

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
ALBANY DIVISION

MAJORITY FORWARD; and GAMALIEL \*  
WARREN TURNER, SR., \*

Plaintiffs, \*

v. \* Case No. 1:20-cv-00266-LAG

BEN HILL COUNTY BOARD OF \*  
ELECTIONS; CINDI DUNLAP, in her official \*  
capacity as Ben Hill County Elections \*  
Supervisor and Chief Registrar; THOMAS \*  
GREEN, in his official capacity as MEMBER \*  
of the Ben Hill County Board of Elections; \*  
DAVID WALKER, in his official capacity as \*  
MEMBER of the Ben Hill County Board of \*  
Elections; DANNY YOUNG, in his official \*  
capacity as MEMBER of the Ben Hill County \*  
Board of Elections; GUNDRON MILLS, in his \*  
official capacity as MEMBER of the Ben Hill \*  
County Board of Elections; PENSON \*  
KAMINSKY, in his official capacity as \*  
MEMBER of the Ben Hill County Board of \*  
Elections; MUSCOGEE COUNTY BOARD \*  
OF ELECTIONS AND REGISTRATION; \*  
NANCY BOREN, in her official capacity as \*  
Muscogee County Director of Elections & \*  
Registration; MARGARET JENKINS, in her \*  
official capacity as MEMBER of the Muscogee \*  
County Board of Elections and Registration; \*  
UHLAND ROBERTS, in his official capacity \*  
as MEMBER of the Muscogee County Board \*  
of Elections and Registration; DIANE \*  
SCRIMPSHIRE, in her official capacity as \*  
MEMBER of the Muscogee County Board of \*  
Elections and Registration; LINDA PARKER, \*  
in her official capacity as MEMBER of the \*  
Muscogee County Board of Elections and \*  
Registration; and ELEANOR WHITE, in her \*  
official capacity as MEMBER of the Muscogee \*  
County Board of Elections and Registration, \*

Defendants. \*

**BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY  
RESTRAINING ORDER**

Defendants MUSCOGEE COUNTY BOARD OF ELECTIONS AND REGISTRATION; NANCY BOREN, in her official capacity as Muscogee County Director of Elections & Registration; MARGARET JENKINS, in her official capacity as MEMBER of the Muscogee County Board of Elections and Registration; UHLAND ROBERTS, in his official capacity as MEMBER of the Muscogee County Board of Elections and Registration; DIANE SCRIMPSHIRE, in her official capacity as MEMBER of the Muscogee County Board of Elections and Registration; LINDA PARKER, in her official capacity as MEMBER of the Muscogee County Board of Elections and Registration; and ELEANOR WHITE, in her official capacity as MEMBER of the Muscogee County Board of Elections and Registration (collectively, "Muscogee County Defendants") submit this Brief in Opposition to Plaintiff's Motion for Temporary Restraining Order [Doc. no. 5], respectfully showing the Court the following.

**PROCEDURAL POSTURE**

Plaintiffs Majority Forward, a Washington, D.C. based not-for-profit organization claiming to support voter registration, and Muscogee County resident Gamaliel Warren Turner, Jr., filed the present case on December 23, 2020 against the Muscogee County Defendants to prevent an elector challenge as to more than 4,000 voters in Muscogee County, and against the Board of Elections and its members in Ben Hill County (the "Ben Hill County Defendants") to prevent an allegedly similar challenge related to some 300 voters in Ben Hill County. Plaintiffs' Complaint was unverified. While Plaintiffs' Complaint sought declaratory and injunctive relief, the Complaint did not seek a temporary restraining order (TRO) or otherwise plead the requirements for relief under Fed. R. Civ. P. 65. [Doc. no. 1].

On December 24, 2020, this Court set a hearing for December 30, 2020. [Doc. no. 2]. Thereafter, at 6:31 p.m. on December 27, 2020, Plaintiffs filed a Motion for TRO, along with various affidavits and documents allegedly in support. [Doc. No. 5]. On December 28, 2020, the Muscogee County Defendants filed a Motion to Recuse [Doc. no. 7], along with a Motion to Sever and Transfer Venue [Doc. no. 11]. The Court has not yet ruled on either motion.

