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Water & Pizza: What Would Alexander Hamilton Think?

Sarah Wiik

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WATER & PIZZA: WHAT WOULD ALEXANDER HAMILTON THINK?

*Sarah Wiik**

Introduction	933
I. Line-warming Activities	935
II. Recent Bans on Line-warming.....	937
A. Florida SB 90.....	940
B. Georgia SB 202	941
III. Fighting the Restrictions	941
A. Standing.....	942
B. First Amendment.....	943
1. Legal Background.....	943
2. Florida SB 90.....	945
3. Georgia SB 202	946
C. Voting Rights Act.....	946
1. Legal Background.....	947
2. Florida SB 90.....	948
3. Georgia SB 202	949
D. The <i>Purcell</i> Principle.....	950
IV. The Impact of these Restrictions.....	951
V. Conclusion	954
Appendix A: Study on Wait Times Following 2012 Elections	955
Appendix B: Review of Legal Challenges to SB 90 & SB 202.....	956

INTRODUCTION

Water and food are basic human needs, but when provided to citizens waiting in line to vote they allegedly become the evils of “tumult and

* J.D. Candidate, 2024, Fordham University School of Law; B.A. 2021, Villanova University. Thank you to Professor Jerry Goldfeder for his support on this Comment, the faculty at Fordham Law for always challenging me, the dedication of the *Fordham Urban Law Journal*, and my friends and family for supporting me along the way.

disorder.”¹ Line-warming activities, also referred to as line relief services,² such as handing out food and water to voters, have come under siege in many states.³ These attacks are part of a larger movement to lessen the measures that guarantee the right to vote across the country; attacks on the Voting Rights Act (VRA),⁴ regulations restricting voting access across the country, and regulation of line-warming activities have become commonplace.⁵ Court decisions and state regulations have eroded the paradigms protecting the “sacred right to vote — won at great cost in blood and treasure.”⁶

In states where legislatures are restricting absentee and early voting, the resulting longer lines are predominantly comprised of people of color and centralized to urban areas.⁷ States that prohibit distribution of these basic needs are contributing to the second-generation of voter disenfranchisement⁸ — obstacles and barriers that restrict the impact of minority votes without overt blocks like literacy tests in the 1960s.⁹ Thus, while the first-generation barriers restricting formal access have been overcome, these second-generation barriers have taken their place to allow access to the polls but diminish the impact of minority votes.¹⁰

1. THE FEDERALIST NO. 68 (Alexander Hamilton); *see* League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1074 (N.D. Fla. 2022) [hereinafter *League of Women Voters I*].

2. *See, e.g.*, Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260, 1277 n.17 (N.D. Ga. 2021).

3. *See infra* Part II.

4. *See League of Women Voters I*, 595 F. Supp. 3d at 1060; *see also* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, No. 4:21-cv-01239, 2022 WL 496908, at *2 (E.D. Ark. Feb. 17, 2022). *See generally* Merrill v. Milligan, 142 S. Ct. 879 (2022); Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321 (2021); Shelby Cnty., Ala. v. Holder, 570 U.S. 529 (2013).

5. *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/B37N-TYJ6>] (explaining how recent regulations create shorter windows for mail-in voting, restrict access to absentee ballot assistance, create stricter identification procedures, etc.).

6. *League of Women Voters I*, 595 F. Supp. 3d at 1060.

7. *See* David C. Kimball, *Why Are Voting Lines Longer for Urban Voters?* 1 (Mar. 29, 2013) (unpublished manuscript) (on file with author) (“The longest voting lines tend to occur in the most heavily populated urban jurisdictions.”); *Voting Laws Roundup: October 2022*, BRENNAN CTR. FOR JUST. (Oct. 6, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022?ga=2.204622740.522198941.1667436290-1326631794.1665261046> [<https://perma.cc/3FVB-XR2L>].

8. *See Shelby Cnty.*, 570 U.S. at 566 (Ginsburg, J., dissenting).

9. *See id.*; *see also* Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS UNIV. PUB. L. REV. 77, 78 (2010) (describing second-generation discrimination as “voting barriers that do not bar minorities from the political process in a wholesale way but prevents the full participation of minorities in the political process”).

10. *See* Garrett, *supra* note 9, at 80.

This Comment will give an overview of two recent statutes in Florida and Georgia containing bans against these distributions, the subsequent litigation, and explore how American democracy can survive in a world of covert discrimination. Part I explains line-warming, its purposes, and the reactions to it.¹¹ Part II discusses the regulatory environment of election laws and the recent bans in Florida and Georgia prohibiting line-warming.¹² Part III gives the legal background to the challenges against these prohibitions and explains the outcome in the courts.¹³ Part IV describes the discriminatory impact that these prohibitions have on communities of color and urban areas.¹⁴

I. LINE-WARMING ACTIVITIES

Line warming activities are actions taken by volunteers to aid and support individuals waiting in line to vote.¹⁵ These actions include handing out water, snacks, umbrellas, fans, ponchos, chairs, and other similar items to citizens who are waiting in line to vote.¹⁶ Some distribution efforts also hand out phone chargers, coloring books for children accompanying voters, or lactation pods for nursing mothers.¹⁷ Some organizations, like the Greater Augusta's Interfaith Coalition, play music and provide other sorts of entertainment for those who are waiting in line.¹⁸

Line-warming activities have a deep history in the civil rights movement and in political activism with and for communities of color.¹⁹ These efforts acknowledge the sacrifice that some voters make to stand in these lines for hours to do their civic duty and make their voice heard.²⁰

Line-warming activities can be politically motivated, politically neutral, or a mix of both. Some act with the primary purpose of recruiting voters to

11. *See infra* Part I.

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See League of Women Voters I*, 595 F. Supp. 3d at 1065.

16. *See id.*; Complaint, Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260 (N.D. Ga. 2021) (No. 21-01284), 2021 WL 6495911 [hereinafter *Sixth District Complaint*].

17. *See In re Georgia Senate Bill 202*, No. 1:21-55555, 2022 WL 3573076, at *2 (N.D. Ga. Aug. 18, 2022).

18. *See id.* at *3 (relaying how the New Georgia Project “sent mariachi bands, circus performers and other entertainers” to support those waiting in line to vote).

19. *See id.*; *Sixth District Complaint*, *supra* note 16 (describing how the African Methodist Church was a prominent supporter of voter's rights during the Civil Rights Movement and today).

20. *See In re Georgia Senate Bill 202*, 2022 WL 3573076, at *4.

their cause or slate, but others do not.²¹ For example, a candidate for the County Recorder position in Arizona discussed how on the day of the 2020 election, he introduced himself to and distributed “granola bars to try and garner some favor” with those waiting in line.²² Comparatively, organizations like the National Association for the Advancement of Colored People (NAACP), “regularly dispatch[] volunteers throughout the state to provide food, water, and other relief to voters waiting to cast their ballots in person.”²³ Those volunteers, unlike the candidate mentioned above, are not trying to persuade voters to vote in line with a certain belief, candidate, or political affiliation.²⁴ Rather, they are trying to communicate the importance of staying in line and that each vote has impact and importance.²⁵

However, not everyone supports line-warming activities. In Georgia, line-warming activities came under attack when an out-of-state donor tried to deliver pizzas to citizens waiting in line to vote in the 2020 elections.²⁶ The local officials claimed that such an action would be an incentive to voters to vote in the way that the organization, or candidate, would want — almost like a bribe.²⁷ But as these organizations and their legal counsel explain, these line-warmers do not reward only those who agree with them after discussing their voting plans.²⁸

Another concern is that polling locations do not have the staff or resources to closely monitor what content is being communicated when the goods are

21. *See id.* at *16.

22. The Daily, *Running an Election in the Heart of Election Denialism*, N.Y. TIMES (Oct. 24, 2022), <https://podcasts.apple.com/us/podcast/running-an-election-in-the-heart-of-election-denialism/id1200361736?i=1000583669938> [<https://perma.cc/NP6N-22YV>].

23. Fla. State Conf. of NAACP v. Lee, 576 F. Supp. 3d 974, 991 (N.D. Fla. 2021).

24. *See In re Georgia Senate Bill 202*, 2022 WL 3573076, at *3; *League of Women Voters I*, 595 F. Supp. 3d 1042, 1129 (N.D. Fla. 2022).

25. *See In re Georgia Senate Bill 202*, 2022 WL 3573076, at *3 (“[L]ine relief is about being intimate . . . to pat them on the back, to nod, to encourage, to hand them very closely a cup — a bottle of water or a snack . . . encourag[ing them] to stay in line and remind them of the importance of casting a ballot to make sure their voices are heard.”).

