

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

**RHONDA J. MARTIN, DANA
BOWERS, JASMINE CLARK,
SMYTHE DUVAL, AND JEANNE
DUFORT,**

Plaintiffs,

v.

BRIAN KEMP, et al.,

Defendants.

Civil Action No.

1:18-cv-04776-LMM

**BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN
SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY
INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
ARGUMENT.....	2
I. The Civil Rights Act Prohibits Gwinnett County from Rejecting Ballots for Immaterial Errors and Omissions Such as “Year of Birth” on Absentee Ballot Envelopes.	2
II. Gwinnett County’s Absentee Ballot Rejection Protocol Is an Unconstitutional, Undue Burden on Voting Because the County Has No Cognizable Governmental Interest in Violating the Civil Rights Act.	8
CONCLUSION	11
CERTIFICATE OF COMPLIANCE	12
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Armstrong v. Exceptional Child Ctr., Inc.</i> , 135 S. Ct. 1378 (2015)	8
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	9
<i>Fla. State Conference of the NAACP v. Browning</i> , 522 F.3d 1153 (11th Cir. 2008)	2, 3, 4

Statutes

52 U.S.C. § 10101(a)(2)(B)	2, 3, 7
Ga. Code Ann. § 21-2-226.....	4
Ga. Code Ann. § 21-2-384(c)(1)	5, 6, 8
Ga. Code Ann. § 21-2-386(a)(1)(B)	5
Ga. Code Ann. § 21-2-386(a)(1)(C)	7

Other Authorities

Giovanna Drpic, <i>Voters Question Absentee Ballot Envelopes</i> , CBS 46 (Oct. 12, 2018).....	6
Hearing on H.R. 7152 before the H. Comm. on the Judiciary, 88th Cong. 2720 (1963)	10

INTEREST OF *AMICUS CURIAE*

Campaign Legal Center (“CLC”) is a leading non-partisan, nonprofit election law organization. CLC litigates, develops policy, and advocates on a range of democracy issues, including by participating in voting rights cases across the country. CLC aims to ensure the protection of Americans’ voting rights to encourage widespread and equal participation in the democratic process. CLC has expertise in legal issues related to the Voting Rights Act, the Civil Rights Act, and the fundamental right to vote protected by the Fourteenth Amendment. CLC is actively working to ensure the rights of Georgia voters are protected. CLC is plaintiffs’ counsel in *Georgia Coalition for the Peoples’ Agenda, Inc., et al. v. Kemp*, No. 1:18-cv-04727-ELR, a case challenging Georgia’s “exact match” registration system, and has also engaged in a public education effort to attempt to remedy the issue of voter confusion surrounding “pending” registrations for those affected by the “exact match” system.

CLC encourages voters to participate in mail-in and early voting, and advocates for election systems designed to streamline those voting options to make the franchise as accessible as possible to all eligible voters. In that regard, CLC has a particular interest in ensuring that no absentee ballots are rejected for immaterial errors and omissions unrelated to the qualification of

the voters, such as the errors at issue in this case, which have caused the disproportionately high rejection of absentee ballots in Gwinnett County.

ARGUMENT

I. The Civil Rights Act Prohibits Gwinnett County from Rejecting Ballots for Immaterial Errors and Omissions Such as “Year of Birth” on Absentee Ballot Envelopes.

Gwinnett County may not burden the right to vote by rejecting absentee ballots for immaterial errors and omissions, such as missing or erroneous entries for “year of birth” on the absentee ballot envelope. Congress included a provision in the Civil Rights Act (“CRA”) to ensure that such immaterial information requests did not pose a barrier to voting. The CRA provides that government officials may not:

deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B).

The Eleventh Circuit has not yet decided the governing standard for “materiality” under the CRA. In *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), the plaintiffs claimed that a Florida law requiring a match between the voter identification number on a registration application and the state’s database of those numbers violated the

CRA's materiality provision. The court noted that if a "minimal relevance" standard applied, the numbers were likely material, but if an "outcome-determinative" standard applied, then the state "would have to meet a higher burden in demonstrating that the information required to make a match is necessary or sufficient, along with other information available, to determining eligibility." *Id.* at 1174. The court did not decide the appropriate CRA materiality standard, however, because it concluded that Congress's decision to require the collection of the voter identification number in the Help America Vote Act ("HAVA") meant they were necessarily material, and thus Florida's law did not conflict with the CRA.

The Court also need not decide the question of whether to apply a "minimal relevance" standard or an "outcome-determinative" governing standard here, because under either standard, Gwinnett County's current practice of rejecting absentee ballots with errors or omissions on the "year of birth" line on the envelope is unlawful.¹ This is so for a number of reasons.

