

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

FAIR FIGHT ACTION, INC, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

Civil Action No.
1:18-cv-05391-SCJ

**PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Plaintiffs Fair Fight Action, Inc. and Baconton Missionary Baptist Church, Inc., (collectively, "Moving Plaintiffs")¹ move this Court for summary judgment in their favor pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1. As shown by the attached Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment, and the Exhibits attached to and filed with that Memorandum, there are no material issues of fact in dispute and, as a matter of law, Moving Plaintiffs are entitled to summary judgment on Count VI of the First Supplemental Complaint.

¹ Care in Action, Inc., Ebenezer Baptist Church of Atlanta, Georgia, Inc., Virginia Highland Church, Inc., and Sixth Episcopal District, Inc. are Plaintiffs in this litigation but do not bring this motion.

WHEREFORE, Moving Plaintiffs respectfully request that this Court enter summary judgment in their favor.

CERTIFICATION

I hereby certify that the foregoing has been prepared with a font size and point selection (Times New Roman, 14 pt.), which is approved by the Court pursuant to Local Rules 5.1(C) and 7.1(D).

Respectfully submitted this, the 26th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2022, the foregoing **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** was filed with the Court using the ECF system, which will serve all counsel of record.

This, the 26th day of April, 2022.

/s/ Allegra J. Lawrence

Allegra J. Lawrence

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FAIR FIGHT ACTION, INC, *et al.*,

Plaintiffs,

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs Fair Fight Action, Inc. and Baconton Missionary Baptist Church, Inc., (collectively, “Moving Plaintiffs”)¹ submit this Memorandum of Law in Support of their Motion for a Partial Summary Judgment. Moving Plaintiffs, in connection with the accompanying Motion for Leave to File a Supplemental Complaint and proposed Supplemental Complaint, seek summary judgment on the narrow and exclusively legal question raised by Count VI of the proposed Supplemental Complaint.²

INTRODUCTION

Shortly after the 2018 General Election, this Court held that “a voter’s ability to correctly recite his or her year of birth on [an] absentee ballot envelope is not material [under 52 U.S.C. § 10101(a)(2)(B)] to determining said voter’s qualifications under Georgia law.” *Democratic Party of Ga. v. Crittenden*, 347 F. Supp. 3d 1324, 1340 (N.D. Ga. 2018) (Jones, J.) (quoting *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09)). This Court thus enjoined the Secretary of State from certifying the election results until the Secretary received confirmation from each county that no absentee ballot was rejected because of an omitted or incorrect

¹ Care in Action, Inc., Ebenezer Baptist Church of Atlanta, Georgia, Inc., Virginia Highland Church, Inc., and Sixth Episcopal District, Inc. are Plaintiffs in this litigation but do not bring this motion.

² Moving Plaintiffs respectfully submit to the Court that this narrow issue can be decided on briefing, without the need for additional fact discovery, and have accordingly submitted a proposed Scheduling Order.

date of birth. *Id.* at 1347.

In their Complaint (Nov. 27, 2018, ECF No. 1) in this case, Plaintiffs asserted claims based on the date-of-birth issues that arose in the 2018 General Election. In 2019, the Georgia General Assembly passed House Bill 316 (“HB 316”), which removed the date-of-birth requirement. Therefore, in its February 16, 2021, Order on Defendants’ Motion for Summary Judgment on Jurisdiction, this Court ruled Plaintiffs’ date-of-birth based claims were moot. Order, Defs.’ Mot. Summ. J. (Jurisdiction), ECF No. 612, at 62–64. In so holding, the Court wrote “the totality of the circumstances persuades this Court that there is no reasonable expectation that the State of Georgia will reenact the challenged legislation or otherwise return to its old law.” *Id.* at 64.

The State of Georgia, however, defied this Court’s reasonable expectations. On March 25, 2021, the General Assembly passed, and the Governor signed into law, Senate Bill 202 (“SB 202”). In relevant part, SB 202 amended O.C.G.A. §§ 21-2-381 (2021), 21-2-384 (2021), and 21-2-386 (2021) to: (a) for the first time require voters to provide their date of birth on both an application for an absentee ballot and then once more to provide a date of birth on the absentee ballot oath envelope itself; (b) require local election officials to send provisional absentee ballots to absentee ballot applicants whose applications had a missing date of birth or a date of birth that does not match the information in the voter’s file; (c) require

local election officials to reject absentee ballots if the required date of birth information on the absentee ballot envelope is missing or does not match the voter roll information for that voter; and (d) require voters whose absentee ballots are rejected in light of missing or non-matching information on the absentee ballot envelope, or who were sent provisional absentee ballots based on mismatched information on their applications, to “cure” the issue with their absentee ballot through submitting an affidavit and additional forms of identification.

In short, and as most relevant here, the General Assembly now requires a date of birth when a voter applies for an absentee ballot notwithstanding that to request an absentee ballot a voter must have *already* registered to vote and thus demonstrated that they are over 18 years of age. And, the General Assembly has reinstated the absentee ballot envelope date-of-birth requirement even though two courts—including this Court—previously concluded that requiring a date of birth on absentee ballot envelopes violates the Civil Rights Act of 1964. Voters will be affected by these new provisions—some will likely be disenfranchised, and others at a minimum will need to go through the burden of “curing” their ballots.

On April 20, 2022, in the middle of this trial, Secretary of State General Counsel Ryan Germany told the Court that his office “worked with the Legislature” on SB 202 and knew that the bill reinstated the date-of-birth requirement on the absentee ballot envelope. Trial Tr. at 1560:25–1561:9, Ex. A.

He told the Court he could not recall whether his office ever alerted the General Assembly to the contradiction between SB 202 and the rulings of two prior federal courts. *Id.* at 1566:21–25. He further said that he was “not sure” he agreed that the new law contradicts the prior order, given the statute now provides a “cure” provision for those whose absentee ballots are rejected for a mismatch of identifying information, including dates of birth. *Id.* at 1567:6–1568:1. As the Court noted, its decision in *Democratic Party of Ga.* “does not indicate” that the appropriate remedy for requiring date of births on absentee ballot envelopes is “to give a time to cure the matter.” *Id.* at 1568:16-23. To the contrary, “[t]he order says it’s not required.” *Id.* at 1568: 22-23.

Whether the date-of-birth requirements violate 52 U.S.C. § 10101 is a pure question of law—just as it was when Judge May and this Court decided the issue in 2018. And the answer is straightforward: The challenged date-of-birth provisions are unlawful. Just as in 2018, the date-of-birth requirements violate 52 U.S.C. § 10101’s prohibition against requiring immaterial information to determine a voter’s qualifications to vote. A voter’s date of birth, provided on an absentee ballot application or absentee ballot envelope, is not material to the eligibility criteria for voting in Georgia. Despite the glaring contradiction with this Court’s prior findings on this precise issue, the Secretary “worked with the Legislature” to craft this new legislation and reimpose this unlawful burden on Georgia voters.

Trial Tr. at 1560:25-1561:4, Ex. A.

This Court’s intervention is needed once more and summary judgment should be granted for Plaintiffs on this purely legal question.

STATEMENT OF FACTS

I. **In 2018, two federal courts issued injunctions against the date-of-birth requirement.**

In *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018), plaintiffs challenged the requirement, which existed under Georgia law from 2007 to 2017, that a voter returning an absentee ballot write his or her date-of-birth on the absentee ballot envelope for the ballot to be counted. The plaintiffs asserted the date-of-birth requirement for absentee ballots violated 52 U.S.C. § 10101(a)(2)(B), which “forbids the practice of disqualifying voters ‘because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting.’” 347 F. Supp. 3d at 1308. On November 13, 2018, Judge May found the plaintiffs had established a substantial likelihood of success on their claim. In so ruling, Judge May recited Georgia’s qualifications for voting—the same criteria that exist today—and concluded date of birth was immaterial to demonstrating qualifications. *See Martin*, 347 F. Supp. 3d at 1308–09 (citing *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) and *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008); O.C.G.A. § 21-2-216 (2019)). Judge May therefore enjoined Gwinnett County from rejecting absentee

ballots because of omitted or incorrect dates of birth. *Id.* at 1311.

