UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE GEORGIA SENATE BILL 202

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.

CIVIL ACTION NO. 1:21-cv-01259-JPB

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

THE CONCERNED BLACK CLERGY OF METROPOLITAN ATLANTA, INC., et al., Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, et al., Defendants.	CIVIL ACTION NO. 1:21-cv-01728-JPB

ORDER

Before the Court are motions for a preliminary injunction filed by the plaintiffs in the above-captioned cases (collectively

seeking a permanent injunction to prevent enforcement of multiple provisions of the bill.

State government defendants are hereinafter referred to as "State Defendants,"[1] and county government defendants are hereinafter referred to as "County Defendants."[2] The Court permitted the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee and Georgia Republican Party, Inc. (collectively "Intervenor Defendants") to intervene in this action. On December 9, 2021, the Court denied State Defendants' and Intervenor Defendants' (collectively "Defendants") motions to dismiss the complaints. Discovery opened thereafter and is ongoing.

The plaintiff groups led by the Sixth District of the African Methodist Episcopal Church (the "AME Church") (No. 1:21-cv-01284) and the Georgia State Conference of the NAACP ("Georgia NAACP") (No. 1:21-cv-01259) (collectively the "AME/NAACP Plaintiffs") filed a joint motion for preliminary injunction seeking to enjoin a single provision of S.B. 202. ECF No. 171. The plaintiff group led by the Concerned Black Clergy of Metropolitan Atlanta, Inc. (No. 1:21-cv-

[1] This list includes Brad Raffensperger, in his official capacity as the Georgia Secretary of State, and the members of the State Elections Board.
[2] The complaints name election officials in fourteen Georgia counties. The master docket contains a complete list of County Defendants.

State Defendants and individual Defendant Gregory W. Edwards filed a joint response to the Motions. ECF No. 197. Intervenor Defendants filed a separate response that joined State Defendants' opposition. ECF No. 194. County Defendants filed a joint opposition. ECF No. 195. Individual Defendant Keith Gammage did not respond to the Motions. Honest Elections Project, with the permission of the Court, filed an amicus brief in support of Defendants. ECF No. 224. The Court heard oral argument and evidence regarding this matter on July 18, 2022.[4]

B. Plaintiffs

Plaintiffs are nonprofit organizations whose work includes fostering participation in the democratic process. Plaintiffs' efforts in this regard range from voter education and registration to get-out-the-vote drives. *See, e.g.*, ECF No. 185-5 at 1 (The New Georgia Project ("NGP") "is dedicated to helping Georgians become more civically active through voter education and engagement."); ECF

[4] The AME/NAACP Plaintiffs filed their motion on May 25, 2022, and the NGP Plaintiffs filed their motion on June 3, 2022. State Defendants thereafter sought an extension of their briefing deadline. ECF No. 180 at 2. Plaintiffs took no position on the extension, so long as it was not later used as a reason to preclude relief under the doctrine articulated in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). *See* ECF No. 180 at 2. The Court found that good cause existed to grant State Defendants' motion and thus extended the briefing schedule to July 5, 2022. The hearing on the Motions was initially scheduled for July 7, 2022, but was subsequently rescheduled to July 18, 2022, due to a scheduling conflict of State Defendants' lead counsel.

specific form of line warming activities varied based on the organization. For example, NGP provided water, snacks, ponchos, umbrellas, fans, books and phone chargers to individuals waiting to vote.[6] ECF No. 185-5 at 2–3. The Georgia 55

Organizations assisted voters irrespective of their political persuasion. *See, e.g.*, ECF No. 185-7 at 2.

Plaintiffs and the organizations who submitted affidavits in support of the Motions frame their purpose in conducting line warming in different ways. However, their reasoning can be summarized as a belief that

Plaintiffs describe their voter assistance activities as "political acts," ECF No. 171-1 at 14, and explain that "[a]dvocating for voting, including by celebrating

While the Buffer Zone is fixed (150 feet from the outer edge of the building in which voting takes place), the Supplemental Zone is fluid. The Supplemental Zone is tied to the location of each voter standing in line and therefore fluctuates based on the specific position of the voter. For example

whether they had partisan aims.[8] *Id.* at 10. The following is a discussion of the types of line warming activities that raised concerns.

