

**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,

v.

**ROBYN A. CRITTENDEN, in her official
capacity as Acting 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.
18-cv-04776 LMM**

**EXPEDITED TREATMENT
REQUESTED**

**PLAINTIFFS' EMERGENCY MOTION
FOR TEMPORARY RESTRAINING ORDER**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs move this Court to enter an order restraining Defendants Stephen Day, John Mangano, Alice O'Lenick, Ben Satterfield and Beauty Baldwin ("the Gwinnett Board Members") from rejecting absentee ballots containing immaterial errors or omissions and enjoining the Gwinnett Board Members to count such ballots in the November 6, 2018 general election.

Pursuant to Rule 65(d), Plaintiffs have filed with this Motion a proposed order directed at the persons to be bound thereby, stating the reasons why the order should issue, stating the order's terms specifically, and describing the acts restrained and required.

Pursuant to Rule 7.1A of the Local Rules of the Northern District of Georgia, Plaintiffs filed with their original motion a brief citing the legal authorities supporting the motion and the facts relied upon.

Respectfully submitted this 11th day of November, 2018

/s/ Bruce P. Brown

Bruce P. Brown
Georgia Bar No. 064460
bbrown@brucepbrownlaw.com
Bruce P. Brown Law LLC
1123 Zonolite Rd. NE
Suite 6
Atlanta, Georgia 30306
(404) 881-0700

Attorney for Plaintiffs

/s/ John Powers

John Powers*
jpowers@lawyerscommittee.org
Lawyers' Committee for Civil Rights Under Law
1500 K Street NW, Suite 900
Washington, D.C. 20005

Telephone: (202) 662-8600

Facsimile: (202) 783-0857

Counsel for Plaintiffs Dinesh Chandra, Corliss Armstead, Dana Bowers, Jeanne Dufort, Rhonda J. Martin and The Georgia Coalition for the People's Agenda, Inc.

Admitted *pro hac vice

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Civil Action No.

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**CERTIFICATE OF SERVICE AND
COMPLIANCE WITH LOCAL RULE 5.1(C)**

I hereby certify that on this 11th day of November, 2018, the foregoing PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER was filed electronically with the Clerk of Court using the CM/Doc system, which will automatically send e-mail notification of such filing to all attorneys of record. I further certify that the foregoing has been prepared in a Times New Roman 14 point font, which is one of the font and point selections approved by the Court in Local Rule 5.1(C).

This 11th day of November, 2018.

/s/ Bruce P. Brown
Bruce P. Brown

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TEMPORARY RESTRAINING ORDER,
NOVEMBER 11, 2018

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**EXPEDITED TREATMENT
REQUESTED**

**BRIEF IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION
FOR TEMPORARY RESTRAINING ORDER**

Plaintiffs file this Brief in Support of their Emergency Motion for
Temporary Restraining Order.

I. INTRODUCTION AND SUMMARY

Plaintiffs bring this motion because they have confirmed that Gwinnett County has in its possession at its central location over one thousand mailed ballots from absentee electors whose eligibility is without question and whose identity Gwinnett County has confirmed. *See* Marks Decl., attached as Exhibit E, ¶ 11. These ballots are complete and accurate in all material respects, but may contain perceived immaterial defects. *Id.* County election staff will not count these ballots, however, because they have not been given the direction to do so by Defendant Members of the Gwinnett County Board of Registration and Elections. If given the direction by this Court to count these ballots, the election staff can and will count these ballots in a matter of a few hours. As explained below, joining as plaintiffs are three Gwinnett County qualified electors whose ballots have been rejected and whose ballots will be counted if this Motion is granted.

Plaintiffs seek expedited treatment of this Motion because the Gwinnett County Board of Registrations and Elections has announced a public meeting that will start at 2 p.m. on Tuesday, November 13, 2018. Plaintiffs understand that the meeting will remain open until the Board is able to review the ongoing tabulations

of all of the ballots, including the provisional absentee ballots that are due to submitted pursuant to this Court's prior Order by 5 p.m. on Tuesday. If necessary for the full effectuation of the relief here requested, Plaintiffs would urge the Court to enjoin Gwinnett County's certification. However, since the ballots affected by this Motion have been organized and segregated, they may be counted quickly without interfering with any other election operations.¹

This Motion should be granted because, as a matter of federal constitutional and statutory law, citizens cannot be disenfranchised because of immaterial defects in their mailed ballots. As the Supreme Court stated long ago in *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), “any restrictions on [the right to vote freely] strike at the heart of representative government.” The State must have a compelling reason to burden the right to vote, but, by definition, there is *no* reason to reject ballots that contain extraneous defects so long as the voter's eligibility has been confirmed and the voter's identity has been verified. This is precisely the case with each of the ballots that are the subject of this Motion.