26. *See* Henri Hollis, *Giving Free Food to Voters Allowed in Practice Despite Legal Gray Area*, ATL. J. CONST. (Oct. 30, 2020), <https://www.ajc.com/politics/giving-free-food-to-voters-allowed-in-practice-despite-legal-gray-area/RBCFSSGRJR.FOLJWAIEOWYBBBHY/> [<https://perma.cc/RP3H-KXVX>]. It appears that this was politically neutral, offered as a donative gesture to support overall voter turn-out in Georgia. *See id.*

27. *See id.*; Anoa Changa, *Despite What Georgia Officials Say, It’s Not Illegal to Send Pizza to the Polls*, REWIRE NEWS GRP. (Nov. 3, 2020, 8:38 AM), <https://rewirenewsgroup.com/2020/11/03/despite-what-georgia-officials-say-its-not-illegal-to-send-pizza-to-the-polls/> [<https://perma.cc/UP3V-BWP6>] (explaining how the donor’s order was cancelled by the restaurant and the Georgia Secretary of State’s office said such a delivery would be illegal under a federal law banning payments that would pressure voters).

28. *See In re Georgia Senate Bill 202*, 2022 WL 3573076, at *3.

delivered.²⁹ For example, there was an incident during the 2020 election in Georgia where line-warming volunteers were wearing clothing and badges that identified their political party, beliefs, or candidate.³⁰ When the distribution becomes political in this way, many fear that line-warmers are engaging in electioneering and improperly influencing the voters in line. Do they change their vote because the man wearing a Republican pin gave them a banana? Many feel that on election day, voters should be free from any outside influence beyond their actual beliefs.³¹

Many state legislatures have noted these concerns, resulting in the enactment of bans on such actions by states who deem them impermissible and a threat to democracy.³² When such bans were passed in Georgia and Florida, organizations and volunteers brought suits alleging that the true threat to democracy is banning such line-warming activities.³³

II. RECENT BANS ON LINE-WARMING

Elections and the right to vote are integral to our system of democracy in the United States. When this right is threatened or potentially corrupted, as some believe happens with line-warming conduct, state legislatures react accordingly.³⁴ When enacting such regulations and laws, states are subject to congressional override of Article I, Section 4 and to judicial review of potential unconstitutionality or violation of federal statutes. However, after the Supreme Court struck down voting rights protections guaranteed by the VRA, states have been given more freedom to pass regulations that burden the right to vote.

The Constitution and principles of federalism support the notion that the states determine their election processes and procedures.³⁵ The states are charged with enacting and regulating their election methods in both federal and state elections.³⁶ The Founding Fathers, when drafting the Constitution, explicitly announced that the “Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”³⁷

29. *See id.* at *5.

30. *See id.*

31. *See id.* at *6.

32. *See, e.g., id.* at *4 (Georgia enacting such a ban); FLA. STAT. ANN. § 102.031(4)(a)–(b) (West 2021); MONT. CODE ANN. § 13-35-211 (West 2015); MINN. STAT. ANN. § 204C.06 (West 2011).

33. *See infra* Part III.

34. *See League of Women Voters I*, 595 F. Supp. 3d 1042, 1139 (N.D. Fla. 2022).

35. *See Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 990 (N.D. Fla. 2021).

36. *See id.*

37. U.S. CONST. art. I, § 4, cl. 1.

The Elections Clause establishes the power of Congress to intervene and enact regulations for state and federal elections that would preempt any contrary state regulation.³⁸ Thus, while states can regulate election procedures, they cannot run afoul of either the Constitution or enactments from Congress, such as the VRA,³⁹ or the First Amendment.⁴⁰ In determining that a prohibition on line-warming in Florida violated federal law,⁴¹ Judge Walker of the Northern District of Florida acknowledged that there were constraints on the judiciary due to states having this power under Article I, Section 4, but that there are also constitutional safeguards that must be upheld regardless of the state's right to enact election regulations.⁴²

The Supreme Court has contributed to the renewed pressure on voting rights. In 2013, the Court ruled that a portion of the VRA of 1965 was unconstitutional in *Shelby County v. Holder*.⁴³ The VRA of 1965 was a bulwark of civil liberties and the protected the right to vote without burdens or discrimination on citizens.⁴⁴ Specifically, the *Shelby County* Court ruled that the coverage formula of Section 4, which required states with a history of discriminatory practices to have their election regulations cleared prior to enactment, was unconstitutional and no longer necessary to prevent discrimination.⁴⁵ Thus, the requirement of Section 5 that states would need preclearance prior to enforcing a regulation became inoperative.⁴⁶ As a result, discriminatory regulations and election practices must be challenged after they have been passed and gone into effect, rather than prior to enactment and subsequent harm.⁴⁷ The effects of *Shelby County* were

38. See Michael T. Morley & Franita Tolson, *Elections Clause: Interpretation and Debate*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-i/clauses/750> [<https://perma.cc/7UZ5-K3W3>] (last visited Feb. 8, 2023); see, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832–33 (1995); Roudebush v. Hartke, 405 U.S. 15, 24 (1972); Foster v. Love, 522 U.S. 67, 69 (1997).

39. 52 U.S.C.A. § 10301 (West).

40. U.S. CONST. amend. I.

41. See *LDF's Lawsuit Challenging Florida's S.B. 90*, LEGAL DEF. FUND (May 6, 2021), <https://www.naacpldf.org/case-issue/florida-naacp-v-lee/> [<https://perma.cc/5ZYN-S9QX>].

42. See *League of Women Voters I*, 595 F. Supp. 3d 1042, 1061 (N.D. Fla. 2022) (“[W]hen called to examine the Florida Election Code’s fidelity to federal law, this Court must use a gentle touch, recognizing the State’s prerogative to make such laws while also safeguarding the Constitution’s guarantees to the people of Florida.”); see also *infra* Sections III.B.2, III.C.2.

43. See *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 557 (2013).

44. See *id.* at 534–35.

45. See *id.* at 554.

46. See *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [<https://perma.cc/A946-H6W9>].

47. See MICHAEL TOMASKY, *IF WE CAN KEEP IT: HOW THE REPUBLIC COLLAPSED AND HOW IT MIGHT BE SAVED* 23 (2019).

immediate, including stricter voter identification provisions from the Texas legislature within 24 hours after the ruling came down.⁴⁸ States, like Texas, that were once covered by this section because of their history of discrimination, were free to enact regulations that might have disproportionate effects and reflect persistent racism.⁴⁹ In addition to stripping the VRA of its strength in *Shelby County*, states recently have been inflamed by the rhetoric spread by Former President Donald Trump and his supporters claiming that there is widespread voter fraud in the United States and that more stringent protections are necessary.⁵⁰ Congress could pass a new Section 4 formula that meets the *Shelby County* Court's guidance, but until then, states are free from preclearance.

State statutes containing line-warming prohibitions have begun to emerge in recent years and are an example of how post-*Shelby County* laws continue to affect voting rights across the country.⁵¹ Two states, Florida and Georgia, have recently attempted to enact bans to prohibit and criminalize the distribution of food and water to those in line.⁵² Minnesota has had a law in place since 2011 that restricts who is permitted to come within 100 feet of the polling location to only election officials, individuals waiting to vote, or individuals conducting exit polling.⁵³ Montana has a law in place that prohibits food and water distribution within 100 feet of a polling site, but only when distributed by candidates, family members of a candidate, or campaign volunteers because of the direct political implications.⁵⁴

These bans, though few, were mentioned by Justice Kagan in her dissent in *Brnovich v. Democratic National Committee*.⁵⁵ There, Justice Kagan explained that food and water bans “may be lawful under the VRA. But chances are that some have the kind of impact the Act was designed to prevent — that they make the political process less open to minority voters than to others.”⁵⁶ The disparate impact that the bans had on minority voters that Justice Kagan suggested has proven to be true in reality. States that are

48. See *The Effects of Shelby County v. Holder*, *supra* note 46.

49. See *id.*

50. See Jane C. Timm, *Federal Judge Blocks Florida Restrictive Voting Law*, NBC NEWS (Mar. 31, 2022, 1:48 PM), <https://www.nbcnews.com/politics/elections/federal-judge-overrules-florida-restrictive-voting-law-rcna22432> [<https://perma.cc/QP4T-GS86>].

51. See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2356 (2021) (Kagan, J., dissenting) (arguing that Arizona's vote counting policies did violate section 2 of the Voting Rights Act (VRA)).

52. See *Voting Laws Roundup: October 2021*, *supra* note 5; FLA. STAT. ANN. § 102.031(4)(a)–(b) (West 2021); GA. CODE ANN. § 21-2-414 (West 2021).

53. MINN. STAT. ANN. § 204C.06 (West 2011).

54. MONT. CODE ANN. § 13-35-211 (West 2015).

55. See 141 S. Ct. at 2356 (Kagan, J., dissenting).

56. *Id.*

not subject to the preclearance of the VRA after *Shelby County* can enact and enforce regulations until they are deemed unconstitutional or in violation by a court — a process that could take months, if not years.⁵⁷ In post-*Shelby* Georgia, the Georgia Election Board is responsible for investigating and sanctioning counties that violate election laws, but they rarely charge for violations of federal law and have a backlog of complaints dating back almost a decade.⁵⁸ This stirs up mistrust in the electoral process for voters and could serve as a deterrent to voting.