First, officials were concerned that line warming personnel could be perceived as advancing a specific political agenda and that poll staff lacked the capacity to monitor what was being communicated to voters who were approached

station. *Id.* 193:13–15. Mashburn thereafter complained to the Secretary of State's office that while "Georgia has always turned a compassionate blind eye to people delivering water and food to people in line," the practice had become more "worrisome." ECF No. 197-2 at 18. He pointed out that people dressed in "clearly identifiable campaign clothing and colors" were setting up tables and food stations within the Buffer Zone. *Id.* Another example, also from October 2020, is an email complaint submitted to the Secretary of State's office. That complaint concerned a woman (and two children) dressed in "political attire" who parked a van "covered in political paraphernalia" in front of the Roswell Fulton County Library polling station and began to distribute water and snacks to voters waiting in line.[9] *See* Defs.' Ex. 44, Prelim. Inj. Hr'g.

Officials were also concerned that refreshments or other items could be used or perceived as a pretext for electioneering (prohibited by Georgia law within the Buffer and Supplemental Zones), Tr. 194:4–16, ECF No. 234, or as a reward for voting (likewise prohibited under Georgia law), ECF No. 197-2 at 11. Mashburn gave the example of a group that was campaigning at a DeKalb County polling

[9] Mashburn ECF ise

location during early voting in 2010. Tr. 187:20–188:5, ECF No. 234. He stated that after the group was told that campaigning was prohibited at the polling station, the group circumvented the rule by returning to distribute water to voters. *Id.* In a case before the State Elections Board, a candidate was observed giving pizza to voters waiting in line at the Cross Keys precinct in DeKalb County. *Id.* 193:17–25.

Defs.' Ex. 39, Prelim. Inj. Hr'g. The OEB noted that "[t]he appearance of [f]ood [t]rucks, doughnuts, free coffee, snacks, and other items of value being given to voters (even beyond the 150' distance limit) have the possibility of being seen as rewarding people who vote in violation of the . . . law." *Id.* The OEB concluded that "[o]ffers of anything of value, including food and drinks that could be considered a 'reward' for voting or an inducement to vote . . . are not proper or legal and do very little to preserve [the] atmosphere of serenity and noninterference for voters waiting to cast their votes." *Id.*

Like the OEBs, Mashburn

E. Line Warming Issues

Affidavits from voters who benefitted from Plaintiffs' and other organizations' line warming efforts indicate that those voters appreciated the support they received in the face of long lines and were not frightened by line warming volunteers. *See, e.g.*, ECF Nos. 171-6 at 4; 171-11 at 5; 171-13 at 4; 171-15 at 5; 171-19 at 3. One voter testified that she "never felt intimidated or threatened by any of the volunteers handing out food and water." ECF No. 171-6 at 4. She stated that "[v]oters are accustomed to the full line relief activities that volunteers have been conducting at the polls for years." *Id.* at 5.

about line warming activities. ECF 171-24 at 4. Conversely, a Fulton County election official, whom Plaintiffs called to testify, acknowledged that there were complaints at a polling location in Fulton County. Tr. 67:14–19, ECF No. 234.

F. The Food, Drink and Gift Ban

S.B. 202 changed Georgia law regarding third parties' engagement with voters waiting in line at polling stations. The legislative findings in the text of S.B. 202 state that the "sanctity of the [voting] precinct was . . . brought into sharp focus in 2020, with many groups approaching electors while they waited in line." S.B. 202 § 2, ¶ 13, Reg. Sess. (Ga. 2021). The legislature further found that "[p]rotecting electors from improper interference, political pressure, or

6 (t)-2.999 (ie-2.999 0 0 05

3 > S @ U Rdaw(i)3.996 9 ( )]TJ ET Q 70.5l4 361.99 470.95 32.1f2.999 ( )10.997 Q q 0p 03>Gnge

> Within 150 feet of the outer edge of any building within which a polling place is established; (2) Within any polling place; or (3) Within 25 feet of any voter standing in line to vote at any polling place.

