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

RHONDA J. MARTIN, DANA BOWERS, JASMINE CLARK, SMYTHE DUVAL, JEANNE DUFORT, and THE GEORGIA COALITION FOR THE PEOPLE'S AGENDA, INC., Plaintiffs, and CAROLYN BOURDEAUX FOR CONGRESS and FAZAL KHAN, Plaintiff-Intervenors, v. BRIAN KEMP, SECRETARY OF STATE OF GEORGIA; REBECCA N. SULLIVAN, RALPH F. "RUSTY" SIMPSON, DAVID J. WORLEY, and SETH HARP; STEPHEN DAY, JOHN MANGANO, ALICE O'LENICK, BEN SATTERFIELD, and BEAUTY BALDWIN, Defendants.	Civil Action File No. 1:18-cv-04776 LMM

[PROPOSED] PLAINTIFF-INTERVENORS' BRIEF IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE AND FOR A PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff-Intervenors CAROLYN BOURDEAUX FOR CONGRESS and FAZAL KHAN respectfully submit the following memorandum of law in support of their emergency motion for a temporary restraining order and preliminary injunction and order to show cause why a temporary restraining order and/or preliminary injunction should not issue. Specifically, Proposed Plaintiff-Intervenors move for a temporary restraining order prohibiting Defendants, their officers, employees, and agents, all persons acting in active concert or participation with Defendants, or under Defendants' supervision, direction, or control, and all other persons within the scope of Federal Rule of Civil Procedure 65, from certifying the 2018 General Election results for the U.S. House of Representatives Congressional District 7 until all absentee ballots that were improperly rejected in violation of the Civil Rights Act, and the First and Fourteenth Amendments and pursuant to 42 U.S.C. §§ 1983 and 1988 have been counted. Proposed Plaintiff-Intervenors further move for a preliminary injunction to order Defendants to count the unlawfully rejected ballots and include them in the certified returns of the election. Proposed Plaintiff-Intervenors further move for a preliminary injunction requiring Defendants to allow voters to cure absentee ballots on which they failed to sign

the oath and extending the cure period to three business days after this Court issues any such Order.

I. BACKGROUND

Under Georgia law, any eligible elector may vote by mail ("absentee mail voters" or "mail voters"). Given the highly-publicized dangers associated with voting in person using Georgia's paperless Direct Recording Electronic ("DRE") voting system, applications for absentee ballots surged in advance of the 2018 general elections. Democratic, Republican, and Libertarian gubernatorial candidates all urged Georgia voters to vote absentee by mail, and Georgia's Libertarian candidate for Secretary of State made the same public recommendation.

Gwinnett County voters who request an absentee ballot receive two return envelopes. The absentee ballot should be placed inside the smaller envelope, which is provided to ensure the secrecy of the ballot. The smaller ballot-secrecy envelope is then placed inside of the larger envelope. The outer envelope includes a form printed in small-type font in English and Spanish, which includes an oath for a voter to swear to his or her eligibility. *See* Complaint, Ex. D. There are also blank spaces provided for a voter's year of birth and address. The envelope does not indicate that providing these details

is mandatory. Because this information is provided on the outer envelope, it is visible when the envelope is returned by mail.

The promise of convenient and reliable no-excuse absentee voting has proven to be false for more than 900 Georgia voters in Gwinnett County, who now stand to be disenfranchised as a result of Defendants' draconian interpretation of O.C.G.A. § 21-2-3986(a)(1)(C), which Defendants now interpret to allow election officials to reject absentee ballots on the basis of an error or omission in the voter's year of birth or address with no opportunity for the voter to cure. Defendants also have not provided any opportunity for a voter to cure an unsigned absentee ballot.

