

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

IN RE GEORGIA SENATE BILL 202	MASTER CASE NO. 1:21-mi-55555-JPB
<p>SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>BRIAN KEMP, <i>Governor of the State of Georgia, in his Official Capacity</i>, et al.,</p> <p>Defendants,</p> <p>REPUBLICAN NATIONAL COMMITTEE, et al.,</p> <p>Intervenor-Defendants.</p>	CIVIL ACTION NO. 1:21-cv-01284-JPB
<p>GEORGIA STATE CONFERENCE OF THE NAACP, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>BRAD RAFFENSPERGER, <i>in his official capacity as t</i> § GEORGIA COMTEE, et al. ,</p> <p>Intervenor-Defendants.</p>	CIVIL ACTION NO. 1:21-cv-01259-JPB

ORDER

This matter is before the Court on Plaintiffs’¹ Motion for a Preliminary Injunction Based on Immaterial Voting Requirements [Doc. 548]. This Court finds as follows:

BACKGROUND

Georgia Senate Bill 202 (“S.B. 202”) governs election-related processes and was signed into law by Governor Brian Kemp on March 25, 2021. Plaintiffs, among other plaintiff groups, subsequently challenged various provisions of S.B. 202. At issue here is a provision in S.B. 202 that requires voters to print their date of birth on the outer envelope of an absentee ballot. The Court provides a brief factual overview below.

All Georgia voters are permitted to vote absentee by mail. To do so, a voter must first apply for an absentee ballot by completing an application form and submitting it to the appropriate county’s registrar or absentee ballot clerk. The

¹ Plaintiffs represent two plaintiff groups in two cases. The plaintiffs from case no. 1:21-cv-1259 comprise the following: Georgia State Conference of the NAACP; Georgia Coalition for the People’s Agenda, Inc.; League of Women Voters of Georgia, Inc.; GALEO Latino Community Development Fund, Inc.; Common Cause; and the Lower Muskogee Creek. The plaintiffs from case no. 1:21-cv-1284 are as follows: Georgia Muslim Voter Project; Women Watch Afrika; Latino Community Fund Georgia; The Arc of the United States; Sixth District of the African Methodist Episcopal Church; Delta Sigma Theta Sorority; Georgia ADAPT; Georgia Advocacy Office; and Southern Christian Leadership Conference.

application form requires an applicant to “provide his or her name, date of birth, address as registered, address where the elector wishes the ballot to be mailed, and the number of his or her Georgia driver’s license or identification card.” O.C.G.A. § 21-2-391(a)(1)(C)(i).

Upon receipt of the absentee ballot application, the registrar or clerk verifies “the identity of the applicant” and determines “if the applicant is eligible to vote in the primary or election involved.” Id. § 21-2-391(b)(1). If the applicant is eligible to vote, the registrar or clerk sends that individual an absentee ballot. Id. § 21-2-391(b)(2).

When an absentee ballot is sent to a voter, the ballot is accompanied by two envelopes: an inner envelope and an outer envelope. Id. § 21-2-385(a). Once a voter votes his or her ballot, the voter must “fold the ballot and enclose and securely seal the same” in the inner envelope on “which is printed ‘Official Absentee Ballot.’” Id. Next, the voter shall place the inner envelope in the outer envelope. See infra Figure 1. On the outer envelope, the voter must execute the oath and print his or her driver’s license number or identification card number. O.C.G.A. § 21-2-385(a). The voter must also “print his or her date of birth” (the “Birthdate Requirement”). Id. Completing the outer oath envelope allows the

county election office to “verify that the absentee ballot was voted by the elector who requested the ballot.” Id.