One day after Judge May’s decision, this Court agreed with the reasoning in *Martin* and issued a statewide injunction enjoining the Secretary of State from certifying election results without confirming that counties had accepted all absentee ballots with missing or incorrect dates of birth. *See Democratic Party of Ga.*, 347 F. Supp. 3d at 1340–41, 1347.

II. In 2019, Georgia’s law changed so as not to require dates of birth on absentee ballot envelopes.

In April 2019, the Georgia Legislature enacted HB 316, which implemented various reforms to Georgia’s election processes, including revising the absentee ballot oath envelope to no longer request date or year of birth. *See* O.C.G.A. § 21-2-384 (2019). In discussing this change, Defendants recognized that removing the date-of-birth requirement “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, and that “[t]here were quite a number in 2018 that were rejected for that missing information.” Oral Arg. Tr. at 51:12–15, *Wood v. Raffensperger*, No. 1:20-cv-4651 (N.D. Ga. Nov. 19, 2020) (“*Wood* Tr.”), Ex. B.

III. SB 202 re-imposed a date-of-birth requirement.

Two years later, the Georgia legislature did an about-face. As evidenced by Defendants’ April 25 Letter to the Court, the elements of the General Assembly’s

new law are not in dispute. *See* B. Tyson Letter to Hon. Steve C. Jones (April 25, 2022), Ex. C (hereinafter “April 25 Letter”). SB 202—passed and signed into law on March 25, 2021—reinstated the date-of-birth requirement for absentee ballot envelopes. *See* 2021 Ga. Laws, Act 9, §§ 27, 29, eff. July 1, 2021; April 25 Letter at 2 (“Local election officials must provide voters with envelopes containing space to place . . . date of birth”). SB 202 also imposed a new date-of-birth requirement on absentee ballot applications. *See* 2021 Ga. Laws, Act 9, § 25; April 25 Letter at 2 (“SB 202 . . . created a mandatory statewide application form that included . . . date of birth”). The General Assembly, working with Secretary of State, adopted these date-of-birth provisions despite two federal court rulings enjoining application of the date-of-birth requirement under 52 U.S.C. § 10101.

Under SB 202, if the “identifying” information (which includes date of birth) on an absentee ballot application does not match the voter’s information on record, the voter must be sent a provisional absentee ballot. *See* O.C.G.A. § 21-2-381(b)(3) (2021); April 25 Letter at 2 (where an absentee ballot application has “mismatched identifying information . . . registrars must send those individuals a provisional ballot”). The provisional ballot will not be counted unless the voter provides an affidavit and identification, either in person or through providing a photocopy of the identification when returning the provisional ballot. *See* O.C.G.A. § 21-2-381(b)(3) (2021).

Similarly, a voter who applies for an absentee ballot with his or her date of birth but then neglects to include the date of birth on the absentee ballot envelope will not have their vote counted. *See* O.C.G.A. § 21-2-381(b)(3) (2021); April 25 Letter at 2 (noting the registrar “rejects the [voted absentee] ballots if the ‘identifying information entered’ on the envelope does not match”). Instead, the voter will be mailed a “cure affidavit form” in which the voter must affirm that they are registered and qualified to vote in the election and submit one of a number of forms of acceptable ID within three days of the election. *See* O.C.G.A. § 21-2-386(a)(1)(C) (2021); April 25 Letter at 2 (for voters with rejected absentee ballots, “the registrar is further required to ‘promptly notify’ the elector and the elector is then permitted to cure the issue”).

STANDARD OF REVIEW

Summary judgment is appropriate where there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. Pro. 56(a). A court shall construe factual inferences in favor of the non-moving party and then answer all “legal question[s] . . . under that version of the facts.” *Jackson v. Humphrey*, 776 F.3d 1232, 1238 (11th Cir. 2015). After the movant satisfies their initial burden to show there are no genuine disputes of material fact the burden “shift[s] to the non-moving party to demonstrate there is indeed a material issue of fact that precludes summary judgment.” *Clark v. Coats*

& *Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). There are no disputed facts on the narrow legal issue Moving Plaintiffs raise in this motion.

ARGUMENT

The requirement that voters write their date of birth on the outside of an absentee ballot envelope to have their vote counted violates Section 10101(a)(2)(B) of the Civil Rights Act just as much today as it did when the Court so ruled in 2018. And SB 202’s new requirement—that *already registered voters* include their date of birth on their absentee ballot application form—violates Section 10101(a)(2)(B)’s prohibition for exactly the same reason. These reinstated and new requirements are but one more attempt to achieve precisely what Section 10101(a)(2)(B) was designed to prevent: “the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters.” *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003).

The touchstone of Section 10101(a) is whether a requirement is material to determining the eligibility of the applicant. The Eleventh Circuit has defined “materiality” as “whether, accepting [an] error as *true and correct*, the information contained in the error is material to determining the eligibility of the applicant.” *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008)

(emphasis in original). Applying this standard, *Martin* determined that reviewing an elector's year of birth on a returned absentee ballot was "not material to determining the eligibility of an absentee voter," because "the only *qualifications* for voting in Georgia are U.S. Citizenship, Georgia residency, being at least eighteen years of age, not having been adjudged incompetent, and not having been convicted of a felony." *Martin*, 347 F. Supp. 3d at 1308 (quoting *Schwier I*, 340 F.3d at 1297, and citing O.C.G.A. § 21-2-216 (1998)) (emphasis in original).³ Conversely, "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." *Id.* at 1308–09. Indeed, once a voter's absentee ballot application is approved, county officials must by necessity have already determined that the applicant is eligible to vote. *Id.* at 1309. As such, *Martin* determined an incorrect or missing date of birth on the outside of an absentee ballot envelope was immaterial. *Id.* This Court agreed. *See Democratic Party of Georgia*, 347 F. Supp. 3d at 1341. Under this well-established caselaw, neither of SB 202's date-of-birth requirements are permissible.

³ Although Section 21-2-216 was amended following *Martin*, the only change was to clarify that a person 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." *See* O.C.G.A. § 21-2-216(a)(3) (2019).

First, the new requirement that a voter must provide his or her date of birth on an absentee ballot application form is “not material to determining the eligibility of an absentee voter.” *Martin*, 347 F. Supp. 3d at 1308. The reason for this is simple: in order for a voter to request an absentee ballot they must *already* be registered and thus must already have demonstrated to the State that they are over 18 years old. *See id.* at 1309 (“[T]he qualifications of absentee voters are not at issue because Gwinnett County elections officials have already confirmed such voters’ eligibility through the absentee ballot application process.”). Furthermore, requiring a date of birth provides no added verification of a voter’s identity given the other information Georgia now requires voters to provide in applying for and submitting absentee ballots. To apply for an absentee ballot, a voter must provide their name, address of registration, and either a driver’s license number, state identification number, or (if the elector has neither) a copy of another form of identification prescribed by statute. O.C.G.A. § 21-2-381(a)(1)(C)(i). Election officials therefore necessarily have other (*less* publicly accessible) identifying information with which to verify the identity of the voter, and Defendants cannot seriously contend the date of birth is material to assessing the qualifications of the absentee voter.⁴

⁴ Moving Plaintiffs are aware that lawsuits involving other plaintiffs are challenging the materiality of other aspects of the absentee ballot application and

Second, the reinstated requirement in SB 202 that a voter provide his or her date of birth on the absentee ballot envelope when mailing in their ballot is as invalid now as it was in 2018. *See Dem. Party of Georgia*, 347 F. Supp. 3d at 1340-41; *Martin*, 347 F. Supp. 3d at 1309. Indeed, as Judge May noted, the “conclusion that year of birth information is immaterial is only strengthened by the Georgia Supreme Court’s explicit recognition that Georgia law ‘does not mandate the automatic rejection of any absentee ballot lacking the elector’s place and/or date of birth.’” *Martin*, 347 F. Supp. 3d at 1309 (citing *Jones v. Jessup*, 279 Ga. 531, 533 n.5 (2005)).⁵ Moreover, in submitting their absentee ballots, voters must provide on the absentee ballot envelope their name as well as their driver’s license number, state identification number, or (if the elector has neither) the last four digits of their social security number. *Id.* § 21-2-384(b). This shows, once more, all the other sources of information the state has regarding a voters’ identity.⁶ Given this Court’s and Judge May’s prior rulings, and undisturbed Georgia Supreme Court precedent, little more need be said about that provision.

