at 796–806). Accordingly, Plaintiffs' arguments about hearsay, opinion testimony, and alleged factual disputes raised by the opinions and observations of some election officials are irrelevant noise. But they are also incorrect.

For instance, Plaintiffs mischaracterize testimony from several of State Defendants' witnesses as hearsay, Opp. at 31 (citing Consol. Pls.' Resp. to State Defs.' Consol. Statement of Material Facts ("PRSOF") ¶¶ 263, 265, 266, 268 [Doc. 807]), when those witnesses merely referenced the State's receiving various complaints from the public. Those alleged hearsay complaints are certainly admissible—at a minimum, to show their *effect* on the State's officials in enacting the Gift Ban. *See United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015) ("[A]n out-of-court statement admitted to show its effect on the hearer is not hearsay.").

Plaintiffs also mischaracterize percipient witness testimony from several of State Defendants' witnesses as opinion testimony. Opp. at 31 (citing PRSOF ¶¶ 272–76, 278, 284). But the testimony of those officials was based on their own perception, not "scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. For instance, at the time SB 202 was enacted, Ryan Germany was "the General Counsel for the Office of the Georgia Secretary of State[,] … providing legal advice and guidance" and "work[ing] with the Georgia General Assembly on election legislation." Germany 10/30/23 Decl. ¶¶ 1–2 [Doc. 755-3].

At the same time, Matt Mashburn was "a member of the State Election Board" with responsibility for "developing and enacting rules and regulations regarding the conduct of elections[.]" Mashburn Decl. ¶ 1 [Doc. 755-14]. Accordingly, Plaintiffs cannot succeed in their attempts to block this Court from considering the testimony from these witnesses. Nor can Plaintiffs call this testimony into dispute by citing "[s]everal *county* election officials [who] have expressed that they do not understand the need for the [Gift] Ban" and "never saw any evidence" for it. Opp. at 31 (emphasis added). That a few county officials seemingly lack awareness of the State's interests is simply irrelevant.

However, even if State Defendants were required to identify evidence supporting the State's interests behind the Gift Ban, they have done so. The Gift Ban furthers the important interests of increasing voter confidence in election integrity, reducing the burden on election officials, streamlining the elections process, protecting voters and polling places from disruptions, and promoting uniformity in voting. State Defs.' Statement of Material Facts ¶ 277 ("SOF") [Doc. 755] (SB 202 at 4:70–82, 6:126–29 [Doc. 755-2]); *id.* ¶ 429 (citing Defs.' Ex. PPP, Harvey 146:16-147:10) (officials were concerned with "militias and armed groups" eventually showing up); *id.* ¶ 468 (citing Defs.' Ex. M, Mashburn Decl. ¶¶¶ 19, 21, 25 ("ensures that any voter interacting with the third-party organization does so voluntarily"); Defs.' Ex. F, Germany 6/24/22 Decl. ¶¶ 29–31)). Both the Supreme Court and the Eleventh Circuit confirm

that such interests are "indisputably … compelling." *Common Cause*, 554 F.3d at 1353 (citing first *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); then *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)); *accord Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) ("It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal."). No factual dispute exists as to these important interests.

Plaintiffs also fail in their various attempts (at 32) to identify material factual disputes about these interests. For instance, Plaintiffs create an artificial distinction (at 32) in the State's officials' testimony by arguing that they "fail to point to any evidence of complaints or concerns about line relief activities in the Supplemental Zone." But in fact, the testimony Plaintiffs identify from State Defendants' witnesses focused on the *entire* voting line. The rules restricting campaigning and soliciting votes have always applied to *both* the Buffer Zone *and* the Supplemental Zone. *See* Defs.' Resp. to Pls.' Consol. Statement of Additional Material Facts ("DRSOF") ¶¶ 422–23; O.C.G.A. § 21-2-414(a) (2010); H.B. 540, 150th Gen. Assemb., Reg. Sess. (Ga. 2010). SB 202 simply clarified that giving gifts to voters should be treated the same way that campaign and vote-solicitation restrictions have long been treated. The state interests in protecting voters in line do not decrease depending on the length of the line.

The Supplemental Zone restriction is thus different in kind than the cases that Plaintiffs cite involving bubbles extending in all directions from a polling place. *See* Opp. at 19 (citing *Anderson v. Spear,* 356 F.3d 651, 658 (6th Cir. 2004); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015)). In fact, Plaintiffs do not even challenge Georgia's longstanding prohibition against campaigning and soliciting votes in the Supplemental Zone, a tacit admission that the State's interests apply equally to all portions of the voting line.