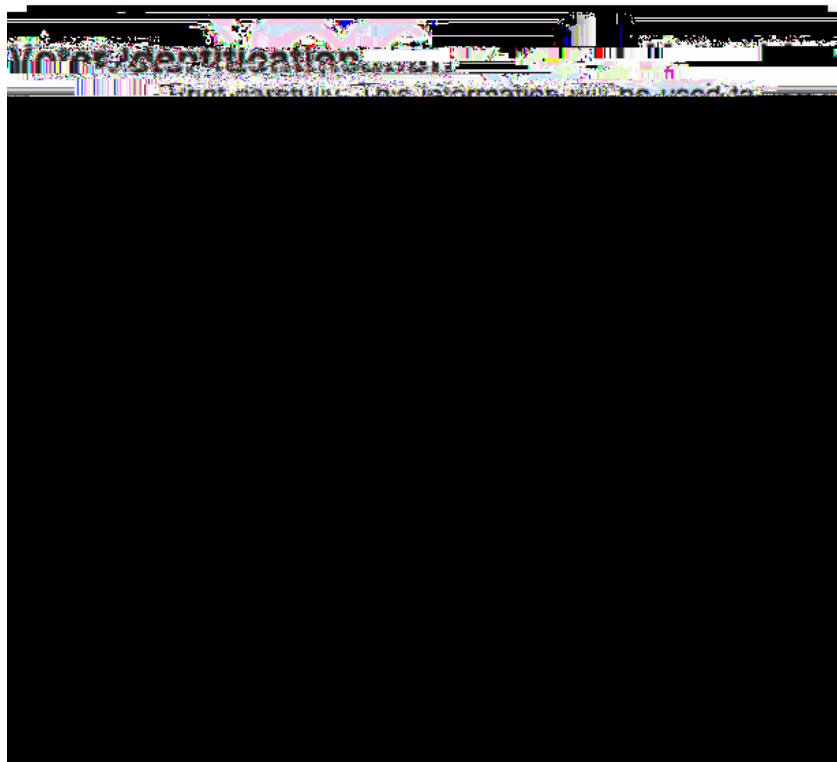


Figure 1: The Outer Envelope.

After the absentee ballot is returned, the registrar or clerk compares the elector’s driver’s license number (or state identification card number) and the elector’s date of birth, as printed on the outer envelope, with the information contained in voter registration records. Id. § 21-2-386(a)(1)(B). The registrar or clerk also confirms that the elector signed the oath. Id. If the oath is signed and the information matches the voter registration records, the registrar or clerk certifies that the requirements are met, and the elector’s name is added to the list of

absentee voters in a particular precinct. Id. If an elector “has failed to sign the oath, or if the identifying information on the absentee ballot envelope does not match the same information appearing in the elector’s voter registration record,” the registrar or clerk rejects the ballot. Id. § 21-2-386(a)(1)(C). When a ballot is rejected, the registrar or clerk promptly notifies the voter of the rejection, and the voter is given the opportunity to cure the defect. Id.

Plaintiffs filed complaints against Georgia state officials² (“State

p. 7]. Plaintiffs further ask the Court to order “the Secretary of State to count such ballots and refuse certification of election results until all such ballots have been counted.” Id. State Defendants and Intervenor Defendants⁵ (collectively, “Responding Defendants”) oppose the motion. As to County Defendants, the motion is unopposed.⁶ The motion is ripe for review.

ANALYSIS

Plaintiffs seek a preliminary injunction in this case. Before the Court can analyze whether Plaintiffs are entitled to this relief, the Court must s A.85e5our s /TT0 1 Tw 2

fold.” Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1159 (11th Cir. 2008). First, a plaintiff must show that he suffered an injury-in-fact. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). Second, a plaintiff must show that the injury was caused by a defendant’s complained-of actions. Id. And third, a plaintiff must show that his injury or threatened injury is likely to be redressed by a favorable judicial decision. Id.

1. Injury-in-Fact

Organizations can establish the injury-in-fact requirement in two ways: (1) through its own injury by showing a diversion of resources (organizational injury) or (2) through its members (associational standing). Ga. Ass’n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections, 36 F.4th 1100, 1114 (11th Cir. 2022).⁸ Here, State Defendants assert that Plaintiffs cannot establish the required injury through either of these methods. The Court disagrees.

⁸ According to State Defendants, Plaintiffs are required to show third-party standing, that is, that they have standing to assert the rights of third parties not before the Court. A plaintiff can establish third-party standing if the plaintiff demonstrates (1) an injury-in-fact to itself, (2) a close relationship to the third-party and (3) a hindrance to the third-party’s ability to assert its own interests. Young Apartments, Inc. v. Town of Jupiter, 529 F.3d 1027, 1042 (11th Cir. 2008). However, third-party standing is not at issue when a plaintiff is a membership organization, like many of the organizations here. See Browning, 522 F.3d at 1158 (declining to address third-party standing where the plaintiffs were membership organizations suing on behalf of their members and had sufficiently shown the diversion of resources). This Court therefore does not address whether Plaintiffs have third-party standing in this case.

