IN THE 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
GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants*. SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH,	Civil Action No.: 1:21-cv-01259-JPB

GEORGIA NAACP PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION BASED ON IMMATERIAL VOTING REQUIREMENTS

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INTRODUCTION

The 2022 election results show that Senate Bill 202 ("SB 202") has already denied the right to vote to hundreds and potentially thousands of qualified Georgia voters by rejecting absentee ballots without a correct birthdate on the return envelope. Absent a preliminary injunction, the birthdate requirement will, disenfranchise many more eligible voters in the upcoming 2024 primaries and general election. Because this "error or omission" on the ballot return envelope is "not material to determining" whether any person "is qualified under State law to vote"—as the State and counties admit—this requirement violates the Civil Rights Act (the "CRA"), 52 U.S.C. §10101(a)(2)(B). This Court should enjoin it.

Indeed, this District held twice before, in 2018, that laws requiring absentee voters to provide birthdates on ballot return envelopes violate the CRA. *See Martin v. Crittenden*, 347 F. Supp. 3d 1302 (N.D. Ga. 2018); *Democratic Party of Georgia, Inc. v. Crit*

the prior injunctions, and with full knowledge that the immaterial birthdate requirement would increase rejections of valid ballots, the General Assembly and Governor Kemp in 2021 reintroduced a birthdate requirement in SB 202.

To stop SB 202's immaterial birthdate requirement from disenfranchising more Georgians in the upcoming 2024 elections, the Georgia State Conference of the NAACP and other signatory Plaintiffs below ("Plaintiffs") request that this Court enter an injunction that parallels those in the *Crittenden* cases: ENJOIN Defendants from rejecting absentee ballots based on any error or omission relating to SB 202's requirement of birthdates on ballot return envelopes and ORDER the Secretary of State to count such ballots and refuse certification of election results until all such ballots have been counted.

BACKGROUND

A. GEORGIA REMOVED A SIMILAR BIRTHDATE REQUIREMENT AFTER THIS DISTRICT HELD IT VIOLATED FEDERAL LAW

1. This District Struck Down Birthdate Requirements in 2018.

Birthdate plays only one role in determining qualifications to vote under Georgia law. A voter must be "[a]t least 18 years of age on or before the date of the primary or election in which such person seeks to vote"—a determination made at the time of registration. O.C.G.A. § 21-2-216(a)(3) (2020).

From 2007 to 2018, Georgia law nonetheless required absentee voters to write their birthdates on ballot return envelopes, even though those voters had already proven their age eligibility when registering, and after election officials had already confirmed their eligibility to receive ballots. A registered voter could request an absentee ballot by completing an application requiring the voter's name, home address, the election the voter wished to vote in, and the voter's signature on an oath. O.C.G.A. § 21-2-381 (a)(1)(C) & (b)(2) (2018). Before mailing an absentee ballot and two envelopes to the voter, Georgia law required election officials to "compare the Identifying information on the application with the information on file in the registrar's office and, if the application is signed by the elector, compare the signature or mark of the elector on the application with the signature or mark of the elector on the elector's voter registration card." O.C.G.A. § 21-2-381 (b)(1) (2018).

To submit the absentee ballot, the voter had to place the ballot in a first envelope, and then place that envelope in a second, ballot return envelope. On the ballot return envelope, voters had to again sign an oath, and provide their home address and birthdate. Georgia law changed in 2017, requiring voters to instead write their year of birth on the envelope. O.C.G.A. § 21-2-384(c)(1) (2018). Georgia law further provided that, if the voter failed to put this information on the

return envelope, the absentee ballot "shall" be rejected. O.C.G.A. § 21-2-386(a)(1)(C) (2018).