Plaintiffs also incorrectly argue (at 32) that the State "fail[s] to provide any evidence demonstrating that the [Gift] Ban actually provides a clear rule for election officials to implement." But that assertion cannot stand up to the clear text of the statute itself, which expressly prohibits gift-giving to a voter "[w]ithin 150 feet of the outer edge" of a polling place, "[w]ithin any polling place," or "[w]ithin 25 feet of any voter standing in line to vote at any polling place." O.C.G.A. § 21-2-414(a). This rule provides a "bright line" to guide election officials, and "a bright-line rule would no doubt be easier to apply." *Yegiazaryan v. Smagin*, 599 U.S. 533, 545 (2023). SB 202 simply makes clear to county election officials that giving gifts to voters should be treated by county election officials in the same way that they treat the restrictions on campaigning and vote solicitation in and around the polling place—rules that they have long been applying.

Plaintiffs next discount as "pure speculation" testimony from State officials stating that they relied on complaints of intimidation, confusion, and interference when enacting the Gift Ban. Opp. at 33.[1] But there is nothing speculative about relying on widespread complaints from members of the public. *See, e.g.*, *Glock, Inc. v. Wuster*, No. 1:14-CV-568-AT, 2019 WL 13043038, at *15 & n.15 (N.D. Ga. Aug. 9, 2019) (noting the acceptability of "social media" comments to show consumer confusion).

Finally, Plaintiffs argue that "nothing in SB 202—including the [Gift] Ban—prohibits people from approaching voters in line." Opp. at 33–34. But that ignores the fact that the Gift Ban works against the backdrop of laws that limit such conduct, a fact that Plaintiffs largely concede. *Id.* at 9 (conduct "already prohibited under Georgia law"). The Gift Ban merely eliminates yet another tactic that caused confusion, led to voter complaints, and greatly increased the potential for a confrontation around the polling place or a voter waiting in line.

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[1] Plaintiffs erroneously argue (at 32 n.13) that State Defendants failed to "set out" Mashburn's and Eveler's testimony "in the State Defendants' statement of undisputed facts in violation of Local Rule 56.1(B)(1)." But Mashburn's cited testimony is part of State Defendants' SOF filing (¶ 244), appearing at Ex. KK (Mashburn 3/14 93:17-94:25 [Doc. 755-38 at 23]). So too for Janine Eveler's testimony, which appears at Ex. T [Doc. 755-21] (Eveler 143:6-16). *See* SOF ¶ 245.

Accordingly, there is no dispute that the Gift Ban furthers important State interests. But of course, binding precedent holds that the State need do no more than "identify the interests that it seeks to further by its regulation." *Common Cause*, 554 F.3d at 1353 (quoting *Anderson,* 460 U.S. at 796) (cleaned up). And Plaintiffs' efforts to twist the record here cannot undermine the State's interests. *Id.* (citing *Anderson*, 460 U.S. at 796–806). The existence of those established interests alone requires summary judgment on these challenges to this provision of SB202.

B. Plaintiffs fail to identify any burden that outweighs the State's identified interests.

Plaintiffs also have not come close to showing that any inconvenience created by the Supplemental Zone Gift Ban rises beyond the "ordinary burdens" of securing food, water, and other necessities that are typical of "life's vagaries" and which "do not raise any question about the constitutionality of … Georgia['s] statute." *Common Cause*, 554 F.3d at 1354 (cleaned up). The Constitution does not mandate that such matters of "personal preference" be given "recognition and accommodation." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 630 (6th Cir. 2016).

As a matter of law, voters providing their own food or water when standing in a voting line is hardly a more significant burden than "producing a photo identification to vote." *Common Cause*, 554 F.3d at 1354. In fact, the

burden here is *far less* than the photo-identification burden addressed in *Common Cause*, a burden the Eleventh Circuit held was no more than a mere vagary of life. *Id.* at 1354–55. Not only can voters bring their own food, water, or necessities from home (much as voters are required to do for any other activity they choose to engage in on Election Day), but under SB 202 polling places may provide self-serve water containers. And Plaintiffs may make available food, drinks, gifts, and campaign paraphernalia or literature—provided that Plaintiffs stay several steps away from the voting line in the Supplemental Zone and that nothing of value is given to a voter in exchange for voting. In contrast, voters who arrive at the polls without identification must either leave and find it or seek a new one from the appropriate agency.