Gwinnett County, in particular has rejected an alarmingly high percentage of absentee ballots cast in the 2018 General Election. As of November 11, the Secretary of State's data shows that Gwinnett County had rejected 901 absentee mail ballots, not including voters whose absentee ballots were originally rejected but who were able to cast ballots on Election Day or ballots rejected due to alleged signature mismatches. Of these 901 rejected absentee ballots, at least 265 ballots were rejected solely because voters omitted the year of their birth, and at least another 58 rejections were solely because the voters erroneously wrote that they were born in 2018. Gwinnett

County rejected at least another 8 ballots for failing to provide a residential address and rejected at least 22 ballots because they omitted both the voter's address and year of birth. The County has rejected 394 ballots for unspecified "insufficient oath information," which is an undefined rejection code, and could include any one or several of these deficiencies. The remaining 154 rejections were for signature omissions and other alleged discrepancies.

Under Georgia law, an absentee ballot *may* be rejected "[i]f 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 in the registrar's or clerk's office, or if the elector is otherwise found disqualified to vote." O.C.G.A. § 21-2-386(a)(1)(C). Federal law, however, prohibits states from using immaterial errors or omissions in information provided by the voter as a barrier to voting. Under the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), any person acting under color of law shall 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.

While a failure to furnish required information is a ground for rejection under O.C.G.A. § 21-2-386(a)(1)(C), the Georgia Supreme Court has held that nothing in the statute mandates the "automatic rejection of any absentee ballot lacking the elector's place and/or date of birth." *Jones v. Jessup*, 279 Ga. 531, 533 n.5 (2005).

Further, the Defendant Secretary of State has already conceded that "where the year of birth is not necessary to confirm the identity of a voter, it is not otherwise required by O.C.G.A. § 21-2-386(a)(1)(C)." *Martin v. Kemp*, No. 18-4776 Dkt. No. [36] at 3–4; *see also In re Burke Cty. Bd. of Election and Registration*, SEB Case No. 2011-000095 (Feb. 11, 2016), attached as Worley Decl. Ex. B (concluding accepting absentee ballots that were "missing a street address" did not violate Georgia law); *In re Gale and McIntosh Cty. Bd. of Election and Registration*, SEB Case No. 2012-131 (Feb. 1, 2016) at 11, attached as Worley Decl. Ex. A (concluding accepting absentee ballots that were missing a date of birth, address, or listed a P.O. Box number as a residential address did not violate Georgia law); *see also In re Haymans*, SEB Case No. 2012-31 (May 22, 2018) (dismissing charge for violating O.C.G.A. § 21-2-386(a)(1)(C) brought against election officials who accepted absentee ballots without all of the requested information in the oath). Indeed, the

Attorney General's office and the State Election Board have acknowledged that federal law "*prohibits* the denial of the right to vote 'because of an error or omission on any record or paper . . . if such error or omission is not *material* in determining whether such individual is qualified under State law to vote in such election.'" *See, e.g.* Worley Decl. Ex. A at 12 (emphasis in original) (citing 52 U.S.C. § 10101).

Plaintiff-Intervenors Bourdeaux for Congress and Fazal Khan, bring this Emergency Motion for Temporary Restraining Order and Order to Show Cause to restrain the Defendants from certifying the 2018 General Election results until all absentee ballots that were improperly rejected in violation of the Civil Rights Act, the First and Fourteenth Amendments, and 42 U.S.C. §§ 1983 and 1988, are counted. Plaintiff-Intervenors further move for a preliminary injunction requiring such votes to be counted and included in the certified totals. Absent emergency relief, these 901 Gwinnett County voters whose ballots were improperly rejected will be disenfranchised, not based on their eligibility to vote, but rather, because of Defendants' unlawful interpretation of O.C.G.A. § 21-2-386(a)(1)(C).

II. ARGUMENT

A. Preliminary Injunction Standard

"A party seeking a preliminary injunction bears the burden of establishing its entitlement to relief." *Scott v. Roberts*, 612 F.3d 1279, 1289–90 (11th Cir. 2010). "To obtain such relief, the moving party must show: (1) a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury outweighs possible harm that the injunction may cause the opposing party; and (4) that the injunction would not disserve the public interest." *GeorgiaCarry.org v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015). The standard for a temporary restraining order is the same. *See Parker v. State Bd. of Pardons and Paroles*, 275 F.3d 1032, 1034-35 (11th Cir. 2001).