¹ Plaintiffs note that the results of elections involving Gwinnett County voters have not been finally determined.

The granting of this Motion is also required by the federal Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), which explicitly forbids governments from denying the right to vote because of an error or omission “if such error or omission is not material in determining whether such individual is qualified under State law to vote.”² The defects in these ballots have nothing to do with whether these voters are “qualified” under Georgia law; Gwinnett County has already confirmed these voters are qualified while approving their mail ballot application before issuing an absentee mail ballot and has already confirmed the identity of these voters through the County’s strict signature matching requirements. Indeed, the State Defendants have conceded that, under Georgia law, if, as is the case with each of these ballots, the identity of the voter is confirmed “with the information that *is* provided,” errors and omissions on a ballot return envelope may be ignored. Doc. 36 at 3.³

² See generally Brief of Amicus Curiae Campaign Legal Center In Support of Plaintiffs’ Motion for a Preliminary Injunction, Doc. 13-1.

³ Citing *Jones v. Jessup*, 279 Ga. 551, 533 n. 5 (2005) (rejection of ballots that do not comply with Georgia statutory requirements is not mandatory). This the State Defendants acknowledged: “The Georgia Supreme Court has held that while § 21-2-386(a)(1)(C) provides a basis upon which an election official *may* reject a ballot, rejection is not mandatory. . . . In other words, what is required is that the county election official can confirm the identity of the voter with the information that *is* provided.” Doc. 36 at 3 (emphasis in original).

There also is no equitable or practical reason to deny this Motion. Crucially, Gwinnett County has already made the determination of which ballots contain only immaterial defects. Marks Decl. ¶ 11. As a result, Gwinnett County has more than enough time to count these votes before it certifies the election results, and cannot legally certify the results when a material number of legally cast ballots are excluded that could change the outcome of the election. Unlike prior motions for injunctive relief, this Motion does not require the election staff to obtain any additional information from the voters and does not involve any “cure” process whatsoever. This relief is not burdensome administratively in the least. These ballots are organized in batches in a vault in Gwinnett County’s offices and the election staff is ready, willing and able to count these ballots if given the direction to do so.

Three voters whose ballots are in the batch of ballots that is the subject of this Motion are Dinesh Chandra, James Arthur Moore, and Corliss Armstead, who are joining the case as additional plaintiffs pursuant to an amended complaint to be filed later today or tomorrow:

1. *Dinesh Chandra*. Mr. Chandra, 72, is an U.S. citizen who has resided in Gwinnett County for 28 years. Chandra Decl., attached hereto as Exhibit A, ¶ 2.

Mr. Chandra typically votes in person on Election Day but chose to vote by absentee for the first time in the November 2018 election because it is more convenient at his age and he did not want to wait in long lines or in the rain. *Id.* ¶

9. Mr. Chandra applied for an absentee ballot in early October, the first week that Georgia voters could do so, and received his absentee ballot in the mail at his home around the second week of October. Mr. Chandra states in his declaration: “I filled out my absentee ballot completed and entered all the requested personal identifying information on both the inner and outer absentee ballot envelopes.” *Id.* ¶ 12. On the day before Election Day, Mr. Chandra returned his absentee ballot in person at the Gwinnett BORE office. Mr. Chandra presented the ballot envelope to the BORE employee working at the desk. The employee took Mr. Chandra’s ballot and “returned and informed me that the signatures matched,” and “informed me there was nothing more that I needed to do for my vote to count in the November 2018 election.” *Id.*, ¶ 17-18.

On November 8, two days after the election, Mr. Chandra – prompted by a message from Asian Americans Advancing Justice – checked the status of his absentee ballot on the Secretary of State’s My Voter page website. “The website informed me that my absentee ballot had been rejected because my Year of Birth was missing.” *Id.*, ¶ 23. Mr. Chandra is quite confident that he entered the information correctly, but later on November 8, went back to the BORE office and told the employee what had happened. “The employee said it was too late to correct the error and that my ballot could not be counted.” *Id.*, ¶ 27. Mr. Chandra concludes: “Voting in this election was very important to me and I am very disappointed that I was disenfranchised through no fault of my own.” *Id.*, ¶ 28.