That SB 202 offers a “cure” provision to voters whose absentee ballot

take no position in this filing as to whether those requirements are valid or not under Section 10101 or other statutory and constitutional provisions.

⁵ As Defendants note, “the Georgia Supreme Court has not limited, overturned, or otherwise abrogated its holding in *Jones v. Jessup*.” April 25 Letter at 3.

⁶ Again, by referencing these other sources Plaintiffs do not take a position on whether some or all of them are invalid as matter of law. *See supra* at n.4.

applications or absentee ballot itself are rejected because of the failure to provide a date of birth is—as this Court noted during Mr. Germany’s testimony—of no moment. By its plain text, Section 10101 does not hinge on the availability of a “cure” mechanism to mitigate an unlawful requirement for immaterial information: Section 10101 prohibits requiring immaterial information *in the first place*. See 52 U.S.C. § 10101(a)(2)(B) (forbidding the practice of “deny[ing] the right of any individual to vote in any election *because of* an error or omission . . . [that is] not material in determining whether such individual is qualified” to vote (emphasis added)). This alone renders a “cure”—whether illusory or not—irrelevant.

Even leaving plain text aside, there is a good reason why the “cure” cannot save SB 202’s immaterial date-of-birth provision. As Judge May noted, Section 10101 was “intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify voters.” *Martin*, 347 F. Supp. 3d at 1308 (citing *Schwier I*, 340 F.3d at 1294, and *Browning*, 522 F.3d at 1173). But requiring—as SB 202 does—immaterial information and then providing a “cure” that should not have been triggered in the first place, results in exactly the evil that the Civil Rights Act sought to prohibit. Indeed, accepting Defendants’ argument would open a substantial loophole in Section 10101’s protections. For example, Defendants

could require absentee voters provide the precise number of days they have been a Georgia resident on their absentee ballots provided that anyone who failed the test completed a potentially arduous cure process within a short period of time before an election ended. With good reason, the law does not permit such cynical attempts to disenfranchise voters.

Furthermore, just as the availability of in-person voting (without immaterial information requirements) does not mean Defendants can require immaterial information from those who choose instead to vote via absentee ballot, the availability of a “cure” period after a voter’s absentee ballot has been rejected does not fix the unlawful rejection in the first instance.⁷ Indeed, the court adjudicating challenges to SB 202 has already rejected Defendants’ motions to dismiss on this exact basis. *See Order, New Ga. Project v. Raffensperger*, No. 1:21-cv-01229 at 40 (N.G. Ga. Dec. 9, 2021) (“State Defendants have not provided any support for their argument that the opportunity to cure an error rehabilitates any potential violation of § 10101(a)(2)(B), and the statute is silent on this point.”); *Order, Sixth Dist. of*

⁷ Defendants’ burdensome cure process, however, does underscore the need for relief. Voters do not always receive notice that a cure is necessary in the first place; even if they do receive notice, they sometimes cannot cure within the specific time period provided. Even those who do cure their ballots are forced to bring identification to a county office or required to photocopy their identification and send it to the county in time to have their ballots counted. Given the inaccuracies in the voter rolls resulting in inaccurate birth dates, as Plaintiffs have and will continue to describe at trial, it remains possible that some voters will be further burdened if their identification is found not to match the birth date on record.

the African Methodist Episcopal Church v. Kemp, No. 1:21-cv-01284 at 37 (N.D. Ga. Dec. 9, 2021) (same); Order, *Ga. State Conf. of the NAACP v. Raffensperger*, No. 1:21-cv-01259 at 35 (N.D. Ga. Dec. 9, 2021).

This Court has ruled once already that a date-of-birth requirement constituted a likely violation of the Civil Rights Act. The Legislature has now reinstated the requirement and, worse, added another immaterial date of birth requirement. Moving Plaintiffs should prevail on the merits of their claim.

CONCLUSION

For the foregoing reasons, Moving Plaintiffs respectfully request that the Court grant Moving Plaintiffs' Motion for Partial Summary Judgment and enter an Order:

- i. enjoining the Secretary of State from requiring date of birth on any absentee ballot application forms or absentee ballot oath envelopes generated by the Secretary of State, *see* O.C.G.A. § 21-2-50(a)(5);
- ii. enjoining the Secretary of State from certifying election results under O.C.G.A. § 21-2-499 until county election officials have confirmed that they have not rejected any absentee ballots solely for missing or inaccurate dates of birth;
- iii. enjoining the Secretary of State to issue an Official Election Bulletin to all counties instructing them that in compliance with

- federal law, they must accept absentee ballot applications and ballots with missing or inaccurate dates of birth as long as the voter's identity and eligibility can otherwise be verified; and
- iv. enjoining the State Election Board from enforcing the challenged provisions of SB 202 where counties accept absentee applications or ballots with a missing or inaccurate date of birth, including through (a) the State Election Board's power to undertake "appropriate proceedings" to impose penalties to "prohibit[] the actual or threatened commission of any conduct constituting a violation of state election law," O.C.G.A. § 21-2-33.1(a), including through issuing cease and desist orders, *id.* § 21-2-33.1(a)(1); (b) the State Election Board's authority to authorize an Attorney General Action in the name of the State Election Board, *id.* § 21-2-33.1(c); or (c) the State Election Board's authority to suspend county or municipal superintendents and appoint a replacement, *id.* § 21-2-33.1(f).

CERTIFICATION

I hereby certify that the foregoing has been prepared with a font size and point selection (Times New Roman, 14 pt.), which is approved by the Court pursuant to Local Rules 5.1(C) and 7.1(D).

Respectfully submitted this, the 26th day of April, 2022.

/s/ Allegra J. Lawrence

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Church, Inc.; Virginia-Highland Church, Inc.;
and The Sixth Episcopal District, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2022, the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** was filed with the Court using the ECF system, which will serve all counsel of record.

This, the 26th day of April, 2022.

/s/ Allegra J. Lawrence

Allegra J. Lawrence

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

FAIR FIGHT ACTION, INC, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

Civil Action No.
1:18-cv-05391-SCJ

**PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN
SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Plaintiffs Fair Fight Action, Inc. and Baconton Missionary Baptist Church, Inc., (collectively, “Moving Plaintiffs”)¹ submit the following Statement of Undisputed Material Facts in support of Moving Plaintiffs’ Motion for Partial Summary Judgment.

I. In 2018, two federal courts issued injunctions against the date-of-birth requirement.

1. In *Martin v. Crittenden*, plaintiffs challenged the requirement that existed under Georgia law from 2007 to 2017 that a voter returning an absentee ballot write his or her date of birth on the absentee ballot envelope for the ballot to be counted. 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018).