Having just received Plaintiff's Motion for TRO late Sunday evening on December 27, 2020 (that arose from an unverified Complaint that did not even ask for a TRO), the Muscogee County Defendants were in the process of preparing their response in anticipation of the Court hearing set for December 30, 2020. At 9:08 p.m. on December 28, 2020, just over 24 hours after Plaintiffs filed their Motion for TRO and without the Muscogee County Defendants being afforded the opportunity to respond, the Court issued an Order granting Plaintiffs' Motion for TRO. [Doc. no. 12].

The Muscogee County Defendants recognize that the Court has already ruled on Plaintiffs' Motion for TRO. Nevertheless, to perfect the record, and to provide the Court with evidence about what is *actually happening* in Muscogee County voting, as opposed to what Plaintiffs *allege* is happening, the Muscogee County Defendants respond to Plaintiffs' Motion for TRO as follows.

### **INTRODUCTION**

Plaintiffs have moved for a temporary restraining order ("TRO"), warning the Court of a "dangerous tidal wave of attempted voter suppression." [Doc. no. 5, p. 1]. The great deluge of which Plaintiffs warn has not even been a drip. These are the facts. Pursuant to O.C.G.A. § 21-2-230(a), Ralph A. Russell, Jr., a registered voter in Muscogee County, Georgia, challenged the qualifications of several thousand individuals on the Muscogee County voter list to vote in the

Georgia Senate run-off election on January 5, 2010. [Boren Declaration (“Boren Decl.”), ¶ 3].<sup>1</sup> Mr. Russell submitted a spreadsheet (the “Spreadsheet”) containing each individual’s voter registration number and demonstrating that the challenged individuals simultaneously appear on both the Muscogee County voter registration database and the National Change of Address Registry (“NCOAR”). [Id.]

As it was required to do upon presentation of such a challenge, the Muscogee County Board of Elections and Registration (the “Board”) immediately considered the challenge brought by Mr. Russell. [Id., ¶ 6]. After hearing Mr. Russell’s challenge and considering the evidence, the Board found probable cause to support Mr. Russell’s allegations except with respect to the military, elderly and disabled individuals. [Id., ¶ 16]. It therefore determined that any of these challenged voters who attempted to vote would be told that their eligibility had been challenged and they could complete a provisional ballot, pending a later hearing to decide whether their vote would be counted. [Id., ¶ 18]. As of December 25, 2020, 38 provisional ballots have been completed in accordance with these procedures and 12 absentee ballots have been marked as challenged. [Id., ¶¶ 19, 26]. ***The Board has not removed any voter from the list of those eligible to vote in the upcoming run-off election, nor does the Russell challenge request that any voter be removed from the voter registry. [Id., ¶ 29]. And no ballot of any of the challenged ballots will be rejected unless the Board finds clear and convincing evidence that the ballot was not cast by a Georgia resident. [Id., ¶ 31].***

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<sup>1</sup> The Muscogee County Defendants have herewith submitted the Declaration of Nancy Boren, the Director of the Board in Muscogee County since 1995. [Exhibit “1”; Boren Decl., ¶ 2]. Ms. Boren’s work as the Director of the Board has been widely acclaimed for many years. She also just received a Democracy Action Hero Award from former California Governor Arnold Schwarzenegger for standing “up to attacks and intimidation while working diligently to ensure the integrity of our election process.” [See Ledger-Enquirer article attached as Exhibit “2”]

These undisputed facts get lost in Plaintiffs' rhetoric. The Board received a challenge to certain electors in accordance with O.C.G.A. § 21-2-230. As required by O.C.G.A. § 21-2-230(b), that challenge was investigated and probable cause was found to exist to support the challenge. That challenge continues to be investigated with further information received from electors involved in the challenge. In short, this case is not about voter suppression. It is about the Board responding to an elector challenge filed by a voter in accordance with Georgia law. In doing so, the Board has enacted a fair and equitable process by which all legal votes of Georgia residents can and will be counted.