2. *James Arthur Moore.* Mr. Moore, 78, mailed in his absentee ballot on October 29, 2018. Moore Decl., attached hereto as Exhibit B, ¶ 4. Gwinnett County is required by statute to “promptly” notify absentee voters of the rejection of their mailed ballots, but Mr. Moore never received any such notification. *Id.*, ¶ 5. On November 9, two days after Election Day, a volunteer working for Coalition for Good Governance informed Mr. Moore that his ballot had been rejected

because Mr. Moore wrote the current date, rather than his “year of birth,” next to his signature. *Id.*, ¶ 16; *see also* Marks Decl., ¶ 6.

3. *Corliss Armstead.* Ms. Armstead has lived in Gwinnett County since 2013. Corliss Decl., attached as Exhibit C, ¶ 4. Ms. Armstead typically votes in person, but chose to vote by absentee ballot in the November 2018 general election because she operates her own business in DeKalb County and did not want to wait in long lines on election day. Ms. Armstead mailed her ballot on or about Saturday, November 3, 2018. Concerned that her ballot would not be received on time, Ms. Armstead went to the polls on Election Day. She first went to her usual polling place, but was told there that her polling had changed. At the new polling location, Ms. Armstead was told by a supervisor that her absentee ballot had been received. “Believing that my ballot had been received and that there was nothing more I needed to do for my vote to count, I left the polling place.” *Id.*, ¶ 9. On Friday, November 9, 2018, prompted by calls and emails from volunteers, Ms. Armstead called the Gwinnett County BORE office, and was told that her “absentee ballot was received on Monday, November 5, 2018, but had been rejected because my Year of Birth was missing.” *Id.*, ¶ 22. Ms. Armstead asked

the employee if there was anything she could do to ensure his vote would be counted. “The employee responded that it was too late, that there was nothing I could do, and that my ballot could not be counted.” *Id.*, ¶ 23. This experience was devastating to Ms. Armstead. *Id.* ¶ 24. Ms. Armstead is African-American, and having her ballot rejected over a minor error reminded her of her mother being disenfranchised through literacy tests and other devices in the 1960s. *Id.* ¶ 25.

Although the experiences of Mr. Chandra, Mr. Moore and Ms. Armstead each feature Gwinnett County’s particularly egregious and common rejection of ballots because of “year of birth” mistakes,⁴ this Motion is not specific to the particular reason that Gwinnett County is using to reject absentee ballots, but instead applies, as it must under federal constitutional and statutory law, to every legally cast ballot that is being rejected for immaterial reasons. In addition,

⁴ Rejecting an absentee ballot on the basis that a voter has failed to correctly recite their year of birth is especially arbitrary given that Carroll, Camden, and Richmond Counties do not even provide voters with ballot envelopes requesting that information. Until 2017, O.C.G.A. § 21-2-384(c)(1) required absentee ballot envelopes to request that the voter list their month and day of birth, whereas the updated statute requires ballot envelopes to request the voter’s year of birth. This year, some counties have switched to the new envelopes while other counties are still using the old envelopes that do not require year of birth information. *See generally* Reply Memorandum of Law, Doc. 39, at 23; *see also* Brief of Amicus Curiae Campaign Legal Center In Support of Plaintiffs’ Motion for a Preliminary Injunction, Doc. 13-1.

although this Motion seeks specific relief relating to these three individuals, it is well settled that the organizational Plaintiff, The Georgia Coalition for the People's Agenda, has standing to seek this injunctive relief, which should be applied to every ballot that Gwinnett County is not counting because of immaterial defects.

There are many problems that this case, and cases like it, cannot solve or cannot solve in time to prevent massive disenfranchisement of Georgia voters or to reverse a depressing but understandable lack of trust in the integrity of Georgia's election system. But the imminent disenfranchisement of Mr. Chandra, Mr. Moore and Ms. Armstead, and hundreds of voters like them, is a grievous injury that may and must be prevented by the granting of this Motion. As a society, we cannot make grand statements like the right to vote "is of the most fundamental significance under our constitutional structure," *Burdick v. Takashi*, 504 U.S. 428, 433 (1992), or tell our young people that voting is at the "heart of democracy," and then stand by and permit Gwinnett County for no good reason discard these ballots without counting them.

Plaintiffs would urge the Court to require Defendants to respond to this Motion within twenty four hours. Plaintiffs do not believe that a hearing is

necessary, but of course are willing to attend any hearing by telephone or in person as the Court may direct.