O.C.G.A § 21-2-414(a).[12] As the statutory text reflects, the Food, Drink and Gift Ban applies to the same Buffer Zone and Supplemental Zone that were established by the 2010 amendment. Under this update to the law, organizations are still permitted to approach voters anywhere in line and verbally encourage them to stay in line.[13]

---

[12] S.B. 202 also established measures to address the issue of long lines at polling stations, including a mandate that counties reduce the size of precincts and monitor the length of lines for future adjustments. O.C.G.A. § 21-2-263. This provision built on State Defendants' previous efforts to address the issue. ECF No. 197-2 at 5. State Defendants assert that those efforts resulted in an average wait time of three minutes on election day in November 2020, *id.*, and almost no lines during the May 2022 primary election, "despite record voter turnout," *id.* at 7. Germany also stated that lines typically do not extend beyond the Buffer Zone. Tr. 88:14–

G. The Impact of the Food, Drink and Gift Ban

Many Plaintiffs and organizations that have conducted line warming activities in the past testified that they have ceased such activities due to the Food, Drink and Gift Ban. *See, e.g.*, ECF Nos. 171-4 at 12; 171-7 at 3; 185-3 at 7. For example, the Georgia Muslim Voter Project now refrains from all line warming activities due to the threat of criminal penalty. ECF No. 171-11 at 6.

The AME Church, NGP and the Arc of the United States ("Arc") have modified their programs or are contemplating adjustments to comply with the Food, Drink and Gift Ban. The AME Church shared that it is "trying to decide how to continue to support voters waiting in line," ECF No. 171-9 at 6, and it is "thinking about how e," ECF utn a n j y ε я

II. DISCUSSION

A. Preliminary Injunction Standard

A plaintiff seeking preliminary injunctive relief must show the following:

> (1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.

Sofarelli v. Pinellas Cnty., 931 F.2d 718, 723-24 (11th Cir. 1991) (quoting *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1519 (11th Cir. 1983)). "[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establish[es] the burden of persuasion as to each of the four prerequisites." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (internal punctuation omitted) (quoting *McDonaldôs Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)). Granting a preliminary injunction is thus the exception rather than the rule. *See id.*

1. Likelihood of Success on the Merits

A plaintiff seeking preliminary injunctive relief must show a substantial likelihood that he will ultimately prevail on the merits of his claim. *Sofarelli*, 931 F.2d at 723. This factor is generally considered the most important of the four factors, *see Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986), and

failure to satisfy this burden—as with any of the other prerequisites—is fatal to the claim, *see Siegel*, 234 F.3d at 1176.

Because Plaintiffs contend that the Food, Drink and Gift Ban infringes on their freedom of speech and expression,

least protection. *See id.* Other categories of speech rank somewhere between these poles. *See id.*

Importantly, First Amendment protections exist against the reality that "[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 303 i03 i.71.46 543(-3.001.71.46 549(3)4.0039i.7

"control the mechanics of the electoral process." *McIntyre v. Ohio Elections Commôn*, 514 U.S. 334, 345 (1995). Under those circumstances, courts must employ whatever level of scrutiny corresponds to the category of speech.

U.S. 367, 376 (1968). The Court explained in *Rumsfeld* that "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." 547 U.S. at 66.