During the 2018 election, this District held, in two separate decisions, that requiring birth year information violated the Materiality Provision of the CRA, which forbids officials from denying the right to vote "because of an error or omission on any record or paper relating to any . . . 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). In *Martin*, the court held that "a voter's ability to correctly recite his or her year of birth on the absentee ballot envelope is not material to determining said voter's qualifications under Georgia law," and accordingly enjoined Gwinnett County from rejecting absentee ballots for failure to provide year of birth on the return envelope. 347 F. Supp. 3d at, 1308-09. One day later, the court in *Democratic Party of Georgia* adopted "the rationale set forth in" *Martin* and confirmed "that absentee mail-in ballots rejected solely because of an omitted or erroneous birth date must be counted" state-wide and granted plaintif

2.

Eliminating the immaterial birth year requirement cut the rejection rate for valid absentee ballots. Just a few months before SB 202's enactment, counsel for the Secretary of State and members of the Georgia State Election Board confirmed that HB 316 had "resulted in a significant decrease in the percentage of absentee ballots that were rejected at the outset" in the 2020 General Election as compared to the 2018 General Election, in part because "[t]here were quite a number in 2018 that were rejected for that missing [birthdate] information." *See* Decl. of Laurence Pulgram dated May 17, 2023 ("Pulgram Decl.") Ex. 1 at 51:12-15 (Oral Argument Transcript from *Wood v. Raffensperger et al.*, No. 20-cv-4651-SDG (N.D. Ga. Nov. 19, 2020), ECF. No. 64,).

B. SB 202 REINSTATES A BIRTHDATE REQUIREMENT THAT DISENFRANCHISES ELIGIBLE ABSENTEE VOTERS

Despite this history, SB 202 reinstitutes the very type of absentee-ballot-envelope birthdate requirement that the *Crittenden* cases held impermissible. Registered voters who submit an absentee ballot application must include their name, date of birth, address as registered, address where they want the ballot mailed, a signed oath, and the number on their driver's license or identification card. SB 202 § 25 at 945-48. Election officials must compare the applicant's "name, date of birth, and number of his or her Georgia driver's license or identification card" in the application with the same information in the voter's registration records to "verify

the identity of the applicant." *Id*. at 1056-63. If the application contains all the the idne ap

dated May 16, 2022). Upon rejection of an absentee ballot, voters have just three days from the date of the election, no matter when they receive notice of the error or omission, to "cure" the problem by submitting an affidavit to the county registrar or clerk, along with a valid form of identification. SB 202 § 29 at 1602-07. Otherwise, the lack of birthdate negates their vote.

The foreseeable consequence of the renewed birthdate requirement is more disenfranchised Georgians. The table below shows the number of absentee ballots rejected due to the birthdate requirement just before and after enactment of SB 202, as identified for just the six counties that have responded to Plaintiffs' interrogatories.

	Pre-SB 202		Post-SB 202	
County	**Nov. 2020**	**Jan. 2021**	**Nov. 2022**	**Dec. 2022**
Athens-Clarke	0	0	17	3
Chatham	0	0	25	49

See Pulgram Decl. Exs. 4-9 (interrogatory responses of County Defendants). Even the limited information available shows that this birthdate requirement has already disenfranchised qualified voters in every county reporting.

ARGUMENT

To obtain a preliminary injunction, the movant must establish that: (1) it has a substantial likelihood of success on the merits; (2) it will suffer an irreparable injury unless the injunction is granted; (3) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The third and fourth factors merge when the government opposes injunctive relief. *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1271 (11th Cir. 2020) (citing *Swain v. Junior*, 961 F.3d 1276, 1285 n.3 (11th Cir. 2020)). Here, all factors support a preliminary injunction.

A. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS

1. Plaintiffs Have Standing.

To establish standing, a plaintiff must show (1) that it has suffered, or faces an imminent, "concrete and particularized" injury; (2) that defendant's conduct caused that injury; and (3) that the injury or threat is redressable by a favorable outcome. *Democratic Party of Ga.*, 347 F. Supp. 3d at 1336. Each requirement is met here.