The foregoing summary, along with prior briefing, provides sufficient support for the granting of this Motion. The rest of this Brief provides additional factual and legal support. Plaintiffs address standing in Part II and in Part III provide a brief procedural history. In Part IV, Plaintiffs will discuss the four-factor test for the granting of injunctive relief, drawing heavily upon the substantial briefing that has already been submitted in this case and the Court's earlier decisions.

II. PARTIES AND JURISDICTION

A. Plaintiffs have Standing

Mr. Chandra, Ms. Armstead, and Mr. Moore set forth the facts in their declarations sufficient to establish standing. They experienced a concrete injury because their absentee ballots were rejected and they were not able to vote in the November 6, 2018 general election. The organizational plaintiff, the Georgia Coalition for the Peoples' Agenda, has standing because they have been and are continuing to assist voters such as Ms. Armstead and Mr. Chandra. Doc. 16,

Butler Decl., ¶¶ 16-17. The organization is diverting time, money, and resources to try to locate absentee voters who are similarly situated to Mr. Chandra and Ms. Armstead to help them have their vote counted in this election. *Id.* *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014); *see also Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350-51 (11th Cir. 2009) (Georgia NAACP has standing to challenge photo ID statute because it needed to divert resources to educate and assist voters); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (organizational standing to challenge new voter registration verification process satisfied due to the anticipated diversion of resources to educate voters and resolve problems).

B. These Defendants are Proper for the Relief Sought

Defendant Robyn Crittenden is Georgia's Acting Secretary of State and Chief Elections Administrator, *see* O.C.G.A. § 21-2-210, overseeing all election activity, including voter registration, and municipal, state, county, and federal elections, and maintaining the official list of registered voters. O.C.G.A. § 21-2-50(a)(14). The Gwinnett County Board of Registrations and Elections and its individual members, Defendants Chairman Stephen Day, Vice Chairman John Mangano, Alice O'Lenick,

Ben Satterfield, and Beauty Baldwin, oversee the preparation and delivery of absentee ballots, mailing ballots to voters, administration of the oath, ballot safekeeping, rejection and certification of absentee ballots for Gwinnett County. O.C.G.A. §§ 21-2-384, 21-2-386.

III. PROCEDURAL HISTORY

Plaintiffs Martin, Bowers, Clark, DuVal, and Dufort filed a complaint on October 15, 2018, which was amended to add the Georgia Coalition for the Peoples' Agenda on October 22, 2018, alleging Georgia's practice and procedures for rejecting absentee ballot applications and absentee ballots infringed upon the fundamental right to vote. *See* Docs. 1, 10. Plaintiffs filed a motion for preliminary injunction on October 19, 2018, seeking to enjoin the Secretary of State and Gwinnett County election officials from rejecting absentee ballots without first giving electors reasonable notice and an opportunity to cure perceived deficiencies. *See* Doc. 4 at 1. Plaintiffs put forward evidence, which this Court accepted, that Defendants failed to provide adequate notice to ensure these eligible voters' rights were not infringed and that an appeal process would not be overly onerous for Defendants to implement. *See, e.g.*, Doc. 23 at 28. The Court granted Plaintiffs' request for preliminary injunction with respect to absentee ballot

applications and absentee ballots rejected due to an alleged signature mismatch, *see* Doc. 26. In an order dated November 2, 2018, this Court denied Plaintiffs' request for relief with respect to voters whose ballots were denied for other reasons. *See generally* Doc. 41.⁵

IV. THE STATE'S AND GWINNETT COUNTY'S ABSENTEE BALLOT PROCEDURES

Gwinnett County's practice of rejecting absentee ballots for immaterial reasons is not required by State law. Under Georgia law, an elector transmitting his or her absentee ballot "furnish[es] required information . . . [which] conform[s] with that on file in the registrar's or clerk's office." O.C.G.A. § 21-2-386(a)(1)(C). If election officials decide to reject an absentee ballot, they write "Rejected" on the absentee ballot envelope along with the reason for the rejection and are supposed to "promptly notify the elector of such rejection." O.C.G.A. § 21-2-386(a)(1)(C). Defendants concede that Georgia law does not mandate rejection of absentee mail ballots with insufficient oath information; this information is intended only to aid

⁵ The Court noted that while Plaintiffs identified several prospective voters who did not receive sufficient notice of rejection, they "have not requested specific injunctive relief for those individuals." Doc. 41 at 10 n. 5. Plaintiffs Armstead, Chandra, and Moore request that precise relief.

election officials in confirming the identity of the voter if for some reason, the signature verification is inconclusive. State Defendants' Opposition, Doc. 36 at 3. ("In other words, what is required is that the county election official can confirm the identity of the voter with the information that is provided.").