Rumsfeld involved a challenge to a statute that penalized schools for refusing to allow United States military recruiters to interview on their campuses due to the military's policy on homosexuals serving in the military. *Id.* at 51. The Supreme Court found that the schools' exclusion of military recruiters was not inherently expressive conduct because an observer would not know whether the recruiters were interviewing off campus due to personal preference, lack of space or some other innocuous reason. *Id.* at 66. The Court pointed out that the necessity of "explanatory speech" to elucidate why military recruiters were absent from campus was "strong evidence" that the speech was not "so inherently expressive" as to qualify for First Amendment protection. *Id.* In other words, the "expressive component of [the] . . . school's actions [was] not created by the conduct itself but by the speech that accompanie[d] it." *Id.*

By contrast, the Eleventh Circuit Court of Appeals, in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale* ("*FLFNB*"), found that a charity's distribution of food in a public park constituted expressive conduct because a

demonstrated an intent to express an idea through activity and that a reasonable observer would interpret the events as conveying that message. *Id.* at 1243–44.

The *FLFNB* court distinguished the *Rumsfeld* opinion on the grounds that unlike in *Rumsfeld*, explanatory speech was not necessary to convey the charity's message regarding hunger and poverty. *Id.* at 1243. Rather, the surrounding circumstances allowed the message to be understood without the need for speech. *Id.* at 1244. The court noted that conduct does not lose its expressive nature simply because it is accompanied by other speech (banners and literature in the *FLFNB* case) and reiterated that the "critical question is whether the explanatory speech is *necessary* for the reasonable observer to perceive a message from the conduct." *Id.*

Here, as detailed above, the record contains substantial evidence that Plaintiffs intend to convey a message that voting is important and that voters should remain in line to ensure their participation in the democratic process. The evidence is also clear that voters infer "some" message from Plaintiffs' efforts. Even though the voter affidavits frame that message in somewhat different ways, the common thread is that voters understand that line warming activities are intended to support and encourage voters who have chosen to exercise their right to vote.

issue of community concern (long lines at polling stations) that the legislature has acknowledged and is now attempting to address; and, as Plaintiffs explain, food has specific historical and cultural significance in the context of civil rights activities. This context matters and supports Plaintiffs' argument that voters perceive Plaintiffs' activities as more than just the distribution of food and water. *See Spence*, 418 U.S. at 409–10 (finding that "the nature of [the defendant's] activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression"). In short, the evidence demonstrates that Plaintiffs' line warming activities convey a message regarding the importance of voting that is understood by the reasonable observer.

protected by the First Amendment is only the first step in determining whether a statute regulating such activity is constitutional. 468 U.S. 288, 293 (1984).

As a baseline, a statute that regulates expressive conduct is subject to "the most exacting scrutiny." *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). However, the applicable level of scrutiny shifts depending on the content and purpose of the statute. For example, restrictions that are facially content-based or those that are justified only by reference to the content of the regulated speech are subject to strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015). On the other hand, a content-neutral statute that imposes only time, place or manner restrictions warrants an intermediate level of scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

An additional consideration is whether "the exercise of free speech rights conflicts with another fundamental right," such as the right to vote

the restriction was "'reasonable'" and did not "'*significantly impinge*'" on constitutional rights. *Id.* at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)).

In light of the foregoing authority, the applicable level of scrutiny depends on (i) whether the Food, Drink and Gift Ban is a content-based restriction on speech and (ii) whether the modified burden articulated in *Burson* applies.

i. Whether the Food, Drink and Gift Ban Is a Content-Based Restriction on Speech

Under Supreme Court precedent, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "The government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Therefore, a court assessing the constitutionality of a statute that regulates speech must "consider whether [the] regulation of sp o D Mא l T sЬ iurF ʻ deV npdeV M

Additionally, the Supreme Court has recognized that facially content-neutral laws can nevertheless be content-based if they "cannot be 'justified without reference to the content of the regulated speech'" or if they "were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 576 U.S. at 164 (alteration in original) (quoting *Ward*, 491 U.S. at 791); *see also Ward*, 491 U.S. at 791 (finding that government regulation of expressive activity is content-based if it is justified with reference to the content of the regulated speech).