A. Florida SB 90

In 2021, the Florida Legislature passed Senate Bill 90 (“SB 90”), an election law that contained many provisions that restrict voting access for both federal and state elections.⁵⁹ SB 90 contained sections that restrict drop boxes for ballots, limit third-party registration, and impede mail-in voting.⁶⁰ In addition, the Florida regulation bans any person who is “engaging in any activity with the intent to influence or effect of influencing a voter” within a large range from the polling facilities.⁶¹ Courts have read this definition broadly to prohibit these line warming activities, even though there would presumably be an intent or effect requirement.⁶² The statute created a first-degree misdemeanor offense for any of these line-warming actions within a 150-foot zone around the polling location.⁶³ The questions of what would influence a voter and whether the buffer-zone started at the end of the line or at the front door of the polling facility was left vague and unanswered.⁶⁴ After this legislation was passed, multiple organizations filed lawsuits in federal court.⁶⁵

57. See *League of Women Voters I*, 595 F. Supp. 3d 1042, 1178 (N.D. Fla. 2022).

58. See Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait in Line for Hours? Few Polling Places*, NAT’L PUB. RADIO (Oct. 17, 2020, 5:01 AM), <https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl> [<https://perma.cc/J945-GRR8>].

59. See *LDF’s Lawsuit Challenging Florida’s S.B. 90*, *supra* note 41.

60. See Timm, *supra* note 50.

61. FLA. STAT. ANN. § 102.031(4)(a)–(b) (West 2021).

62. See *League of Women Voters I*, 595 F. Supp. 3d at 1118.

63. See *id.* at 1074.

64. See *id.* at 1134.

65. See *Harriet Tubman Freedom Fighters Corp. v. Lee*, No. 4:21CV242, 2021 WL 7083360, at *4 (N.D. Fla. Oct. 8, 2021) (consolidated into *League of Women Voters I*, 595 F. Supp. 3d 1042 (N.D. Fla. 2022)); *League of Women Voters of Fla., Inc. v. Lee*, 576 F. Supp. 3d 1004 (N.D. Fla. 2021) (consolidated into *League of Women Voters I*, 595 F. Supp. 3d 1042 (N.D. Fla. 2022)); *Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 980 (N.D. Fla. 2021) (consolidated into *League of Women Voters I*, 595 F. Supp. 3d 1042 (N.D. Fla. 2022)); see also *infra* Part III.

B. Georgia SB 202

In March 2021, Georgia enacted a similar bill, Senate Bill 202 (“SB 202”), which was passed with the purported intent of protecting the integrity of state and federal elections in Georgia.⁶⁶ Its prohibition on line-warming explains that no one is permitted to “give, offer to give, or participate in the giving of any money or gifts, including, but not limited to, food and drink, to an elector.”⁶⁷ It also imposed criminal liability onto any organization or volunteer personnel who distributes these line-warming goods or materials.⁶⁸ Georgia’s bill had two separate zones mapped out around the polling location where line-warming would be prohibited.⁶⁹ It created a Buffer Zone which was 150 feet from the polling location and a Supplemental Zone of 25 feet from any voter standing in line, regardless of their location relative to the Buffer Zone.⁷⁰ Similar to SB 90, a wave of lawsuits followed this enactment.⁷¹

III. FIGHTING THE RESTRICTIONS

This Part reviews cases filed in Florida and Georgia challenging these bans under the First Amendment and the VRA⁷² and analyzes how courts examined certain issues in each case. In determining these questions, courts have focused on deciding “*not* whether this [c]ourt thinks those laws are good policy” but rather “whether they violate federal law.”⁷³ Thus, the challengers must show that the regulation violates one or both of these federal laws and also must obtain an injunction from enforcement. For example, in the District Court in Florida, the judge issued a permanent

66. See Stephen Fowler, *What Does Georgia’s New Voting Law 202 Do?*, GA. PUB. BROAD. (Mar. 27, 2021, 10:08 PM), <https://www.gpb.org/news/2021/03/27/what-does-georgias-new-voting-law-sb-202-do> [https://perma.cc/W9R6-YWRE].

67. GA. CODE ANN. § 21-2-414(a) (West 2021).

68. See *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU (Aug. 17, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020> [https://perma.cc/MHN7-9UP4]; *Sixth District Complaint*, *supra* note 16, at 195; GA. CODE ANN. § 21-2-414 (West 2021).

69. See *In re Georgia Senate Bill 202*, No. 1:21-55555, 2022 WL 3573076, at *4 (N.D. Ga. Aug. 18, 2022). The Judge in that case also ruled on another motion to dismiss in a suit filed by the federal government against the regulation. See *United States v. Georgia*, 574 F. Supp. 3d 1245, 1253 (N.D. Ga. 2021) *reconsideration denied sub nom. In re Georgia Senate Bill 202 II*, No. 1:21-CV-02575-JPB, 2022 WL 1516049 (N.D. Ga. Apr. 21, 2022). [hereinafter *In re Georgia Senate Bill 202 II*].

70. See *In re Georgia Senate Bill 202*, 2022 WL 3573076, at *7.

71. See *id.* at *2.

72. *Id.* at *8 (arguing a First Amendment infringement); see *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363, 1060 (11th Cir. 2022) [hereinafter *League of Women Voters II*] (arguing First Amendment and VRA infringements).

73. *League of Women Voters I*, 595 F. Supp. 3d 1042, 1063 (N.D. Fla. 2022).

injunction from SB 90 going into effect,⁷⁴ but was stayed by the Eleventh Circuit.⁷⁵ In the Georgia cases, District Judge Boulee in the Northern District of Georgia ruled on motions to dismiss and preliminary injunctions from various parties and organizations.⁷⁶ Similar to Florida, both motions to dismiss were denied, but there was no preliminary injunction granted, allowing SB 202 to be in effect as the litigation continues.⁷⁷

A. Standing

For a case to be brought, the plaintiffs must have standing to sue under Article III of the Constitution as a case or controversy.⁷⁸ To satisfy the standing requirement, a plaintiff must show: (1) injury, (2) that the injury is traceable to the defendant, and (3) that the injury will be redressed by a decision for the plaintiff.⁷⁹

In both the Florida and Georgia cases, the challengers successfully argued the diversion-of-resources theory to meet the injury standing requirement.⁸⁰ Their alleged injury was these volunteer organizations' need to "divert resources away from [their] core activities" to new initiatives and programs to help voters maneuver through the new rule's processes.⁸¹ These regulations are usually bills with multiple provisions within them — not just the line-warming bans.⁸² Thus, these organizations have to overcome major hurdles and obstacles in their community and district in regard to the regulation as a whole, such as training activities on the new procedures and gaining the permitted identifications.⁸³ This diversion of resources theory has proven quite effective, in both establishing standing as well as

74. *See id.*

75. *See League of Women Voters II*, 32 F.4th at 1369.

76. *See In re Georgia Senate Bill 202*, No. 1:21-55555, 2022 WL 3573076, at *2 (N.D. Ga. Aug. 18, 2022) (explaining that Plaintiffs include; the New Georgia Party; Rise, Inc.; Delta Sigma Theta Sorority; AME Church's Operation Voter Turnout; and The Georgia NAACP).

77. *See United States v. Georgia*, 574 F. Supp. 3d 1245, 1253 (N.D. Ga. 2021) (denying defendant's motion to dismiss); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1282 (N.D. Ga. 2021) (denying defendant's motion to dismiss); *In re Georgia Senate Bill 202*, 2022 WL 3573076, at *27 (denying plaintiff's request for a preliminary injunction).

78. *See Sixth Dist.*, 574 F. Supp. 3d at 1268.

79. *See id.*

80. *See id.* at 1269; *League of Women Voters I*, 595 F. Supp. 3d 1042, 1066 (N.D. Fla. 2022).

81. *Sixth Dist.*, 574 F. Supp. 3d. at 1269; *see also League of Women Voters of Fla., Inc. v. Lee*, 576 F. Supp. 3d 1004, 1010 (N.D. Fla. 2021).

82. *See League of Women Voters II*, 32 F.4th 1363, 1371 (11th Cir. 2022) (explaining that an injunction would implicate voter registration not just line-warming).