### **STATEMENT OF FACTS**

Plaintiff Majority Forward is an alleged not-for-profit organization claiming to support voter registration and turnout. [Doc. no. 1, ¶ 8]. Although residency is not alleged in its Complaint, Majority Forward appears to be based in Washington, D.C. Plaintiff Gamaliel Warren Turner, Sr. is a resident of Muscogee County, Georgia. [Id., ¶ 9]. Plaintiffs claim that Mr. Turner is a "targeted voter" because his absentee ballot has been marked as "challenged" by the Muscogee County Board of Elections. [Id.]<sup>2</sup>

On December 14, 2020, pursuant to O.C.G.A. § 21-2-230(a), Ralph A. Russell, Jr., a registered voter in Muscogee County, Georgia, challenged the qualifications of over 4,033 individuals on the Muscogee County voter list to vote in the Georgia Senate run-off election on January 5, 2010. [Boren Decl., ¶ 3]. Mr. Russell claimed to have evidence that the individuals he is challenging are not Georgia residents and submitted the Spreadsheet demonstrating that the challenged individuals simultaneously appear on both the Muscogee County voter registration

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<sup>2</sup> Plaintiffs have also sought relief as to the Ben Hill County Board of Elections and Registration and its members. For purposes of this response, the Muscogee County Defendants only discuss the facts applicable to Muscogee County.

database and the NCOAR. [*Id.*]. The Spreadsheet also contained the following pertinent information for each individual listed: (1) Georgia voter registration number; (2) Georgia county of registration; (3) first name; (4) middle or maiden name; (5) last name; (6) new out-of-state delivery address; and (7) new out of state city, state and zip code. [*Id.*, ¶ 5].

After receiving the Russell challenge, Ms. Boren moved quickly to examine the Spreadsheet to determine whether the information contained therein could support a finding by the Board of probable cause under O.C.G.A. § 21-2-230(b) to sustain the challenge. [*Id.*, ¶ 6]. To conduct her examination, Ms. Boren sorted the Spreadsheet alphabetically using the individuals' last names and then sorted it by state. [*Id.*, ¶ 7]. Ms. Boren then determined which states' voter information she could access via databases supported by the states' secretaries of state that were available, which included Alabama, Florida and Washington. [*Id.*].

Ms. Boren then randomly selected individuals on the Spreadsheet whose new addresses were in Alabama, Florida and Washington. [*Id.*, ¶ 8]. Using their Georgia voter registration numbers from the Spreadsheet, Ms. Boren obtained their dates of birth from the Georgia Voter Registration System. [*Id.*]. She then searched the Alabama, Florida and Washington databases using the selected individuals' names, dates of birth, and counties. [*Id.*].

Ms. Boren's examination demonstrated that many of the individuals listed on the Spreadsheet are registered to vote in states other than Georgia. [*Id.*, ¶ 10]. Specifically, just doing a random search over the course of a few hours, she identified nine voters who were registered in states other than Georgia. [*Id.*]. Two individuals were also registered in Alabama, five were also registered in Washington, one was also registered in Florida, and one was also registered in Washington, D.C. [*Id.*].

On December 16, 2020, pursuant to O.C.G.A. § 21-2-230(b), the Board called an emergency special meeting to consider whether probable cause existed to sustain the Russell

challenge. [*Id.*, ¶ 14]. At the hearing, Ms. Boren presented the findings of her examination of the Spreadsheet, and informed the Board that her investigation revealed a number of individuals who had been challenged who were registered in states other than Georgia. [*Id.*].<sup>3</sup>

At the December 16, 2020 meeting, the Board voted unanimously that probable cause existed to sustain the Russell Challenge except with respect to the military, elderly and disabled individuals on the Spreadsheet that were identified with the assistance of the Secretary of State. [*Id.*, ¶ 16].<sup>4</sup> The Board considered the fact that military voters were more likely to have a valid reason for appearing on the NCOAR. [*Id.*]. The Board also discussed the concern of placing any additional burden on the elderly or disabled in light of Covid-19. [*Id.*]. The Board then implemented appropriate procedures to ensure ballots cast in the run-off elections by individuals who have been challenged would be provisional until the Russell challenge can be fully adjudicated at a hearing. [*Id.*, ¶ 17].