In Gwinnett County, however, the absentee ballot envelope is treated as a de facto test reminiscent of tests used in decades past to disenfranchise minorities. In Gwinnett County, minor errors, such as writing the current year instead of the voter's year of birth, are considered a basis to reject the ballot. Doc. 37 at 7 (a voter's "fail[ure] to fill out the form correctly" is a "basis" for rejecting an absentee ballot in Gwinnett County). According to Gwinnett County Elections Director Lynn Ledford, if a voter "fails to include *all* of the [] information" requested on the absentee ballot envelope, "the staff rejects the ballot," Ledford Decl., Doc. 37-2 ¶ 14, even though such rejection is *not* required by Georgia law. *Jessup*, 279 Ga. at 533 n. 5. In fact, much of the very information that is considered "missing" for purposes of ballot acceptance is preprinted elsewhere on the envelope. Because the initial rejection serves no governmental purpose, the rejection would be unconstitutional even with the ability to cure. But in Georgia,

voters whose absentee ballots are rejected cannot cure the rejection; their only option is to vote a second time through other means. *Id.* ¶¶ 7, 22; Exhibit B to Declaration of John Powers, Doc. 16 at 62 (Lynn Ledford email responding “No” to question “Can they cure the defect?”). But this option is only meaningful if the voters are informed of the perceived defect in time to vote again, making it impossible for mail ballot voters whose ballots arrive on or shortly before Election Day and are rejected to have their ballot counted.

As previously explained and documented, other counties in Georgia do not treat the absentee ballot envelope as a de facto test, but instead tolerate immaterial errors or omissions in compliance with federal and Georgia law. *See* Doc. 39 at 21-22. The material differences in the counties’ application of the law is borne out in the disparate rejection rates, from 8.1 percent in Gwinnett County, to 0.7 percent in Oconee County, to zero percent in Floyd, Carroll, and Camden Counties. *Id.*

V. ARGUMENT

The standard for obtaining a temporary restraining order is identical to that of obtaining a preliminary injunction. *Martin v. Kemp*, 2018 WL 5276242 (N.D.

Ga. Oct. 24, 2018). Chief Justice Roberts summarized the familiar test for the granting of a preliminary injunction in *Winter v. NRDC*, 555 U.S. 7, 20 (2008):⁶

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

These are not rigid requirements to be applied by rote. “The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

Though discovery in this case has not opened and the Defendants have not answered the Complaint, this Motion is not premature. “The grant of a temporary injunction need not await any procedural steps perfecting the pleadings or any other formality attendant upon a full-blown trial of this case.” *United States v. Lynd*, 301 F.2d 818, 823 (5th Cir. 1962) (Tuttle, J.).

⁶ See also *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1131 (11th Cir. 2005).

In considering this Motion, the Court also is permitted to rely upon hearsay and upon affidavits in lieu of live testimony. “[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Levi Strauss & Co. v. Sunrise Int’l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (at the “preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction”).

A. Likely Success on the Merits

1. Violation of Civil Rights Act

The failure of Gwinnett County to count these ballots containing only immaterial errors and omissions is a plain violation of federal statutory law. The Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), explicitly forbids governments from denying the right to vote because of an error or omission “if such error or omission is not material in determining whether such individual is qualified under State law to vote.” *See generally* Brief of Amicus Curiae Campaign Legal Center In Support of Plaintiffs’ Motion for a Preliminary Injunction, Doc. 13-1. There may be cases

in which it is difficult for the Court to determine which errors or omissions are material or immaterial under state law, but here the substance of the state law is conceded and the application of state law to these ballots is undisputed. The defects in these ballots have nothing to do with whether these voters are “qualified” under Georgia law; Gwinnett County has already confirmed these voters are qualified by sending them an absentee ballot and has already confirmed the identity of these voters through the County’s strict signature matching requirements. The State Defendants have conceded that what is required is that “the county election official can confirm the identity of the voter with the information that *is* provided.” Doc. 36 at 3 (emphasis in original). Here, the ballots as to which Plaintiffs seek relief are ballots as to which the county election official have already confirmed the voter’s identity from the information provided. By not counting these votes, Gwinnett County is in plain violation of the Civil Rights Act and, for this reason alone, this Motion should be granted.