Yet Plaintiffs ignore the Eleventh Circuit's vagaries-of-life standard and substitute the irreparable injury analysis applied at the preliminary injunction stage of this suit. Opp'n at 25–26 (citing [Doc. 614 at 29–30]). However, that analysis was based *only* on the First Amendment, it lacked the fully developed record provided here, and the decision turned on the *Purcell* principle. By focusing on those inapposite points here, Plaintiffs make only a passing reference (at 24) to the most relevant precedent—the Eleventh Circuit's decision in *Common Cause*, where the court held that the "insignificant burden imposed by" requiring photo identification to vote "is outweighed by the [State's] interests[.]" 554 F.3d at 1354. Plaintiffs' reticence to engage that

precedent is unsurprising because nothing in the handful of anecdotes they cite shows anything more than one of "life's vagaries," like forgetting a photo identification at home. *Id.*

Many provisions of SB 202, including the Gift Ban, help to avoid confrontations and other distractions at polling places and to reduce voting lines. If a voter *does* have to wait in line, any accompanying discomfort, thirst, or hunger is no different than having to wait in line at the grocery store, a sporting event, a concert, or elsewhere—it's one of the well-accepted vagaries of life. And that possibility already rests on the shaky assumption that voters have to stand in a long line at all—because the State has taken action to reduce these lines in SB 202. Yet Plaintiffs minimize the significance of those provisions because, they argue (at 29), some long lines existed in 2022. This misunderstands the point: Under SB 202, any polling station with long lines of more than an hour on Election Day *must* take remedial action for the *next* general election, meaning that any poll with long lines in 2022 should see shorter lines in 2024 as a result of increased voting equipment and workers, or because of smaller precinct boundaries. *See* O.C.G.A. § 21-2-263(b); SOF ¶ 291 (Germany 6/24/22 Decl. ¶¶ 10–12 [Doc. 755-7]).

Moreover, the record shows that State Defendants have eliminated the most burdensome of the issues voters may face by (1) ensuring that voters with disabilities are fast-tracked to the front of the line, (2) ensuring that all polling

places may provide voters with water, (3) allowing voters to bring their own food and drinks, (4) allowing organizations like Plaintiffs to stand mere *steps* away from voters in the Supplemental Zone, and (5) taking many other steps to reduce voting lines generally in Georgia. *See* O.C.G.A. §§ 21-2-285.1, 21-2-409.1; 7/18/22 PI Hr'g Tr. 189:2–14 (disabled voters moved to front of line) (Ex. CC to DRSOF); O.C.G.A. § 21-2-414(e); SOF ¶ 283 (Wurtz 133:15–23 [Doc. 755-41]) (provide own food and drinks); SOF ¶ 281 (Mashburn 3/14 95:7–25 [Doc. 755-38]) (self-serve water containers); SOF ¶ 282 (Mashburn 3/14 128:6–10) (provide food and drinks short distance from line). Plaintiffs contest none of this.

But even if Plaintiffs' scintilla-sized anecdotes (at 27–28) had identified something more burdensome than the mere vagaries of life, Plaintiffs cannot cite any "admissible and reliable evidence that *quantifies* the extent and scope" of not providing food to voters in line. *Common Cause*, 554 F.3d at 1354 (emphasis added); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (party opposing summary judgment must present more than "mere existence of a scintilla of evidence in support of [its] position"). Plaintiffs thus fail to establish anything beyond the "usual burdens of voting." *Crawford*, 553 U.S. at 198. And the evidence is undisputed that, since SB 202, the data show Georgia voters of all races reported "high levels of satisfaction" with the electoral process. *See* Order at 31 [Doc. 686-1] (citing 9/22/23 PI Hr'g Tr. at 252

[Doc. 756-18] discussing Survey Rsch. Ctr., Sch. of Pub. & Int'l Affs. Univ. of Ga., *2022 Georgia Post-Election Survey* 252 (2023)).

Accordingly, the evidence is undisputed that the burden (if any) imposed by the Gift Ban is "insignificant" and "slight." *Common Cause*, 554 F.3d at 1354 (citing *Burdick v. Takushi*, 504 U.S. 428, 439 (1992)). And Georgia's legitimate state interests in increasing voter confidence, reducing the burden on election officials, streamlining the elections process, protecting voters and polling places from disruptions, and promoting uniformity in voting are "more than sufficient to outweigh the limited burden" on voters. *See id.* at 1354–55 (cleaned up) (quoting *Crawford*, 553 U.S. at 440). This limited burden is no more than the most basic burden of human existence that voters must meet every day, and it does not rise to the "exceptional circumstance" that would show a statute is not "rationally related to a legitimate government interest[.]" *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001).

For these reasons, the Gift Ban serves myriad neutral and valid state interests and is constitutional. *See Crawford*, 553 U.S. at 204. This Court should therefore grant summary judgment on Plaintiffs' Fourteenth and Fifteenth Amendment claims.

