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
SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, *et al.*, *Plaintiffs*, v. BRIAN KEMP, Governor of the State of Georgia, in his official capacity, *et al.*, *Defendants,* REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No.: 1:21-cv-01284-JPB
GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, *Plaintiffs,* v. BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.*, *Defendants,* REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No.: 1:21-cv-01259-JPB

AME & GEORGIA NAACP PLAINTIFFS' REPLY BRIEF IN SUPPORT OF RENEWED MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs' renewed motion provided a full array of evidence proving why the geographically limitless criminal ban on line relief within 25-feet of any voter must be enjoined. This record—compiled with the benefit of full discovery—reinforced their strong showing of likelihood of success on the merits in the initial motion. Yet Defendants[1] continue to ignore this evidence. Instead, they mischaracterize Plaintiffs' claim, misread controlling cases, and undermine their own arguments through internal contradictions.

Defendants barely attempt to contest the expressive nature of Plaintiffs' line relief activities, reverting to the same misreading of First Amendment case law this Court (and the Eleventh Circuit and Supreme Court) have already rejected. Their attempt to argue the ban is not content-based also fails. Defendants argue that regulating Plaintiffs' expressive conduct focuses on its "secondary effects" like those of adult theaters on the surrounding community rather than "the content of adult films themselves." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). But the Supreme Court rejected that argument in *Boos v. Barry*, 485 U.S. 312 (1988), where, as here, the ban sought to restrict speech because of concerns about the *direct* effect on the listener.

[1] "Defendants" refers to State Defendants and Intervenor-Defendants collectively.

Even under modified strict scrutiny, *Burson v. Freeman*, 504 U.S. 191 (1992), Defendants bear the burden to prove proper tailoring. Yet they misleadingly argue that Plaintiffs "carry the burden" of rebutting the "State's interests supporting the Anti-Solicitation Provision." Defs.' Opp. to Pls.' Mot. for PI, ECF No. 578 ("Opp.") 3. Unsurprisingly, Defendants have not met and cannot meet that burden given the ban's *limitless* reach no matter the voter's distance from the polling-place entrance.

Applying Defendants' own arguments also shows the ban is unnecessary because—ignoring evidence to the contrary—they claim "lines are largely non-existent in Georgia elections following SB 202." Opp. 7. Defendants justify the ban as an "Anti-Solicitation Provision," Opp. 3, despite line-relief activities not involving solicitation. They also undermine their interference rationale by recognizing that the ban "does not limit [the] ability to approach and speak with voters." Opp. 19. And their own justification for the Supplemental Zone means that the Buffer Zone—which they have defended—is superfluous and thus unnecessary.

Rather, the evidence overwhelmingly shows that the challenged portion of the law at issue here—the ban on providing food and drinks within the Supplemental Zone—is facially unconstitutional because it "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (cleaned up). This holds especially

true as a content-based ban targeting only one type of expressive conduct, and doing so without regard to scope or boundaries. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 766 (1988) (approving "facial challenges to statutes or policies that embodied discrimination based on the content . . . of expression.").

As to irreparable harm—which precedent counsels is easily shown in free expression cases—the record shows that the Supplemental Zone ban has prevented Plaintiffs from engaging in line relief altogether, and that they would resume this activity were the ban enjoined. By contrast, Defendants' slim rebuttal relies on flawed and irrelevant data in a failed attempt to argue that no lines stretch into the Supplemental Zone, and mischaracterizes inapposite evidence of individuals providing refreshments outside the context of line relief in the Supplemental Zone.

On the equities, Defendants criticize Plaintiffs for filing this motion eleven months before the next relevant election. Instead, they suggest Plaintiffs should have moved in August 2022 just after the Court's decision on Plaintiffs' first line relief motion. But Intervenors previously argued that awarding relief in 2022 for elections beyond 2022 would be an "abuse of discretion," PI Hearing Tr., ECF No. 234 ("Tr.") 39–40, and State Defendants then argued that any post-2022 relief should be dealt with in an "expedited trial," *id.* at 34. Accordingly, Plaintiffs renewed their preliminary injunction only after unsuccessfully seeking to secure a trial date, *see*

ECF No. 400, and almost a year before the relevant elections, making the timing eminently reasonable. Indeed, Defendants argue for a Catch 22 where plaintiffs could never seek preliminary relief despite looming irreparable harm as their request would be both too early and too late.

Defendants also argue that applying different line relief rules in 2023 and 2024 elections will cause confusion. But they ignore the evidence from state and county officials that lifting the Supplemental Zone ban would require little implementation, and provide no evidence that line-relief policies will be implicated in the limited 2023 elections. Under Defendants' theory, a court could *never* enjoin an election law because it would change policies from one election to the next.

Finally, Intervenors' *Purcell* argument borders on frivolous. Under their conception, courts must apply Justice Kavanaugh's four-part test from his concurrence in the 2022 *Milligan* Stay Order no matter the distance from the relevant election. Accepting this argument would in essence alter the legal standard for a preliminary injunction altogether. This is belied not only by commonsense, but also by the fact that the Supreme Court did not apply (or even mention) *Purcell* in ultimately affirming the *Milligan* preliminary injunction earlier this month.

Defendants fail to undermine Plaintiffs' strong showing of their entitlement to a preliminary injunction.