a. Organizational Injury

As already stated above, an organization may establish an injury in fact by showing its own injury. Ga. Ass'n of Latino Elected Offs., 36 F.4th at 114. An organization typically makes this showing by relying on a “diversion of resources theory.” Id. “Under this theory, an organization has standing ‘if the defendant’s illegal acts impair [the organization’s] ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.’” Id. (quoting Jacobson v. Fla. Sec’y of State, 974 F.3d 1236, 1250 (11th Cir. 2020)). It is not enough to simply state that resources were diverted. Instead, “an organizational plaintiff must explain where it would have to ‘divert resources away *from* in order to spend additional resources on combatting’ the effects of the defendant’s alleged conduct.” Id. (quoting Jacobson, 974 F.3d at 1250).

Plaintiffs presented evidence that both the Georgia State Conference of the NAACP (“Georgia NAACP”) and the Georgia Muslim Voter Project (“GAMVP”) diverted resources away from their

548-12, p. 3]. Gerald Griggs, the president of the Georgia NAACP, explained that the Georgia NAACP has limited resources and has historically been a volunteer organization. Id. at 3–4. Griggs stated that because of changes to Georgia’s election laws, including the institution of the Birthdate Requirement, the Georgia NAACP has had to make significant changes to its programs. Id. at 4. As just one example, Griggs asserted that the Georgia NAACP had to divert attention and resources away from veteran affairs programs and other similar initiatives and toward voter education efforts, including programs about how to cast an absentee ballot.⁹ Id. at 6.

Similar to the Georgia NAACP, the GAMVP is an organization that assists voters by holding voter registration drives and voter education sessions. [Doc. 548-19, p. 3]. Shafina Khabani, the Executive Director for the GAMVP, explained that the GAMVP operates under a limited budget and that when the GAMVP chooses to expend resources on one activity, it is unable to conduct other activities to advance its mission. Id. According to Khabani, the GAMVP has had to expend additional resources on voter education and outreach to make sure voters understand the information and process required for completing an absentee ballot. Id. at 3–4.

the GAMVP diverted resources away from leadership development programs. Id. at 4.

The evidence before the Court establishes that both organizations diverted their limited resources away from their ordinary programs to programs aimed at educating voters about the absentee voting process. Ultimately, the Court finds that the injury-in-fact element of the standing analysis is satisfied in this case under a diversion-of-resources theory. See Browning, 522 F.3d at 1165–66 (holding that the plaintiffs demonstrated an injury-in-fact because they diverted personnel and time away from traditional activities to educating volunteers and voters on compliance with the challenged regulation); Democratic Party of Ga., Inc. v. Crittenden, 347 F. Supp. 3d 1324, 1337 (N.D. Ga. 2018) (finding that the plaintiffs successfully established standing by showing that they diverted resources from existing uses to assisting individuals impacted by rules concerning absentee ballots).

b. Associational Standing

Plaintiffs also argue that they have associational standing.¹⁰ An organization

sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Browning, 522 F.3d at 1160 (quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)).

The Court must first analyze whether Plaintiffs' members would have standing to sue in their own right. In this case, State Defendants argue that Plaintiffs cannot satisfy this element because Plaintiffs have not identified any specific members who have had their absentee ballots rejected due to the failure to comply with the Birthdate Requirement.

"When the alleged harm is prospective," the Eleventh Circuit Court of Appeals has "not required that the organizational plaintiffs name names because every member faces a probability of harm in the near and definite future." Id. "To satisfy the requirements of associational standing, all that plaintiffs need to establish is that at least one member faces a realistic danger of having his or her application rejected." Id. at 1163.

The alleged injury in this case is the rejection of an absentee ballot because of noncompliance with the Birthdate Requirement. This injury will occur, if at all, at the next election. Plaintiffs presented evidence that the Georgia NAACP has

approximately 10,000 members across the State of Georgia. [Doc. 548-12, p. 3].