In accordance with these procedures, beginning on December 16, 2020, and up to and including December 28, 2020, individuals that have shown up in person to vote and who appear on the Spreadsheet (other than the military, elderly or disabled) have been told that their eligibility to vote has been challenged based on their residency. [*Id.*, ¶ 18]. They have been required to

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<sup>3</sup> One of the individuals Ms. Boren identified before the December 16, 2020 Board meeting was listed by the State of Florida as an active registered voter since 2005. This individual nevertheless voted in Georgia on November 3 via absentee ballot and has asked for an absentee ballot for January 5, 2021 run-off. [Boren Decl., ¶ 10].

The fact that an individual is registered in another state is evidence that the individual is not a resident of Georgia and therefore is not entitled to vote in Georgia. *See* O.C.G.A. 21-2-217(a)(2) and (b). The Board is entitled to know and consider place of registration in considering election challenges like the Russell challenge. In that regard, Ms. Boren's analysis subsequently concluded that more than 50 individuals identified in the spreadsheet provided with the Russell challenge were registered to vote in other states. [*Id.*, ¶ 30].

<sup>4</sup> Plaintiffs' allegation in their Complaint [Doc. no. 1, ¶ 83] that the vote of the Board was 3-1, which the Court relied on as a fact in its Order granting the TRO [Doc. no. 12, p. 4], is incorrect.

complete a provisional ballot. [*Id.*]. Absentee ballots submitted by individuals on the Spreadsheet (other than the military, elderly or disabled) have also been set aside and marked as challenged. [*Id.*, ¶ 25]. But for this Court's December 28, 2020 Order, all of the affected voters would have been advised that a hearing will be held on January 8, 2021 at 4:00 p.m. to determine whether their votes will be counted. All of the affected voters would also have been advised that they have a right to be heard, and can submit documentation concerning their residency at any time prior to or on the date of the hearing. [*Id.*, ¶¶ 23-25].

As of Friday, December 25, 2020, 38 provisional ballots have been completed and 12 absentee ballots have been marked as challenged in accordance with the procedure set by the Board. [*Id.*, ¶ 19]. One person who was asked to complete a provisional ballot volunteered that she was registered to vote in Nevada and she was, in fact, registered to vote there. [*Id.*, ¶ 20]. She also voted on November 3, 2020 in Nevada by provisional ballot that was counted in Nevada. [*Id.*]. She had requested by did not return a Georgia absentee ballot to vote on November 3, 2020. [*Id.*]. Five people who completed provisional ballots have already submitted additional evidence as to their residency which will be considered by the Board the January 8, 2021 hearing. [*Id.*, ¶ 21].

No one has been denied the right to vote in response to the Russell challenge. [*Id.*, ¶ 28]. No one has been discouraged from voting or completing a provisional ballot. [*Id.*]. No one has been or will be removed from the Muscogee County voter registration list as a result of the Russell challenge, nor does the Russell challenge request that anyone be removed from the Muscogee County voter registration list. [*Id.*, ¶¶ 28, 33]. Finally, no votes have been rejected by the Board. [*Id.*, ¶¶ 31-32].

**ARGUMENT AND CITATION OF AUTHORITY**

**I. The Muscogee County Defendants Followed Mandatory Georgia Law.**

Plaintiff's Motion for TRO is premised on the proposition that procedures followed by Muscogee County were inherently wrong. In fact, Georgia law required the Board to do exactly what it did.

A person may not vote in a Georgia election unless they are "[a] resident of this state and of the county or municipality in which he or she seeks to vote[.]" O.C.G.A. § 21-2-216(a). Georgia law permits two distinctly different challenges to the ability of an ineligible elector to vote. The presence of the elector on the list of electors (called under federal law "voter registration lists") can be challenged under O.C.G.A. § 21-2-229. Alternatively, the eligibility of a registered elector to vote in a *particular election* can be challenged under O.C.G.A. § 21-2-230.

Mr. Russell's challenge was brought pursuant to O.C.G.A. § 21-2-230. That is, Mr. Russell challenged the qualification of several thousand persons on the Muscogee County voter registry to vote in the Georgia Senate run-off election on January 5, 2010. Georgia law sets out the process for this challenge:

[a]ny elector of the county or municipality may challenge the right of any other elector of the county or municipality, whose name appears on the list of electors, to vote in an election. Such challenge shall be in writing and specify distinctly the grounds of such challenge. Such challenge may be made at any time prior to the elector whose right to vote is being challenged voting at the elector's polling place or, if such elector cast an absentee ballot, prior to 5:00 P.M. on the day before the election; provided, however, that challenges to persons voting by absentee ballot in person at the office of the registrars or the absentee ballot clerk shall be made prior to such person's voting.