B. Plaintiff is Likely to Succeed on the Merits.

1. Rejecting Absentee Ballots for Errors in the Voter's Address or Year of Birth Violates the Materiality Provision of the Civil Rights Act.

It is a violation of federal law to "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).[1] This requirement of the Civil Rights Act is commonly known as the "Materiality Provision."

The Materiality Provision "forbids the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote." *Schwier*, 340 F.3d at 1294. "This provision was intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Id.* "[O]ne 'such tactic[ ] [was to] disqualify[ ] an applicant who failed to list the exact number of months and days in his age.'" *Id.* (quoting *Condon v. Reno,* 913 F.Supp. 946, 949–50 (D.S.C. 1995)).

"[T]he only *qualifications* for voting in Georgia are U.S. Citizenship, Georgia residency, being at least eighteen years of age, not having been adjudged incompetent, and not having been convicted of a felony." *Schwier*, 340 F.3d at 1297 (emphasis in original) (citing O.C.G.A. § 21–2–216). When voters sign the ballot envelope oath, they "swear or affirm" that they "possess the qualifications of an elector required by the laws of the State of Georgia." O.C.G.A. § 21-2-

[1] 52 U.S.C. § 10101(a)(2)(B) was previously codified at 42 U.S.C. § 1971(a)(2)(B). The Eleventh Circuit has recognized that the Materiality Provision is enforceable by a private right of action. *Schwier v. Cox*, 340 F.3d 1284, 1296–97 (11th Cir. 2003).

384(c)(1). Although the form requests "Elector's Residence Address" and the "Year of Elector's Birth," *id.*, errors in responses to either question do not put the voter's eligibility in genuine doubt, particularly given that this information has already been provided under penalty of perjury on the voter registration application.[2] The rejection of their ballots on those grounds is therefore unlawful, and Plaintiff-Intervenors are likely to prevail on Count I of their Complaint.

2. Defendants' Rejection of These Ballots Unconstitutionally Imposes A Severe Burden on the Right to Vote Without Advancing Any State Interest.

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[2] The voter registration application also requires voters to swear or affirm they meet each of those qualifications:

> I SWEAR OR AFFIRM:
> Are you a citizen of the United States of America?
> Check One: Yes □ No □
> Will you be 18 years of age on or before election day?
> Check One: Yes □ No □
> If you checked "No" in response to either of these questions, do not complete this form.
> I SWEAR OR AFFIRM THAT:
> I reside at the address listed above.
> I am eligible to vote in Georgia.
> I am not serving a sentence for having been convicted of a felony involving moral turpitude.
> I have not been judicially declared to be mentally incompetent.

State of Georgia Application For Voter Registration, http://sos.ga.gov/admin/files/GA_VR_APP_2018.pdf (last visited Nov. 11, 2018). *See also* Register To Vote In Your State By Using This Postcard Form and Guide ("Federal Form") at 3, 7, available at https://vote.gov/files/federal-voter-registration_1-25-16_english.pdf (last visited Nov. 11, 2018) (providing for the same attestation via item 9 of the Georgia instructions). Accordingly, it is unnecessary for voters to provide any additional information on the absentee ballot form itself to establish they are qualified to vote.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Accordingly, election laws burdening that fundamental right are subject to searching judicial scrutiny. *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1256-57 (N.D. Fla. 2016).

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court laid out a "flexible standard" to resolve constitutional challenges to state election laws that burden voting rights. *See Anderson*, 460 U.S. at 789. "A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 433–34 (quotation marks and citation omitted). When a regulation subjects the right to vote to a "severe" restriction, the restriction "must be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 280 (1992). Less severe burdens remain subject to balancing. But "[h]owever slight" the burden on the right to vote

"may appear," "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality) (quoting *Norman*, 502 U.S. at 288-89).