2. *Federal constitutional law*

Plaintiffs Chandra, Moore and Armstead and others similarly situated have wrongly been denied the right to vote due to alleged errors on their absentee ballot

envelope. In each case, Gwinnett County election officials are rejecting absentee ballots even though the voter’s eligibility has been confirmed (through the ballot application process) and the County has verified their identity through the signature match requirement.

The right to vote “is of the most fundamental significance under our constitutional structure.” *Burdick*, 504 U.S. at 433. Creating a “second class of voters” by subjecting an identifiable group of voters to heightened burdens is “constitutionally untenable.” *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1217 (N.D. Fla. 2018). Accordingly, courts have developed a balancing test to prevent the unjustified burdening of the right to vote. Doc. 33 at 14-15.

a) *The Anderson-Burdick Test*

A State may not place any burdens on the right to vote that are not justified by the State’s asserted interests. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick*, 504 U.S. at 428. When considering challenges to state election laws that impact the fundamental right to vote, courts 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.’” *Anderson*, 460 U.S. at 789.

The *Anderson-Burdick* framework is a “flexible” sliding scale, in which the “rigorousness of [the court’s] inquiry” increases with the severity of the burden. *Burdick*, 504 U.S. at 434. When a state imposes a severe burden, strict scrutiny applies, and any burdensome action must be narrowly tailored to advance a compelling state interest. *See id.*; *see also League of Women Voters of Fla.*, 314 F. Supp. at 3d 1219 (distinguishing “disparate inconveniences” from “denial or abridgement”). Even where the burden is not “severe” enough to warrant strict scrutiny, courts weighing the burden on voters against the state’s interest will look to the “precision” with which the state’s interests are advanced by the burdensome regulation. *Burdick*, 504 U.S. at 434.

b) Rejection of Ballots for Immaterial Defects Severely Burdens the Right to Vote

Without doubt, to not count a ballot from eligible voters who have confirmed their identity is a severe burden on the right to vote. Even without the Kafka-esque bureaucratic hurdles and run-arounds these Plaintiffs have endured, the resulting disenfranchisement would still constitute a severe burden on the right

to vote. Further, each of the individual Plaintiffs are at serious risk of experiencing the same hurdles in future elections in which he intends to vote by mail due to his advanced years and desire to avoid long lines characteristic of Gwinnett County's in person voting process. This imminent risk that these Plaintiffs may be disenfranchised is more than sufficient to establish a sufficient likelihood of success under existing case law. *See Curling v. Kemp*, No. 1:17-CV-2989-AT, 2018 WL 4625653, at *15-16 (N.D. Ga. Sept. 17, 2018) (finding that "[p]laintiffs are substantially likely to succeed on the merits of one or more of their constitutional claims" based on evidence "that their votes cast by DRE may be altered, diluted, or effectively not counted").

c) There Is No Justification for Imposing these Burdens on the Right to Vote.

The burdens imposed on Plaintiffs would not pass the *Anderson-Burdick* test, even under the most lenient scrutiny. *See Burdick*, 504 U.S. at 434. Even where a regulation creates a slight burden, the state must show that the regulation is justified by a relevant state interest. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008).

Neither the Gwinnet BORE nor the Georgia Secretary of State's Office has articulated any coherent justification for rejecting absentee ballots for immaterial defects that are unrelated to the eligibility or identity of the voter.

This Motion is not specific to the "year of birth" omission or mistake, but this particular problem shows the complete absence of any governmental interest in rejecting these ballots. In previous pleadings, both the State and Gwinnett County have asserted a general interest in upholding electoral integrity by preventing voter fraud, Doc. 36 at 15; Doc. 37 at 9, but that is sufficiently addressed once the absentee voter's identity is verified. Here, Gwinnett County the Plaintiffs' identity, and the identify of *every other voter whose ballots are the subject of this Motion*, has been confirmed by their signature. Rejecting these Plaintiffs' absentee ballots failed to advance any state interest, including that in preventing voter fraud. As explained above, even though compliance with state law would constitute an excuse to violate federal law, there is nothing in Georgia law that requires Gwinnett County to reject these ballots. *See Jones v. Jessup*, 279 Ga. 531, 533 (2005). The Georgia State Election Board ("SEB") applied this interpretation of Georgia law to absentee voters, finding, in one instance, that "an election official

does not violate O.G.C.A. § 21-2-386(a)(1)(C) when they accept an absentee ballot despite the omission of a day and month of birth and/or an address, if the election official can verify the identity of the voter’s signature and whatever other information is provided.” Decision of the Georgia State Election Board, attached as Exhibit D, at 2.⁷