O.C.G.A. § 21-2-230(a).

Once Mr. Russell invoked the process of O.C.G.A. § 12-2-230(a), Georgia law dictated what happened next:

[T]he board of registrars shall immediately consider such challenge and determine

whether probable cause exists to sustain such challenge. If the registrars do not find probable cause, the challenge shall be denied. If the registrars find probable cause, the registrars shall notify the poll officers of the challenged elector's precinct or, if the challenged elector voted by absentee ballot, notify the poll officers at the absentee ballot precinct and, if practical, notify the challenged elector and afford such elector an opportunity to answer.

O.C.G.A. § 21-2-230(b). As required by Georgia law, the Board immediately considered the challenges raised by Mr. Russell and found probable cause to sustain the challenges. The law then makes clear the steps that should be taken with regards to a challenged elector. *See* O.C.G.A. § 21-2-230(c)-(i). The Board took steps to ensure that any of the challenged voters could submit a provisional ballot, and be afforded the opportunity to provide additional information about their residence status. [Boren Decl., ¶ 18]. All affected persons were provided a formal hearing date of January 8, 2020 at 4:00 p.m., at which time they could submit such information, if not sooner. [*Id.*, ¶¶ 23-25]. Thus far, only 38 provisional ballots have been completed, and only 12 absentee ballots have been marked as challenged. [*Id.*, ¶¶ 19, 26]. No ballots have been rejected and no one has been or will be removed from the Muscogee County voter registration lists. [*Id.*, ¶¶ 29-30].

Plaintiffs' suggestion that the Board did something sinister by considering and acting upon Mr. Russell's challenge is simply wrong. The Board followed the mandatory state procedure set forth in O.C.G.A. § 21-2-230. And those procedures are important because once an individual casts an electronic ballot, it is impossible to reverse that vote based on a subsequent finding that the individual was not a Georgia resident. [Boren Decl., ¶ 15].

In fact, had the Board failed to do their duty to weed out potentially ineligible voters identified in the Russell challenge and the result of the run-off election is subsequently cast into doubt, Georgia law would require that the run-off elections be invalidated and a second special election conducted. O.C.G.A. § 21-2-522 (a result of an election may be contested on the grounds

that “illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result”). *See generally, Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324 (N.D. Ga. 2018); *Parham v. Stewart*, 308 Ga. 170 (2020). If the run-off election was invalidated in such a contest, the remedy would be to invalidate the election and to schedule and hold another election. *See, e.g., O.C.G.A. § 21-2-527*. No one, even including Plaintiffs, wants that to be the case.

## **II. The Muscogee County Defendants Did Not Violate Federal Law.**

Plaintiffs argue in their Motion for TRO that a TRO is necessary if they can prove “(1) a substantial likelihood of ultimate success on the merits; (2) the TRO is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the TRO would inflict on the non-movant; and (4) the TRO would serve the public interest.” *Ingram v. Ault*, 50 F.3d 898, 900 (11<sup>th</sup> Cir. 1995) (per curiam). The Muscogee County Defendants do not dispute the standard asserted by Plaintiffs, but vehemently dispute application of the standards to the facts here.

### **A. Plaintiffs Are Not Likely To Succeed on Their NVRA Claims.**

Plaintiffs argue that they are likely to succeed in showing that the Muscogee County Defendants have violated Section 8(c) and 8(d) of the National Voter Registration Act (“NVRA”). [Doc. no. 5, pp. 12-16]. The NVRA contains a provision [8(c)] which requires that “[a] State . . . complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters,” 52 U.S.C.A. § 20507(c)(2)(A), and lays out specific guidance regarding the process for removing names from the voter rolls, *id.* at § 20507(d) [8(d)]. The provisions relied on by Plaintiffs here, however, are not at issue here since the O.C.G.A. § 21-2-230 procedure does not involve “remov[ing] the names of ineligible voters from the official lists

of eligible voters,” but, instead, questions their right to vote in a particular election.<sup>5</sup>