II. The Gift Ban Does Not Violate the First Amendment.

Plaintiffs' opposition also fails to identify any genuine issue of material fact that would preclude summary judgment on their First Amendment claim. Because Plaintiffs' gift-giving is not expressive, their First Amendment claim fails altogether. However, even if Plaintiffs' conduct were expressive, the Gift Ban is narrowly tailored to satisfy the State's compelling interests in increasing voter confidence, reducing the burden on election officials, streamlining the elections process, protecting voters and polling places from disruptions, and promoting uniformity in voting. *See* SOF ¶ 277 (SB 202 at 4:70–82, 6:126–29); *id.* ¶¶ 429, 468 (citing Defs.' Ex. PPP, Harvey 146:16-147:10; Defs.' Ex. M, Mashburn Decl. ¶¶¶ 19, 21, 25; Defs.' Ex. F, Germany 6/24/22 Decl. ¶¶ 29–31). Accordingly, the Gift Ban survives even strict scrutiny. However, the appropriate level of scrutiny would be intermediate scrutiny, which the Gift Ban easily satisfies.

A. Plaintiffs have failed to establish a material issue of fact on whether their conduct is expressive.

The clearest reason to dispose of Plaintiffs' First Amendment claim is the lack of any disputed material facts suggesting that Plaintiffs engage in expressive conduct when they hand things of value to voters in line. Thus, Plaintiffs failed to meet their burden of showing "that the First Amendment even applies" here. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293

n.5 (1984). Instead, they ask this Court (at 1–2) to import its preliminary-injunction holding, which was based on an incomplete record. But the fully developed record and Plaintiffs' opposition confirm that Plaintiffs engage in non-expressive conduct when they approach voters in line to hand them things of value. As the Eleventh Circuit confirms, Plaintiffs cannot transform that non-expressive conduct into *expressive* conduct by subjectively intending to send a specific message. Instead, the Eleventh Circuit requires Plaintiffs to also show that a "reasonable person would interpret [the conduct] as *some* sort of message[.]" *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004).

To meet that standard, courts in this Circuit consider whether a plaintiff has shown that "the surrounding context" demonstrates that the conduct conveys "some sort of message" to the reasonable observer. *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1212 (11th Cir. 2022) (citation omitted from second quotation), *cert. granted in part mem. sub nom. Moody v. NetChoice, LLC,* 144 S. Ct. 478 (2023), *and cert. denied mem. sub nom. NetChoice, LLC v. Moody,* 144 S. Ct. 69 (2023); *accord Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1241 (11th Cir. 2018) ("*Food Not Bombs I*") ("Context separates the physical activity of walking from the expressive conduct associated with a picket line or a parade.").

Plaintiffs have not come close to identifying any genuinely disputed material fact that would satisfy this burden. Indeed, the shortcomings of Plaintiffs' arguments are made clear by looking to the *Food Not Bombs* and *Burns* decisions, where the Eleventh Circuit identified various factors that would suggest certain conduct is expressive.

For example, in the *Food Not Bombs* cases, the plaintiffs had set up banners conveying their message, and they set up tables with literature alongside the meals that they shared. *Food Not Bombs I*, 901 F.3d at 1242. Moreover, this meal sharing took place against a background of public concern, workshops for public officials, discussions at the city's meetings, and local news coverage of the events. *Id.* And, in concluding that this particular food-sharing conduct was expressive, the Eleventh Circuit paid particular attention to the historic significance of "sharing meals," recognizing Jesus's sharing meals with outcasts, Pilgrims and Native Americans' sharing the Thanksgiving meal, President Lincoln's commemorating the Thanksgiving holiday with a meal, and Americans' sharing the same traditional Thanksgiving meal every year since. *Id.* at 1243. Putting this context together, the Eleventh Circuit concluded that the plaintiffs were engaged in expressive conduct when they shared meals. *Id.*

The Eleventh Circuit did *not*, however, hold that handing food to strangers is always expressive. Quite the opposite: The Eleventh Circuit

explained that "most social-service food sharing events will *not* be expressive." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1292 (11th Cir. 2021) ("*Food Not Bombs II*") (emphasis added). And the same is true, the Eleventh Circuit explained, for "a host of other social services, including the provision of clothing, shelter, and medical care." *Id.*; *accord Burns v. Town of Palm Beach*, 999 F.4th 1317, 1343-44 (11th Cir. 2021) (emphasizing the importance of context to determine whether conduct is expressive).

