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 THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This motion concerns the unconstitutional criminalization of NGP Plaintiffs' First Amendment-protected expression. Although Georgia law has long banned solicitation, electioneering, and intimidation at the polls, *see* O.C.G.A. §§ 21-2-414(a), 21-2-567, it now includes a blanket criminal prohibition on offering "food and drink" to voters within 150 feet of a polling place or 25 feet of a voter in line (the "Line Relief Ban"). NGP Plaintiffs move to enjoin Defendants Gammage and Edwards, prosecutors in Fulton and Dougherty Counties respectively, from enforcing the Line Relief Ban. In response, Defendant Gammage filed nothing. Defendant Edwards joined the State Defendants' brief opposing Plaintiffs' motions but made no arguments to support enforcement of the Ban in his county. Intervenors, in turn, focused largely on the requested relief's timing, but offer no explanation—let alone citation—for how an injunction against law enforcement could confuse voters. Because NGP Plaintiffs' requested injunction against the enforcement of a criminal statute is not precluded by the *Purcell* principle, and because NGP Plaintiffs nonetheless satisfy the heightened *Purcell*-related standard of review that Defendants propose, this Court should grant NGP Plaintiffs' motion.[1]

[1] Unless specified, "Defendants" refers to Defendant Edwards and Intervenors.

ARGUMENT

I. *Purcell* does not preclude the relief NGP Plaintiffs seek.

Defendants first train their fire on the equitable factors that they allege foreclose injunctions against voting rules on the eve of an election, but they fail to reconcile their arguments with the specific relief NGP Plaintiffs seek. Armed only with inapt authorities about voting requirements, Defendants argue that even unconstitutional criminal penalties must remain enforceable simply because an election is near. And in an unprecedented expansion of the *Purcell* doctrine, they attempt to invoke purported concerns about "voter confusion" to forestall an injunction barring county law enforcement officials from arresting or bringing criminal charges against private citizens—who are not participants in the voting process—solely because of their proximity to polling place lines.

Contrary to Defendants' unsupported claims, many courts have recognized that injunctions against criminal prosecution do not implicate the concerns that animate the *Purcell* principle. Unlike the voter-ID requirement that governed the conduct of voters and election officials in *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), an injunction against criminal proceedings is entirely "removed in space and time from the mechanics and procedures of voting." *Paxton v. Longoria*, No. SA:21-CV-1223-XR, 2022 WL 447573, at *20 (W.D. Tex. Feb. 11, 2022) (less than three

weeks before primary, enjoining statute criminalizing solicitation of vote-by mail applications), *vacated and remanded on other grounds*, 2022 WL 2208519 (5th Cir. 2022); *Coal. for Good Governance v. Kemp*, 558 F. Supp. 3d 1370, 1393 (N.D. Ga. 2021) (one month before election, enjoining SB 202 provision imposing criminal penalties); *Towbin v. Antonacci*, 885 F. Supp. 2d 1274 (S.D. Fla. 2012) (in August of election year, enjoining statute imposing criminal penalties on political speech); *see also* ECF No. 185-1 at 18-19 (citing cases).

Defendants, moreover, have not cited a single case that articulates why *Purcell* would apply to the Line Relief Ban.[2] *Purcell* exists to prevent confusion in the voting process, not to enshrine all regulations tangentially related to elections; it cannot be that individuals are subject to the full gauntlet of Georgia's penal system—arrest, prosecution, conviction, and sentencing—for violating an *unconstitutional* statute merely because an election is near. Defendants' attempt to sweep criminal statutes and county law enforcement officials under *Purcell* distorts the doctrine

[2] The Eleventh Circuit's stay order in *League of Women Voters of Florida*, *Inc. v. Florida Secretary of State*, 32 F.4th 1363, 1371 (11th Cir. 2022), did not address *Purcell*'s application to criminal statutes. And despite Defendants' observation that the stay issued less than four months before an election, "[h]ow close to an election is too close may depend in part on the nature of the election law at issue, and how easily the State could make the change without undue collateral effects." *Merrill v. Milligan*, 142 S. Ct. 879, 881 n.1 (2022) (Kavanaugh, J., concurral). So even within the *Purcell* framework, the limited nature of the relief sought here—and its limited application to law enforcement officers—counsels toward granting the injunction.

beyond recognition and should be rejected.