In *Boos v. Barry*, the challenged statute prohibited the display of a sign that was offensive to a foreign government, within 500 feet of that government's embassy. 485 U.S. 312, 315 W 4 (0)3.996 (0)-2.999 n.8 612 792 re W* n f 612 792 re W* n

embassy

electioneering, political pressure or intimidation. The preamble of the Food, Drink and Gift Ban thus justifies the statute on the grounds that it will protect voters waiting in line from "improper interference, political pressure, or intimidation." S.B. 202 § 2, ¶ 13 /TT0 14.04 Tf 72.024 574.3 Td [(S.B.)5 (202)]TJ .7051≥2.999 a487.001.757

The Court is not persuaded by Defendants' arguments that the Food, Drink and Gift Ban is content-neutral because it applies to anyone wishing to offer food or water(o)3. (l)4.003 (i)-2.999 (e)7.999 (s)-2.999 (t0 0 0 447.999 0 0 57 >2.999 0 0 0 0 300576.994 0 0 82

justification underpins a facially content-neutral restriction, . . . that restriction may be content based." *Id.* at 1475.

Based on the foregoing analysis, the Court finds that the Food, Drink and Gift Ban is a content-based regulation of speech. The Court must now determine what level of scrutiny to apply in deciding whether the statute is constitutional.

ii. What Level of Scrutiny Applies

It is well-settled that content-based regulations of speech are subject to the strict scrutiny level of review.[17] *See Reed v. Town of Gilbert*, 576 U.S. 155, 164

City of Boca Raton, 981 F.3d 854, 861 (11th Cir. 2020) (explaining that content-based regulations are analyzed under the strict scrutiny standard).

Content-based regulations "are presumptively unconstitutional." *Reed*, 576 U.S. at 163; *see also*

In *Burson*

the state was required to show only that its response to the problem of voter intimidation and fraud was "'reasonable'" and did not "'*significantly impinge* on constitutionally protected rights.'" *Id.* (quoting *Munro*, 479 U.S. at 195–96). The Court ultimately deemed the statute to be constitutional because the geographic limitation prescribed by the statute (the 100-foot buffer zone) was "minor" and therefore did not significantly impinge on the plaintiff's First Amendment rights. *Id.* at 210.

However, the Supreme Court instructed that "[a]t some measurable distance from the polls, . . . governmental regulation of vote solicitation could effectively become an impermissible burden." *Id.* The Court also clarified that the modified strict scrutiny analysis would not "apply to all cases in which there is a conflict between First Amendment rights and a [s]tate's election process." *Id.* at 209 n.11. Rather, it would apply "only when the First Amendment right threatens to interfere with the act of voting itself." *Id.* This includes cases involving voter confusion from overcrowded ballots and cases "in which the challenged activity physically interferes with electors attempting to cast their ballots." *Id.*

In *Citizens for Police Accountability Political Committee v. Browning*, the Eleventh Circuit considered a Florida statute that prohibited exit solicitation of voters within 100 feet of a polling place. Exit solicitation was defined as seeking

voters' signatures on a petition after they had voted and exited the polling place. 572 F.3d 1213, 1215 (11th Cir. 2009). Even though exit solicitation occurred *after* voters had already voted, the court found that it "threaten[ed] to interfere with the act of voting itself or physically interfere[d] with voters attempting to cast their ballot." *Id.* at 1221 n.17. The court explained that the "commotion tied to exit solicitation is as capable of intimidating and confusing the electorate and impeding the voting process—even deterring potential voters from coming to the polls—as other kinds of political canvassing or political action around the polls." *Id.* at 1219. at f p526/TT0 14.04 Tfo tnd(n)-2.999 r/t996 605.999 60 99 (al)a004F3.992.1hgial tn tn tn

The court was not persuaded by the plaintiffs' characterization of exit solicitation as "a peaceful, non-disruptive activity targeting only those voters who ha[d] already voted" and their attempt to distinguish it from "the more intimidating, violent, and unsavory behavior" described in *Burson*. *Id.* It reasoned that the "commotion" tied to the exit solicitation was equally capable of intimidating voters and deterring them from coming to the polls.