The law in Georgia is clear that O.C.G.A. § 21-2-230 governs challenging an elector’s right to vote in a particular election, not the elector’s eligibility to be on the voter registration list. Any remedy under O.C.G.A. § 21-2-230 accordingly involves preventing an ineligible voter from voting in a specific election, here the run-off election, and does not involve the removal of a voter from the voter registration rolls or the cancellation of an individual’s voter registration. *See Cook v. Board of Registrars of Randolph County*, 727 S.E.2d 478, 482 (2012) (making clear that while O.C.G.A. § 21-2-229 permits an elector “to challenge a person’s right to register to vote or to remain on the list of electors,” O.C.G.A. § 21-2-230 “grants an elector . . . the authority to challenge another elector’s right to vote in a particular election.”). Nothing in the challenge submitted by Mr. Russell under O.C.G.A. § 21-2-230 involves removal of any voter from the voter registration rolls, nor does Mr. Russell’s challenge seek to cancel the registration of any challenged elector. As a result, none of the prohibitions or requirements under the NVRA are triggered here.<sup>6</sup>

The cases cited by Plaintiffs are not helpful to their position. Indeed, each of them involved provisions, laws, and facts completely unrelated to the challenges here, or failed to grant the relief

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<sup>5</sup> The Muscogee County Defendants recognize that the Court has already found that Plaintiffs are likely to succeed on their claims under Section 8(c) and 8(d) of the NVRA. [Doc. no. 12, pp. 5-6]. Respectfully, however, the Court’s Order (and Plaintiffs’ briefing) is replete with references to “removal” of voters from the Muscogee County voter registry lists. The evidence is undisputed that no voters have been or will be removed from the Muscogee County voter registry lists as a result of the Russell challenge. [Boren Decl., ¶¶ 29, 33]. In fact, Mr. Russell did not even seek that relief. [*Id.* at ¶ 29].

<sup>6</sup> A separate code section governs these types of actions. *See* O.C.G.A. § 21-2-229 (providing that “[a]ny elector of a county or municipality may challenge the qualifications of any person applying to register to vote in the county or municipality and may challenge the qualifications of any elector of the county or municipality whose name appears on the list of electors[.]” “[t]he burden shall be on the elector making the challenge to prove that the person being challenged is not qualified to remain on the list of electors[.]” and that “[i]f the registrars uphold the challenge, the person’s application for registration shall be rejected or the person’s name removed from the list of electors, as appropriate.”).

alleged. *See, e.g., Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1339 (11<sup>th</sup> Cir. 2014) (finding that the Florida program was barred by the NVRA because it “was an attempt to systematically remove names from the voter rolls in violation of the 90 Day Provision”); *N. Carolina State Conference of NAACP v. Bipartisan Bd. of Elections & Ethics Enf’t*, No. 1:16CV1274, 2018 WL 3748172, at \*1 (M.D.N.C. Aug. 7, 2018) (enjoining the Defendants from cancelling voter registrations within 90 days of the general election); *Montana Democratic Party v. Eaton*, 581 F. Supp. 2d 1077 (D. Mont. 2008), as amended (Oct. 10, 2008) (refusing to grant a temporary restraining order after the Montana Democratic Party brought action arising out of roughly 6,000 challenges); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 959 (7<sup>th</sup> Cir. 2019) (upholding injunctive relief against an Indiana law that authorized immediate removal of a voter from eligibility rolls); *U.S. Student Ass’n. Found. v. Land*, 546 F.3d 373, 381 (6<sup>th</sup> Cir. 2008) (upholding an injunction which prohibiting Michigan from removing a voters’ name from a registration roll when an ID card was returned). None of the cited cases preclude the type of challenges at issue here, i.e., whether an elector is eligible to vote in a particular election.<sup>7</sup>

As shown, the Board was *required* to act under Georgia law, and it did so in accordance with Georgia law. Neither the NVRA nor any other federal laws regulating voter registration lists are applicable. Plaintiffs are not likely to succeed in showing that the Board violated the NVRA.