First, Plaintiffs have suffered and will suffer a concrete injury through their "diversion-of-resources" to address SB 202's illegal requirements. "[A]n organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341–42 (11th Cir. 2014). An organization must show that it has "diverted its resources," and that "the injury to the identifiable community that the organization seeks to protect is itself a legally cognizable Article III injury that is closely connected to the diversion." *City of S. Miami v. Governor*, 65 F.4th 631, 638 (11th Cir. 2023). Plaintiffs satisfy both prongs.

Plaintiffs are organizations that aid underrepresented communities, including people of color and/or women, to participate in voting. Pulgram Decl. Ex. 10 at ¶ 2 (Decl. of Gerald Griggs dated May 16, 2023 ("Griggs Decl.")); Pulgram Decl. Ex. 11 at ¶ 2 (Decl. of Susannah Scott dated May 15, 2023 ("Scott Decl.")); Pulgram Decl. Ex. 12 at ¶ 2 (Decl. of Gerardo Gonzalez dated May 15, 2023 ("Gonzalez Decl.")); Pulgram Decl. Ex. 13 at ¶ 4 (Decl. of Treaunna ("Aunna") Dennis dated May 16, 2023 ("Dennis Decl.")); Pulgram Decl. Ex. 14 at ¶ 2; (Decl. of Helen Butler dated May 14, 2023 ("Butler Decl.")); Pulgram Decl. Ex. 17 at ¶ 4 (Decl. of Shafina Khabani dated May 16, 2023 ("Khabani Decl.")). The organizations' core missions

include promoting voter registration, voter education, election protection, and maximizing voter participation. *Id*. Their limited resources have been and will continue to be diverted from other activities to address the immaterial birthdate requirement, through time spent educating voters about absentee ballots, constituting a "concrete and demonstrable injury." *Havens Realty Corp. v. Coleman*, 455 US

01734-JPB, 2023 WL 2432011 (N.D. Ga. March 9, 2023) (quoting *Democratic Party of Ga.*, 347 F. Supp. 3d at 1337, and discussing *Browning* and *Arcia*).

Second, as to causation, the State's reinstatement of the birthdate requirement and the Counties' failure to count valid absentee votes directly cause both the diversion of resources and the frustration of the Plaintiffs' missions. The Court "can trace a direct line between . . . any county's[] decision to reject an absentee ballot for missing information, when that information is not material to verifying a voter's identity, and the resulting injury when that person's vote is not counted." *Democratic Party of Ga.*, 347 F. Supp. 3d at 1338. There is no legitimate question that Defendants' rejection of otherwi.1Ra

paper related to any application, registration, or other act requisite to voting, if such error or omission is not material to determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. §10101(a)(2)(B). No racially discriminatory intent or effect is required. Instead, this provision "prohibits denying the right to vote based on errors or omissions that are not material in determining voter eligibility," *Browning*, 522 F.3d at 1173, "thus providing an excuse to disqualify potential voters."

voters to correctly write their birthdate on an absentee ballot return envelope has no bearing on determining their eligibility to vote under Georgia law. To the contrary, to be eligible to vote in Georgia, one need only meet the following qualifications:

(State Defendants' Responses and Objections

Migliori v. Cohen, 36 F.4th 153, 163 (3d Cir. 2022), *vacated as moot sub nom. Ritter v. Migliori*, 143 S.Ct. 297 (Oct. 11, 2022) (finding absence of handwritten date on absentee ballot return envelope immaterial under CRA).

In all events, there is no proof of significant absentee ballot fraud in Georgia, much less proof that a birthdate requirement would be material to reducing fraud. It is highly improbable to believe that a fraudster who somehow obtains an eligible voter's ballot and identification or social security number would not also know that voter's date of birth. If anything, just the opposite; the usual voter ID (*e.g.*, driver's license) generally includes the date of birth. Requiring a birthdate is immaterial even under the farfetched, hypothetical scenario of an effort to obtain, and return, a single fraudulent ballot. As the State's own expert witness, Dr. Justin Grimmer testified, "there is no evidence of meaningful fraud in Georgia [elections] in 2020." Grimmer Depo. Tr. at 36:19-20; *see also id.* at 38:11-39:2 (explaining analysis finding claims of fraud to be false).