II. In any event, the *Purcell*-related injunction factors favor Plaintiffs.

Even if the Court applied the *Purcell* doctrine to law enforcement officers administering unconstitutional criminal sanctions—and determined that a standard articulated in two non-binding orders should govern—NGP Plaintiffs have nonetheless demonstrated that they are entitled to relief.[3]

A. The merits are clearcut in NGP Plaintiffs' favor.

1. Line relief is protected expressive activity.

Defendants attempt to justify the Line Relief Ban as preventing intimidating, confusing, or coercive messages, yet simultaneously contend that line relief is not expressive because it potentially conveys multiple ideas. ECF No. 194 at 11-13; ECF No. 197 at 14-15. Putting aside Defendants' contradictory assertions, the Eleventh Circuit has already rejected the notion that only one message can be protected at a time. *See Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale* ("*FNB I*"), 901 F.3d 1235, 1240 (11th Cir. 2018). Specifically, "a narrow, succinctly articulable

[3] This Court is not bound by the four-factor test articulated in a Supreme Court stay concurrence and utilized in an Eleventh Circuit stay order. *See Maryland v. Wilson*, 519 U.S. 408, 413 (1997) (statement in concurrence is not binding); *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297, 1301 (11th Cir. 2007) (Supreme Court stay orders are non-precedential); *League of Women Voters of Fla, Inc.*, 32 F.4th at 1369 n.1 (noting that stay order has no effect outside the case).

message is not a condition of constitutional protection"—rather, the question is "whether the reasonable person would interpret [the conduct] as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Id.*

Despite Defendant Edwards's attempt to attribute *FNB I*'s finding of protected speech to the presence of a singular message, ECF No. 197 at 16, the Eleventh Circuit said just the opposite and expressly "decline[d] the [] invitation to resurrect the [] requirement that it be likely that the reasonable observer would infer a particularized message." *FNB I*, 901 F.3d at 1245. The court further explained that "[w]hether [plaintiff's] banners said 'Food Not Bombs' or 'We Eat With the Homeless' adds nothing of legal significance to the First Amendment analysis." *Id.* at 1244. Intervenors, too, place undue emphasis on the plaintiff's use of "tables and banners," ECF No. 194 at 14. But that is just one component of the "surrounding circumstances" that may "lead the reasonable observer to view the conduct as conveying some sort of message." *FNB I*, 901 F.3d at 1242. The same "contextual clues" are present in NGP Plaintiffs' line relief efforts. ECF No. 185-1 at 9-10.

The similarities between NGP Plaintiffs' line relief and the speech at issue in *FNB I* also underscore why Defendants' reliance on *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), is misplaced. *See FNB I*, 901 F.3d at 1244 (distinguishing *FAIR*). Unlike the law schools' conduct in *FAIR*, of which a reasonable observer would likely require

"explanatory speech" to infer that the law schools were communicating *any* message, "the expressive component of [NGP Plaintiffs'] actions is [] created by the conduct itself." *FAIR*, 547 U.S. at 66. Likewise, the surrounding context distinguishes line relief from the mailing of absentee ballot applications that this Court found was not expressive in *VoteAmerica v. Raffensperger*, No. 1:21-CV-01390-JPB, 2022 WL 2357395, at *9 (N.D. Ga. June 30, 2022). Sharing food and drink as a form of expression "dates back millennia," *FNB I,* 901 F.3d at 1243, and no explanatory speech or "cover communication," *VoteAmerica*, 2022 WL 2357395, at *7, is needed to infer that it conveys "some sort of message." *FNB I*, 901 F.3d at 1243, 1244. NGP Plaintiffs' message is intrinsic to their actions.

2. The Line Relief Ban is content-based and regulates speech in a public forum.

Defendants' argument that the Line Relief Ban is *facially* content neutral misapplies the governing standard. In determining whether a law is content-based, the court should "look[] to governmental motive, including . . . whether the regulation was justified without reference to the content of the speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015) (cleaned up).[4] As NGP Plaintiffs explained, the

[4] *City of Austin v. Reagan National Advertising of Austin*, 142 S. Ct. 1464 (2022), does not suggest otherwise. *See id.* at 1471 (stating only that particular reading of *Reed* rule advanced by party was "too extreme an interpretation of this Court's precedent"). *But see* ECF No. 197 at 21 n.12.