B. Plaintiffs’ Requested Relief Is Appropriate and Narrowly Tailored

Plaintiffs’ requested relief is narrowly tailored. Plaintiffs request simply that the Gwinnett County Defendants count every legally cast absentee mail ballot that is has received from eligible voters whose identity they have confirmed, regardless of whether those absentee ballots contain other errors or omissions. Such targeted relief is entirely appropriate in close proximity to an election because it will stop

⁷ The Georgia SEB further stated:

This interpretation of O.G.C.A. § 21-2-386(a)(1)(C) is also consistent with federal law which 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.” 52 U.S.C. § 10101 (emphasis added). Where the election official can verify the identity of the voter by comparing their signature on the absentee ballot envelope with the voter’s signature on file, the omission of the additional information of residence address and/or day and month would not be material to that voter’s qualification and the absentee ballot should be counted.

Exhibit D at 2.

unlawful disenfranchisement. *See, e.g., A. Philip Randolph Institute v. Husted*, 2018 WL 5623929, at *7 (6th Cir. Oct. 31, 2018) (ordering the State to count the ballots cast by certain people who were purged from Ohio’s voter rolls based on improper notice); *Pitcher v. Duchess Cty. Bd. of Elections*, No. 7:12-cv-8017 (S.D.N.Y. Oct. 31, 2012) (ordering county election officials on the day before a General Election to register student voters whose voter registrations were rejected because they failed to provide a dormitory name or room number); *Doe v. Walker*, 746 F. Supp. 2d 667, 682 (D. Md. 2010) (issuing a narrow preliminary injunction on October 29, 2010, just four days before election day on November 2, extending the November 12 absentee ballot deadline by ten days for absent uniformed and overseas voters); *Copeland v. Priest*, 4:02-cv-675 (E.D. Ark. 2002) (granting a temporary restraining order on October 30 to restore the voting registration of student voters who were purged due to registering with university addresses).

C. Plaintiffs Will Suffer Irreparable Harm Absent the Requested Relief.

“[B]y finding an abridgement to the voters’ constitutional right to vote, 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).

If a temporary restraining order is not granted requiring the Gwinnett County BORE to take emergency action to count these votes for the November 2018 election, then these eligible voters will be denied their fundamental right to vote. This is a substantial and irreparable harm. *See Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005) (“Denying an individual the right to vote works a serious, irreparable injury upon that individual.”); *Georgia State Conf. of the NAACP v. Georgia*, 2017 WL 9435558, at *5 (N.D. Ga. May 4, 2017) (referring to the irreparable harm that would be suffered by “would-be voters like Plaintiff Myers” in the absence of an injunction). The organizational Plaintiffs, who must divert time, staff, and resources to attempt to locate individuals similarly situated to Mr. Chandra, Mr. Moore and Ms. Armstead, will similarly suffer irreparable harm absent an injunction. *Id.*; *see also Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1350 (N.D. Ga. 2016).

D. Gwinnett County Will Not Be Harmed by the Requested Relief.

Under the circumstances, the harm suffered by Plaintiffs and others similarly situated clearly outweighs the harm to Gwinnett County if an injunction does issue. *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm’rs*, 118 F. Supp. 3d 1338,

1342 (N.D. Ga. 2015). All that is being sought is an order requiring the Gwinnett County BORE to count the ballots that they have already identified and set aside.⁸

E. The Public Interest Weighs Heavily in Favor of Granting the Requested Relief.

The public interest will be best served by a procedure that allows every eligible citizen of Georgia whose identity has been verified to cast an absentee ballot that will count, thereby preserving this fundamental right, an accurate election outcome, and fostering trust in the integrity of the elections. *Washington Ass'n of Churches*, 492 F. Supp. 2d at 1271; *Wesley*, 408 F.3d at 1355; *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1348-49 (N.D. Ga. 2015); *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011). “By definition, the public interest favors permitting as many qualified voters to vote as possible,” and “upholding constitutional rights serves the public interest.” *League of Women Voters of N.C.*, 769 F.3d at 247 (internal punctuation omitted); *Georgia State Conf. of the NAACP v. Georgia*, 2017 WL 9435558, at *5 (N.D. Ga. May 4, 2017).