Here, Plaintiffs' conduct falls on the non-expressive side of the line the Eleventh Circuit drew in *Food Not Bombs* and *Burns*. Plaintiffs fail to show that their conduct at polling locations bears *any* resemblance to the activities discussed in *Food Not Bombs I*. The record does not show that any reasonable observer would perceive a message from a stranger approaching them in the voting line with food, drinks, cellphone chargers, or other things of value. And nothing distinguishes Plaintiffs' conduct from the mere provision of water or snacks that is customary in any number of offices, venues, or waiting rooms.

What set apart the food sharing in *Food Not Bombs I* was "a close examination of the specific context surrounding the events." *Food Not Bombs II*, 11 F.4th at 1292 (citing *Food Not Bombs I*, 901 F.3d at 1242). However, the same "close examination" here shows that there is nothing similar between the meal sharing in *Food Not Bombs I* and Plaintiffs' desire to hand water bottles

and cellphone chargers to voters. At most, Plaintiffs showed that some recipients of their gifts felt appreciated or celebrated. *See* Opp'n 3 n.3 (citing Consolidated Statement of Additional Material Facts ("PSOF") ¶ 457 [Doc. 807-1] (Bray Decl. ¶¶ 14–16 [Doc. 818-8]; Clarke Decl. ¶ 9 [Doc. 818-17]; Sutton Decl. ¶ 8 [Doc. 820-14]; T. Scott Decl. ¶ 10 [Doc. 820-12])). But that does not mean the sharing of gifts communicated any message—some voters simply liked receiving gifts. *See also Burns*, 999 F. 4th at 1343-34.

It is not enough for Plaintiffs to point (at 3 n.3) to *post hoc* statements from some voters who claim to have perceived some message from Plaintiffs' conduct. The standard is the *reasonable* observer. *NetChoice*, 34 F.4th at 1212. And Plaintiffs have failed to establish a material issue of fact as to the perceptions of such an observer.

Moreover, the Supreme Court's decision in *Rumsfeld v. F. for Acad. & Inst'l Rts., Inc.*, 547 U.S. 47 (2006), explains why no reasonable voter could perceive any message from Plaintiffs' conduct. In that case, an observer of military recruiters interviewing away from the law school had "no way of knowing" whether the law school was expressing disapproval of the military or had no available interview rooms, or if the decision was the military recruiters'. *Id.* at 66. On those facts, the Supreme Court confirmed that the underlying conduct was not expressive because additional speech was required to convey a message. *See id.*

So too here, where the record confirms that the mere act of being approached by a stranger with something of value while waiting in line to vote does not communicate anything. *See* Defs.' Resp. to PSOF ¶¶ 457–58, 460–62, 467–69. And the fact that a smattering of voters now claims to have perceived a message does not suggest that a reasonable observer would perceive a message from receiving a bottle of water, a snack, or some other gift while waiting to vote.

Because Plaintiffs are not engaged in expressive conduct, only rational basis scrutiny applies, which the Gift Ban easily satisfies. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). No genuine dispute of material fact exists as to whether the Gift Ban "bears a rational relation to some legitimate end." *Id.* Nor is there any dispute as to whether at least some "reasonably conceivable state of facts that could provide a rational basis" for the statute exists here. *Williams*, 240 F.3d at 948 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)). Accordingly, the Court should apply rational basis review, and enter summary judgment in State Defendants' favor.

B. Plaintiffs have failed to establish a material issue of fact on whether the Gift Ban satisfies strict scrutiny.

Even if the Court concludes that the Gift Ban affects Plaintiffs' expressive conduct, and even if the Court agrees with Plaintiffs (at 5–8) that strict scrutiny applies, summary judgment should still be entered for State

Defendants. In doing so, the Court should apply the relaxed strict-scrutiny standard the Supreme Court applies under *Burson v. Freeman*, 504 U.S. 191 (1992).[2]

The evidence is undisputed that the State has a compelling interest in increasing voter confidence, reducing the burden on election officials, streamlining the elections process, protecting voters and polling places from disruptions, and promoting uniformity in voting. SOF ¶ 277 (SB 202 at 4:70–82, 6:126–29). Such interests are "indisputably … compelling." *Common Cause*, 554 F.3d at 1353 (citing first *Purcell*, 549 U.S. at 4; then *Crawford*, 553 U.S. at 191); *accord Rosario*, 410 U.S. at 761. In response, Plaintiffs are mistaken when they ask the Court to ignore "the State's evidence of reported complaints" from voters, Opp'n at 12 n.8, and they raise a red herring when they argue that "[t]here is no evidence that line relief activities improperly influence voters or threaten election integrity," *id.* at 11. Plaintiffs discount this evidence because, according to Plaintiffs, the complained-of comments did not violate then-