Further, the court accorded significant deference to the state's desire for "peace and order around its polling places" and its desire to preserve "the integrity and dignity of the voting process" and to "encourage[] people to . . . vote." *Id.* at 1220. Thus, the court stated that the suggestion that

> election officials can police the polls to ensure that exit solicitation remains peaceful and targets only voters who have already voted . . . places too great a burden on those officials to make split-second decisions on who is being solicited, on how they are being solicited, and about what they are being solicited: an invitation to controversy and more disturbances then and there.

Id.

The Court must therefore decide whether Plaintiffs' line warming activities fall within the purview of *Burson* and *Browning*. The record in this case shows that line warming activities increased significantly in the latter part of the 2010 decade through the 2021 runoff elections and led to numerous complaints to the Secretary of State's office regarding suspicion of improper motive and

electioneering. That office was also inundated with questions from election officials regarding how to manage line warming activities. A State Elections Board member asserted that the state had lost control of the precincts.

Evidence of these issues include: organizations using food trucks to reach electors before they voted and offering rewards to those who voted; candidates campaigning in the restricted zones under the pretext of line warming; line warming personnel dressed in colors associated with a specific political party and informing voters about the positions of candidates and for whom to vote; perceived intimidation by certain groups; live entertainment from artists, including mariachi bands and circus performers; significant confusion among election officials regarding what activities were acceptable and where they could draw the line; and concern from officials that they were not equipped to monitor what was transpiring around the polling stations. Additionally, "intimate," close contact from line warming volunteers, even if it took the form of a friendly pat of encouragement on the back, could be unwelcome and could interfere with the voting process.[18] Tr. 105:19–25, ECF No. 234. The Court can also envision circumstances where close

[18] *See Browning*, 572 F.3d at 1221 n.17 (observing that *Burson* applies where "the

contact from groups associated with controversial issues could deter some voters from going to the polls.

In all, these facts evoke images of the kind of commotion at the polls that convinced the *Burson* and *Browning* courts to uphold the restricted zones in those cases. *See Burson*, 504 U.S. at 193 (recognizing the state's "'power to regulate conduct in and around the polls in order to maintain peace, order and decorum'" (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))); *Browning*, 572 F.3d at 1220 (noting that "it takes little foresight to envision polling places awash" with third parties competing for the attention of voters and voters refraining from participating in the election process "to avoid the resulting commotion"). Indeed, State Defendants contend that Plaintiffs' activities interfere with the serenity of the polling place and diminish voters' confidence in the election process. *See Burson*,

cast their ballots and could involve physical contact. Therefore, the concern regarding intimidation and influence appears even greater here than in *Browning*, where the Eleventh Cctnt

connd

Accordingly, both *Burson* and *Browning* require this Court to apply the modified strict scrutiny analysis to the question of whether the Food, Drink and Gift Ban is constitutional.

iii. Evaluation of the Food, Drink and Gift Ban Under the *Burson* Modified Strict Scrutiny Analysis

The modified *Burson* standard did not change the traditional strict scrutiny requirement of proof that (i) the regulation is necessary to serve compelling state interests and that (ii) it is narrowly tailored for that purpose. The difference lies in the way the Supreme Court conducted the strict scrutiny analysis. First, the Court did not require the government to provide evidence regarding the necessity of the restricted zone, given the long and well-documented history of voter intimidation around the polls. Second, although the second prong of the traditional strict scrutiny test requires the government to implement the least restrictive means to achieve its goal, *see United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000), the *Burson* Court upheld the Tennessee statute based on the less stringent requirement that the statute be "'reasonable'" and not "'*significantly impinge* on constitutionally protected rights,'" *Burson*, 504 U.S. at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)).