2. The *Martin v. Crittenden* plaintiffs asserted the date-of-birth requirement for absentee ballots violated 52 U.S.C. § 10101(a)(2)(B), which “forbids the practice of disqualifying voters ‘because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting.’” 347 F. Supp. 3d at 1308.

3. On November 13, 2018, Judge May found the plaintiffs had established a substantial likelihood of success on their claim. 347 F. Supp. 3d at 1309.

¹ Care in Action, Inc., Ebenezer Baptist Church of Atlanta, Georgia, Inc., Virginia Highland Church, Inc., and Sixth Episcopal District, Inc. are Plaintiffs in this litigation but do not bring this motion.

4. In so ruling, Judge May recited Georgia’s qualifications for voting—the same criteria that exist today—and concluded date of birth was immaterial to demonstrating qualifications. *See Martin*, 347 F. Supp. 3d at 1308–09 (citing *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) and *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008); O.C.G.A. § 21-2-216 (2019)).

5. Judge May further noted the “conclusion that year of birth information is immaterial is only strengthened by the Georgia Supreme Court’s explicit recognition that Georgia law ‘does not mandate the automatic rejection of any absentee ballot lacking the elector’s place and/or date of birth.’” *Martin*, 347 F. Supp. 3d at 1309 (citing *Jones v. Jessup*, 279 Ga. 531, 533 n.5 (2005)).

6. The Georgia Supreme Court held in *Jones v. Jessup* that the failure to furnish “required information” on an absentee ballot “does not mandate the automatic rejection of any absentee ballot lacking the elector’s place and/or date of birth.” *Jones v. Jessup*, 279 Ga. 531, 533 n.5 (2005).

7. “The Georgia Supreme Court has not limited, overturned, or otherwise abrogated its holding in *Jones v. Jessup*.” B. Tyson Letter to Hon. Steve C. Jones (April 25, 2022), Ex. C (hereinafter “April 25 Letter”) at 3.²

² “Ex.” refers to the exhibits attached to Plaintiffs’ Motion for Partial Summary Judgment.

8. Judge May therefore enjoined Gwinnett County from rejecting absentee ballots because of omitted or incorrect dates of birth. 347 F. Supp. 3d at 1311.

9. One day after Judge May's decision, this Court agreed with the reasoning in *Martin* and issued a statewide injunction enjoining the Secretary of State from certifying election results without confirming that counties had accepted all absentee ballots with missing or incorrect dates of birth. *See Democratic Party of Ga.*, 347 F. Supp. 3d at 1340–41, 1347.

II. In 2019, Georgia's law changed so as not to require dates of birth on absentee ballot envelopes.

10. In April 2019, the Georgia Legislature enacted HB 316, which implemented various reforms to Georgia's election processes, including revising the absentee ballot oath envelope to no longer request date or year of birth. *See* O.C.G.A. § 21-2-384 (2019).

11. In discussing this change, Defendants recognized that removing the date-of-birth requirement “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, and that “[t]here were quite a number in 2018 that were rejected for that missing information.” Oral Arg. Tr. at 51:12–15, *Wood v. Raffensperger*, No. 1:20-cv-4651 (N.D. Ga. Nov. 19, 2020) (“*Wood* Tr.”), Ex. B.

III. **SB 202 re-imposed a date-of-birth requirement.**

12. SB 202—passed and signed into law on March 25, 2021—reinstated the date-of-birth requirement for absentee ballot envelopes. *See* 2021 Ga. Laws, Act 9, §§ 27, 29, eff. July 1, 2021; April 25 Letter at 2 (“Local election officials must provide voters with envelopes containing space to place . . . date of birth”).

13. SB 202 also imposed a new date-of-birth requirement on absentee ballot applications. *See* 2021 Ga. Laws, Act 9, § 25; April 25 Letter at 2 (“SB 202 . . . created a mandatory statewide application form that included . . . date of birth”).

14. Under SB 202, if the “identifying” information (which includes date of birth) on an absentee ballot application does not match the voter’s information on record, the voter must be sent a provisional absentee ballot. *See* O.C.G.A. § 21-2-381(b)(3) (2021); April 25 Letter at 2 (where an absentee ballot application has “mismatched identifying information . . . registrars must send those individuals a provisional ballot”).

15. The provisional ballot will not be counted unless the voter provides an affidavit and identification, either in person or through providing a photocopy of the identification when returning the provisional ballot. *See* O.C.G.A. § 21-2-381(b)(3) (2021).

16. A voter who applies for an absentee ballot with his or her date of birth but then neglects to include the date of birth on the absentee ballot oath envelope

will not have their vote counted. *See* O.C.G.A. § 21-2-381(b)(3) (2021); April 25 Letter at 2 (the registrar “rejects the [voted absentee] ballots if the ‘identifying information entered’ on the envelope does not match”).

17. Voters whose absentee ballots are rejected will be mailed a “cure affidavit form” in which the voter must affirm that they are registered and qualified to vote in the election and submit one of a number of forms of acceptable ID within three days of the election. *See* O.C.G.A. § 21-2-386(a)(1)(C) (2021); April 25 Letter at 2 (for voters with rejected absentee ballots, “the registrar is further required to ‘promptly notify’ the elector and the elector is then permitted to cure the issue”).

CERTIFICATION

I hereby certify that the foregoing has been prepared with a font size and point selection (Times New Roman, 14 pt.), which is approved by the Court pursuant to Local Rules 5.1(C) and 7.1(D).

Respectfully submitted this, the 26th day of April, 2022.

/s/ Allegra J. Lawrence

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and The Sixth Episcopal District, Inc.*

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CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2022, the foregoing **PLAINTIFFS'**
STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT was filed with the Court
using the ECF system, which will serve all counsel of record.

This, the 26th day of April, 2022.

/s/ Allegra J. Lawrence

Allegra J. Lawrence

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EXHIBIT A

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

FAIR FIGHT ACTION, INC.; CARE)
IN ACTION, INC.; EBENEZER)
BAPTIST CHURCH OF ATLANTA,)
GEORGIA, INC.; BACONTON)
MISSIONARY BAPTIST CHURCH, INC.;)
VIRGINIA-HIGHLAND CHURCH, INC.;)
AND THE SIXTH EPISCOPAL)
DISTRICT, INC.,) VOLUME VIII - A.M. SESSION
Plaintiffs,) DOCKET NO. 1:18-cv-05391-SCJ
-vs-)
BRAD RAFFENSPERGER, IN HIS)
OFFICIAL CAPACITY AS SECRETARY)
OF STATE OF THE STATE OF)
GEORGIA; REBECCA N. SULLIVAN,)
SARAH TINDALL GHAZAL, MATTHEW)
MASHBURN, AND ANH LE, IN THEIR)
OFFICIAL CAPACITIES AS MEMBERS)
OF THE STATE ELECTION BOARD,)
AND STATE ELECTION BOARD,)
Defendants.)

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE
WEDNESDAY, APRIL 20, 2022

VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER TO THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT COURT
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1 course, the legislation speak for themselves.

2 THE COURT: I guess the question I would like to hear
3 the answer to that Ms. Bryan is asking is, two judges ordered --
4 one in particular ordered that this be removed as a requirement,
5 and then it's back into a passed bill signed by the Governor. So
6 on remedies -- I'm going to overrule the objection. I want to
7 hear the answer.