Here, the rejection of 901 absentee ballots would result in these voters' disenfranchisement in the 2018 general election. These rejections are based on errors and omissions on a form printed in tiny type and provides no clear warning that the information requested is mandatory. And the state does not provide a reasonable opportunity to cure the alleged defects. That sort of categorical denial of the right to vote on the basis of the voter's clerical precision plainly amounts to a severe burden on the franchise. *See, e.g.*, *Ayers-Schaffner v. DiStefano*, 860 F. Supp. 918, 921 (D.R.I.), *aff'd*, 37 F.3d 726 (1st Cir. 1994) ("A complete denial of the right to vote is a restriction of the severest kind."); *see also Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 585-87 (6th Cir. 2012) ("summary" and "automatic" nature of disqualification of right-place, wrong-precinct ballots suggests burden on right to vote is "substantial").

Given the likelihood of total disenfranchisement of more than 900 Georgia voters based on Defendants' rejection for errors and omissions on the absentee ballot return envelope, Defendants must assert an interest that is "sufficiently weighty" to justify rejecting and discarding scores of absentee ballots and show

that their official actions in discarding such absentee ballots is narrowly drawn to further that interest. *Norman*, 502 U.S. at 288-89. Defendants cannot do so. There is no valid, let alone compelling, reason to disenfranchise more than 900 voters based on minor errors on the voters' absentee ballot envelopes.

Nor can the Defendants justify not providing voters who submitted ballots without a signature an opportunity to cure. Defendants have already implemented this Court's order requiring that voters whose absentee ballot signatures purportedly do not match their signatures on file to be cured on the same terms as provisional ballots. The state cannot justify failing to afford voters who omitted their signature the same opportunity after notice and a reasonable opportunity to cure the deficiency.

Plaintiff-Intervenors are therefore likely to prevail on Count II of their Complaint.

3. The Unequal Standards to Reject Absentee Ballots in Forsyth County and Gwinnett County Violate Equal Protection.

The Equal Protection Clause prevents states from "valu[ing] one person's vote over that of another" by "arbitrary and disparate treatment." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Equality is required not only in the "initial allocation of the franchise," but also to "the manner of its exercise." *Id.* "[T]he question that

is of constitutional dimension [is]: Are voters in [one county] less likely to cast an effective vote than voters in [another county]?" *Wexler v. Anderson*, 452 F.3d 1226, 1231 (11th Cir. 2006).

Forsyth County absentee voters were far less likely to have their votes rejected than Gwinnett County voters. More than six percent of absentee ballots in Gwinnett County have been rejected due to purported errors or omissions in the year-of-birth, address, signature, or other unspecified deficiencies in the oath submitted by absentee voters. *See* Complaint, Exs. A, B. Forsyth County has not rejected any ballots due to errors or omissions in the voter's address or the voter's year or date of birth. *See id.*, Ex. C. The only reasonable inference from these facts is that the frequency of rejections of absentee ballots is due to county officials applying markedly different standards in evaluating the sufficiency of absentee ballot oaths. Different standards to reject ballots are inconsistent with the Equal Protection Clause. The only remedy available for this infirmary is to order that such ballots (with immaterial errors or omissions) be counted throughout the whole of the Seventh Congressional District. Plaintiff-Intervenors are therefore likely to prevail on Count III of their Complaint.

C. Plaintiff Satisfies the Other Preliminary Injunction Factors.

1. An Injunction Is Necessary to Avoid Irreparable Harm.

There is no genuine dispute that the harm threatened here—disenfranchisement in the November 2018 election—is irreparable. "This isn't golf: there are no mulligans." *Fla. Democratic Party*, 215 F. Supp. 3d at 1258. Once an election is decided, "'there can be no do-over and no redress.'" *Id.* (citing *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)). Thus, courts have long recognized that when an "abridgment to the voters' constitutional right to vote" is imminent, "irreparable harm is presumed and no further showing of injury need be made." *Touchston v. McDermott*, 234 F.3d 1133, 1158-59 (11th Cir. 2000); *see also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("*OFA*") (abridgement of right to vote constitutes irreparable harm); *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997) (same); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (same).