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[2] Plaintiffs attempt to divert attention from the proper standard by arguing that *Burson* scrutiny applies "only where the prohibited activity threatens to interfere with the act of voting itself or physically interferes with voters attempting to cast their ballot." Opp'n at 8 (quoting *Citizens for Police Accountability Pol. Comm. v. Browning*, 572 F.3d 1213, 1221 n.17 (11th Cir. 2009)). But the next line of *Browning* reads: "We believe that exit solicitation of the kind in this case triggers" *Burson* scrutiny. *Browning,* 572 F3d at 1221 n.17. If exit solicitation outside the polling place after a vote is cast triggers *Burson* scrutiny, then surely gift-giving in the same areas *before* casting a vote triggers the same standard.

existing Georgia law—even though it clearly bothered some voters who equated it with campaigning. *Id.* However, Plaintiffs *do not* dispute that the referenced complaints were submitted to State Defendants. That undisputed fact is fatal to Plaintiffs' argument, as these complaints—whether or not the complained-of conduct violated then-existing Georgia law—had the effect of causing State Defendants to address general complaints about activities around the voting line. State Defendants' entitlement to summary judgment does not turn, as Plaintiffs believe, on whether the complained-of conduct violated then-existing Georgia law. And, when "compelling interest[s] in securing the right to vote freely and effectively" result in a "facially content-based restriction on political speech in a public forum," such as a "campaign-free zone," a less exacting form of strict scrutiny applies. *Burson*, 504 U.S. at 198, 206, 208.

Under this less "strict" form of strict scrutiny, State Defendants need only assert a compelling interest and "demonstrate that its law is necessary to serve the asserted interest." *Burson*, 504 U.S. at 199. As the Supreme Court explains: "A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary[.]" *Id.* at 211. For instance, the Supreme Court held that a 100-foot content-based solicitation ban was a "minor geographic limitation" and that reducing it by 75 feet would be "a difference only in degree, not a less restrictive alternative in kind." *Id.*

at 210. Although, "[a]t some measurable distance from the polls … governmental regulation of vote solicitation could effectively become an impermissible burden akin to" an absolute bar on publishing newspaper editorials on election day, that is not the case here where there are a host of ways Plaintiffs may still communicate their message to voters just steps away from a lengthy voting line. *Id.* (citing *Mills v. Alabama*, 384 U.S. 214 (1966)).

The 150-foot Buffer Zone here is within the same "minor geographic limitation" range that the Supreme Court upheld in *Burson*. There is no meaningful distinction between this 150-foot Buffer Zone and the 100-foot zone addressed in *Burson*. And the difference certainly is not "a question of constitutional dimension." *Id.* at 210 (cleaned up). Plaintiffs' parade of horribles (at 13) describing lines "an unlimited distance from polling locations and with no fixed boundaries" relies on countless unjustified and speculative assumptions. Unlike Plaintiffs' speculation, the evidence shows that lines to vote in Georgia post-SB 202 are quite short. DRSOF ¶ 433 (citing Defs.' Ex. LLLL, Shaw Rebuttal Rep. ¶ 48 (showing wait times averaged "0 minutes to approximately 10 minutes"); Defs.' Ex. E, Germany 6/15/23 Decl. ¶¶ 10–11 (average wait of 1 minute 45 seconds); Defs.' Ex. MM, Manifold 30:11–17 (stating that "we don't have lines nearly as much as they used to have in the past[.]")). And, even when long lines do occur, they do not generally extend into the Supplemental Zone. *See, e.g.*, PSOF ¶ 453 (Pls.' Ex. 76 (Rose Dep. 32:15-

34:4)) ("the line was wrapped twice around the building"); *id.* ¶ 493 (Pls.' Ex. 76 (Rose Dep. 32:15-34:4)). And such issues, if they ever arise, must be addressed through as-applied challenges, as *Burson* recognized. *Burson*, 504 U.S. at 210 n.13 (declining to address arguments that buffer zone might extend into a highway or that cars with prohibited campaign bumper stickers might pass through the buffer zone).

Moreover, the Supplemental Zone is not at all like the type of fixed, speech-free bubble that has been rejected by other courts. *See Anderson,* 356 F.3d at 658 (500-foot buffer zone unconstitutional); *Russell*, 784 F.3d at 1053 (300-foot buffer zone unconstitutional). These large buffer zones were rejected, as the Plaintiffs concede, because "the state's evidence was 'glaringly thin … as to why the legislature'" chose such large boundaries. Opp'n at 18 (quoting *Anderson*, 356 F.3d at 658). In contrast, even a *600-foot* buffer zone was held to be constitutional when the state had a reason for such a large buffer zone. *Schirmer v. Edwards*, 2 F.3d 117, 122 (5th Cir. 1993). Here, State Defendants opted not to extend a 600-foot bubble out in all directions from the polling place, but instead to keep it tightly cocooned around voters if the line happens to extend beyond the modest 150-foot buffer zone.