**B. Plaintiffs Are Unlikely To Succeed On Their Right-to-Vote Claim.**

Plaintiffs secondly argue that the Board’s actions burden the right to vote under the First and Fourteenth Amendments. Plaintiffs rely on the oft-cited *Anderson-Burdick* balancing test which requires courts to “weigh ‘the character and magnitude of the asserted injury to the rights

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<sup>7</sup> If, in fact, Hancock County recently settled a lawsuit by entering into a Consent Decree, that obviously has no precedential value here. *Ga. State Conf. of NAACP v. Hancock Cnty. Bd. Of Elections & Registration*, 5:15-CV-00414 (CAR), 2018 WL 158160, at \*1 (M.D. Ga. March 30, 2018) (cited by Plaintiffs at page 14 of their Brief).

... that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justification for the burden imposed by its rule,’” considering “‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983)). Plaintiffs’ argument fails for at least two reasons.

First, there has been no showing of a substantial burden on the right to vote. The Board has specifically established procedures for these challenged electors to be allowed to vote. All of them will be allowed to submit provisional ballots and all of them will be notified of how to submit additional information confirming their residency. [Boren Decl., ¶¶ 20-25]. Five of the affected persons have already submitted such information. [*Id.*, ¶ 21]. None of them has been disqualified from their votes being counted, and they will not be disqualified unless there is clear and convincing evidence that the ballots were cast by a non-Georgia resident. [*Id.*, ¶ 31]. The procedures established by the Board here are not of the type that severely burden voting rights and demand strict constitutional scrutiny. *See, e.g., Democratic Exec. Comm. Of Fla. v. Lee*, 915 F.3d 1312, 1318 (11<sup>th</sup> Cir. 2019).<sup>8</sup>

Second, Plaintiffs’ argument that the Board has no “legitimate interest” [Doc. no. 5, p. 18] in ensuring that it complies with O.C.G.A. § 21-2-230 is likewise wrong. Surely Plaintiffs would concede that Muscogee County has a significant interest in ensuring that voters in the upcoming

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<sup>8</sup> To the extent Plaintiffs complain about how the Muscogee County Defendants found “probable cause” to sustain Mr. Russell’s election challenge, that is not Plaintiffs’ decision to make. The fact that the Board determined “probable cause,” at least in part, based on NCOAR data is not novel. It is a wholly accepted methodology. *See, e.g., Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1840 (2018) (affirming the reliance of thirty-six states on the NCOAR for data in fulfilling the NVRA’s obligation to remove from voter registration rolls the names of voters ineligible by reason of change in residence and holding that “[t]his procedure is undisputably lawful.”).

election are “[a] resident of this state and of the county or municipality in which he or she seeks to vote[.]” O.C.G.A. § 21-2-216(a). Just because Georgia state law has certain provisions like O.C.G.A. § 24-2-230 to guard against out-of-state voters voting in the upcoming run-off election does not make such provisions unconstitutional. Instead, the United States Supreme Court has repeatedly held:

Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates. We have recognized that, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). *To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. [footnote omitted].*

Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any “litmus-paper test” that will separate valid from invalid restrictions. *Storer, supra*, 415 U.S., at 730, 94 S. Ct., at 1279. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See *Williams v. Rhodes, supra*, 393 U.S., at 30-31, 89 S. Ct., at 10; *Bullock v. Carter, supra*, 405 U.S., at 142-143, 92 S. Ct., at 855; *American Party of Texas v. White*, 415 U.S. 767, 780-781, 94 S. Ct. 1296, 1305-1306, 39 L.Ed.2d 744 (1974); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S. Ct. 983, 989, 59 L.Ed.2d 230 (1979). The results of this evaluation will not be automatic; as we have recognized, there is “no substitute for the hard judgments that must be made.” *Storer v. Brown, supra*, 415 U.S., at 730, 94 S. Ct., at 1279.

*Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983) (emphasis added).