The denial of even one qualified voter's ballot due to an immaterial requirement establishes a violation of the statute.[3] The undisputed record to date shows at least hundreds in six counties, alone.

[3] The superficiality of SB 202's "cure" process is magnified in that it grants absentee voters a mere three days after the election to cure. SB 202 § 27 at 1258-61. As the uncounted votes in 2022 reflect, voters do not always receive timely notice that a

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). That is because "a violation of the right to vote cannot be undone through monetary relief and, once the election results are tallied, the rejected electors will have been disenfranchised without a future opportunity to cast their votes." *Martin*, 347 F. Supp. 3d at 1309.

C. THE BALANCE OF HARDSHIPS WEIGHS STRONGLY IN FAVOR OF A PRELIMINARY INJUNCTION

Any purported hardship that Defendants suffer from a preliminary injunction is outweighed by the harm that Plaintiffs seek to redress. SB 202's birthdate requirement disenfranchises already eligible voters for simply failing to write a correct date of birth on a ballot return envelope. "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." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Without an injunction, voters have been

In contrast, Defendants will suffer little, if any, hardship from an injunction. Plaintiffs request narrow and easily implemented relief that would not disrupt upcoming elections or even require change in forms. If anything, enjoining the Secretary of State and County Defendants from rejecting otherwise valid ballots based on the immaterial birthdate requirement would make review of absentee ballots *easier*, as birthdates need not be checked. The Secretary of State would also issue an Official Election Bulletin advising of this and be enjoined from certifying the election until county election officials confirm that they have complied. The relief sought is straightforward and mirrors the relief granted on a much shorter timeline in the two prior court decisions after the 2018 general election. *Democratic Party of Ga.*, 347 F. Supp. 3d at 1340-41 (enjoining certification of election results until Secretary "has confirmed that each county's returns include the counts for absentee ballots where the birth date was omitted or incorrect"); *Martin*, 347 F. Supp. 3d at 1308-09 (enjoining Gwinnett County from rejecting absentee ballots because of omitted or incorrect dates of birth).[4]

[4] Of course, if there is sufficient time before an election to eliminate the immaterial requirement from absentee ballot forms, that remedy is preferable. But if the State contends there is insufficient time, then counting absentee ballots regardless of birthdate information on the return envelope is an adequate alternative.

For these reasons, the prudential principles in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) do not weigh against an injunction here. To the contrary, *Purcell* supports immediate issuance of an injunction now, to ensure relief is granted sufficiently in advance of coming elections to prevent any disruption or confusion.

D. THE PUBLIC INTEREST STRONGLY FAVORS AN INJUNCTION

Vindicating voting rights and enforcing "a federal statute serve the public interest almost by definition." *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012); *see also Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) (explaining that a preliminary injunction serves the public interest when it helps permit "as many qualified voters to vote as possible").

Further, as explained above, Defendants have not and cannot show that the birthdate requirement will prevent even a single instance of fraud, and Congress enacted the Materiality Provision to eliminate exactly these kinds of clerical hurdles to the right to vote rather than subject them to a balancing test.

Accordingly, the public interest here is best served by a procedure that allows otherwise valid absentee ballots to be cast and counted without the risk of being rejected because the voter omitted immaterial information. Without an injunction, the State of Georgia will continue to enforce "an excuse to disqualify potential

voters" by creating immaterial requirements that needlessly "increase the number of errors or omissions on the application forms." *Schwier*, 340 F.3d at 1294.

CONCLUSION

For the reasons above, Plaintiffs respectfully ask this Court to grant this motion for a preliminary injunction and enter an order: enjoining Defendants from rejecting absentee ballots based on any error or omission relating to SB 202's requirement of birthdates on ballot return envelopes, directing the Secretary of State to issue guidance to all counties to comply, and ordering the Secretary of State to count such ballots and refuse certification of election results until all such ballots have been counted.

Respectfully submitted, this 17th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a font size of 14.

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I hereby certify that on May 17, 2023, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.