These members are located in nearly every county. Id. Plaintiffs also presented evidence that since the enactment of S.B. 202, numerous ballots have been rejected for the failure to comply with the Birthdate Requirement. The below chart compares the number of absentee ballots rejected due to the Birthdate Requirement before and after the passage of S.B. 202 for a selection of counties:

County	Pre-S.B. 202		Post-S.B. 202	
	Nov. 2020	Jan. 2021	Nov. 2022	Dec. 2022
Athens-Clarke	0	0	17	3
Chatham	0	0	25	49
Cobb	0	0	0	180
Fulton ¹¹	0	0	16–283	1–279
Hall	0	0	3	1
Richmond	0	0	21	13

See [Doc. 548-1, p. 13]. Given that the Georgia NAACP has around 10,000 members state-wide, it is highly unlikely “that not a single member will have his or

¹¹ Plaintiffs asked Fulton County to provide the number of absentee ballots rejected for a missing birthdate for the 2022 general election and the 2022 general runoff election. [Doc. 548-9, p. 7]. In its response, Fulton County stated that it rejected between 16 and 283 absentee ballots for the 2022 general election and between 1 and 279 for the 2022 general runoff election. Fulton County explained that it gave a range of numbers because its record-keeping program only allows “one specific reason [for the ballot rejection] to be chosen on its drop-down menu.” Id. at 10. For instance, if an absentee voter failed to provide both his date of birth and his social security number, the absentee ballot would be rejected. The registrar or clerk rejecting the ballot, however, could indicate only one reason for the rejection in the record-keeping program. Consequently, according to Fulton County, “[t]here is no accurate way to calculate how many applications were rejected” because an application could be rejected for multiple reasons. Id.

For these reasons, the Court finds that Plaintiffs have sufficiently alleged
that me

will be ‘redressed by a favorable decision’” of the court. Lujan, 504 U.S. at 561 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38 (1976)).

information is missing or does not match voter registration records.

election officer of the state’ with ‘general supervision and administration of the election laws’ does not make the order in which candidates appear on the ballot traceable to her.”

B. Preliminary Injunction Standard

considers whether Plaintiffs have shown a substantial likelihood of success on their claim that the Birthdate Requirement violates the Materiality Provision.

a. Application of the Materiality Provision

2008). Indeed, the Materiality Provision was “intended to address the practice of requiring unnecessary information for voter registration with the intent that such

contained in the error is material to determining the eligibility of the applicant.”¹⁴
Id. at 1175. In sum, if the error is not material to determining whether the voter is eligible to vote, the law or procedure violates the Materiality Provision.

To evaluate whether the Birthdate Requirement violates the Materiality Provision, this Court must assess whether requiring an individual’s date of birth on the outer envelope is material to determining whether that individual is qualified to vote. To be qualified to vote in Georgia, an individual must meet the following requirements: (1) be a citizen of the United States, (2) be at least eighteen years of age, (3) be a resident of Georgia and of the county in which he or she seeks to vote, (4) not have been convicted of a felony and (5) not have been declared mentally incompetent. O.C.G.A. § 21-2-216. Notably, the determination of whether an individual is

absentee ballot, that information is not used to determine whether the individual is qualified to vote. In fact, to have received the ballot (and the envelope) in the first instance, that determination has necessarily already taken place.

State Defendants even admit that the Birthdate Requirement is not used to determine whether a voter is qualified to vote and is only used to verify the voter's identity. [Doc. 582, p. 23]. In other words, the Birthdate Requirement is not used to ensure that the voter is at least eighteen years of age because the voter's age was already verified during the *application* process. Thus, even if the voter did, in fact, write his or her correct birthdate on the outer envelope (i.e., even if the error were accepted as true), the birthdate is not material to determining whether the voter is qualified to vote.

Ultimately, these uncontroverted facts show that a voter's ability to correctly provide his or her birthdate on the outer envelope of an absentee ballot is not material to determining that voter's qualifications under Georgia law. And yet, if an error or omission is made on the outer envelope, the absentee ballot will be rejected, and the vote not counted. As a result, this Court finds that Plaintiffs have

established a substantial likelihood of success on the merits of their claim that the Birthdate Requirement violates the Materiality Provision.¹⁵

b. Responding Defendants' Arguments

In

Provision does not apply in the first instance. The Court addresses these arguments in turn.¹⁶

i. Whether Rejecting a Ballot Constitutes a Denial of the Right to Vote

Responding Defendants argue that if a registrar or clerk rejects an absentee ballot based on a missing or incorrect date of birth, the voter has not been denied the right to vote. Instead, even though the vote is not counted, Responding Defendants’ contend that the voter has forfeited his vote because the voter failed to follow the process outlined in Georgia law for casting an absentee ballot.