ARGUMENT

I. Defendants Fail To Rebut Plaintiffs' Strong Showing That They Are Likely To Succeed On The Merits Of Their Claim.

A. Defendants' Arguments Against Line Relief As Expressive Conduct Are Legally Flawed And Fail To Address The Evidence.

This Court correctly held that the "evidence demonstrates that Plaintiffs' line warming activities convey a message regarding the importance of voting that is understood by the reasonable observer," making their line relief activities expressive conduct. ECF No. 241 at 33. Defendants ignore this Court's finding and the evidentiary record. Instead, they repeat their already rejected assertion that "there is no basis to conclude that voters would understand being handed something of value in line to impart *any* message." Opp. 13. Defendants then pivot to the Eleventh Circuit's second decision in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1292 (11th Cir. 2021), which they say emphasized the "fact-bound nature" of the analysis concerning food-sharing programs, implying that this decision changes the analysis. Opp. 14. But the decision predated the parties' original briefing on this issue, and only reaffirms that this Court reached the correct conclusion here by engaging in a *fact-specific* analysis of Plaintiffs' evidence.

Defendants cite only a single piece of evidence for the idea that Plaintiffs' line relief does not imply any message. They contend that declarant Jauan Durbin says

"he received 'encouragement and support' from the organizations that also provided him 'water and snacks.'" Opp. 14 (citing ECF No. 547-9 ¶ 6). Yet Defendants misleadingly frame this stray comment, and it is insufficient on its own to rebut Plaintiffs' showing. The declaration does not say or imply that these were separate expressions of verbal support and line relief. Rather, Mr. Durbin says he "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." ECF No. 547-9 ¶ 6. Even if Mr. Durbin had also received verbal support, which he does not mention, this alone would not diminish his experience of receiving a non-verbal message by virtue of receiving line relief.

B. Defendants' Arguments Only Confirm That The Line Relief Ban Is A Content-Based Restriction Of Speech Meriting Strict Scrutiny, And They Misapply The Secondary Effects Doctrine.

Defendants' sole attempt to undercut the Court's prior evidence and the plain evidence that the line relief ban is content-based rests on their claim that the ban is targeted toward the secondary effects of the restricted speech rather than its primary message and thus not content-based under *Renton*, 475 U.S. 41. But the Supreme Court's later decision in *Boos*, 485 U.S. 312, directly rejects Defendants' argument.

The plaintiffs in *Boos* challenged a law banning "an entire category of speech—signs or displays critical of foreign governments" within a certain distance

of foreign embassies. 485 U.S. at 319. As here, the defendants in *Boos* tried to analogize the ban to *Renton*. There, an ordinance banned any adult movie theater from operating within certain distances of any residential zone, church, park, or school, and the Supreme Court found the ordinance content-neutral because it was not aimed "at the *content* of the films . . . . but rather at the *secondary effects* of such theaters on the surrounding community" in terms of crime and property values. *Renton*, 475 U.S. at 47. The *Boos* Court rejected this attempt, explaining that "[r]egulations that focus on the direct impact of speech on its audience present a different situation" and that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton.*" *Boos*, 485 U.S. at 320–21; *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). Rather, the Court has "made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000) (citations omitted).

The same principle holds true here. Defendants explicitly justify the line relief ban by pointing to "concerns about undue influence and intimidation" of voters, Opp. 11. Thus, the ban targets line relief precisely because of concerns about the

primary effect of the expressive conduct on voters, rather than secondary effects like line relief providers interfering with traffic in surrounding communities. Defendants, moreover, admit that the ban "does not limit [the] ability to approach and speak with voters," Opp. 19. This admission, in light of the fact that the law already prohibited electioneering activities before SB 202, underscores how the SB 202 ban targets a particular type of expressive conduct: line relief.

C. The Limitless Supplemental Zone Cannot Survive First Amendment Scrutiny.

Because the Supplemental Zone line relief ban is a content-based restriction in a public forum, strict scrutiny applies.[2] *See Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). Yet even under the modified-*Burson* strict scrutiny test, the Supplemental Zone ban fails because its geographically limitless nature is unreasonable and because it "punishes a 'substantial' amount of protected free speech" in relation to any legitimate goal. *Hicks*, 539 U.S. at 118 (citation omitted).

[2] Plaintiffs maintain that full strict scrutiny applies here because in *Burson*, the Court explained this modified standard "does not apply to all cases in which there is a conflict between First Amendment rights and a State's election process—instead, it applies only when the First Amendment right threatens to interfere with the act of voting itself, *i.e.,* cases involving voter confusion from overcrowded ballots," or cases where "the challenged activity physically interferes with electors attempting to cast their ballots." 504 U.S. at 209 n.11. This is especially true here with respect to the Supplemental Zone, which by definition only applies in geographic areas farther than 150-feet from the polling place, creating no risk that groups offering food or beverages to voters might interfere with the act of voting itself.

Defendants argue for the Supplemental Zone ban by contending it "creat[es] 'an island of calm in which voters can peacefully contemplate their choices.'" Opp. 23 (quoting *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1887 (2018)). The "island of calm" rationale might support the State's interests in the Buffer Zone, albeit not in a sufficiently tailored manner, but it loses any force when applied to the geographically limitless Supplemental Zone. Similarly, Intervenors contend that it "makes no sense to require a zone around voters to comply with a standard of degree that applies to zones around polling places." Intervenors' Opp. to Pls.' Mot. for PI, ECF No. 579 ("Intervenors' Opp.") 6. But were this true, the State would not have enacted a Buffer Zone at all and would have defined the restricted area solely with reference to the proximity of the voter.