¹ If the Court concludes it is necessary to decide the relevant materiality standard, it should reject the "minimal relevance" standard as incompatible with Congress's purpose in enacting § 10101(a)(2)(B). As the Eleventh Circuit has explained, Congress chose a "broad[] remedy," *Browning*, 522 F.3d at 1173, by enacting this provision; it did not limit the provision to only prohibiting nefarious efforts to disenfranchise voters over trivial information requests. If the "minimal relevance" standard were adopted, even those nefarious attempts, such as "list[ing] the exact number of months and days in

First, the County cannot send the voter an absentee ballot until it first determines the voter is qualified as part of the registration process. *See* Ga. Code Ann. § 21-2-226 (requiring county board of registrars to determine eligibility upon receipt of voter registration application and to notify applicant of eligibility determination). Thus, registrars have already determined that the voters' age qualifies them to vote before issuing absentee ballots (and the envelopes asking for "year of birth"). Therefore, the information on the absentee ballot envelope cannot be material to determining the voters' qualifications. And to the extent the year of birth is omitted (or the voter makes a mistake, such as listing the current date), the County already has the information on file as part of the voter's registration record, which is sufficient to confirm the voter's eligibility.² *See Browning*, 522 F.3d at 1174 (noting relevance of "other information available" to officials).

[a voter's] age," *id.*, would pass as minimally relevant to determining qualifications. The Court should not adopt a standard that would make the statute meaningless.

² Moreover, "year of birth" alone may not suffice to establish whether a voter is qualified, because a voter may not turn 18 until after the election, sometime in November or December. The absentee ballot envelopes do not ask for the month or day of birth necessary to determine age eligibility, and thus "year of birth" cannot be a material source of information in determining voters' qualification to vote.

Second, the legislature did not include “year of birth” as information requested on the envelope in order to assess voters’ qualifications; rather it is included to aid in confirming the identity of the voter. *See* Ga. Code Ann. § 21-2-386(a)(1)(B) (requiring registrar to “compare the identifying information on the oath” upon receipt of the ballot). The state may have an important interest in determining that the person who fills out an absentee ballot is actually its intended recipient. But the state employs at least two other methods of verifying the identity of the absentee voter. First, the state requires the voter to sign an affirmation under penalty of perjury that she is qualified and entitled to vote in the election in which the ballot is to be cast. *See id.* §21-2-384(c)(1). Second, the state compares the signature of the voter to the one on file with his or her registration.³ *See id.* § 21-2-386(a)(1)(B). Requiring the voter to list her year of birth in addition to these measures is not a necessary or reliable method for confirming the voter’s identity or eligibility. Indeed, a voter’s year of birth is widely available to anyone conducting a simple internet search, and does nothing to prevent voter impersonation.⁴ So it cannot be

³ Any reliance on signature matching to verify the identity of the voter must include procedural safeguards, such as notice and opportunity to cure, to ensure a voter is not erroneously deprived of the right to vote.

⁴ To the extent the year of birth aids in differentiating between voters with the same name living at the same address—for example “John Smith” and “John

material to determining voters' qualifications—it is not even used for that purpose.

Third, the legislature did not make “year of birth” mandatory information, but rather required that counties include an oath “in substantially the [] form” as provided by statute. *See id.* § 21-2-384(c)(1). Indeed, other counties have continued using the old envelopes that ask the voters to provide their month and day of birth (but not the year), for the November 2018 election and those ballots have not been rejected.⁵ The year of birth cannot possibly be *material* information to determining qualifications if some counties are not even requesting the information on their absentee ballot envelopes.

Fourth, year of birth cannot be material because only absentee voters are asked to provide this information at the time of voting. While Georgia voters

Smith, Jr.,” Gwinnett County’s practice of rejecting *all* ballots lacking “year of birth” information is too blunt an instrument. If that problem presents itself, the County can take steps to verify the identity of the voter on a case-by-case basis.

⁵ *See* Giovanna Drpic, *Voters Question Absentee Ballot Envelopes*, CBS 46 (Oct. 12, 2018), <https://bit.ly/2Cxwe0n> (noting that “since there was inventory of the old ‘month and day’ forms, those are still being handed out to voters”); *id.* (quoting representative of Cobb County elections office as saying “[e]ither month and day, or if they write the year, no matter which is on the form, we’ll accept it”).

are required to present a photo ID when they vote in person, not every form of acceptable ID includes the year of birth.⁶ If year of birth were in any way material to determining voter qualification at the time of voting, it would be required as part of in-person voting as well.

Voters prove age eligibility when they register, not when they mail their absentee ballot. The “year of birth” information on the absentee ballot envelope is immaterial to determining whether the voter is qualified, and Gwinnett County may not reject ballots because of errors or omissions related to the envelope’s request for “year of birth.” *See* 52 U.S.C. § 10101(a)(2)(B). That is so regardless of whether the County thinks that, under a strict interpretation of Georgia law, it must reject any absentee ballot lacking perfect oath information on the envelope. *See* Ga. Code Ann. § 21-2-386(a)(1)(C) (requiring registrar to reject ballots where “the elector has failed to sign the oath, or if the signature does not appear to be valid, or if the elector has failed to furnish *required* information or information so furnished does not conform with that on file”) (emphasis added). Even if Gwinnett County were correct in its reading of this

⁶ For example, Georgia accepts state and federal government employee photo IDs, many of which do not list a date or year of birth.

statute,⁷ the federal CRA supersedes any contrary state law purporting to require rejection of ballots based upon errors or omissions immaterial to determining voters' qualifications. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (noting that courts "must not give effect to state laws that conflict with federal laws"). The CRA prohibits Gwinnett County from rejecting absentee ballots based upon errors or omissions related to the space for "year of birth" on the envelope. And that information is, in any event, of little (or no) value in confirming the ballot was completed by the intended voter, as discussed above.