The unofficial tally of votes on the Georgia Secretary of State's website has Rob Woodall leading Carolyn Bourdeaux by 901 votes (139,837 to 138,936), or 0.32% of the 278,773 votes cast. Under Georgia law, a candidate who trails the certified winner by one percent or less of the votes cast may request a recount within two days of the certification. Ga. Code § 21-2-495(c)(1). However,

Proposed Plaintiff-Intervenors understand that rejected absentee ballots will be excluded from any recount. Accordingly, certification should be temporarily restrained to avoid the irreparable harm that would result from the exclusion of these rejected ballots from any recount.

2. The Balance of Hardships Weighs in Favor of an Injunction.

The balance of hardships favors the Plaintiff-Intervenors and weighs in favor of issuing emergency injunctive relief. Delaying the certification of the canvass to ensure it is accurate and lawful is, at most, a minor administrative inconvenience. With respect to a preliminary injunction requiring the votes to be counted, there is no legitimate state interest in discarding lawful votes.

Conversely, if relief is not granted, hundreds of Georgia voters will be disenfranchised, not because they were ineligible to vote, but because of Defendants' unlawful interpretation of O.C.G.A. § 21-2-3986(a)(1)(C) to require a perfect match between the information that a voter provides on the absentee ballot envelope and the information in the voter file. Under these circumstances, equity plainly favors the interest of the Plaintiff-Intervenors. *Fla. Democratic Party*, 215 F. Supp. 3d at 1258 ("it would be nonsensical to prioritize [administrative] deadlines over the right to vote"); *see also Taylor v. Louisiana*,

419 U.S. 522, 535 (1975) (stating "administrative convenience" cannot justify the deprivation of a constitutional right).

3. A Temporary Restraining Order And Injunction Is in The Public Interest.

The public has a paramount interest in elections where every eligible voter may cast a ballot and have it counted. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005); *see also LOWV*, 769 F.3d at 248 ("[t]he public has a 'strong interest in exercising the fundamental political right to vote.'" (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)); *OFA*, 697 F.3d at 437 ("The public interest . . . favors permitting as many qualified voters to vote as possible."). Under the circumstances, an injunction requiring Defendants to count all ballots that it had previously rejected pursuant to Defendants' erroneous, unlawful interpretation of O.C.G.A. § 21-2-3986(a)(1)(C) to require the inclusion and perfect match of information provided on an absentee ballot and the information within a voter's registration file, including immaterial omissions or errors, is plainly in the public interest. The Constitution guarantees the right of voters "to cast their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941).

III. CONCLUSION

For the reasons provided herein and in Plaintiff-Intervenors' contemporaneously-filed emergency pleadings, Plaintiff-Intervenors respectfully request that the Court issue an emergency temporary restraining order restraining Defendants, their officers, employees, and agents, all persons acting in active concert or participation with Defendants, or under Defendants' supervision, direction, or control, from certifying the results of the election, and thereafter issue a preliminary injunction (1) requiring votes unlawfully rejected be included in any certified returns of the election, and (2) permitting the cure of absentee ballots for which the voter failed to sign the oath on the back of the absentee ballot envelope within three business days of this Court's issuance of any such order.

Dated: November 11, 2018

Respectfully submitted,

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**Pro Hac Vice* Applications forthcoming

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Proposed Order Granting Plaintiff-Intervenor Carolyn Bourdeaux for Congress Motion to Intervene has been prepared in accordance with the font type and margin requirements of LR 5.1, using font type of Times New Roman and a point size of 14.

Dated: November 11, 2018

/s/ Veronica Higgs Cope

Counsel for Proposed Plaintiff-Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of November 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 parties in this action.

Dated: November 11, 2018

/s/ Veronica Higgs Cope

Counsel for Plaintiff-Intervenor