Responding Defendants’ position does not find support in the plain language of the Materiality Provision. Pa. State Conf. of the NAACP v. Schmidt, No. 1:22-CV-339, 2023 WL 3902954, at *6 (W.D. Pa. June 8, 2023) (concluding that this argument “runs afoul of the plain language of the statutory text”). As previously stated, the Materiality Provision prohibits “deny[ing] 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.” 52 U.S.C. §

¹⁶ State Defendants also argue that Plaintiffs are not entitled to injunctive relief because the Materiality Provision does not create a private right of action. While a circuit split exists as to this issue, the Eleventh Circuit has already held that the Materiality Provision can be enforced by a private right of action under § 1983. Schwier, 340 F.3d at 1297. Given this binding precedent, the Court finds that this argument is without merit.

person.” Instead, the statute prohibits the denial of the right to vote. As this Court explained above, Congress defined “voting” expansively. This Court is bound by the statutory text, which makes no distinction between acts requisite to the specific manner in which a voter submits his or her ballot. When a voter returns an absentee ballot to the clerk or registrar, the ballot contained in the inner envelope is

qualified' to vote.” Ball, 289 A.3d at 25 n.139 (quoting 52 U.S.C. § 10101(a)(2)(B)). The Court is unpersuaded by this final argument.

* * *

As set forth above, Plaintiffs have established that they are substantially likely to succeed on the merits of their claim that the Birthdate Requirement violates the Materiality Provision, and none of Responding Defendants’ arguments lead this Court to a different conclusion. The Court now turns to the remaining preliminary injunction factors.

2. Irreparable Harm

“A showing of irreparable injury is ‘the sine qua non of injunctive relief.’” Siegel, 234 F.3d at 1176 (quoting Ne. Fla. Chapter of Ass’n of Gen. Contractors v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990)). Even if a plaintiff can show a substantial likelihood of success on the merits, “the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.” Id.; see also City of Jacksonville, 896 F.2d at 1285 (declining to address all elements of the preliminary injunction test because “no showing of irreparable injury was made”). Irreparable injury “must be neither remote nor speculative, but actual and imminent.” Siegel, 234 F.3d at 1176 (quoting City of Jacksonville, 896 F.2d at 1285).

over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin the law.”); see also Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration & Elections, 446 F. Supp. 3d 1111, 1125 (N.D. Ga. 2020) (“A restriction on the fundamental right to vote . . . constitutes irreparable injury.” (quoting Obama for Am. v. Husted, 697 F.3d 423, 436 (6th Cir. 2012))). Ultimately, this Court finds that the potential infringement on the right to vote is sufficient to establish irreparable injury.

State Defendants argue that Plaintiffs unreasonably delayed in filing the instant motions and have thus not shown irreparable injury. It is true that “[a] delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm.” Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1248 (11th Cir. 2016). This is because obtaining preliminary injunctive relief “requires showing ‘imminent’ irreparable harm.” Id. (quoting Siegel, 234 F.3d at 1176–77).

In the Court’s view, Plaintiffs did not unreasonably delay in requesting the instant relief. To obtain an injunction, Plaintiffs must establish that the harm is imminent. Moreover, Plaintiffs are simultaneously

2023—ten months before the next elections. Had Plaintiffs filed their motions earlier, their prospective harms would not have been imminent, but had they filed any later, their relief may have been barred by Purcell.

The Eleventh Circuit has held that a delay “*militates against* a finding of irreparable harm”—not that it precludes such a finding entirely. Wreal, 840 F.3d at 1248. Even if this Court determined that Plaintiffs delayed in bringing the instant motion, the Court would still need to weigh that finding against the Court’s prior conclusion that Plaintiffs established irreparable injury in the form of the diversion of resources and the infringement of the right to vote. And because “[d]enying an individual the right to vote works a serious, irreparable injury upon that individual,” Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005), it is unlikely that any delay in filing these motions—particularly considering the context of this case as one concerning election-related relief—would “militate against a finding of irreparable harm,” Wreal, 840 F.3d at 1248. Consequently, for the reasons set forth above, the Court finds that Plaintiffs have established irreparable injury sufficient to support preliminary injunctive relief.