II. Gwinnett County's Absentee Ballot Rejection Protocol Is an Unconstitutional, Undue Burden on Voting Because the County Has No Cognizable Governmental Interest in Violating the Civil Rights Act.

Because the CRA prohibits Gwinnett County's practice of rejecting absentee ballots with errors or omissions related to the "year of birth" information, Gwinnett County cannot show that it has a governmental interest in requiring this information. Thus, plaintiffs must prevail on their Fourteenth Amendment undue burden claim. Plaintiffs' current complaint does not raise

⁷ The statute does not explain *which* information is "required," and nothing in the text of the oath printed on the ballot indicates that the voter is *required* to provide their year of birth in order for their ballot to be counted. *See* Ga. Code Ann. § 21-2-384(c)(1).

a specific cause of action under the CRA’s materiality provision,⁸ but that provision is nonetheless central to deciding plaintiffs’ undue burden claim. That is so because in weighing whether Gwinnett County has erected an unconstitutional undue burden on voting, the Court must consider “the precise interests put forward by the State,” and whether the restriction is “narrowly drawn to advance a state interest of compelling importance.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

Whatever interests Gwinnett County articulates for rejecting absentee ballots that contain errors or omissions with regard to the “year of birth” date on the envelope, they cannot possibly constitute sufficient interests—let alone *compelling* ones—when the CRA prohibits the County from rejecting ballots on that basis. Simply put, a governmental body does not have a cognizable interest in violating federal law, and so the County cannot impose *any* restriction—regardless of how small or great the severity—that results in

⁸ As discussed above, Gwinnett County’s absentee ballot rejections plainly violate the CRA’s materiality provision, and should the Court wish to order relief on that basis, rather than deciding the constitutional questions currently raised in plaintiff’s complaint, *amicus* respectfully suggests that the Court direct plaintiffs to amend their complaint following the emergency hearing on the motion for a preliminary injunction, given the urgency of this matter and the importance of the fundamental right at issue.

ballots being rejected because the voter failed to provide information that is immaterial to the qualification determination. By definition, such a restriction is an undue burden in violation of the Fourteenth Amendment; conduct that violates the CRA cannot serve as the foundation for a cognizable governmental interest supporting a burden on the right to vote. Congress's purpose in enacting the CRA was to eliminate barriers to voting that too often disenfranchised racial minorities. *See* Hearing on H.R. 7152 before the H. Comm. on the Judiciary, 88th Cong. 2720 (1963) (statement of Robert F. Kennedy, U.S. Atty. Gen.) ("To meet our national needs the law enacted by Congress must effectively eliminate racial discrimination in voting, in public accommodations, in education, and in employment."). Congress's judgment is due great weight, particularly here where the evidence shows stark racial disparities in Gwinnett County's rejection of absentee ballots.

Plaintiffs are entitled to a preliminary injunction because Gwinnett County's violation of the CRA necessarily means that its rejection of absentee ballots for errors or omissions related to the "year of birth" information on the envelope is an undue burden on voting in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant plaintiffs' motion for a preliminary injunction and enjoin Gwinnett County from rejecting absentee ballots based upon errors or omissions related to the "year of birth" on the envelope.

Dated: October 22, 2018 Respectfully submitted,

/s/ Bryan L Sells

Bryan L. Sells

Georgia Bar No. 635562

The Law Office of Bryan L. Sells, LLC

P.O. Box 5493

Atlanta, GA 31107-0493

(404) 480-4212

bryan@bryansellslaw.com

Mark P. Gaber (*pro hac vice forthcoming)

Danielle M. Lang (*pro hac vice forthcoming)

Campaign Legal Center

1411 K Street NW, Ste. 1400

Washington, DC 20005

(202) 736-2200

mgaber@campaignlegalcenter.org

dlang@campaignlegalcenter.org

*Counsel for Amicus Curiae Campaign Legal
Center*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief has been prepared in accordance with the font type and margin requirements of LR 5.1, using font type Century Schoolbook and a point size of 13.

/s/ Bryan L. Sells
Bryan L. Sells

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Bruce Brown: bbrown@brucepbrownlaw.com

Cristina Correia: ccorreia@law.ga.gov

Russell Willard: rwillard@law.ga.gov

Anne Lewis: awl@sbllaw.net

Frank B. Strickland: fbs@sbllaw.net

Bryan Tyson: bpt@sbllaw.net

/s/ Bryan L. Sells
Bryan L. Sells