⁸ Because the Gwinnett County BORE will not suffer monetary loss due to the entry of the requested preliminary injunctive relief, a bond is not required under Rule 65(c) of the Federal Rules of Civil Procedure.

VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter an order granting their motion for a temporary restraining order and such further relief as it deems just and proper.

Respectfully submitted this 11th day of November, 2018

/s/ Bruce P. Brown
Bruce P. Brown
Georgia Bar No. 064460
bbrown@brucepbrownlaw.com
Bruce P. Brown Law LLC
1123 Zonolite Rd. NE
Suite 6
Atlanta, Georgia 30306
(404) 881-0700

Attorney for Plaintiffs

/s/ John Powers
John Powers*
jpowers@lawyerscommittee.org
Lawyers' Committee for Civil Rights Under Law
1500 K Street NW, Suite 900
Washington, D.C. 20005
Telephone: (202) 662-8600
Facsimile: (202) 783-0857

*Counsel for Plaintiffs Dinesh Chandra, Corliss
Armstead, Dana Bowers, Jeanne Dufort, Rhonda J.
Martin and The Georgia Coalition for the People's
Agenda, Inc.*

***Admitted pro hac vice**

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

RHONDA J. MARTIN, et al.,

Plaintiffs,

v.

ROBYN A. CRITTENDEN, et al.,

Defendants.

Civil Action No.

1:18-cv-04776-LMM

**CERTIFICATE OF SERVICE AND
COMPLIANCE WITH LOCAL RULE 5.1(C)**

I hereby certify that on this 11th day of November, 2018, the foregoing BRIEF IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER was filed electronically with the Clerk of Court using the CM/Doc system, which will automatically send e-mail notification of such filing to all attorneys of record. I further certify that the foregoing has been prepared in a Times New Roman 14 point font, which is one of the font and point selections approved by the Court in Local Rule 5.1(C).

This 11th day of November, 2018.

/s/ Bruce P. Brown
Bruce P. Brown

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BRIEF IN SUPPORT OF
PLAINTIFFS' EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER,
NOVEMBER 11, 2018

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

RHONDA J. MARTIN, et al.,

Plaintiffs,

v.

BRIAN KEMP, et al.

Defendants.

Civil Action File No.

1:18-cv-04776-LMM

**PLAINTIFFS' PROPOSED ORDER GRANTING EMERGENCY
MOTION FOR TEMPORARY RESTRAINING ORDER**

This matter is before the Court on the Plaintiffs' Emergency Motion for Temporary Restraining Order.

Upon considering the amended motion and supporting authorities, the response from the Defendants, and the evidence and pleadings of record, the Court finds that Plaintiffs are likely to succeed on the merits of their claims, that they will be irreparably harmed if this motion is not granted, that the balance of equities tip in Plaintiffs' favor, and that the requested equitable relief is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Court accordingly GRANTS the motion and issues the relief set forth below.

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PLAINTIFFS' PROPOSED ORDER
GRANTING EMERGENCY MOTION
FOR TEMPORARY RESTRAINING ORDER
NOVEMBER 11, 2018

DEFENDANTS Stephen Day, John Mangano, Alice O’Lenick, Ben Satterfield and Beauty Baldwin (“the Gwinnett Board Members”) are HEREBY enjoined, until further order of this Court, from rejecting absentee ballots containing immaterial errors or omissions and ORDERED to count such ballots in the November 6, 2018 general election.

SO ORDERED this ____ day of _____, 2018.

U.S. District Court Judge Leigh Martin May

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Proposed Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order 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.

/s/ Bruce P. Brown
Bruce P. Brown
Georgia Bar No. 064460
BRUCE P. BROWN LAW LLC
Attorney for Plaintiffs
1123 Zonolite Rd. NE
Suite 6
Atlanta, Georgia 30306
(404) 881-0700

CERTIFICATE OF SERVICE

This is to certify that I have this day caused the foregoing Proposed Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order to be served upon all other parties in this action by via electronic delivery using the PACER-ECF system.

This 11th day of November, 2018.

/s/ Bruce P. Brown

Bruce P. Brown

Georgia Bar No. 064460

BRUCE P. BROWN LAW LLC

Attorney for Plaintiffs

1123 Zonolite Rd. NE

Suite 6

Atlanta, Georgia 30306

(404) 881-0700