General Assembly justified the Line Relief Ban by referring to "improper interference, political pressure, or intimidation" of "electors . . . while waiting in line to vote," SB 202 § 2(13). In other words, the Legislature's (and Defendants') "focuses [] on the content of the speech and the direct impact that speech has on its listeners," reveals that the restriction is content-based. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (concluding law that "regulates speech due to its potential primary impact" is content-based). *See also* ECF No. 185-1 at 12.

But the Court need not even consider the Legislature's clear motives to find that the Line Relief Ban is content-based. On its face, the Ban reaches some categories of speech but leaves others untouched. For one, it prohibits select messages—conveyed by offering food and water—while allowing individuals to approach voters in line for a host of other reasons, including for commercial gain. And it restricts line relief only when directed to voters but would permit the same interactions with individuals queuing to enter a bank next door, or a different establishment located in the same building. *See Burson v. Freeman*, 504 U.S. 191, 197 (finding statute that reached select categories of speech content-based).

Although Defendants attempt to relitigate whether the area outside a polling place is a public forum, the U.S. Supreme Court and Eleventh Circuit have both concluded that it is. *See* ECF No. 185-1 at 9-10 (citing cases). *Minnesota Voters*

Alliance v. Mansky, 138 S. Ct. 1876 (2018), does not hold otherwise; there, the Court concluded only that the *interior* of a polling place is not a public forum. *Id.* at 1886. Nor does *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004), which concluded only that election day does not transform a traditionally *private* area near a polling place into a public forum. *Id.* at 750.

3. Defendants' remaining arguments are unavailing.

Defendants' attempt to invoke court decisions finding that "helping people vote" or "facilitating voting" is not protected speech misses the point. *See* ECF No. 194 at 13 (citing cases); ECF No. 197 at 17 (same). NGP Plaintiffs do not contend that line relief is protected speech simply because it helps voters vote, but rather because it conveys a message of support and solidarity. *See* ECF No. 185-1 at 7.[5]

Furthermore, contrary to Defendants' claims, NGP Plaintiffs need not prove that the Ban is "unconstitutional in all its applications" to establish its facial invalidity. ECF No. 194 at 15-16; ECF No. 197 at 14 n.6. In the First Amendment context, "[t]he showing that a law punishes a 'substantial' amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to

[5] Courts often find electoral organizing constitutes protected speech. *See Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 224 (M.D.N.C. 2020) (assisting voters apply for absentee ballots), *reconsideration denied*, No. 1:20CV457, 2020 WL 6591396 (M.D.N.C. Sept. 30, 2020); *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 814 (E.D. Mich. 2020) (collecting cases).

invalidate *all* enforcement of that law." *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) (citation omitted). Here, NGP Plaintiffs have undoubtedly shown that the prohibition on offering food and water criminalizes the protected activities that they and other groups undertake to communicate with voters at the polls. ECF No. 185-1 at 7-8. In contrast, Defendants do not provide *any* evidence of the law's "legitimate sweep."[6]

4. The Line Relief Ban fails any level of scrutiny.

Contrary to Defendants' assertions, and as this Court recently explained, courts do not "apply the *Anderson-Burdick* framework in cases that concern 'pure speech' as opposed to the 'mechanics of the electoral process,'" even if that speech is election-adjacent. *VoteAmerica*, 2022 WL 2357395 at *13 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995)). Accordingly, *Anderson-Burdick* is not the appropriate standard here; "[r]egulations that burden political speech must typically withstand strict scrutiny."[7] *Gaspee Project v. Mederos*, 13

[6] To the extent the circumstances of food and water distribution at the polls are not sufficiently specific to warrant relief as to all line relief providers, *see FNB I*, 901 F.3d at 1241, NGP Plaintiffs' claims are both facial and as applied to their own line relief activities. *See Citizens United v Fed. Election Comm'n,* 558 U.S. 310, 331 (2010) ("[T]he distinction between facial and as-applied challenges is not so well defined that it . . . must always control the pleadings and disposition in every case involving a constitutional challenge. . . . [I]t goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.").

[7] Intervenors' assertion that this Court should apply the four-part test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), similarly fails, as the government's

F.4th 79, 84–85 (1st Cir. 2021) (citing *Citizens United*, 558 U.S. at 366).