Defendants also cite the recent decision in *League of Women Voters of Florida, Inc. v. Florida Secretary of State*, 66 F.4th 905 (11th Cir. 2023), which affirmed in part and reversed in part the district court's conclusion that Florida's buffer zone was unconstitutionally vague.[3] They mention this case for a proposition that no one disputes: states have an interest in orderly administration of the immediate zone around the polling place. Opp. 26; Intervenors' Opp. 1. But the

[3] Plaintiffs there did not bring, and that court did not rule upon, a First Amendment expressive conduct challenge like the one Plaintiffs bring here.

question is not whether the State has any interest, but whether the ban punishes an unreasonable amount of protected speech in attempting to pursue that interest and may do so at ever-expanding distances from the entrance. The answer is no.

Much of Defendants' framing of the ban's supposed tailoring comes from misclassifying Plaintiffs' conduct and what they challenge. Intervenors and Defendants repeatedly refer to the challenged law as an "Anti-Solicitation Provision." Yet Plaintiffs' conduct and the ban on line relief do not implicate solicitation at all. Solicitation concerns the "act or an instance of requesting or seeking to obtain something." BLACK'S LAW DICTIONARY (11th ed. 2019). Plaintiffs do not challenge any prohibition on solicitation, and none of the evidence shows that they engage in solicitation. Claiming solicitation as a justification but then banning line relief—which does not involve any solicitation—at unlimited distances from the polling place makes the ban facially unconstitutional because it "punishes a 'substantial' amount" of speech unrelated to the claimed interest. *Hicks*, 539 U.S. at 118 (citation omitted). Moreover, Defendants admit other provisions of Georgia law already prohibit "providing anything of value to a person in exchange for voting. O.C.G.A. § 21-2-570." ECF No. 578-3 ¶ 19. As such, the limitless ban on providing basic food and drink is inherently unreasonable and unnecessary.

Defendants also claim the ban is appropriately tailored because, "rather than extending the Buffer Zone to cover the *entire* line, irrespective of length, Georgia stopped that zone at 150 feet and limited restrictions thereafter (in the Supplemental Zone) only to the areas immediately surrounding the voting line." Opp. 27. But there is no dispute that Plaintiffs' line relief activities seek contact with voters, and the law seeks to prevent that contact. Thus, when it comes to the protected expressive conduct at issue here, the Supplemental Zone ban does indeed "cover the *entire* line." This practically concedes the Supplemental Zone ban's complete lack of tailoring.

Ultimately, stuck with *Burson*'s guidance that "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden," Defendants' efforts sputter. 504 U.S. at 210. They cite other cases either upholding anti-electioneering buffer zones larger than 150 feet, or try to distinguish those striking them down. Opp. 20–21; Intervenors' Opp. 7–8. But as Mr. Germany admits, the ban applies "to all voters waiting in line to vote, irrespective of how far they are away from a polling place." ECF No. 578-3 ¶ 15. Like the cases cited by *Burson—Mills v. Alabama,* 384 U.S. 214 (1966), and *Meyer v. Grant,* 486 U.S. 414 (1988)—the Supplemental Zone ban shuts down Plaintiffs' expressive line relief activities completely, no matter how far from the polling place. Defendants try to cherry-pick from the extensive evidence of

the ban shutting down line relief to argue otherwise. Opp. 26–27. But none of the three examples plucked from the record undermines the absolute nature of the ban. Instead, Defendants mischaracterize the testimony and describe conduct that is not line relief at all.

ADAPT testified that separate and apart from any *line relief* activities, they have sometimes handed voters with disabilities a bottle of water as they transport them to the polls. ECF No. 578-6 at 4. Defendants claim Black Voters Matter admitted that they have the *ability* to provide food and water nearby, but fail to mention that they testified that their ability to provide actual line relief "has been blocked." ECF No. 578-7 at 4. And the Concerned Black Clergy (CBC) testimony Defendants cite did not implicate the Supplemental Zone at all but rather voters inside the Buffer Zone. Meanwhile, Defendants ignore that CBC could not provide line relief to people waiting in line after the polls closed and that their efforts were ineffective compared to previous years. CBC Dep. 122–25, 150–51 (Ex. A to Rosborough Decl.).

Intervenors fail once again to rebut Plaintiffs' facial challenge. Such challenges are particularly appropriate where, as here, the statute challenges "embodied discrimination based on the content . . . of expression." *City of Lakewood*, 486 U.S. at 766; *see also Gold Coast Publ'ns, Inc. v. Corrigan*, 42 F.3d 1336, 1343

(11th Cir. 1994) (plaintiffs could successfully "facially attack the constitutionality of the Ordinance" where it "could arguably provide the opportunity to discriminate based on the content of speech"). Intervenors do not rebut Plaintiffs' showing that the Supplemental Zone ban "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,'" by completely shutting down their expressive line-relief activities. *Hicks*, 539 U.S. at 118–19 (citation omitted). Nor do they provide any counter examples of how the ban prohibits anything that was not already illegal other than Plaintiffs' line-relief activities, dooming their argument.[4]

In contrast, Plaintiffs have repeatedly shown that the Supplemental Zone Ban has shut down their ability to engage in expressive line relief activities completely, no matter how far from the polling place, which is an unreasonably expansive restriction given electioneering and other bans already in place.