Here, the interests that State Defendants offer in support of the

trtdanrns

peace and order around the polls; protecting voters from political pressure and intimidation; and supporting election integrity. Courts routinely recognize these interests as compelling. *See, e.g.*, *id.* at 198–99 (finding that a state "obviously" has compelling interests "in protecting the right of its citizens to vote freely for the candidates of their choice" and "in an election conducted with integrity and reliability"); *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."); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (stating that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society"); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009) (noting that a state "'indisputably has a compelling interest in preserving the integrity of its election process'" (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006))). Therefore, State Defendants have made the requisite showing of compelling interests.

Furthermore, even though Defendants were not required to do so,[20] State Defendants offered

intimidation and improper influence demonstrate the need for a restricted zone around polling stations. Therefore, the Court concludes that the government has satisfied its burden on the first prong of the strict scrutiny test:2 792 re Wiz t BT /TT0 14.04 Tf 4

:2.999 (4.0T0 14.04 Tf 12m.)7.991 (t)-2.991 (7f 417102386 47)3.7unrstrsr(n)3.996 ni2.999 (ce)- r

no limit. In practice, the Supplemental Zone could easily extend thousands of feet away from the polling station (and across private property) given the documented hours-long lines that voters at some polling locations have experienced.

Although the *Burson* Court did not establish where to draw the line between a restricted zone that is reasonable and one that is an "impermissible burden," the Court did indicate that a restricted zone becomes unconstitutional at "some measurable distance from the polls." *Id.* at 210. Applying this reasoning here, it is improbable that a limitless Supplemental Zone would be permissible. *See Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004) (finding that a 500-foot buffer zone was unconstitutional where the state's evidence was "glaringly thin . . . as to why the legislature . . . ultimately arrived at a distance of 500 feet"); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015) (rejecting a 300-foot buffer zone because the state "did not present any evidence . . . justifying a no-speech zone nine times larger than the one previously authorized by the Supreme Court [in *Burson*] and offer[ed] no well-reasoned argument" for a restricted area of that size); *cf. Schirmer*, 2 F.3d at 122 (approving a 600-foot buffer zone because it was implemented only after the legislature's implementation of a 300-foot limitation failed to remedy the identified issues).

2. Irreparable Harm

"A showing of irreparable injury is 'the sine qua non of injunctive relief.'" *Siegel*, 234 F.3d at 1176 (quoting *Ne. Fla. Chapter of Assôn of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). Even if a plaintiff can show a substantial likelihood of success on the merits, "the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Id.*; *see also City of Jacksonville*, 896 F.2d at 1285 (declining to address all elements of the preliminary injunction test because "no showing of irreparable injury was made").

The irreparable injury sufficient to satisfy the burden "must be neither remote nor speculative, but actual and imminent." *Siegel*, 234 F.3d at 1176 (quoting *City of Jacksonville*, 896 F.2d at 1285). In the context of constitutional claims, it is well-settled that "[t]he l ses enmæo ϒ i ɹ ʻ Î sl D M

constitutes a per se irreparable injury." (quoting *Cate v. Oldham*

because they have not provided evidence of threatened enforcement of the Food, Drink and Gift Ban.[24]

Applying the above precedent here, the Court finds that Plaintiffs have carried their burden to show that they would suffer irreparable harm should the Court preclude enforcement of the Food, Drink and Gift Ban in the Supplemental Zone. The record shows that the Food, Drink and Gift Ban has already deterred Plaintiffs and other organizations from engaging in line warming activities.

3. Balance of the Equities and the Public Interest

The Court combines its analysis of the final two factors of the preliminary injunction test—balance of the equities and the public interest—because "where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest." *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020). Further, in the context of an election, the balance of the equities and the public interest factors are considered in tandem because "the real question

This principle of restraint has continued to develop over the years, and the Supreme Court's opinion in *Purcell v. Gonzalez* is now frequently cited for the proposition that a court should ordinarily decline to issue an injunction that changes existing election rules when an election is imminent. 549 U.S. 1, 5–6 (2006). The *Purcell* Court reasoned that such a change could be inappropriate because it may result in "voter confusion and [the] consequent incentive to remain away from the polls." *Id.* at 4–5.