8 DIRECT EXAMINATION BY MS. BRYAN (continued):

9 Q. It did go back in, did it not?

10 A. What you just read is basically a place for the elector to
11 print his or her name, a signature line, a space for the elector
12 to print the number of his or her driver's license, a space to
13 affirm that he does not have a driver's license, a space to print
14 his or her date of birth, a space to provide the last four digits
15 of the Social Security number. And then it continues to go on as
16 to kind of what should be on the absentee ballot --

17 Q. Including the date of birth?

18 A. -- envelope.

19 THE COURT: Yes? No? Maybe?

20 THE WITNESS: Date of birth is on -- is certainly on the
21 absentee ballot envelope, yes.

22 THE COURT: I guess the question is that, why is it now
23 back on there?

24 THE WITNESS: I don't think I can answer that.

25 THE COURT: You didn't know about it? They don't --

1 they didn't consult you when they put this bill together, the
2 Secretary of State?

3 THE WITNESS: I mean, we worked with the Legislature on
4 this, correct. That's correct.

5 THE COURT: So you knew nothing about this -- the
6 putting this --

7 THE WITNESS: I'm not saying I knew nothing about it,
8 but in terms of why they did it, you know, I can't -- I can't
9 speak to that.

10 THE COURT: But you knew they were going to do it;
11 right?

12 THE WITNESS: I don't know what they're going to do.

13 THE COURT: All right. We're going to take a lunch
14 break. Everybody have a good lunch.

15 (Whereupon, a lunch break was taken at 12:32 p.m.)
16
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

I do hereby certify that the foregoing pages are a true and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 20th day of April, 2022.

/s/Viola S. Zborowski
VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION
4

5 FAIR FIGHT ACTION, INC., et al,

DOCKET NO.
1:18-cv-05391-SCJ

6 PLAINTIFFS,

7 v.

Wednesday, April 20, 2022
Vol. 8

8 BRAD RAFFENSPERGER, IN HIS
9 OFFICIAL CAPACITY AS SECRETARY
10 OF STATE OF GEORGIA and as
11 CHAIR OF THE STATE ELECTION
12 BOARD OF GEORGIA, et al,
13

AFTERNOON SESSION

14 DEFENDANTS.
15
16
17
18
19
20
21

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
AFTERNOON SESSION
BEFORE THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT COURT JUDGE

22 COURT REPORTER:

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1 (There was a lunch recess, and proceedings continued as
2 follows at 1:41 p.m.):

3 THE COURT: You all can be seated.

4 Ms. Bryan, I have a couple questions before we begin.

5 Mr. Germany, when we left off, Ms. Bryan had pointed
6 out there was an addition consent to SB 202 that somewhat
7 contradict a previous order this Court has entered.

8 You indicated that you were aware of the -- of this
9 addition in Senate Bill 202 that contradicts the Court's
10 order.

11 Now, let me preference that by saying I realize you
12 are not in the General Assembly, you can't control what they
13 do in the General Assembly.

14 But my first question is when were you aware of the
15 addition of Senate Bill 202? Was it before or after they
16 passed it?

17 THE WITNESS: It was well before they -- before they
18 passed 202?

19 THE COURT: Yes.

20 THE WITNESS: Before they passed it.

21 THE COURT: At any point in time did the Secretary of
22 State's office or you directly specifically point this out to
23 the people in the General Assembly of what they were adding
24 was a contradiction?

25 THE WITNESS: I can't recall.

1 THE COURT: You don't recall the position at all?
2 You don't recall where y'all said, Hey, this contradicts the
3 judges, not just one judge, two judges -- well, Judge Mays'
4 order was just for Gwinnett County, so I can see where that
5 might be, but my order was statewide.

6 You don't remember whether you all said, Hey, this
7 contradicts something we had dealt with three years earlier?

8 THE WITNESS: I mean, not sure that I agree with you
9 that it does.

10 THE COURT: Okay. Why does it not contradict it?
11 Tell me.

12 THE WITNESS: SB202 changed the whole way of how
13 Georgia does absentee ballot verification.

14 Previously, in 2018, there was no cure period.
15 Judge May put in a judicial cure for signature mismatches.
16 And then later on, she enjoined Gwinnett from rejecting
17 subjects with a nonmatched year of birth.

18 And then your and her reasoning, the best I can
19 recall, was that then contradicts the materiality provision of
20 the act says you can't use something in verification that
21 essentially goes beyond what you need to verify the identity
22 of the voter.

23 And then you, Your Honor, extended that statewide.

24 There was no -- at that point, if there was a year of
25 birth nonmatch, there was no cure. There was no opportunity

1 to cure it.

2 And then SB202 completely changed, and it said, I
3 mean, my understanding of what the legislature wanted to do
4 was go to these more objective things because signature match
5 got such a -- sort of a hard time from, frankly, from both
6 sides of the aisle.

7 We were sued on it by Democrats; we were sued on it
8 by Republicans. And they all make the point that, Hey, these
9 county election officials aren't really in a position, they
10 are not signature matching experts.

11 THE COURT: Let me ask you this. I have had a chance
12 to reread my order, and you haven't had a chance to do that.
13 There is nowhere in the order that says anything about you
14 have to give time for a cure.

15 THE WITNESS: I'm sorry?

16 THE COURT: The order does not indicate that they
17 have to give a time to cure the matter. The order signed by
18 me on 11/14/18.

19 Again, you haven't had a chance to look at it.

20 I understand your argument says, well, 202 says now
21 you have time to go back and correct and cure the matter, but
22 the order does not indicate that. The order says it's not
23 required.

24 It's a side issue that the Court will look at
25 further.

REPORTER'S CERTIFICATE

I, Judith M. Wolff, Certified Realtime Reporter and Official Court Reporter for the United States District Court for the Northern District of Georgia, with offices at Atlanta, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on the afternoon of Wednesday, April 20, 2022, in the matter of Fair Fight Action, Inc., et al., vs. Brad Raffensperger, in his official capacity as Secretary of State of the State of Georgia and as Chair of the State Election Board of Georgia, Case No. 1:18-cv-05391-SCJ;

That said proceedings in connection with the hearing were reduced to typewritten form by me;

And that the foregoing transcript is a true and accurate record of the proceedings.

This the 21st day of April, 2022.

/s/ Judith M. Wolff, RPR, CRR
Official Court Reporter

EXHIBIT B

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1 the Court supporting that, nor any cognizable argument that that
2 has happened.

3 And, finally, as Ms. McGowan said, in terms of the
4 plaintiff's apples-to-oranges comparison, he's comparing the
5 totality of the absentee-ballot rejections from 2018. As our
6 brief response makes clear, the General Assembly made a policy
7 decision following the 2018 election to change the evaluation of
8 absentee ballots partially due to identity theft concerns and the
9 fact that voters felt uncomfortable putting their date of birth
10 on the outside of the envelope. The General Assembly took that
11 off the outer envelope where it was no longer visible to anyone
12 during the mail transmission. That resulted in a significant
13 decrease in the percentage of absentee ballots that were rejected
14 at the outset. There were quite a number in 2018 that were
15 rejected for that missing information.

16 In terms of when you actually do an apples-to-apples
17 comparison - and it is referenced in Chris Harvey's affidavit
18 that we will be moving into evidence, it's an exhibit in our
19 brief response - when you actually look at ballots from 2018 that
20 were rejected signature match and you look at ballots from 2020,
21 after the cure period, those numbers are identical in terms of --

22 MR. SMITH: Your Honor, if he continues on he's going
23 to become a fact witness.

24 MR. WILLARD: I am referencing what is in our
25 affidavit, Your Honor. It is in our brief response, as well. I

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF GEORGIA

3 CERTIFICATE OF REPORTER

4
5 I do hereby certify that the foregoing pages are a
6 true and correct transcript of the proceedings taken down by me
7 in the case aforesaid.

8
9 This the 23rd day of November, 2020.

10
11 /s/ Alicia B. Bagley _____
12 ALICIA B. BAGLEY, RMR, CRR
13 OFFICIAL COURT REPORTER
14 (706) 378-4017
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

L. LIN WOOD, JR.,

Plaintiff(s)

V.