[4] To the extent this Court nonetheless finds a facial challenge improper here, it can and should still provide relief to Plaintiffs because the Supplemental Zone ban unconstitutionally burdens their line-relief activities. *See Texas v. Johnson*, 491 U.S. 397, 403 n.3 (1989) ("Although Johnson has raised a facial challenge to Texas' flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment.").

II. Nothing Offered By Defendants Undermines Plaintiffs' Strong Showing Of Irreparable Harm.

Just the *threat* of impairment of First Amendment interests, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (citations omitted). Yet Defendants try to undermine Plaintiffs' showing of irreparable harm by offering irrelevant data and unsupported claims about a lack of long lines post-SB 202. But they entirely ignore the extensive evidence showing otherwise. They also disregard unrebutted testimony that lines are almost always longer in Presidential election years, Pettigrew Dep. 59 (Ex. B to Rosborough Decl.), meaning that this problem will continue and likely worsen in 2024 relative to 2022.

In their opening brief, Plaintiffs provided numerous examples across multiple counties of lines exceeding an hour during the 2022 elections, *see* Br. 11, ECF No. 535 (citing Exs. N–P). Defendants simply ignored this evidence in their response. They disregard testimony from Gwinnett County's Elections Director that during the 2022 runoff election, lines "[d]efinitely" extended beyond 150 feet from the polls. ECF No. 535-16 at 3. Cobb County's Elections Director also testified that there were lines stretching more than 150-feet from the polling-place entrance. Cobb. Cnty. Dep. 142 (Ex. C to Rosborough Decl.). Defendants even introduce new evidence of such lines, citing the CBC deposition, where its representative testified that during

the 2022 election, individuals were in line waiting to vote *more than three hours* after the polls closed in South Fulton and at the C.T. Martin Natatorium, CBC Dep. 124, but voters would risk losing their chance to vote if they left the line to get food or drink.

Defendants' citations to *average* wait times are irrelevant to the presence of lines stretching far into the Supplemental Zone. Notwithstanding that Defendants' figures cover only Election Day and not early voting, the issue is not whether *most* voters are waiting in lines stretching more than 150-feet, but whether *some* are in areas where Plaintiffs provide line relief and would likely continue to provide line relief but for the ban. Even State Elections Director Blake Evans testified that "[t]here were areas that saw long lines" in 2022. ECF No. 535-15 at 3. Likewise, Defendants do not dispute that long lines existed in prior years, and they do not rebut Plaintiffs' expert Dr. Pettigrew's testimony that based on 2022 figures shown to him by Defendants, there weren't "statistically significant differences in how long lines were in 2022 versus the midterms prior" and there were "meaningful differences in the . . . white and black rates among people who waited longer than 30 minutes." Pettigrew Dep. 122. Indeed, "for early in-person voters, which in Georgia is a huge, huge chunk of people who vote, Georgia had . . . the second longest lines of any state" in 2022. *Id.* at 124. And because it is "pretty much always the case that lines

are longer in presidential years than midterms," it is highly unlikely lines beyond 150-feet will disappear in 2024. *Id.* at 187–88.

Plaintiffs offered evidence that many organizations that previously provided line relief were unable to do so in light of SB 202 and that an injunction against the Supplemental Zone ban would allow them to resume some of that activity. *See* ECF Nos. 535-10–535-14. Given this evidence, and the continued presence of long lines in some areas, Plaintiffs have shown likely irreparable harm in 2024.

III. Defendants' Legally Erroneous Arguments Fail To Undermine The Strong Equities In Plaintiffs' Favor.

As the Court previously found, the equitable factors strongly support Plaintiffs. ECF No. 241 at 61. Defendants offer only timing-related arguments in response, all of which are entirely unfounded in law and fact.

First, they argue that Plaintiffs unreasonably delayed in filing this renewed motion. But courts have found that a delay in seeking a preliminary injunction matters only where it "militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). Here, Plaintiffs face irreparable harm in the 2024 elections. By bringing this motion eleven months before the next relevant election, armed with evidence of still-present long lines in the November and December 2022 elections but with ample time to implement any

change to the law, Plaintiffs have struck a reasonable balance between ensuring they prevent future irreparable harm and guarding against mere speculation.

Indeed, Defendants' arguments that Plaintiffs should have renewed their preliminary injunction immediately following the denial last September is surprising given Defendants' previous contradictory assertions. When questioned by the Court as to whether it could block relief under *Purcell* for the 2022 elections but order relief for future elections at that time, State Defendants themselves argued that rather than granting a preliminary injunction at that time, "the solution would be just go ahead and have an expedited trial and move to a final decision before the next election after the election season this fall." Tr. at 34. After this Court in February 2023 denied the parties' request to set a trial date that would allow for such timing, ECF No. 400, Plaintiffs immediately switched gears to seek preliminary relief to protect against irreparable harm for 2024. Intervenors' position is even more contradictory, as they argued at the hearing last year that it "would be an abuse of discretion" to do what they now say Plaintiffs should have done, contending that "irreparable harm would not be shown for an election so far in advance." Tr. at 39–40. Plaintiffs are always either too early or too late under Defendants' ever-shifting timing arguments.