Accordingly, the Gift Ban is narrowly tailored to the State's compelling interests, and Plaintiffs have not presented any evidence of a less restrictive alternative to achieve those interests. Their argument (at 12) that "[t]he

conduct that purportedly justifies the bans is already illegal" ignores the undisputed fact that the State continued receiving complaints with those provisions in place, justifying further restrictions and a bright-line rule. And the State is not required to sit on its hands waiting for disturbances to arrive. The Supreme Court allows states to act preemptively to further their interests. *See Burson*, 504 U.S. at 208–09.

The record therefore confirms that the Gift Ban operates in conjunction with Georgia's other laws limiting disturbances near the polling places. And the Gift Ban is sufficiently narrowly tailored—far more narrowly than the looser *Burson* standard requires—because it focuses only on the narrow conduct of giving items of value to voters in immediate physical proximity to the voting line.

C. Plaintiffs have failed to establish a material issue of fact on whether the Gift Ban satisfies intermediate scrutiny.

Because the Gift Ban satisfies strict scrutiny, it also necessarily satisfies the intermediate scrutiny standards applicable if the Court concludes that the Gift Ban impacts: (a) *Anderson-Burdick* election mechanics; (b) expressive conduct that does not involve core political speech; or (c) core political speech that is subject to a time, place, and manner restriction. Each of these intermediate scrutiny standards requires slightly different considerations, but

the Gift Ban easily satisfies each. And Plaintiffs have failed to offer or identify any evidence that would create a material issue of fact bearing on these issues.

***Anderson-Burdick* election mechanics.** The same standard that defeats Plaintiffs' Fourteenth and Fifteenth Amendment claims also bars their First Amendment claim under the *Anderson-Burdick* standard. On that point, Plaintiffs are inconsistent in conceding that the *Anderson-Burdick* standard applies to the former but not the latter claims. But, as the Eleventh Circuit confirms, the *Anderson-Burdick* standard applies statute-by-statute, not claim by claim. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) (applying *Anderson-Burdick* to First and Fourteenth Amendment challenges); *Libertarian Party of Ala. v. Merrill*, No. 20-13356, 2021 WL 5407456, at *4 (11th Cir. Nov. 19, 2021) (same). And it applies when, as here, a law that controls "the mechanics of the electoral process" also incidentally burdens constitutional rights, such as Plaintiffs' First Amendment rights. *McIntyre*, 514 U.S. at 345. As explained in detail above, no genuine issue of material fact exists as to the tailoring of the Gift Ban to the State's interests, and summary judgment should be granted on Plaintiffs' First Amendment claim if the Court concludes that the *Anderson-Burdick* balancing standard applies.

Expressive conduct not involving core political speech. Even if the Court concludes that Plaintiffs' conduct is expressive, moreover, it still does

not involve core political speech. Core political speech is not speech *about* politics or the political process. Instead, the Supreme Court confirms that core political speech is speech *as part of* the political process. *See, e.g.*, *Meyer v. Grant*, 486 U.S. 414, 422 (1988) (petition circulation); *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 186 (1999) (same); *McIntyre*, 514 U.S. at 347 (pamphleteering campaign literature). Here, Plaintiffs have pointed to nothing more than mere celebrations or acts of solidarity with voters. Plaintiffs' gift-giving is therefore not core political speech.

Under this standard, summary judgment should still be entered in the State's favor because the Gift Ban is: (1) grounded in a substantial governmental interest; and (2) "no greater than is essential." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Here, given that the Gift Ban passes with flying colors under *Burson* strict scrutiny—for reasons already discussed—it necessarily passes this intermediate scrutiny standard as well. And Plaintiffs have offered no evidence that would cast any doubt on that conclusion.

Time, Place, and Manner. Finally, the Gift Ban also satisfies the similar—but lower—level of scrutiny for time, place, and manner restrictions. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1364 (11th Cir. 1999) (noting that the time, place, and manner test is similar to expressive conduct but sufficiently different that it "may occasionally be outcome determinative"). This standard would be applicable here because the Gift Ban

is a content-neutral time, place, and manner restriction that allows Plaintiffs to provide all the food, drinks, and gifts they want, provided none is conditioned on a person voting, and so long as they do so outside the immediate vicinity of the polling place and voters waiting in line to vote.