BRAD RAFFENSPERGER, et al.,

Defendant(s)

Case No. 1:20-CV-4651-SDG

NOTICE OF FILING OF OFFICIAL TRANSCRIPT

Notice is hereby given that an official transcript of a proceeding has been filed by the court reporter/transcriber in the above-captioned matter. Counsel/Parties have twenty-one (21) days from the date of delivery of the transcript to the Clerk to file with the Court a Request for Redaction of this transcript. If no Request for Redaction is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days.

Any counsel or party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter/transcriber or view the document at the Clerk's Office public terminal.

11/24/2020

Date

ALICIA B. BAGLEY, RMR, CRR

Court Reporter

VERIFICATION OF FINANCIAL ARRANGEMENTS

Proceeding Type: TRO

Proceeding Date: 11-19-20

Volume Number: 1

Notice is hereby given that financial arrangements for a copy of the transcript have been made with the following individual(s): Ray Smith, Emilie Denmark, Susan Coppedge

as counsel/party in this case. He/She is to be provided with remote access to the transcript via CM/ECF and PACER.

11/24/20

Date

ALICIA B. BAGLEY, RMR, CRR

Court Reporter

EXHIBIT C

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April 25, 2022

Via Hand Delivery

The Honorable Steve C. Jones
United States District Judge
1967 Richard B. Russell Federal Building
75 Ted Turner Drive, SW
Atlanta, GA 30303-3309

Re: *Fair Fight Action, Inc., et al. v. Raffensperger, et al.*,
Civil Action No. 1:18-cv-5391-SCJ (N.D. Ga.)

Dear Judge Jones:

This letter responds to the Court's concerns regarding the provisions of Senate Bill 202 that added a date of birth provision back to Georgia's absentee ballot envelope as a part of reforming Georgia's absentee-ballot-verification process.

I. The 2020 election and the adoption of SB 202.

During the runup to and aftermath of the 2020 general election in Georgia, the Georgia election system was under attack by groups affiliated with both political parties. The legislature specifically determined that "[f]ollowing the 2018 and 2020 elections, there was a significant lack of confidence in Georgia election systems, with many electors concerned about allegations of rampant voter suppression and many electors concerned about allegations of rampant voter fraud." SB 202, § 2(1). In the area of absentee ballots, Democratic and Republican groups both challenged the state's signature-matching process for verifying absentee ballots. *See* SB 202, § 2(2); *Dem. Party of Ga. v. Raffensperger*, Case No. 1:19-cv-05028-WMR (N.D. Ga.) Doc. 1 (Nov. 6, 2019), ¶¶ 56-57; *Twelfth Congressional Dist. Repub. Comm. v. Raffensperger*, Case No. 1:20-cv-00180-JRH-BKE (S.D. Ga.) Doc. 1 (Dec. 9, 2020), ¶¶ 13, 55-61. As a result of these challenges, the General Assembly took action to "update existing processes to reduce the burden on election officials and boost voter confidence." SB 202, § 2(3).¹

¹ SB 202 also explained the role of local and state election officials, with the General Assembly making a finding that "[e]lections in Georgia are administered by counties, but that can lead to problems for voters in counties with dysfunctional election systems. Counties with long-term problems of lines, problems with processing of

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A number of the changes in SB 202 involved processes for absentee ballots. For example, SB 202 updated the process for absentee ballot applications. The changes created a mandatory statewide application form that included name, Georgia driver's license number, date of birth, and address of the voter, along with processes for voters who do not have driver's licenses. O.C.G.A. § 21-2-381(a)(1)(C)(i). The county registrar is then charged with verifying the identity of the voter from the information on the application. O.C.G.A. § 21-2-381(b)(1). But SB 202 also prohibited county registrars from rejecting an absentee ballot application based "solely" on mismatched identifying information. O.C.G.A. § 21-2-381(b)(3). Instead, registrars must send those individuals a provisional ballot. *Id.*

For voters who receive an absentee ballot, the absentee ballot envelope was also significantly revised. Local election officials must provide voters with envelopes containing spaces to place their name, signature, driver's license number, mark or affirm whether they do not have a driver's license number, date of birth, and last four digits of their Social Security Number. O.C.G.A. § 21-2-384(b). Some of this information is required to be hidden when the envelope is properly sealed, including, the voter's date of birth. *Id.* For their part, absentee voters are required to print their driver's license number and date of birth, or, if they do not have a driver's license number, the last four digits of their Social Security Number and their date of birth. O.C.G.A. § 21-2-385(a).

Now we move to the role of the registrar when he or she receives an absentee ballot. The county registrar compares the driver's license number and date of birth or the last four digits of the Social Security Number and date of birth with the information on file. O.C.G.A. § 21-2-386(a)(1)(B). The registrar only rejects the ballots if the "identifying information entered" on the envelope does not match. O.C.G.A. § 21-2-386(a)(1)(C). In such an instance, the registrar is further required to "promptly notify" the elector and the elector is then permitted to cure the issue during the time provided for similarly curing provisional ballots. *Id.*

All of these provisions further operate within the same electoral framework which existed at the time of this Court's summary judgment orders—a framework which places primary (and in many cases exclusive) authority on administration of

absentee ballots, and other challenges in administration need accountability, but state officials are limited in what they are able to do to address those problems. Ensuring there is a mechanism to address local election problems will promote voter confidence and meet the goal of uniformity." SB 202, § 2(7).

polling places, registration, and absentee ballots with county election officials. Likewise, the backdrop of existing state law remains the same. Specifically, the Georgia Supreme Court has not limited, overturned, or otherwise abrogated its holding in *Jones v. Jessup*, 279 Ga. 531 (2005), on which this Court relied in entering its 2018 Order concerning omitted or erroneous birth dates. *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1339–41 (N.D. Ga. 2018). And the observed application of SB 202’s provisions against this backdrop shows no material change either. See Mark Niesse, *Unlike Texas, new voter ID rules in Georgia didn’t cause surge in rejections*, Atlanta-Journal Constitution (Feb. 26, 2022), <https://www.ajc.com/politics/unlike-texas-new-voter-id-rules-in-georgia-didnt-cause-surge-in-rejections/D5BHR5WRNRATHGOGO4TJOXOBHA/> (indicating that only 0.6% of all absentee ballots returned in 2021 municipal elections throughout Georgia were rejected due to “incorrect or missing ID information or signatures”).

Viewed holistically, the General Assembly’s material revisions to the entirety of the absentee ballot application and absentee ballot process is not the state “revers[ing] course and reenact[ing] the allegedly offensive portion of its Code.” *Flanigan’s Enters. v. City of Sandy Springs*, 868 F.3d 1248, 1256 (11th Cir. 2017). The revisions in SB 202 are significant—they are not minor changes that “differ[] only in some insignificant respect.” *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). In doing so, the General Assembly did not disturb the legal framework of Georgia’s county-administered election laws, but it did significantly and comprehensively revise the process those local election officials are charged with administering. Consequently, the General Assembly did not simply endeavor to repeat the challenged conduct—it instead responded to the administrative challenges of the 2020 election by creating an entirely new process for dealing with absentee ballots that happened to include date of birth information. See SB 202, § 2(2).

II. Plaintiffs’ claims about absentee-ballot rejections.

We next turn to Plaintiffs’ claims in this case. Plaintiffs’ Second Amended Complaint only made claims about rejections for missing or incorrect birth years on absentee ballots in the context of a failure to “oversee, train, and advise counties about the proper handling of absentee ballots.” Doc. No. [582], ¶¶ 133, 137, 141. Plaintiffs also referenced the decisions of this Court in 2018 regarding birth-year rejections, but those claims involved the Civil Rights Act, not a failure-to-train or fundamental-right-to-vote claim. *Id.* at ¶ 139. The Civil Rights Act prohibits denying the right to vote because of an “error or omission on any record or paper relating to any application, registration, or other act requisite to voting,” if that error or omission is not material

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to determining a voter's qualifications. 52 U.S.C. § 10101(a)(2)(B). Plaintiffs never raised a Civil Rights Act claim in this case.² *Id.* at ¶ 136. Plaintiffs only sought relief about absentee-ballot rejections under a failure-to-train theory. *Id.* at ¶ 147.