3. Balance of the Equities and the Public Interest

The final two factors of the test for a preliminary injunction are the balance of the equities and the public interest. Swain v. Junior, 958 F.3d 1081, 1090 (11th

Cir. 2020). The Court combines its analysis of the final two factors of the preliminary injunction test because “where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest.” Id. at 1091. In the context of an election, the balance of the equities and the public interest factors are considered in tandem because “the real question posed . . . is how injunctive relief . . . would impact the public interest in an orderly and fair election, with the fullest voter participation possible and an accurate count of the ballots cast.” Curling v. Kemp, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018). Ultimately, to conduct this analysis, a court must weigh (i) whether State Defendants’ interests in conducting an orderly and efficient election and generally preserving the integrity of the electoral process outweigh the threat of injury to Plaintiffs and (ii) whether an injunction would be adverse to the public’s interests, which merge with those of the state. See Sofarelli, 931 F.2d at 723–24.

State Defendants argue that they will suffer irreparable harm if an injunction is issued because the Birthdate Requirement helps verify the identity of the voter casting the absentee ballot. State Defendants therefore contend that an injunction “eliminating a tool for verifying the identity of voters who cast absentee ballots lowers the overall integrity of the election and risks introducing fraudulent ballots that would dilute lawful votes cast by Georgia voters.” [Doc. 582, p. 27].

The Court is not convinced that State Defendants' alleged harms are significant. As an initial matter, a voter's identity can be verified without the Birthdate Requirement. In fact, voters are required to provide their social security number and the number from their driver's license or state identification card on the outer envelope. State Defendants fail to adequately explain why these verification methods are not sufficient to identify a voter. Moreover, State Defendants did not present any evidence that absentee ballots rejected for failure to comply with the Birthdate Requirement were fraudulent ballots. Given the evidence presented, the Court is simply not persuaded that eliminating the Birthdate Requirement risks introducing fraudulent ballots or threatens election integrity.

After carefully considering State Defendants' arguments, the Court finds that "none of the harm that [State] Defendants will allegedly suffer from an injunction rises to the same level as the harm that disenfranchised Plaintiffs (and, undoubtedly, other absentee voters) will suffer without an order from this Court." Martin v. Crittenden, 347 F. Supp. 3d 1302, 1310 (N.D. Ga. 2018). Moreover, "the public interest is best served by allowing qualified voters to vote and have their votes counted." Id. at 1310–11. Ultimately, the Court finds that an injunction requiring County Defendants to count absentee ballots with a missing or incorrect

birthdate is not so burdensome as to outweigh an individual's right to vote. As such, Plaintiffs have established that the balance of the equities weighs in their favor and that an injunction would not be adverse to the public interest.

C. Application of the Purcell Principle

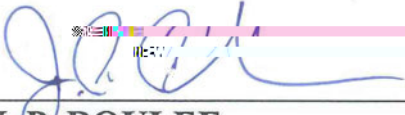
The Purcell principle, first enunciated in Purcell v. Gonzalez, 549 U.S. 1 (2006), is the proposition that “lower federal courts should ordinarily not alter the election rules on the eve of an election,” Republican Nat’l Comm. v. Democratic

(S.D. Fla. June 7, 2023) (declining to apply Purcell “nearly six months prior to an election”).¹⁸

CONCLUSION

For the reasons explained above, the Motion for a Preliminary Injunction Based on Immaterial Voting Requirements [Doc. 548] is **GRANTED IN PART AND DENIED IN PART**. Insofar as Plaintiffs seek an injunction as to State Defendants, the Motion is **DENIED**. To the extent that Plaintiffs seek to enjoin County Defendants, the Motion is **GRANTED**. County Defendants are **HEREBY ENJOINED** from rejecting absentee ballots based on any error or omission relating to the Birthdate Requirement.

SO ORDERED this 18th day of August, 2023.



J. P. BOULEE
United States District Judge

¹⁸ The Court notes that State Defendants do not argue that Purcell prevents the Court from entering an injunction. Intervenor Defendants contend, however, that Purcell applies. Intervenor Defendants assert that voter confusion would result if an injunction is issued because “voters have already voted with the birthdate requirement in place.” [Doc. 583, p. 17]. Intervenor Defendants further contend that an injunction would require retraining. Intervenor Defendants’ arguments are not supported by the record, and Intervenor Defendants provide no evidence that counting absentee ballots regardless of purported errors or omissions with respect to birthdates would result in confusion or substantial costs for training.