Defendants' weak arguments under *Purcell* make clear that what they really seek is a standard under which courts can never enjoin an election law. They contend that "an injunction for the 2024 elections would cause substantial confusion because it would mean that a different standard will govern upcoming elections in 2023 than will be in place for elections in 2024." Opp. 33. Yet there will always be a "next election,"[5] and thus never a proper time for a court to order changes under Defendants' standard. Moreover, Defendants also admit the elections they cite—"a possible July 18th runoff, a September 19th special election, and a November 7th election" in some localities—are unlikely to involve lines that "extend beyond 150 feet," Opp. 32 n.12, and ignore that Plaintiffs have ceased to provide line relief since the passage of SB 202, *see* ECF Nos. 535-10–535-14. Those limited elections are also part of a different election cycle from the statewide elections in 2024.

Defendants also entirely disregard the most salient facts about implementation. First, the counties—who are the ones to actually deal with line relief policies on the ground, *see* ECF No. 578-3 ¶ 24—did not even file a brief opposing this relief. Rather, experienced county election officials testified that they "wouldn't have to implement anything" were the line-relief policies changed. ECF No. 535-8

[5] Georgia has held at least one non-municipal election every year dating back to at least 1996. *See* Ga. Sec'y of State, Ga. Election Results, https://sos.ga.gov/page/georgia-election-results.

at 5. Likewise, Georgia's State Election Director testified that if the Court orders relief here, he's "not sure there's anything there for a county to implement." ECF No. 535-15 at 5.

Intervenors' *Purcell* arguments ignore the law completely. They contend that despite Plaintiffs filing this motion nearly a year before the next relevant election, Plaintiffs must meet Justice Kavanaugh's four-part test from his concurrence to the *Milligan* stay order. Under this framing, any election-related preliminary injunction would need to show not only a strong likelihood of success, but also that the merits are "entirely clearcut." Intervenors' Opp. 15. That is not the law.

Even were his concurring opinion to a stay order controlling, Justice Kavanaugh explained that *Purcell* applies when "a lower court has issued an injunction of a state's election law in the period close to an election" because when "an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring). Thus, in staying the initial preliminary injunction in *Milligan*, the Supreme Court was concerned with "Alabama's congressional districts be[ing] completely redrawn within a few short weeks" with the primary elections beginning seven weeks from then. *Id.* at 879. But in ultimately affirming the preliminary injunction earlier this month after full briefing and argument, the Supreme Court did not apply or even

mention *Purcell*, let alone Justice Kavanaugh's four-part test, even though Alabama's next statewide election, like Georgia's, is in March 2024.[6] *See generally Allen v. Milligan*, 143 S. Ct. 1487 (2023). This is no surprise given that just last year, the Court awarded relief on a constitutional claim ordering new maps just under five months before the election without applying the Kavanaugh *Purcell* factors. *See Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022). Similarly, the Eleventh Circuit recently held that applying the Kavanaugh *Purcell* factors even "five months prior to the elections" would unreasonably "extend the 'eve of an election' farther than we have before." *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *2 (11th Cir. Nov. 7, 2022).

Purcell is not a burden of proof for every election-law claim. It applies as an analytical framework when "an election is close at hand." *Merrill*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring). The Court should reject Defendants' attempt to remake the Supreme Court's jurisprudence and evade this Court's review.

CONCLUSION

The Court should reject Defendants' arguments and grant Plaintiffs a preliminary injunction.

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[6] *See* Ala. Sec'y of State, Upcoming Elections, https://www.sos.alabama.gov/alabama-votes/voter/upcoming-elections.

Respectfully submitted, this 29th day of June, 2023.

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Attorneys for Plaintiffs Sixth District of the African Methodist Episcopal Church, Delta Sigma Theta Sorority, Georgia ADAPT, and Georgia Advocacy Office

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

/s/ *Davin M. Rosborough*
Davin M. Rosborough
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 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

/s/ *Davin M. Rosborough*
Davin M. Rosborough
Counsel for Plaintiffs

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
SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, *et al.*, *Plaintiffs*, v. BRIAN KEMP, Governor of the State of Georgia, in his official capacity, *et al.*, *Defendants,* REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No.: 1:21-cv-01284-JPB
GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, *Plaintiffs,* v. BRAD RAFFENSPERGER, in his officialcapacity as the Secretary of State for theState of Georgia, *et al.*, *Defendants,* REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No.: 1:21-cv-01259-JPB

DECLARATION OF DAVIN M. ROSBOROUGH

I, Davin M. Rosborough, hereby declare as follows:

1. All facts set forth herein are based on my personal knowledge, and if called upon to testify as to the contents of this Declaration, I could and would do so.

2. I am an attorney with the ACLU Foundation and serve as counsel for Plaintiffs Sixth District of the African Methodist Episcopal Church, Delta Sigma Theta Sorority, Georgia ADAPT, and Georgia Advocacy Office in the above-captioned matter.

3. Attached hereto as **Exhibit A** is a true and correct copy of excerpts of the February 28, 2023 deposition transcript of the Concerned Black Clergy of Metropolitan Atlanta, Inc.

4. Attached hereto as **Exhibit B** is a true and correct copy of excerpts the May 5, 2023 deposition transcript of Stephen Pettigrew, PhD.