The Georgia state statutory framework of O.C.G.A. § 21-2-230 may certainly have some effect on the right of certain persons to vote in the upcoming run-off election, but that effect is negligible at best. State law required the Board to follow the statutory procedures it followed. The procedures followed by the Board safeguard the right to vote, while also safeguarding against out-of-state voting in the upcoming run-off election. Plaintiffs are unlikely to succeed on the merits of their right-to-vote claim.<sup>9</sup>

**C. Plaintiffs Will Not Suffer Irreparable Harm and Public Interest Not Served.**

In summary fashion, Plaintiffs assert that they will suffer irreparable harm unless the Court grants the requested TRO and that the public interest will be served by granting a TRO. In that regard, Plaintiffs claim that the actions of the Board “put Targeted Voters and others a risk of disenfranchisement, which undeniability constitutes irreparable harm.” [Doc. no. 5, p. 19]. While Plaintiffs say this, they have no proof of it, because it is not true.

The evidence is undisputed that no persons have been or will be removed from the Muscogee County voter registration lists. [Boren Decl., ¶¶ 29, 33]. No votes in the run-off election have been disallowed. [*Id.*, ¶ 31]. And, regardless of whether this lawsuit was filed or not, there were no plans to disallow any votes unless there was clear and convincing evidence that the votes were not cast by Georgia residents. [*Id.*]. There is simply no evidence of imminent harm here. All of the challenges raised by the Russell challenge will be resolved on or before January 8, 2021,

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<sup>9</sup> Plaintiffs’ string citations to various cases do not change the result here. Plaintiffs cite *Schmitz v. Fulton Cnty. Bd. of Registration & Elections*, 2020CV339337 (Super. Ct. Ga. Oct. 1, 2020)—a four-page summary dismissal without prejudice—which says nothing whatsoever about the NCOAR or probable cause, and *Black Voters Matter Fund v. Raffensperger*, which did not claim that the NCOAR failed to meet O.C.G.A. § § 21-2-230’s probable cause standard, a matter that was not raised or discussed by the court, either. No. 1:20-CV-04869-SCJ (N.D. Ga. Dec. 16, 2020). Moreover, neither was the court in *Black Voters Matter Fund* swayed by the claim, repeated by Plaintiffs here, that the NCOAR data is unreliable. *Id.* at 27-28.

and there could well be no votes disallowed. Plaintiffs have made no showing of irreparable harm sufficient for the Court to enter a TRO.<sup>10</sup>

Finally, issuance of a TRO would not serve the public interest. While certainly the right to vote in sacrosanct, so, too, is the right of the State of Georgia to enact an election code providing for elector challenges. And so, too, is the obligation of Muscogee County to follow the mandates of Georgia law when such a challenge is brought pursuant to O.C.G.A. § 21-2-230 as it was here. As the evidence in this case makes clear, no voters have been purged from the Muscogee County registered voter list and no votes have been disallowed. [Boren Decl., ¶¶ 28-29]. In contrast, at least 50 of the challenged voters have been identified as being registered in other states, with one of them already having admitted to being registered in another state where she voted on November 3, 2020, and another being actively registered in another state but having voted in Muscogee County as recently as November 3, 2020. [*Id.*, ¶¶ 10, 21, 30].

Under the process adopted by the Board, all of these challenges will be resolved on or before January 8, 2021, and it may be that few, if any, votes are disallowed. And, no voters will be removed from the registry. Under the TRO proposed by the Plaintiffs and now entered by the Court, however, all of these potentially disputed votes will be allowed, even if those votes are from persons not residents of the State of Georgia and therefore in violation of O.C.G.A. § 21-2-216(a). The public interest is best served by following the fair and equitable process enacted by the Board, as opposed to a process that greatly enhances the prospects that illegal votes will be cast.

### **CONCLUSION**

For the aforementioned reasons, the Muscogee County Defendants submit that Plaintiffs'

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<sup>10</sup> The Muscogee Defendants recognize that the Court has found that the balance of harms favors a TRO because of the risk of voters being "intimidated" or "discouraged" from voting. [Doc no. 12, p. 9]. Respectfully, any such concerns are not supported by the record and are speculative.

Motion for TRO should be **DENIED**.

Respectfully submitted this 29th day of December, 2020.

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**CERTIFICATE OF SERVICE**

I do hereby certify that on the date indicated below, I submitted the foregoing document to the Clerk of Court using the CM/ECF system which will automatically send electronic mail notification of such filing to all counsel of record, and by U.S. mail to the following:

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