83. *See Sixth Dist.*, 574 F. Supp. 3d at 1269.

emphasizing the impact that these prohibitions would have on communities and organizations as the injury alleged.⁸⁴ In these cases, the traceability and redressability prongs are relatively easy to meet. The defendants, namely the Governor and other legislative bodies, are responsible for enforcing the regulation.⁸⁵ An injunction from the court would address the injury in the complaint by granting the declaratory and injunctive relief requested.⁸⁶ In Florida and Georgia, the district judge ruled that all three standing prongs were met with the diversion theory.⁸⁷ Thus, standing — though required — was not an insurmountable burden for these challengers to meet.⁸⁸

B. First Amendment

Some organizations and distributors challenged these bans on line-warming activities under the First Amendment. Specifically, challengers argued that the bans inhibit their expressive conduct of distribution to voters.⁸⁹ This is because the First Amendment to the U.S. Constitution prohibits Congress from enacting a law that would “abridg[e] the freedom of speech, or of the press; or the right of the people peaceably to assemble.”⁹⁰

1. Legal Background

There are usually two claims to be made in these First Amendment challenges: (1) that the ban constitutes an undue burden on the right to vote⁹¹ and (2) that the ban violates the challenger’s freedom of speech.⁹²

For the first claim, *Anderson v. Celebrezze* and *Burdick v. Takushi* are the two seminal cases for analyzing burdens imposed on voters under the First Amendment and whether regulations would constitute an undue burden.⁹³ These two cases set out a flexible standard to determine whether an election regulation would violate the First Amendment. Specifically, if “a court finds that a plaintiff’s voting rights ‘are subjected to severe restrictions, the [respective] regulation must be narrowly drawn to advance a state interest of compelling importance. But when [the law] imposes only reasonable,

84. *See id.* at 1270; *League of Women Voters I*, 595 F. Supp. 3d at 1067.

85. *See Sixth Dist.*, 574 F. Supp. 3d at 1272.

86. *See id.*

87. *See id.*; *see League of Women Voters I*, 595 F. Supp. 3d at 1075–76.

88. *See Sixth Dist.*, 574 F. Supp. 3d at 1272.

89. *See In re Georgia Senate Bill 202*, No. 1:21-55555, 2022 WL 3573076, at *8 (N.D. Ga. Aug. 18, 2022)

90. U.S. CONST. amend. I.

91. *See In re Georgia Senate Bill 202*, 2022 WL 3573076, at *9.

92. *See id.*

93. *See Anderson v. Celebrezze*, 460 U.S. 780, 780 (1983); *Burdick v. Takushi*, 504 U.S. 428, 428 (1992).

nondiscriminatory restrictions . . . the [s]tate’s important regulatory interests are generally sufficient to justify the restrictions.”⁹⁴ The court performs this balancing test between the state’s interest in the regulation and the burden imposed on the state’s electorate’s First Amendment rights.⁹⁵ This *Anderson/Burdick* framework is not applied if the regulation goes beyond the mechanisms and procedures of elections, such as regulating political speech.⁹⁶

The second kind of claim regarding the violation of one’s freedom of speech is analyzed under a different standard. Protected speech is not only speech in the most literal, verbal sense, but rather includes conduct that would have the basic effect of communication, such as the distribution of food and water to those waiting in line to vote.⁹⁷ Because freedom of speech, protected by the U.S. Constitution explicitly, is a fundamental right, a court would need to find a compelling and narrowly tailored reason from the state to uphold a restriction.⁹⁸ For decades, the test for an abridgement of the First Amendment protections of speech discussed whether the “nature of appellant’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.”⁹⁹ Specifically, recent courts have broken the question into two parts: whether (1) “an intent to convey a particularized message was present,” and (2) “the likelihood was great that the message would be understood by those who viewed it.”¹⁰⁰ These factors are analyzed to determine whether the conduct in question is expressive conduct.

Challengers arguing that these bans violate their freedom of speech explain that their distribution of food and drink is protected expressive conduct, conveying the message of the importance of staying in line to vote.¹⁰¹ In an often-cited case in these challenges, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, the organization Food Not Bombs distributed food to spread their message that poverty and hunger can be resolved if the resources directed to the military were directed toward food

94. *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1278 (N.D. Ga. 2021) (citations omitted) (quoting *Burdick*, 504 U.S. at 434).

95. *See League of Women Voters of Fla., Inc. v. Lee*, 576 F. Supp. 3d 1004, 1011 (N.D. Fla. 2021)

96. *See In re Georgia Senate Bill 202*, No. 1:21-55555, 2022 WL 3573076, at *9 (N.D. Ga. Aug. 18, 2022) (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995)).

97. *See Spence v. State of Wash.*, 418 U.S. 405, 409–10 (1974).

98. *See Sixth Dist.*, 574 F. Supp. 3d at 1279.

99. *Spence*, 418 U.S. at 409–10.

100. *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1336 (11th Cir. 2021) (quoting *Spence*, 418 U.S. at 410–11).

101. *See League of Women Voters of Fla., Inc. v. Lee*, 576 F. Supp. 3d 1004, 1013 (N.D. Fla. 2021).

insecurity.¹⁰² In protecting their ability to do so, the Eleventh Circuit explained that there were five non-exhaustive factors to consider to determine whether the contested behavior is protected First Amendment speech: whether (1) “the plaintiff intends to distribute literature or hang banners in connection with the expressive activity,” (2) “the activity will be open to all,” (3) “the activity takes place in a traditional public forum,” (4) “the activity addresses an issue of public concern,” and (5) “the activity ‘has been understood to convey a message over the millennia.’”¹⁰³ In that situation, the court ruled that based on the context of distribution, a reasonable person would understand that there was a message involved, even if it is not necessarily the exact message intended.¹⁰⁴ Thus, it was expressive conduct that would be protected under the First Amendment.¹⁰⁵

2. Florida SB 90

In Florida, the district court judge determined that line-warming activities were expressive conduct requiring protection under the First Amendment since it spreads the message that voters matter and that staying in line is important to democracy.¹⁰⁶ After ruling that line-warming was expressive conduct, the judge determined that the definition of “solicitation” in the line-warming prohibition was vague in violation of the Due Process Clause and overly broad in violation of the First Amendment.¹⁰⁷ Thus, the district court did not consider the *Anderson/Burdick* test since SB 90 was deemed unconstitutional for those reasons.¹⁰⁸

However on appeal, the Eleventh Circuit took issue with the district court’s ruling that the definition was vague and overbroad because there was no balancing of legitimate applications and potentially unconstitutional applications as required.¹⁰⁹ In addition, the Eleventh Circuit believed that a reviewing court could find that the language was not overly broad because of its contextual circumstances.¹¹⁰

102. See *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1238 (11th Cir. 2018).

103. See *Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 992–93 (N.D. Fla. 2021) (quoting *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1344–45 (11th Cir. 2021)); see also *League of Women Voters*, 576 F. Supp. 3d at 1014.

104. See *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1245.

105. See *id.*

106. See *League of Women Voters I*, 595 F. Supp. 3d 1042, 1131 (N.D. Fla. 2022).

107. *Id.* at 1138.

108. See *id.* at 1163.

109. See *League of Women Voters II*, 32 F.4th 1363, 1374 (11th Cir. 2022)

110. See *id.*

3. Georgia SB 202

The challengers to the line-warming law in Georgia argued that their activities also qualified as expressive activities, conveying the message that votes matter, the voters themselves matter, and that they should stay in line.¹¹¹ They explained that it is a nonpartisan activity, as they are handing out supplies regardless of whom the people in line are planning to vote.¹¹² The defenders of the regulation argue that these actions could stir up electioneering or bribing and that these prohibitions keep the peace, order, and lack of intimidation around the polling location.¹¹³

In Georgia, on the motion to dismiss the First Amendment claim relating to regulation of speech, the state did not even argue that line-warming could be a burden on speech and thus, their motion to dismiss was quickly denied.¹¹⁴ Later in August of 2022, Judge Boulee issued a lengthy opinion in which the court held that the conduct is expressive speech under the First Amendment and the regulation would be a content-based restriction.¹¹⁵ Applying *Burson*, the court found that the 150 foot Buffer Zone from the polling location was not an unreasonable burden and was outweighed by the compelling government interests of political integrity and order at the polling sites.¹¹⁶ However, Judge Boulee determined that the prohibition on line-warming in the Supplemental Zone — 25 feet from any voter standing in line — was impermissible because it was potentially limitless, following voters as they move in line, and there was no reasoning behind such an infinite reign of protection.¹¹⁷

C. Voting Rights Act

The VRA, enacted in 1965, prohibits discriminatory elections and emphasizes orderly voting generally.¹¹⁸ Section 2 specifically prohibits practices or procedures that would “result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”¹¹⁹ Courts look at the totality of the circumstances and determine

111. See *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1278–79 (N.D. Ga. 2021); *Sixth District Complaint*, *supra* note 16.

112. See *Sixth Dist.*, 574 F. Supp. 3d at 1278–79.

113. See *In re Georgia Senate Bill 202*, No. 1:21-55555, 2022 WL 3573076, at *18 (N.D. Ga. Aug. 18, 2022).

114. See *Sixth Dist.*, 574 F. Supp. 3d at 1279.

115. See *In re Georgia Senate Bill 202*, 2022 WL 3573076, at *11.

116. See *id.* at *19.

117. See *id.*

118. See *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 536–37 (2013).

119. 52 U.S.C.A. § 10301(a) (West 2014).

whether an election was “not equally open” to all.¹²⁰ Thus, any regulation that would result in an unequal opportunity to vote would be questioned, not only claims where the legislature had a specific and identifiable discriminatory purpose in passing the regulation.¹²¹ In other words, both discriminatory intent of the legislature and discriminatory results of the regulation are analyzed.