The record is clear on the threshold neutrality point: this provision targets only secondary effects, such as voter intimidation and the appearance of corruption attendant with *anyone* giving queued voters items of value for *any reason*. SOF ¶ 284 (Germany 6/15/23 Decl. ¶¶ 21–22, 28 [Doc. 755-6]). Because the regulation focuses on the "placement" of Plaintiffs' conduct, not its "subject matter," it is a valid time, place, and manner restriction. *One World One Fam. Now v. City of Miami Beach*, 175 F.3d 1282, 1287 (11th Cir. 1999). And, for reasons discussed above, it is "not substantially broader than necessary to achieve the government's interest." *Lady J. Lingerie*, 176 F.3d at 1364 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

This stands in stark contrast to the restrictions that the Supreme Court considered in *Burson*, where the plaintiffs could not solicit votes or distribute campaign materials near a polling place. 504 U.S. at 197. Here, it is undisputed that *all* gift-giving is prohibited, without reference to "whether [such] speech is related to a political campaign," or any other content-based restriction. *See id*. Neither does the Gift Ban "refer[] to the content of the regulated speech" for justification, nor was it adopted "because of disagreement with the message

[the speech] conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (quoting *Ward*, 491 U.S. at 791). Simply put, the Gift Ban is content neutral, and it prohibits an entire category of conduct: no giving food, drink, or gifts to a voter for *any reason* within a certain distance of voters standing in line to vote. But it is also undisputed that the Gift Ban allows that very conduct just steps away outside the Buffer Zone. The Gift Ban is thus like the valid time, place, and manner restrictions in *One World One Family Now* that prohibited vending from streets or sidewalks. 175 F.3d at 1284.[3]

Plaintiffs fail to meaningfully engage the time, place, and manner analysis. Instead, they rely on inapposite cases that addressed content-based regulations. *See* Opp'n at 21 (citing *Spence v. Washington*, 418 U.S. 405 (1974); *Project Veritas v. Schmidt*, 72 F.4th 1043 (9th Cir. 2023); *Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987)).[4]

Additionally, Plaintiffs rely on the Eleventh Circuit's decision addressing a restriction on feeding the homeless, with twice yearly exceptions in each of the subject public parks. *See* Opp'n at 21 (citing *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 761 (11th Cir. 2011)). But that case cuts

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[3] That restriction even exempted some businesses from the regulation, unlike the case at hand. *One World One Fam. Now*, 175 F.3d at 1284 (exempting restaurants with outdoor tables and a limited number of non-profits).

[4] Moreover, *Project Veritas* has been vacated and rehearing *en banc* granted. *Project Veritas v. Schmidt*, 95 F.4th 1152 (9th Cir. 2024) (mem.).

against Plaintiffs, who overlook the Eleventh Circuit's reasoning that this regulation was far less burdensome than the restriction on *any* sleeping in tents outside of designated campsites that the Supreme Court upheld in *Clark*. *See First Vagabonds*, 638 F.3d at 760. The Supreme Court had reasoned there that the government in that case "neither attempts to ban sleeping generally nor to ban it everywhere in the parks." *Id.* at 761 (quoting *Clark*, 468 U.S. at 295). So too here. The State "neither attempts to ban [gift-giving] generally nor to ban it everywhere" in the public forums surrounding the polls. Plaintiffs have offered no evidence disputing that the Gift Ban "leave[s] open ample alternative channels for communication of the information," or that it allows Plaintiffs to provide all the food, drinks, and gifts they want to voters, provided they are not providing them in return for voting. *See Food Not Bombs II*, 11 F.4th at 1292 (quoting *Clark*, 468 U.S. at 293). Plaintiffs are merely required to do so more than 150 feet from the polling place, or more than 25 feet from the voters if the line extends past that buffer. That is a quintessential time, place, and manner restriction, and Plaintiffs have not identified any factual dispute suggesting that their First Amendment claim survives the scrutiny applicable to such restrictions.

CONCLUSION

For Plaintiffs' challenges to the Gift Ban under the Voting Rights Act and the Americans with Disabilities Act, summary judgment should be entered for State Defendants because Plaintiffs have conceded those claims by not addressing them in their summary judgment oppositions. For Plaintiffs' Fourteenth and Fifteenth Amendment claims, summary judgment should also be entered for State Defendants because Plaintiffs have offered no evidence suggesting that the Gift Ban imposes any burden that outweighs the undisputed interests that it serves. Finally, for Plaintiffs' First Amendment claim, Plaintiffs have offered no evidence that the Gift Ban affects Plaintiffs' expressive conduct. And, even if it did, Plaintiffs fail to identify any factual disputes about the Gift Ban's serving compelling State interests and being tailored to further those interests. For all of those reasons, the Court should enter summary judgment in State Defendants' favor.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing document has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(C).

/s/Gene C. Schaerr
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