5. Attached hereto as **Exhibit C** is a true and correct copy of excerpts of the November 29, 2022 deposition transcript of the Cobb County Board of Elections and Voter Registration.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 29, 2023

/s/ *Davin M. Rosborough*
Davin M. Rosborough

Counsel for Plaintiffs

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

IN RE GEORGIA SENATE BILL 202)
)
Master Case No.)
vs. 1:21-MI-55555-JPB)
)

VIDEOTAPED 30(B)(6) DEPOSITION OF
THE CONCERNED BLACK CLERGY
OF METROPOLITAN ATLANTA, INC.
THROUGH
SOPHIA BURNS AND REVEREND SHANAN JONES
February 28, 2023
9:30 a.m.
Taylor English Duma, LLP
1600 Parkwood Circle
Suite 200
Atlanta, Georgia
Robin K. Ferrill, CCR-B-1936, RPR

like 65 or 60 -- you know, you don't meet that threshold.

Q. And did CBC provide folding chairs for the elderly in the 2020 election?

A. There were cases where we did provide chairs.

Q. In 2020?

A. In 2020.

Q. Do you remember for how many people?

A. I'm not sure.

Q. What about in the 2018 election?

A. Yes, I know in the 2018 election, church folding chairs.

Q. And we discussed earlier that members of CBC or CBC staff stayed behind a barrier for the 2022 --

A. The buffer line.

Q. The buffer line --

A. Uh-huh.

Q. -- to provide food and snacks.

Did CBC do anything else to provide items to voters other than stay behind the buffer line during the voting days, election days?

A. In terms of on the -- in terms of what's considered line warming?

Q. Yes.

A. So we couldn't do anything beyond, you know, staying behind that buffer. So if we saw someone who, you know, was in line -- for instance, as long as you're in line before 7 o'clock, you're allowed to vote. Some folks may have gotten there at 6:50 and they're still in line at 10 o'clock at night, and there's nothing we can do. They can get out of line and come back. And we've got, you know, hot chocolate or something back here, water.

But if they don't -- if they're not comfortable getting out of line, we can't say, here, you know, I know this is -- this is daunting; let me offer you some water or some hot chocolate or, you know, you've been standing a while. Can I give you this chair just --

Q. And you mentioned that --

A. We couldn't do that, so that mean we had to stay beyond that buffer line and, you know, unable to help someone that we would have seen that probably could have used, you know, a drink of water or a chair.

Q. And did CBC engage in any efforts to provide drinks or snacks or even folding chairs to people outside of the zone of the voting lines?

So, for example, like at the church, did any member churches provide those items for voters to take before their voting or something like that?

A. I'm not sure if some of the members' buses didn't have water on them when they -- you know, when the bus picked folks up so the people could take their own water and have that with them or some chips to have on them or snack bar or something. I'm not sure.

Q. Did CBC ever encourage its members to bring their own snacks or water to go vote?

A. Oh, yes.

Q. You mentioned the example of someone who arrived at 6:50 p.m. but was still in line at 10 p.m. Do you remember that?

A. Yes.

Q. And is that a story you're aware of that happened or were you using that as an example?

A. No. That's happened in several voting locations; in South Fulton, off of Stonewall Tell, at the South Services Center. It's happened at the natatorium, the C.T. Martin Natatorium, and there were other cases that -- that that happened.

Q. And were those all for the 2022 election?

A. In the 2022 election specifically.

Q. And are you aware of any instances like that that happened at the 2020 election?
A. Yes.
Q. And how did you come to learn of those long lines in the 2022 election?
A. We had folks that were out. We were out, you know, supporting voters with water or something behind that buffer line, just kind of going out to see how the lines are looking, how, you know, folks are exercising their right to vote.
Q. And were those CBC staff or CBC members?
A. Pastors and members. I would imagine our staffer did the same thing, our executive director.
Q. And did those people report back to you what they were seeing with the lines in 2022?
A. Yeah. We would get phone calls to say what was happening, or if we called in some issues, then we'd find out. You know, they would say, yeah, and we heard that that's happening at one, two or three other locations. And generally that would be to our partnerships, like the NAACP or the Coalition for the People's Agenda.
Q. And did you receive similar calls about voting line lengths in the 2020 elections?
A. Did we --

MS. SQUIERS: I have no further questions for the witness.

MR. FOGELSON: Anybody on Zoom have questions?

Can I take --

MR. RICH: No questions from DOJ. Thank you.

MR. FOGELSON: Can we take 10 minutes?

MS. SQUIERS: Sure.

THE VIDEOGRAPHER: Off the record at 1:43 p.m.

(WHEREUPON, a recess was taken.)

THE VIDEOGRAPHER: Back on the record at 1:58 p.m.

EXAMINATION

BY MR. FOGELSON:

Q. Reverend Jones, real briefly. You mentioned that CBC engaged in line warming activities during the 2020 election cycle and also during the 2022 election cycle in a more modified way.

In your view, was CBC's line warming effort in 2022 as effective as its effort in 2020?

A. No, it was not.

Q. And why do you say that?

A. Because we had to remain behind a buffer

line. You know, some of those days were pretty hot and, you know, you had folks that couldn't get out of line, folks that, you know, could have been standing there for two or three hours. And we normally would have just gone up and said, would you like some water or would you like a sandwich or a bag of chips or do you need a chair or something? And we were unable in 2022 to do that, you know, yes.

Q. You mentioned a couple of times today that members were -- I think you used the term -- fearful of absentee voting or concerned about absentee voting. Do you recall speaking about that earlier today?