The Supreme Court has reiterated this directive on many occasions. *See, e.g.*, *Republican Natâl Comm. v. Democratic Natâl Comm.*, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."). The Eleventh Circuit also routinely enforces the *Purcell* principle to stay relief when an election is imminent and the injunction would impact the election process. *See, e.g.*, *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) (staying an injunction entered "at the last minute" because it would "violate *Purcell*'s well-known caution against federal courts mandating new election rules").

In February of 2022, Justice Kavanaugh stated in a concurring opinion in *Merrill v. Milligan* that *Purcell* concerns can be overcome if the plaintiff can "at least" establish that:

(i) the underlying merits are entirely clearcut in favor of the plaintiff;
(ii) the plaintiff would suffer irreparable harm absent the injunction;

next election was set to begin in less than four months and that the injunction implicated aspects of the election machinery that were already underway. *Id.* at 1371. The court also found that the merits of that case were not "'entirely clearcut.'" *Id.* at 1374 (quoting *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring)). It cautioned that "[e]ven seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Id.* at 1371 (alteration in original) (quoting *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring)).

Even more recently, in *Rose v. Georgia Secretary of State*, the Eleventh Circuit similarly stayed an injunction issued three months before a scheduled election. No. 22-12593, slip op. at 3–4 (11th Cir. Aug. 12, 2022). The court reasoned that: (i) the election was "sufficiently close at hand under . . . [its] recent precedent," *id.* at 3; (ii) while "the mechanics of implementing the injunctive relief [were] relatively straightforward," *id.*, the injunction "'fundamentally alter[ed] the nature' of the upcoming elections," *id.* at 4 (quoting *Republican Nat'l Comm.*, 140 S. Ct. at 1207); and (iii) "the permanent injunction was issued too close to [the

---

(noting that the statutory provision at issue "can be read to prohibit 'line warming' activities"), *appeal filed*, No. 22-11143 (11th Cir. Apr. 11, 2022).

connection with the recent primary elections will need to retrained. *See id.* 112:15–25. He further stated that the poll manual is available online and used by third parties, *id.* 111:25–112:25, and that it would be difficult to reach a large number of people and ensure that they are aware that the poll manual has changed, *id.* 113:1–10. Germany believes that this could lead to confusion regarding what activities are permissible. *Id.* 113:24–114:1. Intervenor Defendants build on these arguments and contend that an injunction would diminish confidence in the election process because voters who were aware of the Food, Drink and Gift Ban

are not electioneering or engaging in otherwise prohibited behavior, ECF No. 197-

Brower opined that the change could be implemented one day before early voting. Tr. 72:24–73:15, ECF No. 234.

Plaintiffs also provided evidence that voters would not be confused by an injunction applicable to the current law. Specifically, one of Plaintiffs' witnesses testified that voters at polling locations where line warming activities have been historically conducted would not be confused by an injunction against the Food, Drink and Gift Ban because voters are accustomed to line warming activities, and many are not even aware of the Food, Drink and Gift Ban's impact on those activities. ECF No. 171-6 at 4–5.

As demonstrated by the arguments above, one of the key issues here is whether an order enjoining the enforcement of the Food, Drink and Gift Ban within the Supplemental Zone at this stage of the current election cycle would cause voter confusion and disrupt the election process. Significantly, S.B. 202 is already the law, and an injunction with respect to the Supplemental Zone would not merely preserve the status quo. It would affect the mechanics of the election by requiring a different set of rules than what was applicable during the primary elections that occurred just a few months ago.

Further, poll workers were recently trained that offering any item of value, including food and water, to voters waiting in line was prohibited within both the

("free from ambiguity or uncertainty"). For these reasons, the Court cannot say that this prong of the *Merrill* analysis is satisfied.

The above discussion regarding voter confusion and the burden on election administrators bears on the fourth prong of the *Merrill* analysis, too. Accordingly, Plaintiffs have not shown that compliance with an injunction would be "feasible . .