1. Legal Background

Claims of discriminatory intent are usually brought in combination with discriminatory results claims, but it is a higher bar to meet.¹²² The standard for determining discriminatory intent is based on the case *Village of Arlington Heights v. Metropolitan Housing Development Corporation*. That case involved zoning regulations that were racially discriminatory.¹²³ The Court held that discriminatory effects were not sufficient to prove the case, and that discriminatory intent or purpose was required by the plaintiffs to succeed on their claims.¹²⁴ Factors to consider would be the history of invidious actions, whether the procedures normally followed were changed, and whether there were any statements made by the legislature indicating a discriminatory intent.¹²⁵ Courts, such as the Eleventh Circuit, have added to these original factors with some of their own creation, including the foreseeability of discriminatory effects, awareness of the effects, and whether there was an alternative method to achieve the state’s goals.¹²⁶ This is a much higher burden for challengers to face than proving discriminatory impact — which the VRA allows — because this requires plaintiffs to overcome the hurdles of intent required under *Arlington Heights*.¹²⁷

To evaluate claims of violations of the VRA under discriminatory effect, courts turn to the seminal case of *Thornburg v. Gingles*.¹²⁸ This case,

120. *Id.* at (b).

121. *See* Fla. State Conf. of NAACP v. Lee, 576 F. Supp. 3d 974, 984 (N.D. Fla. 2021) (quoting *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338 (2021)); *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

122. *See League of Women Voters I*, 595 F. Supp. 3d 1042, 1076 (N.D. Fla. 2022) (“Plaintiffs must show that SB 90 has *both* a discriminatory impact and that the Legislature passed it with discriminatory intent.”).

123. *See* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977).

124. *See id.* at 266 (“[I]mpact alone is not determinative, and the Court must look to other evidence.”).

125. *See id.*

126. *See* *Greater Birmingham Ministries v. Sec’y of State*, 992 F.3d 1299, 1322 (11th Cir. 2021).

127. *See League of Women Voters I*, 595 F. Supp. 3d at 1076.

128. *See generally* 478 U.S. 30 (1986).

specifically referencing the VRA, laid out factors from a Senate Report to consider when determining whether an election regulation caused discriminatory effects.¹²⁹ These factors include the history of discrimination in the area, racially polarized voting, mechanisms used to enhance the non-minority votes, hindrances to minorities effectively participating in the elections, and racial campaigning.¹³⁰ These factors serve as guideposts, rather than an exhaustive list, and all tend to focus on whether there is a burden being placed on a certain group of voters and the size or degree of any disparities between voters.¹³¹

As Justice Kagan wrote in her dissent from *Brnovich*, “[w]hat does not prevent one citizen from casting a vote might prevent another” and thus a judge cannot make a broad assumption that there is or is not an inconvenience generally.¹³² Justice Kagan went further, using regulations against line-warming as an example, explaining that a provision banning distribution of food or water would not be “an inconvenience when lines are short; but what of when they are, as in some neighborhoods, hours-long?”¹³³ Even though these regulations were not at issue in that case, Justice Kagan aptly pointed out the arguments that would be made by plaintiffs who are challenging these prohibitions.

2. *Florida SB 90*

Challengers of Florida’s line-warming prohibition articulated that the limitations imposed, alongside the other restrictions, would particularly burden specific subsets of the community.¹³⁴ When reviewing text messages between representatives submitted as evidence of discriminatory intent, the district judge accosted the legislature and lamented that SB 90 was extremely partisan and “what one would expect to see if the Legislature was in fact motivated by race . . . [or] had some other *nefarious* motivation.”¹³⁵ Judge Walker explained that these messages, as well as statements made by representatives, showcased discriminatory intent against Black voters.¹³⁶ At the conclusion of his lengthy opinion, Judge Walker granted relief for the plaintiffs through section 3(c) of the VRA, which allows judges to order

129. *See id.* at 36–37.

130. *See id.* at 37.

131. *See* Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260, 1277 (N.D. Ga. 2021); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2336 (2021)

132. 141 S. Ct. at 2363 (Kagan, J., dissenting).

133. *Id.*

134. *See* Fla. State Conf. of NAACP v. Lee, 576 F. Supp. 3d 974, 987 (N.D. Fla. 2021).

135. *League of Women Voters I*, 595 F. Supp. 3d 1042, 1095 (N.D. Fla. 2022) (emphasis added).

136. *See id.* at 1076.

jurisdictions to preclear any election regulation for a set period of time.¹³⁷ Even though this relief is extremely rare, Judge Walker deemed that it was necessary for Florida to be required to submit certain legislation to his court for the next ten years because of the concern of discriminatory intent in the legislature.¹³⁸

The Eleventh Circuit reversed Judge Walker's opinion. Specifically, the Eleventh Circuit ruled that Judge Walker's position that the line-warming bans were unconstitutional and vague suffered from "flaws" and was "vulnerable."¹³⁹ It found that the district court's determination of intentional discrimination under *Arlington Heights* was unfounded and problematic.¹⁴⁰ The Circuit Court was particularly astounded that the district court opinion did not once mention the presumption of good faith in reviewing the legislature's actions, and found that the district court was quick to assume the worst.¹⁴¹

3. *Georgia SB 202*

In challenging Georgia's ban, the plaintiffs made clear that the enactment and enforcement of the bill would have a disparate impact against communities of color. Further, the intersectional impact of race, gender, and class create multiplied obstacles on the right to vote for many citizens, when considered alongside other regulations restricting means of accessing the polls.¹⁴² In December 2021, Judge Boulee ruled on a motion to dismiss that even under the *Arlington Heights* standard, the plaintiffs plausibly amounted a claim of discriminatory intent.¹⁴³ The Judge also ruled that the plaintiff had shown a plausible claim under the *Anderson/Burdick* standard that the regulation was an undue burden without any legitimate state interest in burdening the voters.¹⁴⁴

137. 52 U.S.C. § 10302.

138. *See League of Women Voters I*, 595 F. Supp. 3d at 1179 ("Pursuant to section 3(c) of the VRA, this Court retains jurisdiction for a period of ten years following the date this Order is entered. During that time, Florida may enact no law or regulation governing 3PVRs, drop boxes, or 'line warming' activities without submitting such law or regulation for preclearance.").

139. *League of Women Voters II*, 32 F.4th 1363, 1372 (11th Cir. 2022).

140. *See id.* at 1373.

141. *See id.*

142. *See Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1277 (N.D. Ga. 2021).

143. *See id.* at 1275.

144. *See id.* at 1278.

D. The *Purcell* Principle

In *Purcell v. Gonzalez*, the Supreme Court ruled that a court could decline to enjoin an unconstitutional regulation if an election is imminent.¹⁴⁵ This is because of the risk of voter confusion and potential voter deterrence if the election process is too daunting.¹⁴⁶ There is no bright-line test under the *Purcell* principle; courts conduct an analysis considering factors such as administrative obstacles, potential voter confusion, and the reasonableness of the time frame.¹⁴⁷

Even though the Florida judge's opinion was scathing, his power was extinguished by an Eleventh Circuit order to stay the injunction of the challenged statute, citing the *Purcell* doctrine.¹⁴⁸ The Florida statute included a provision regarding voter registration which would cause administrative difficulties in re-training on a new constitutional procedure, educating voters about it, and getting the system working properly.¹⁴⁹ These changes were deemed to be major administrative obstacles¹⁵⁰ — exactly what the *Purcell* principle is designed to prevent.¹⁵¹ The next statewide election was to be held in less than four months, which the Supreme Court held in *Merrill v. Milligan* is too short a time to enjoin an unconstitutional regulation.¹⁵²

In Georgia, Judge Boulee said that a preliminary injunction regarding the prohibition of line-warming in the Supplemental Zone would be appropriate, except that it would violate the *Purcell* principle as too close to the election that was less than three months away.¹⁵³ The state's arguments of

145. See 549 U.S. 1, 5 (2006).

146. See *id.*

147. See *In re Georgia Senate Bill 202*, No. 1:21-55555, 2022 WL 3573076, at *23 (N.D. Ga. Aug. 18, 2022). There is no definite timeline for when a change would be considered “on the eve of the election” and thus not appropriate for an injunction. *League of Women Voters II*, 32 F.4th 1363, 1371 (11th Cir. 2022). Overall, if the implementation of the changes would be reasonable, feasible, and without substantial burden in the time remaining before the election, then it could be appropriate to enjoin the regulation and permit the regulator to alter its process. See *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (arguing that four months from an election would be an adequate amount of time for feasible changes).