This Court's order from 2018 addressing the date of birth issue recognized that Georgia law "does not mandate the automatic rejection of any absentee ballot lacking the elector's place and/or date of birth." *Democratic Party of Ga.*, 347 F. Supp. 3d at 1340 (quoting *Jessup*, 279 Ga. at 533 n.5). That order also referenced the Official Election Bulletin (OEB) issued by then-Secretary Crittenden, advising counties of Georgia law on this topic. *Id.*

Further, this Court expressly recognized that some of the information on the absentee ballot envelope may be material to identifying a voter. *Id.* at n.4. Ultimately, the relief ordered in *Democratic Party* was to ensure "the sake of statewide uniformity and assurance that all absentee mail-in ballots are equally treated." *Id.* at 1341.

III. Summary judgment motions and orders.

Following the adoption of HB 316, and in the summer of 2020, Defendants moved for summary judgment in this case on a variety of grounds, including that any claims about voter birth date rejections had been mooted by that statute's elimination of the birth year on the absentee ballot envelope. Doc. No. [441-1], p. 28. Plaintiffs' only response on this jurisdictional claim was that dates of birth were still used in some local election materials. Doc. No. [489], p. 25.

² The cases Plaintiffs cited in the Second Amended Complaint and in trial testimony resulted in relief under the Civil Rights Act, not some other theory. *See Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1304 (N.D. Ga. 2018) (sole issue was "[d]oes Gwinnett County's process of rejecting absentee ballots solely on the basis of an omitted or incorrect birth year violate the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B)?") and *Democratic Party of Ga.*, 347 F. Supp. 3d at 1340 (deciding absentee-ballot-rejection issue solely on basis of Civil Rights Act and noting that other errors on envelopes are not immaterial). Indeed, Plaintiffs' Second Amended Complaint cites several statutes, but only mentions the Civil Rights Act in passing and cannot reasonably be construed to be seeking relief under that statute. *See generally* Doc. No. [582]. For that matter, Plaintiffs' briefs on summary judgment do not cite to the Civil Rights Act either. *See* Doc. Nos. [489, 490].

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But at the same time as Defendants moved for summary judgment on jurisdictional and mootness grounds, they also moved for summary judgment on the entirety of the merits of Plaintiffs' training claims in their entirety, including the rejection of absentee ballots. Doc. No. [450-1], pp. 26-27. At the time the briefs were filed, the General Assembly was not in session, the 2020 general election was months away, and no one had introduced or pre-filed SB 202 or anything like it. Further, Plaintiffs' focus on absentee-ballot rejections was not regarding birth years, but the alleged racial and geographic disparities in those rejections. Doc. No. [490], pp. 52-53, 66.

A. The Order on the jurisdictional motion was correct and remains so.

This Court decided both motions in early 2021 during the waning days (and for the decision on the merits, on the last day) of the legislative session. On jurisdiction, this Court determined that the training claims about absentee-ballot rejections were not mooted by the change in law. Doc. No. [612], p. 63. The Court also found that, standing alone, the claims about date of birth rejections based on the requirement for voters to provide the birth date on the envelope were moot due to the changes in HB 316 and the lack of likelihood the state would "reenact the challenged legislation or otherwise return to its old law." Doc. No. [612], p. 64. The Court did so in part because reenactment of the challenged statute "could not reasonably be expected to recur." *Flanigan's Enters.*, 868 F.3d at 1256.

Nothing about the *Flanigan* factors indicates that the Court wrongly decided the mootness question. First, the changes in HB 316 resulted from "substantial deliberation" and was not merely an attempt to manipulate jurisdiction. *Id.* at 1257. Second, the repeal was unambiguous because it was the result of passage by the General Assembly and action of the Governor—as complete and final as any statutory adoption in the State of Georgia can be. *Id.* Third, Georgia administered the 2020 elections using HB 316, making it a consistent commitment, especially given the challenges involved with conducting the 2020 elections in a pandemic. *Id.*

Further, the Court specifically did not rule on Defendants' arguments that the remaining absentee ballot processing claims (including birth year rejections) were barred by the Eleventh Amendment because they involve claims Defendants were not following state law. Doc. No. [612], p. 63 n.29. Since the time of this Court's ruling, the Eleventh Circuit has confirmed that Defendants have no role in the processing of absentee ballots, further illustrating how Plaintiffs' claims are barred as a matter of law. *See Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 WL

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7488181 at *2 (11th Cir. Dec. 20, 2020) (applying *Jacobson v. Fla. Sec’y of State*, 974 F.3d 1236 (11th Cir. 2020), and finding that “the absentee ballot statute places the duty to ‘compare the signature’ and accept or reject a ballot on the ‘registrar or clerk’—not the Secretary of State”).

B. The Order on the merits provided an alternative basis for dismissal.

More importantly, the outcome of this trial is not impacted by the passage of SB 202 and its inclusion of a birthdate requirement as part of a different statutory scheme. Specifically, in this Court’s summary judgment order on the merits, this Court held “that Plaintiffs have failed to connect their allegations related to mailing and rejection of absentee ballots to training” and that Plaintiffs did not “connect their facts regarding absentee ballot rejection rates to training in any way.” Doc. No. [617], p. 24. And this conclusion remains correct, notwithstanding any provision of SB 202, particularly in light of intervening determinations of the Eleventh Circuit and other district courts concerning the role of county officials with respect to the processing of absentee ballots. *See, e.g., Ga. Repub. Party*, 2020 WL 7488181 at *2; *Trump v. Kemp*, 511 F. Supp. 3d 1325, 1333–34 (N.D. Ga. 2021) (holding that “Under Georgia election law, county election officials are solely responsible for processing, validating, and tabulating both absentee and in-person ballots”); *Wood v. Raffensperger*, No. 1:20-cv-5155-TCB, 2020 WL 7706833 at *6, n.6 (N.D. Ga. Dec. 28, 2020) (citing *Ga. Republican Party*). In other words, even if the Court ruled *against* the State on the mootness of the birthdate requirement, summary judgment would still have been granted to Defendants on Plaintiffs’ claim involving absentee-ballot rejections because Plaintiffs could not demonstrate a dispute of material fact on causation and traceability. Thus, considering all of the circumstances, arguments, and judicial orders on summary judgment, there is neither prejudice to the Plaintiffs nor any reason to reconsider the Court’s decision and its alternative bases for dismissing the absentee-ballot-rejection claims that have nothing to do with mootness.

IV. Plaintiffs have been on notice of this change, filed a separate lawsuit raising the issue, and never alerted the Court of any objections.

Finally, this Court should not revisit this issue because of Plaintiffs’ delay in bringing this SB 202 issue to the Court’s attention. Plaintiffs have been on notice of the changes to the absentee ballot process in SB 202 for more than a year. And one of the Plaintiffs in this case has already brought a separate Civil Rights Act claim against Defendants regarding this exact issue.

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The Governor signed SB 202 on March 25, 2021. Within the next few days, the Sixth District AME, along with other plaintiffs and allied groups, sued on the provisions of SB 202, including those asserting materiality claims about absentee ballots under the Civil Rights Act—unlike Plaintiffs in this case. *See Sixth District AME v. Kemp*, Case No. 1:21-cv-01284-JPB (N.D. Ga.) Doc. 83 (May 24, 2021), ¶¶ 372-376 (Civil Rights Act claim based on date of birth); *New Georgia Project v. Raffensperger*, Case No. 1:21-cv-01229-JPB (N.D. Ga.) Doc. 39 (May 17, 2021), ¶¶ 190-197 (same).