Regardless, Defendants' asserted interests in the Line Relief Ban simply underscore that it fails *any* level of scrutiny. Defendants argue they have compelling interests "in guarding against voter fraud (and the appearance of fraud), confusion, and intimidation, as well as in enhancing election efficiency." ECF No. 197 at 28; ECF No. 194 at 18. Even assuming these interests are compelling, Defendants fail to explain how the Line Relief Ban is related to them.[8] For instance, their only example of so-called "voter intimidation" is a second-hand report that "[o]lder voters felt intimidated by the presence of [the Black Voters Matter] group." ECF No. 197-2 at 11, 50. In other words, it was the group's *presence* that, for whatever reason, allegedly intimidated "[o]lder voters," and not their handing out of food and water.

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interest in the Line Relief Ban is content-based. *See supra* Section II.A.2; *Texas v. Johnson*, 491 U.S. 397, 407 (1989) ("[W]e have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free expression.'").

[8] Although Defendant Edwards argues that record evidence is not required to support state interests, ECF No. 197 at 23-24 (citing *Anderson-Burdick* case), the Supreme Court combed extensively through the factual record in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), a First Amendment case, to find there was "a dramatic mismatch . . . between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end." *Id.* at 2386; *see also Soltysik v. Padilla*, 910 F.3d 438, 446–48 (9th Cir. 2018) (explaining issue of whether governmental interests justified burden under *Anderson-Burdick* required "fully developed evidentiary record").

ECF No. 197 at 5. Notably, Black Voters Matter's mere presence at a polling place does not violate any law, including the Line Relief Ban. *See* ECF No. 194 at 13 ("The plaintiffs remain free to approach every voter in line . . . .").

Defendants also fail to connect the Line Relief Ban with their fraud prevention or election efficiency goals beyond declaring that it is difficult to separate line relief from nefarious activities like "giv[ing] [in]accurate information." *See*, *e.g.*, ECF No. 197 at 4. That argument quickly unravels because the Ban does nothing to address that concern—the aforementioned conveyors of inaccurate information are still (and have always been) free to approach voters in line, whereas solicitors never were (even before SB 202). *Id.* The Line Relief Ban simply prohibits a message of support conveyed by Plaintiffs' volunteers, and Defendants effectively concede that the restriction is content-based while also being entirely prophylactic and poorly tailored.[9] Unlike the electioneering prohibition in *Burson*, 504 U.S. 191 (1992), or the solicitation ban in *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213 (11th Cir. 2009), the Line Relief Ban fails to address

[9] *See supra* Section II.A.2 (Defendants' justifications for Ban reveal that it is content-based); ECF No. 194 at 4 (underscoring prophylactic nature of ban and poor tailoring by explaining "'there is no practical way for elections officials to ensure that' individuals . . . are 'not using food or water as a basis to approach a voter and electioneer' or ensure 'that the individual is giving the voter accurate information about voting"); *see also* ECF No. 185-1 at 13-15.

improper influence in elections, and instead targets the messages of support and encouragement that help to alleviate the burdens of long lines.[10]

B. NGP Plaintiffs' requested relief will not impose cost, confusion, or hardship on the upcoming election.

The NGP Plaintiffs' requested relief does not impede election administration or any aspect of the voting process. *See supra* Section I. While Defendant Edwards complains of the need to "update [] trainings to educate officials and poll workers about the new rules in place for the general election." ECF No. 197 at 11, he fails to demonstrate how informing election officials that volunteers are once again permitted to offer line relief (as they were in every previous election cycle) imposes a significant burden. If the need to notify election officials of a court order precluded relief under *Purcell*, then *any* change to *any* election-related rule would be verboten months before any election. *Purcell* does not countenance, much less require, such "bright-line" rules. *VoteAmerica*, 2022 WL 2357395, at *19 (collecting cases).

Defendant Edwards also cites *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), to suggest that any non-statewide injunction raises "serious constitutional issues," ECF No. 197 at 11-12 n.3, but, tellingly, says very little about what those issues are. To the extent this undeveloped argument attempts to imply that this Court may not

[10] As set forth in NGP Plaintiffs' opening brief, the equities and public interest also tip sharply in NGP Plaintiffs' favor. *See* ECF No. 185-1 at 17-20.

issue an injunction against local law enforcement officers, *Bush* says no such thing. There, the question before the Supreme Court was "*not* whether local entities . . . may develop different systems for implementing elections," but whether a court-ordered statewide recount had minimal procedural safeguards to ensure fundamental fairness in determining what is a legal vote. *Bush*, 531 U.S. at 109 (emphasis added).