148. *League of Women Voters II*, 32 F.4th at 1371.

149. See *id.*

150. See *id.*

151. See *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

152. See *League of Women Voters II*, 32 F.4th at 1371; see *Merrill*, 142 S. Ct. at 888 (Roberts, C.J., dissenting).

153. See *In re Georgia Senate Bill 202*, No. 1:21-55555, 2022 WL 3573076, at *27 (N.D. Ga. Aug. 18, 2022); 2022 *Scheduled Elections Calendar of Events*, OFF. SEC'Y STATE ELECTIONS DIV., <https://sos.ga.gov/sites/default/files/forms/2022%20State%20Scheduled%20Elections%20S hort%20Calendar.pdf> [<https://perma.cc/QH7F-J3UH>] (last visited Apr. 4, 2023).

administrative consequences, voter confusion, and implementing changes between primary and general elections outweighed the plaintiff's burden.¹⁵⁴ Thus, both the Florida and the Georgia statutes were not granted relief because of the potential confusion and administrative hurdles of changing the election process.

While the district courts in Florida and Georgia found in favor of the plaintiff's claim that these prohibitions violate constitutional and federal protections, injunctive relief was not granted because elections were about to occur.¹⁵⁵ This resulted in the regulations being in place and enforceable for the current election cycle.

IV. THE IMPACT OF THESE RESTRICTIONS

These bans may seem innocuous and harmless to the election system in our country — they only prohibit handing out snacks. However, the complaints filed in these suits and the research done by organizations and journalists shed light on the discriminatory impact of these restrictions.¹⁵⁶

Recent bans nationwide impose restrictions on the opportunities to vote with ease by restricting absentee voting and mobile voting units, creating limitations on drop boxes, and limiting early voting opportunities.¹⁵⁷ These limitations burden minority communities the most by restricting their access to the ballot box.¹⁵⁸ Though these restrictions and reductions of polling places affect all citizens generally,¹⁵⁹ the harms from these bans fall disproportionately on those living in urban areas, including mainly people of

154. See *In re Georgia Senate Bill 202*, 2022 WL 3573076, at *27.

155. See *id.* at *27; *League of Women Voters II*, 32 F.4th at 1372.

156. See John Fortier et al., *Improving the Voter Experience: Reducing Polling Place Wait Times by Measuring Lines and Managing Polling Place Resources*, BIPARTISAN POL'Y CTR. (Apr. 2018), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2018/04/Improving-The-Voter-Experience-Reducing-Polling-Place-Wait-Times-by-Measuring-Lines-and-Managing-Polling-Place-Resources.pdf> [<https://perma.cc/RVD6-XWNB>] (“Longer lines are correlated with . . . precincts that are more urban, dense, and have higher minority populations.”); Ashley Lopez, *Activists in Florida Say Black Voters Have Seen Their Political Power Curtailed*, NAT'L PUB. RADIO (Aug. 21, 2022, 5:00 AM), <https://www.npr.org/2022/08/21/1118503562/florida-black-voters-election-laws-redistricting> [<https://perma.cc/24U2-HG7T>] (“A combination of new election laws and congressional redistricting has made it harder for Black communities in Florida to organize and vote.”).

157. See *Voting Laws Roundup: October 2022*, *supra* note 7.

158. See CHRISTOPHER FAMIGHETTI, BRENNAN CTR. FOR JUST., LONG VOTING LINES 2–3 [hereinafter FAMIGHETTI, LONG VOTING LINES], https://www.brennancenter.org/sites/default/files/analysis/Long_Voting_Lines_Explained.pdf [<https://perma.cc/F7TN-R58B>] (last visited Feb. 9, 2023).

159. See Fowler, *supra* note 58.

color.¹⁶⁰ While voter registration is increasing, especially in metropolitan locations, the amount of voting locations is decreasing.¹⁶¹ For example, the counties in Georgia with almost 50% of voters—because they are highly populated urban locations—have only 38% of the state’s polling spots.¹⁶² These reductions lead to fewer resources (including voting machines, poll workers, and poll books) allocated to the places that need it the most—urban areas and areas with a higher concentration of people of color.¹⁶³ One study found that as counties became less white-concentrated, their election resources were comparatively smaller.¹⁶⁴ In a study done after the Florida 2012 election, data reflected that “there were fewer machines and poll workers per Election Day eligible voter in Florida counties with higher percentages of black or Latino registered voters.”¹⁶⁵

Efforts in Georgia showed that food and water distribution “contributed to turnout numbers” in these most impacted neighborhoods.¹⁶⁶ When voters feel seen, supported, and fed, they are more likely to put in the extra time to stay in line. Bans on line-warming directly attack the practice of volunteers who go to those longer lines and provide the incentive to voters to stay in line, to vote, and to sacrifice the hours that they are losing to do so.¹⁶⁷

When looking at the totality of the circumstances surrounding these bans and their impact, the discriminatory effect on people of color becomes

160. See Fla. State Conf. of NAACP v. Lee, 576 F. Supp. 3d 974, 984 (N.D. Fla. 2021) (“[A] large fraction of the more than half-a-million Black voters and more than 700,000 Hispanic voters who cast VBM ballots in the 2020 General Election will likely be disproportionately burdened by the [challenged] provisions of SB 90.”); Hannah Klain et al., *Waiting to Vote*, BRENNAN CTR. FOR JUST. (Jun. 3, 2020), <https://www.brennancenter.org/our-work/research-reports/waiting-vote> [<https://perma.cc/YQ79-4WXL>]; Famighetti, *supra* note 158.

161. See Fowler, *supra* note 58.

162. See *id.*

163. See FAMIGHETTI, LONG LINES, *supra* note 158; CHRISTOPHER FAMIGHETTI ET AL., BRENNAN CTR. FOR JUST., ELECTION DAY LONG LINES: RESOURCE ALLOCATION 1–2 [hereinafter FAMIGHETTI ET AL., RESOURCE ALLOCATION], <https://www.brennancenter.org/sites/default/files/publications/ElectionDayLongLines-ResourceAllocation.pdf> [<https://perma.cc/94A2-Y8QD>] (last visited Feb. 9, 2023).

164. See Klain et al., *supra* note 160 (“The average county where the population became whiter had 63 voters per worker and about 390 voters per polling place. In comparison, the average county that became less white had 80 voters per worker and 550 voters per polling place.”).

165. See FAMIGHETTI ET AL., RESOURCE ALLOCATION, *supra* note 163.

166. *Sixth District Complaint*, *supra* note 16.

167. See Fla. State Conf. of NAACP v. Lee, 576 F. Supp. 3d 974, 985 (N.D. Fla. 2021); Bob King, *Confusion Reigns Among Florida Voters*, POLITICO (Nov. 6, 2012, 7:01 PM), <https://www.politico.com/story/2012/11/confusion-reigns-among-fla-voters-083401> [<https://perma.cc/U36G-3KKH>] (“We’re going to encourage people to stay in line . . . give them water, some snacks . . . That’s what we’re going to have to do to make sure people stay in [line to] vote.”).

clear.¹⁶⁸ People of color, namely Black and Latino voters, are “more likely to be poor, more likely to lack a high school or college degree, more likely to be essential workers, and more likely to lack access to transportation,” and thus, absentee voting is crucial for participation.¹⁶⁹ In Georgia’s 2020 election, 30% of people of color voted through the mail and the candidate preferred by Black voters gained the majority of their votes from absentee ballots.¹⁷⁰ Thus, when access to absentee voting is taken away or made unbearably confusing, people of color are the ones who must travel distances to get to these now-crowded polling locations and wait for hours.¹⁷¹ In Florida and Georgia, even when there was absentee voting, the polling places for communities of color were markedly longer than those in white neighborhoods, forcing those polling locations to stay open past close to account for those waiting in line.¹⁷² One voter in Georgia’s 2020 primary election recounted to journalists that some voters did not get inside the poll location until past midnight, causing irritation, anxiety, and anger.¹⁷³ The effects of SB 202 have already started to shine through in Georgia. In this year’s midterm election, mail voting dropped by over 80% from 2020, indicating the immense difficulties in voting absentee after the new restrictions.¹⁷⁴

This phenomenon was plainly showcased in Georgia’s election cycle prior to the enactment of the ban. For example, in a general election in Gwinnett County, Georgia, which serves predominantly people of color, “early voting lines began forming at 4:00 AM, three hours prior to the opening of polls, and during midday reported wait times of five to eight hours.”¹⁷⁵ The voting

168. See Appendix A.

169. *Fla. State Conf.*, 576 F. Supp. 3d at 985.

170. See *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1274 (N.D. Ga. 2021).

171. See *id.* (“[SB] 202 placed restrictions on many of the safe and secure options by which Black voters, voters of color, immigrant voters, poor voters, student voters, older voters, and voters with disabilities exercised their right to vote.”).