A. I do.

Q. Okay. I want to ask you to elaborate on that. Why were folks fearful or concerned about absentee voting?

A. Well, we had folks that were -- stated that they were, you know, concerned that they were -- that their absentee ballot would be lost in the mail or that, you know, they didn't have the amount of time that it was going to -- not going to get there. Not enough time that they sent it because they -- you know, I'm trying to think through all the stories that we heard.

C E R T I F I C A T E

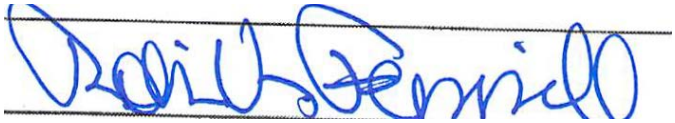
STATE OF GEORGIA)
) ss.:
FULTON COUNTY)

I, Robin Ferrill, Certified Court Reporter within the State of Georgia, do hereby certify:

That Sophia Burns and Reverend Shanan Jones the witnesses whose depositions is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of March, 2023.



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ROBIN K. FERRILL, RPR

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

IN RE: GEORGIA SENATE BILL 202 — MASTER CASE NO. 1:12-MI-55555-JPB

GEORGIA STATE CONFERENCE OF THE NAACP, et al.,
Plaintiffs,

vs. — CASE NO. 1:21-CV-01259-JPB

BRAD RAFFENSPERGER, in his official capacity as the Secretary of the State for the State of Georgia, et al.,
Defendants.

SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, et al.,
Plaintiffs,

vs. — CASE NO. 1:21-CV-01284-JPB

BRIAN KEMP, Governor of the State of Georgia, in his official capacity, et al.,
Defendants.

VIDEOTAPED ZOOM DEPOSITION OF
STEPHEN PETTIGREW, Ph.D.
May 5, 2023
TIME 9:41 a.m. to 3:54 p.m.

Q Okay. If we can go to the next page, this is page 13 of the report, that -- and there's a subheading, "Addressing Long Lines and the Standard for Judging What is 'Long'."

Do you see that?

A I do.

Q In the -- in the second paragraph under that subheading, the paragraph starts off, quote, The problem of long Election Day lines, it should be emphasized, is a problem largely limited to Presidential elections, end quote.

Do you agree with that statement?

A I would say that lines tend to be the worst in presidential elections, but that doesn't mean that there aren't long lines in other elections.

Q But do you disagree with the statement that long lines are a problem largely limited to presidential elections?

MR. ROSEBOROUGH: Object to the form.

THE WITNESS: I think it comes down to how you define largely. So it's hard for me to

there's a couple of things going on here. So one is that this -- this figure is -- it I'm -- I'm -- I'm not really sure why they didn't do this, but for some reason, this figure is not broken out by early in-person versus election day as my figure is, which is an interesting choice. I'm not really sure why they didn't do that since I think it would have been pretty straightforward to do. So it sort -- in some ways it makes it a little bit apples to oranges.

But the other thing that is worth noting is they have the confidence intervals down below, but whoever made this figure opted to not include the confidence intervals in the graph itself as -- as I did in my graph. And just -- just looking at what the confidence intervals are, you -- if -- if you had put them on the graph, you would see that the confidence intervals from 2022, just from my eyeballing it, and I feel very certain of this, would be overlapping with the confidence intervals from previous years, which suggests there wasn't a statistically different -- there wasn't --

there weren't statistically significant differences in how long lines were in 2022 versus the midterms prior.

Q All right. Does anything else strike you about these data or the chart?

A I -- I think it's noteworthy, if we look at the table at the top, that -- that -- that "not at all" category, you had 37, about 38, percent of white voters saying they didn't vote -- they didn't wait at all. That number for -- for people of color was 22.8, and for black voters, it was 21.6. There's a huge difference in the proportion of people who -- who breezed through, to use the language I used earlier.

And then as I noted, there's -- there's meaningful differences in the -- the white and black rates among people who waited longer than 30 minutes.

Q But your -- your benchmark really is the 30-minute threshold, right?

A That's the -- that's what I used in my analysis, is that 30-minute threshold.

Q So whether -- whether a voter had to wait not at all or less than 10 minutes, we don't worry so much about voters with that experience, right?

MR. ROSEBOROUGH: I object to the form.

THE WITNESS: It's not meaningless. It's not -- it's not -- I don't -- I don't use that as a metric in my analysis, but -- but when you see, you know, almost 20 percentage points of difference in that category, it's -- it's eye-opening, because the consequence that's going to have, and something they didn't do here is take these numbers and estimate, you know, turn them into -- into minutes and seconds using midpoint imputation.

And -- and when you do that, if you have twice as many people in the not at all category, you're going to see pretty consequential differences in the number of minutes white voters are waiting versus non-white.

And I'll also add that -- I was going to say this earlier and I forgot. I should also add that it's important to -- to put this in context comparing to other states. So -- so they don't have the overall estimate of -- of what -- what the average wait time was for all voters in Georgia. But that was something that I looked at. And what I found is that consistent with previous years, Georgia was -- I don't remember the exact ranking it was overall, but it was among the worst five or six states or so in terms of the various metrics that I looked at in 2022.

And in particular, I found -- I do specifically remember that for early in-person voters, which in Georgia is a huge, huge chunk of people who vote, Georgia had the second longest -- the second longest lines of any state. And so, you know, it's -- it's -- it's nice that we have some data from 2022. One election year is not going to be enough to get a very great -- a great estimate of the effective of this law necessarily, but -- but I -- I think it's

important to point out that -- that Georgia remained one of the worst states in 2022, even if all overall nationwide lines were short of 2020 because of all of the issues that we saw in 2020 yes.