The Court's ability to enjoin county prosecutors from enforcing an unconstitutional law has nothing to do with *Bush*'s call for statewide standards in determining a valid vote during a statewide recount. Indeed, Defendants' misguided attempt to convert *Bush* into a blanket requirement for any election-related injunction is precisely the outcome the Supreme Court sought to avoid when it limited its analysis in *Bush* "to the present circumstances," recognizing that "the problem of equal protection in election processes generally presents many complexities." *Id*. That is why the Eleventh Circuit has cited *Bush* only once in a majority opinion, and even then, it rejected the plaintiffs' claim that variations in election procedures violated the equal protection clause. *See Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006). NGP Plaintiffs seek to enjoin the prosecutors in Fulton and Dougherty Counties from enforcing the Line Relief Ban because that is where they conduct substantial line relief activities. And Defendants do not cite a single case that disputes a court's authority to issue injunctions against

specific law enforcement officials to redress a plaintiff's injuries. *But see Allee v. Medrano*, 416 U.S. 802, 811-12 & n.7, 821 (1974) (affirming injunction against specific law enforcement officers in challenge to constitutionality of Texas statutes).

C. NGP Plaintiffs will suffer irreparable injury.

NGP Plaintiffs have engaged in line relief activities in Fulton and Dougherty Counties in the past and would do so again but for the Line Relief Ban. *See, e.g.*, Hector Decl. ¶ 30, ECF No. 185-3; Honor Decl. ¶ 22, ECF No. 185-5; Johnson Decl. ¶ 13, ECF No. 185-7. Despite multiple opportunities, neither prosecutor has disclaimed their intent to enforce the Ban. *See, e.g.*, Gammage MTD at 6, *New Ga. Project v. Raffensperger*, No. 1:21-cv-01229-JPB (N.D. Ga. June 17, 2021), ECF No. 57-1 (noting prosecution "generally rests entirely in his discretion" and that he "has diligently and effectively prosecuted violations of [state and county] laws"). As a result, NGP Plaintiffs are not participating in any line relief activities presently—a chill on their speech caused by the ongoing threat of criminal penalty. *See, e.g.*, Hector Decl. ¶ 22; Honor Decl. ¶ 20; Johnson Decl. ¶ 11; *see also Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285-86 (11th Cir. 1990) (ongoing First Amendment violation is irreparable injury); *White v. Baker*, 696 F. Supp. 2d 1289, 1312–13 (N.D. Ga. 2010) ("Plaintiffs that show a chilling effect on free expression have demonstrated an irreparable injury.").

D. NGP Plaintiffs did not unduly delay in seeking relief.

Finally, contrary to Defendants' claims, NGP Plaintiffs did not unduly delay in seeking relief. "[C]ases discussing undue delay in connection with the *Purcell* doctrine usually refer to the timing of the complaint," *VoteAmerica,* 2022 WL 2357395 at *19, and NGP Plaintiffs filed this lawsuit the same day the Governor signed SB 202 into law, *see* Compl., *New Ga. Project*, No. 1:21-cv-01229-JPB (N.D. Ga. Mar. 25, 2021), ECF No. 1. But even accepting Defendants' novel contention that the timing of the precise motion at issue controls, NGP Plaintiffs proceeded diligently, seeking pertinent discovery from the State and County Defendants regarding the Line Relief Ban and other challenged provisions. Brooks and Spalding County responded on May 13, 2022, State Defendants responded on May 16, 2022, and Fulton County's responses are currently outstanding. The NGP Plaintiffs subsequently filed their motion for a preliminary injunction about three weeks later on June 3, 2022, the court-ordered deadline for submission of preliminary injunction motions "related to the general election." Scheduling Order, ECF No. 84, with sufficient time to implement relief well in advance of the November election.

CONCLUSION

NGP Plaintiffs' Motion for Preliminary Injunction should be granted.

Respectfully submitted this 13th day of July, 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 font type of Times New Roman and a point size of 14.

Dated: July 13, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2022, 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: July 13, 2022

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