172. See *Sixth District Complaint*, *supra* note 16 (“[W]hile on Election Day polls closed at 7 p.m., individuals who are in line by the time the polls close are allowed to vote, and the vast majority of polling places that had to stay open late to ensure those waiting in line could cast their ballots were in majority-Black neighborhoods. Some voters waited hours to vote.”); FAMIGHETTI ET AL., *RESOURCE Allocation*, *supra* note 163 (“When we looked within Florida counties, precincts with higher percentages of black or Latino registered voters tended to have longer lines.”).

173. See Fowler, *supra* note 58.

174. See Nick Corasaniti, *Turnout Was Strong in Georgia, but Mail Voting Plummets After New Law*, N.Y. TIMES (Dec. 1, 2022), <https://www.nytimes.com/2022/12/01/us/politics/georgia-voting-election-law-midterms.html?smid=nytcore-ios-share&referringSource=articleShare> [<https://perma.cc/HU53-2T35>].

175. *Sixth District Complaint*, *supra* note 16.

locations in communities that were 90% white had a wait time of six minutes whereas communities that were ten percent or less white had an average of fifty-one minutes.¹⁷⁶ In Florida, reports showed that voters were waiting in line for several hours to get inside.¹⁷⁷

In these communities, long waits often mean leaving the line and losing the opportunity to vote for a myriad of reasons including one's health, time, or employment.¹⁷⁸ This is not just about the one-time election; it also serves as a deterrent for voters to show up in the future. A study done in Georgia showed that “nearly 200,000 people failed to vote in the 2014 election due to long lines in 2012.”¹⁷⁹ This deterrence and lack of access is a threat to democracy, faith in our elected officials, and the representativeness of governing bodies. These small gestures of kindness given to those waiting in line can be the solace that pushes voters to stay in line. Notwithstanding that, these acts could be as simple as giving out water to those in need — a basic human need.

V. CONCLUSION

Water and pizza may not seem like much in a broad-ranging statute that eliminates many ways to access voting. However, further examination into the effect and net result of these bans showcase the discriminatory impact they have for minority and urban communities suffering with long lines. While the litigation has been successful in preliminary motions, the recent shift in the judiciary to be more partisan, more stringent, and less democratic bears an unfortunate omen to the future of this line-warming practice. When bans, such as these, reflect serious racist and partisan agendas, court and voters alike must be cautious. The *Purcell* principle is being used as a tool of anti-democratic agents to allow discriminatory practices to continue throughout election cycles.

Alexander Hamilton wrote that elections must be regulated for order, but that the “choice of persons” must never be corrupted or abused.¹⁸⁰ We must persist to be the ones who wait in long lines to ensure our vote is cast, the ones who challenge regulations that have disproportionate impacts, and the ones who challenge legislators who attempt to campaign on and pass laws that burden the right to vote.

176. *See id.*

177. *See* Kimball, *supra* note 7.

178. *See* Complaint, United States v. State of Georgia, No. 1:21-cv-02575-JPB, 2021 WL 2629488 (N.D. Ga. June 25, 2021).

179. *Sixth District* Complaint, *supra* note 16.

180. THE FEDERALIST NO. 59 (Alexander Hamilton).

APPENDIX A: STUDY ON WAIT TIMES FOLLOWING 2012 ELECTIONS¹⁸¹

APPENDIX A: SUMMARY OF FINDINGS FROM STATEWIDE AND COUNTY MODELS

	Maryland	South Carolina	Florida
Who Waited Longer in Lines	Latino	Blacks	Latino
Minorities Had Fewer	Machines (Blacks & Latinos)	Machines (Blacks & Latinos) Poll Workers (Latinos)	Poll Workers (Latinos)
Factors that Drove Long Lines	Number of Machines	Race of Voter (Black) Number of Machines Number of Poll Workers	Number of Machines Number of Poll Workers

Figure 3. Statewide Regression Findings. Race and resource allocation relationship to line length.

Variation Within Counties	Maryland	South Carolina	Florida
Who Waited Longer in Lines	Blacks Latinos	Blacks Latinos	Blacks Latinos
Minorities Had Fewer			Machines (Black & Latino) Poll Workers (Black & Latino)
Factors that Drove Long Lines	Race of Voter (Black) Number of Machines	Race of Voter (Black) Number of Machines Number of Poll Workers	Race of Voter (Latinos & Blacks) Number of Poll Workers

Figure 4. Regression Findings from Models Measuring Variation Within Counties. Race and resource allocation relationship to line length.

181. See FAMIGHETTI ET AL., RESOURCE Allocation, *supra* note 163.

APPENDIX B: REVIEW OF LEGAL CHALLENGES TO SB 90 & SB 202

SB 90 Challenges			
<i>Fla. State Conf. of NAACP v. Lee</i> , 576 F. Supp. 3d 974 (N.D. Fla. 2021) Defendant’s Motion for Summary Judgment Denied and Granted in Part ¹⁸²			
Standing Ruling	First Amendment Ruling	VRA Ruling	<i>Purcell</i> Ruling
<p>“[T]his Court recognized Plaintiff’s cognizable injuries under a diversion-of-resources theory and an associational standing theory at the pleading stage. Now Plaintiff’s have put meat on the bones to show that the challenged provisions burden their members’ and constituents’ voting rights by limiting access to drop boxes, voting line relief activities and expression, and voting by mail.”¹⁸³</p>	<p>“Plaintiffs have come forward with evidence suggesting that the challenged provisions impose at least some burdens on Florida’s electorate.”¹⁸⁴</p> <p style="text-align: center;">***</p> <p>“This Court must determine whether Plaintiff’s conduct implicates the First Amendment after hearing all the evidence at trial.”¹⁸⁵</p>	<p>“Plaintiffs offer enough evidence—at this stage — to support their claims under <i>Arlington Heights</i>.”¹⁸⁶</p> <p>“Plaintiffs must come forward with some evidence. And they have. <i>See, e.g.</i>, ECF No. 306-24 at 10–13 (explaining that — on average — Black and Latino voters are more likely to be poor, more likely to lack a high school or college degree, more likely to be essential workers, and more likely to lack access to transportation, and thus rely more heavily on absentee voting).”¹⁸⁷</p>	N/A

182. Motion for Summary Judgment was denied for the facial challenge under the First Amendment, but the court hinted that the Plaintiffs could change to an as-applied challenge moving forward.

183. *Fla. State Conf.*, 576 F. Supp. 3d at 981.

184. *Id.* at 986.

185. *Id.* at 993.

186. *Id.* at 984.

187. *Id.* at 985.

<i>League of Women Voters of Fla., Inc. v. Lee,</i> 576 F. Supp. 3d 1004 (N.D. Fla. 2021) Plaintiff's Motion for Summary Judgment Denied			
Standing Ruling	First Amendment Ruling	VRA Ruling	<i>Purcell</i> Ruling
<p>“Plaintiffs respond that they are injured by each of the challenged provisions, ‘which make it harder for them and their members to vote, require them to divert resources from other critical tasks, and both prevent them from engaging in expressive activity they would like to engage in and require them to say things they do not want to say’ . . . Plaintiffs have standing to proceed at the summary judgment stage.”¹⁸⁸</p>	<p>“[T]his Court's task is to balance Defendants’ proffered justifications for the challenged provisions against the burdens, if any, those provisions place on those voters for whom the provisions present an impediment to voting.”¹⁸⁹</p> <p>“[B]ecause material factual disputes abound, Defendants’ motion for summary judgment is denied.”¹⁹⁰</p> <p style="text-align: center;">***</p> <p>“[T]he issue of whether the distribution of food and water conveys a message may only be adjudicated on an as-applied challenge.”¹⁹¹</p>	N/A	N/A

188. *League of Women Voters of Fla., Inc. v. Lee*, 576 F. Supp. 3d 1004, 1010 (N.D. Fla. 2021) (quoting summary judgment motion).

189. *Id.* at 1011.

190. *Id.* at 1012 (emphasis omitted).