Q I was going to ask you about your, you know, intrastate comparisons. If -- if the wait time in Georgia is X, the fact that Georgia is first or last or in the middle among states, it doesn't change what your wait time is, right?

A It doesn't change what the wait time is, but it's -- what you see -- turnout in midterm and presidential elections tends to ebb and flow nationally. The 2014 midterm, for example, was at a historically low level of the turnout. 2018, 2020, those were historically high levels of turnout.

And that's going to have an effect kind of everywhere on how long the lines are. And so it's important to contextualize where Georgia falls relative to other states. In order to understand is -- is Georgia -- are the wait times

given sort of the political contentiousness of Georgia, the -- the dividedness of the state, and I think the level of political heat that we're likely to see in 2024, and the fact that lines are going to be longer in 2024 than they were in 2022, it will surprise me if there is not an instance of this happening in 2024.

Q But that's speculation?

A The 2024 election hasn't happened yet, so it's -- it's based on -- based on my understanding of politics and the provision of this law, I think there will be something -- if this law is in effect in 2024, there will be some sort of media reports of something of this sort happening.

Q And, again, that's a prediction or speculation?

A It's an educated prediction.

Q You just said lines will be longer in 2024. And you're saying that because that's a presidential election year, right?

A It's pretty much always the case that lines are longer in presidential years than

midterms.

Q Do you know of any prosecutions of a person for giving water to a family member?

A I -- as far as I know, I am not familiar with any. But under the law, that would be -- to my reading, that -- that's possible.

Q Now, on page 28 of your report, heading 4.2 is, "SB202 will negatively affect wait times."

A That's right.

Q Are you saying that it will, in fact, have that causal effect?

A I --

MR. ROSEBOROUGH: I object to the form.

THE WITNESS: What do you mean by causal effect here?

BY MR. BARTOLOMUCCI:

Q Well, we spent a lot of time talking about what --

A Sure.

Q -- causation is. As a social

scientist, are -- are you saying that there is sufficient evidence for you to offer the opinion that SB202 will, in fact, have an effect upon wait times in the future?

A Yes, I think that lines will be longer in Georgia under SB202 than they would have been if SB202 were not in effect.

Q And what's your basis for saying that?

A So I have a bunch of things that I discuss in here, several sections, but the -- the main crux of it comes down to one of the things that we talked about earlier, which is that queuing theory tells us that if you have more people show up to vote, all things equal, lines are going to get longer.

SB202 has several provisions in it that that the litany of -- or a whole bunch of academic research, my own as well as others, indicates will result in more people either not turning out to vote at all or potentially turning out to vote in person, which is going to have an

CERTIFICATE OF NOTARY PUBLIC

I, FELICIA A. NEWLAND, CSR, the officer before whom the foregoing videotaped deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

_____

FELICIA A. NEWLAND, CSR

Notary Public

My commission expires:

September 15, 2024

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

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30(B)(6) VIDEOTAPED DEPOSITION OF

COBB COUNTY BOARD OF ELECTIONS AND VOTER REGISTRATION

(MS. JANINE EVELER)

November 29, 2022

10:02 a.m.

995 Roswell Street

Marietta, Georgia 30060

Marcella Daughtry, RPR, RMR

Georgia License No. 6595-1471-3597-5424

California CSR No. 14315
~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

those two parameters different to you in any meaningful way?

A "Two parameters" being?

Q Being on one hand the what I can refer to as the buffer zone, so 150 feet from the polls versus to beyond the 150 feet but within 25 feet --

A Yeah.

Q -- of any voter?

A Yeah. I think that has recently been referred to as the buffer zone and the supplemental zone.

Q Sure. So between the buffer zone and the supplemental zone, from your purposes as an elections administrator, does the line relief ban have any greater purpose in one zone versus the other zone?

MS. LaROSS: Objection as to form.

THE WITNESS: Yeah, I don't have an opinion on that.

Q BY MR. ROSBOROUGH: Do you agree that it's not uncommon for lines to extend past the 150-foot buffer zone?

A It's not common, but it does happen, and that's the reason for the supplemental zone.

Q Does Cobb County provide self-service water receptacles at any or all polling places?

A We do not.

CERTIFICATE OF REPORTER

STATE OF GEORGIA)
)
COUNTY OF DEKALB)

I, Marcella Daughtry, a Certified Reporter in the State of Georgia and State of California, do hereby certify that the foregoing deposition was taken before me in the County of DeKalb, State of Georgia; that an oath or affirmation was duly administered to the witness, JANINE EVELER; that the questions propounded to the witness and the answers of the witness thereto were taken down by me in shorthand and thereafter reduced to typewriting; that the transcript is a full, true and accurate record of the proceeding, all done to the best of my skill and ability;

The witness herein, JANINE EVELER, has requested signature.

I FURTHER CERTIFY that I am in no way related to any of the parties nor am I in any way interested in the outcome hereof.

IN WITNESS WHEREOF, I have set my hand in my office in the County of DeKalb, State of Georgia, this 9th day of December, 2022.

Marcella Daughtry

Marcella Daughtry, RPR, RMR
GA License No. 6595-1471-3597-5424
California CSR No. 14315