Fair Fight Action was also well aware of the legislation. In fact, it worked against SB 202 in the General Assembly and was aware of its provisions after its passage—putting out dozens of press statements, including on the same day that Governor Kemp signed the legislation. *See, e.g., Stacey Abrams' Statement on Signing of Anti-Voter Power Grab SB 202*, <https://fairfight.com/stacey-abrams-statement-on-signing-of-anti-voter-power-grab-sb-202/> (March 25, 2021); *Kemp Signs Anti-Voter Power Grab SB 202 After Georgia Republicans Force Through Bill on Party-Line Vote*, <https://fairfight.com/kemp-signs-anti-voter-power-grab-sb-202-after-georgia-republicans-force-through-bill-on-party-line-vote/> (March 25, 2021); *BREAKING: Georgia Republicans Force Voter Suppression and Elections Power Grab Bill SB 202 Through Committee on Party-Line Vote*, <https://fairfight.com/breaking-georgia-republicans-force-voter-suppression-and-elections-power-grab-bill-sb-202-through-committee-on-party-line-vote/> (March 22, 2021); *Fair Fight Action and Voting Rights Groups Slam Rep. Fleming's Latest Last-Minute Voter Suppression Bill in Virtual Press Conference*, <https://fairfight.com/fair-fight-action-and-voting-rights-groups-slam-rep-flemings-latest-last-minute-voter-suppression-bill-in-virtual-press-conference/> (March 18, 2021).

Fair Fight Action trumpeted its efforts, broadcasting in a tweet that “we sounded the alarm when SB 202 first reared its ugly head.” Tweet from @fairfightaction, Nov. 9, 2021 6:36PM, <https://twitter.com/fairfightaction/status/1458216834100961287> It also released advertisements about the legislation. *NEW AD: Fair Fight Action Explains Why Georgia Republicans' Massive Power Grab Is Bad for Georgia's Economy*, <https://fairfight.com/new-ad-fair-fight-action-explains-why-georgia-republicans-massive-power-grab-is-bad-for-georgias-economy/> (March 22, 2021).

But perhaps most damning is Fair Fight Action's detailed analysis of SB 202, released just under a year ago, on April 28, 2021, which specifically identified one of the “50 reasons SB 202 harms voters” as:

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42. DOB Requirement: Adds DOB requirement back to VBM envelope after removed in 2019. This requirement led to Date vs. DOB voter confusion and two federal courts have ruled in GA cases that counties must count ballots with DOB issues (which is why it was removed). (lines 1459-1460)

Document posted at <https://fairfight.com/wp-content/uploads/2021/04/TOP-50-Reasons-Why-SB202-Is-Harmful-to-Voters.pdf>; Tweet from @fairfightaction, Apr. 28, 2021, 3:05PM, <https://twitter.com/fairfightaction/status/1387483208019701760>

Thus, at the very least, Sixth District AME and Fair Fight Action knew of this exact provision and waited a year before ever raising it to the Court. This is not a situation where Plaintiffs learned about this issue during this trial. They knew. And they waited to raise the issue until now to create confusion and delay the resolution of this case.

Consequently, “(1) there was a delay in asserting a right or a claim, (2) the delay was not excusable, and (3) the delay caused . . . undue prejudice,” and—in addition to the lack of causation the Court has already decided—laches should preclude Plaintiffs’ late effort to expand this case into areas unrelated to their actual claims. *United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005) (citing *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1545 (11th Cir. 1986)).

Further, pretrial “orders [should] be firmly (but fairly) enforced.” *Morro v. City of Birmingham*, 117 F.3d 508, 515 (11th Cir. 1997). While this Court has broad discretion in enforcing the limits of pretrial orders, *Caradigm USA LLC v. PruittHealth, Inc.*, 964 F.3d 1259, 1278 (11th Cir. 2020), Plaintiffs should not be allowed to expand this case to topics beyond the pretrial order, especially when they were on notice of the exact issue well in advance of the entry of that order.

V. Conclusion.

In summary, this Court correctly decided that Plaintiffs’ claims about training on birth years were moot and ruled in Defendants’ favor on the remaining failure-to-train claims on alternative grounds that would have included the birth-year claims. The General Assembly’s later wholesale revision of the absentee process did not change that fact or provide a basis to revive Plaintiffs’ claims. And Plaintiffs have been on notice of the exact issue they first raised in this case on April 20, 2022 for more than

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a year, said nothing, and in fact sued over this exact provision in a separate case. This case should proceed to its final resolution without further delay.

Sincerely,

A handwritten signature in blue ink that reads "Bryan P. Tyson". The signature is fluid and cursive, with the first name "Bryan" being more prominent than the last name "Tyson".

Bryan P. Tyson

Counsel for Defendants in *Fair Fight Action*

Counsel for State Defendants in *In re Georgia
Senate Bill 202*, Case No. 1:21-mi-55555-JPB

cc: Allegra Lawrence-Hardy, Esq.
Josh Belinfante, Esq.

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

FAIR FIGHT ACTION, INC, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

Civil Action No.

1:18-cv-05391-SCJ

[PROPOSED] ORDER

This matter is before the Court on Plaintiffs' Fair Fight Action, Inc. and Baconton Missionary Baptist Church, Inc.'s Motion for Partial Summary Judgment of Count VI of Plaintiffs' Second Supplemental Complaint. The Court **GRANTS** Moving Plaintiffs' Motion for Partial Summary Judgment on Count IV of Plaintiffs' First Supplemental Complaint and hereby **ORDERS**:

- i. The Secretary of State is enjoined from requiring date of birth on any absentee ballot application forms or absentee ballot oath envelopes generated by the Secretary of State, *see* O.C.G.A. § 21-2-50(a)(5);
- ii. The Secretary of State is enjoined from certifying election results under O.C.G.A. § 21-2-499 until county election officials have

confirmed that they have not rejected any absentee ballots solely for missing or inaccurate dates of birth;

- iii. The Secretary of State is enjoined to issue an Official Election Bulletin to all counties instructing them that in compliance with federal law, they must accept absentee ballot applications and ballots with missing or inaccurate dates of birth as long as the voter's identity and eligibility can otherwise be verified; and
- iv. The State Election Board is enjoined from enforcing the challenged provisions of SB 202 where counties accept absentee applications or ballots with a missing or inaccurate date of birth, including through: (a) the State Election Board's power to undertake "appropriate proceedings" to impose penalties to "prohibit[] the actual or threatened commission of any conduct constituting a violation of state election law," O.C.G.A. § 21-2-33.1(a), including through issuing cease and desist orders, *id.* § 21-2-33.1(a)(1); (b) the State Election Board's authority to authorize an Attorney General Action in the name of the State Election Board, *id.* § 21-2-33.1(c); or (c) the State Election Board's authority to suspend county or municipal superintendents and appoint a replacement, *id.* § 21-2-33.1(f).

IT IS SO ORDERED this ____ day of _____, 2022.

Honorable Steve C. Jones
United States District Court Judge

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

FAIR FIGHT ACTION, INC, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

Civil Action No.
1:18-cv-05391-SCJ

[PROPOSED] SCHEDULING ORDER

Defendants will file any response to Moving Plaintiffs' Motion for Partial Summary Judgment 21 days from the granting of Plaintiffs' Motion for Leave to File a Supplemental Complaint.

Moving Plaintiffs will file any reply brief 14 days after Defendants' response.

IT IS SO ORDERED this ____ day of _____, 2022.

Honorable Steve C. Jones
United States District Court Judge