191. *Id.* at 1013. Thus, the motion for summary judgment on Plaintiff’s facial challenge was denied. *Id.*

<i>League of Women Voters of Fla., Inc. v. Lee</i> , 595 F. Supp. 3d 1042 (N.D. Fla. 2022) Order Granting Preliminary Injunction			
Standing Ruling	First Amendment Ruling	VRA Ruling	<i>Purcell</i> Ruling
<p>“[T]he resources Florida Rising Together is diverting to address the challenged portions of SB 90 would otherwise have been used to fund the organization's vaccine education canvass, support families facing eviction, fund the organization's climate emergency programming, and fund other civic engagement work in Florida.”¹⁹²</p> <p>“[Organizations focus on] creating educational materials to</p>	<p>“Plaintiffs have proved the likelihood is great that a reasonable person would interpret their ‘line warming’ activities to communicate an identifiable message.”¹⁹⁴</p> <p>“[E]xpanded language banning ‘engaging in any activity with the intent to influence or effect of influencing a voter’ is overbroad in violation of the First Amendment.”¹⁹⁵</p>	<p>“In backroom discussions, however, legislators were more cogent. Indeed, the only rationale for SB 90 that makes any sense — benefitting the Republican Party — was offered in a private text message chain. Finally, although legislators struggled to publicly explain why SB 90 was needed, its sponsor candidly admitted that it would harm Black voters.”¹⁹⁸</p>	<p>“[T]he [Supreme] Court has allowed its wholly judge-made prudential rule to trump some of our most precious constitutional rights.”²⁰⁰</p> <p>“[T]he closest election is roughly five months away. Plaintiffs ask for an injunction <i>preventing</i> changes to Florida's election law from going into effect; namely, Plaintiffs ask this Court to enjoin Defendants from enforcing <i>new</i> limitations on drop boxes, enforcing a <i>new</i> solicitation definition, enforcing <i>new</i> restrictions on 3PVRs” and injunctive relief was granted.²⁰¹</p>

192. *League of Women Voters I*, 595 F. Supp. 3d 1042, 1075 (N.D. Fla. 2022).

194. *Id.* at 1129.

195. *Id.* at 1138.

198. *Id.* at 1097–98.

200. *Id.* at 1172.

201. *Id.* at 1172–74.

<p>deliver to voters in its core counties, hiring more staff, and paying the additional fees for attending more community events to educate the public about SB 90, including the solicitation definition.”¹⁹³</p>	<p>“[G]iven the myriad constitutional infirmities discussed at length above with respect to the solicitation definition, this Court need not reach the constitutional question of whether this provision also violates the First Amendment[’s free speech right] as applied to Plaintiffs’ ‘line warming’ activities”¹⁹⁶ or the “constitutional question of whether these provisions also violate the Constitution under <i>Anderson-Burdick</i>.”¹⁹⁷</p>	<p>“One way, then, to measure whether this provision will have a disparate impact on Black or Latino voters is to determine whether Black and Latino voters are disproportionately likely to wait in line to vote . . . [and] minority voters spend more time waiting in line to vote than White voters.”¹⁹⁹</p>	<p>“[W]ithout preclearance, Florida can pass unconstitutional restrictions like the registration disclaimer with impunity. Litigation takes time; here, it has taken a year. And so, before litigation can run its course, the Legislature can merely change the law — as it has done here. The result is that Floridians have been forced to live under a law that violates their rights on multiple fronts for over a year. Without preclearance, Florida could continue to enact such laws, replacing them every legislative session if courts view them with skepticism. Such a scheme makes a mockery of the rule of law.”²⁰²</p>
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193. *League of Women Voters I*, 595 F. Supp. 3d at 1125.

196. *Id.* at 1140.

197. *Id.* at 1163.

199. *Id.* at 1106–07.

202. *Id.* at 1178.

<i>League of Women Voters of Fla., Inc. v. Fla. Sec’y of State,</i> 32 F.4th 1363 (11th Cir. 2022) Stay of the District Court’s ruling and injunction			
Standing Ruling	First Amendment Ruling	VRA Ruling	<i>Purcell</i> Ruling
N/A	“[T]he district court below [when ruling that SB 90 was overbroad] failed to contend with any of the plainly legitimate applications of the Solicitation Provision, and thereby arguably failed to balance its legitimate applications against its potentially unconstitutional applications.” ²⁰³	“[T]he district court’s historical-background analysis to be problematic. We have been clear that old, outdated intentions of previous generations should not taint a state’s legislative action forevermore on certain topics.” ²⁰⁴ “[T]he district court failed to properly account for what might be called the presumption of legislative good faith.” ²⁰⁵	“When the district court here issued its injunction, voting in the next statewide election was set to begin in <i>less</i> than four months (and local elections were ongoing). Moreover, the district court’s injunction implicates voter registration — which is currently underway — and purports to require the state to take action now, such as re-training poll workers.” ²⁰⁶

203. *League of Women Voters II*, 32 F.4th 1363, 1374 (11th Cir. 2022) (internal quotations omitted).

204. *Id.* at 1373 (internal quotations omitted).

205. *Id.* (internal quotations omitted).

206. *Id.* at 1371.

SB 202 Challenges			
<i>Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp</i> , 574 F. Supp. 3d 1260 (N.D. Ga. 2021) Defendant’s Motion to Dismiss Denied			
Standing Ruling	First Amendment Ruling	VRA Ruling	Purcell Ruling
<p>“AME Church alleges that it will be forced to divert much-needed and limited resources from its existing activities to initiatives, such as assisting constituents to understand and comply with SB 202’s requirements AME Church also asserts that SB 202’s prohibition of food and water distribution at the polls will result in the arrests of Black clergymen, lay leaders, and other volunteers.”²⁰⁷</p>	<p>“Here, the Amended Complaint contains detailed allegations of burdens that Plaintiffs assert the challenged provisions will impose on Georgia voters. Plaintiffs also maintain that there are no legitimate state interests that would support such burdens. <i>Anderson</i> and <i>Burdick</i> do not require more from Plaintiffs at the motion to dismiss stage.”²⁰⁹</p>	<p>“Complaint [is] consistent with the <i>Arlington Heights</i> factors and otherwise bear on the issue of intentional discrimination, the Court finds that Plaintiffs have stated a plausible discriminatory purpose claim.”²¹¹</p> <p>“Plaintiffs’ allegations identified above correspond with <i>Gingles</i> factors that may be relevant in this specific circumstance and ultimately weigh upon the issue of whether the political process in Georgia is equally open to all voters.”²¹²</p> <p>“[T]he Court finds that Plaintiffs have stated a VRA § 2 claim under both the intent and results tests.”²¹³</p>	N/A

207. *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1269 (N.D. Ga. 2021).

209. *Id.* at 1278.

211. *Id.* at 1275.

212. *Id.* at 1277.

213. *Id.*

<p>“The injuries Plaintiffs allege are directly traceable to SB 202, for which County and State Defendants, including the Governor, have enforcement responsibility.”²⁰⁸</p>	<p>“Taking as true Plaintiffs’ allegations that SB 202 establishes what type of conduct and communication is permissible while engaging with voters who are waiting in line and construing those allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have plausibly alleged that SB 202’s restrictions on line relief impinge on speech and/or expressive conduct in some way.”²¹⁰</p>		
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208. *Id.* at 1272.

210. *Id.* at 1279.

<i>United States v. Georgia</i>, 574 F. Supp. 3d 1245 (N.D. Ga. 2021), reconsideration denied sub nom. <i>In re Georgia Senate Bill 202</i>, 2022 WL 1516049 (N.D. Ga. Apr. 21, 2022)			
Defendant’s Motion to Dismiss Denied			
Standing Ruling	First Amendment Ruling	VRA Ruling	<i>Purcell</i> Ruling
N/A	N/A	<p>“[T]he Complaint alleges that factors such as socio-economic disparities that persist in the Black community, racially polarized voting in elections and Georgia’s history of voting-related discrimination interact with the challenged provisions of SB 202 to cause Black voters to have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice. These allegations have ‘a logical bearing on whether voting is “equally open” and affords equal “opportunity” to minority voters.’”²¹⁴</p> <p>“[W]hether the Court employs the <i>Arlington Heights</i> framework or the totality of the circumstances approach, the Complaint sufficiently pleads a VRA § 2 claim.”²¹⁵</p>	N/A

214. *United States v. Georgia*, 574 F. Supp. 3d 1245, 1251 (N.D. Ga. 2021), reconsideration denied sub nom. *In re Georgia Senate Bill 202 II*, No. 1:21-CV-02575-JPB, 2022 WL 1516049 (N.D. Ga. Apr. 21, 2022).

215. *Georgia*, 574 F. Supp. 3d at 1253.

<i>In re Georgia Senate Bill 202, No. 1:21-mi-55555-JPB, 2022 WL 3573076 (N.D. Ga. Aug. 18, 2022)</i> Plaintiff's Motion for Injunctive Relief Denied			
Standing Ruling	First Amendment Ruling	VRA Ruling	<i>Purcell</i> Ruling
N/A	<p>“[T]he 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.”²¹⁶</p> <p>“[T]he Court finds that when implemented in the Buffer Zone, the Food, Drink and Gift Ban is reasonable and does not significantly impinge on Plaintiffs’ constitutional rights.”²¹⁷</p> <p>“[T]he Court finds that imposing the Food, Drink and Gift Ban in the Supplemental Zone is unreasonable and significantly impinges on Plaintiffs’ constitutional rights.”²¹⁸</p>	N/A	<p>“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.”²¹⁹</p>

216. *In re Georgia Senate Bill 202*, 2022 WL 3573076, at *11.

217. *Id.* at *9.

218. *Id.* at *20.

219. *Id.* at *25.