UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VOTE.ORG, *et al.*,

Plaintiffs,

v.

GEORGIA STATE ELECTION BOARD, *et.al.*,

Defendants,

GEORGIA REPUBLICAN PARTY, INC.; and REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendants.

No. 1:22-cv-01734-JPB

INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"The opportunities provided by a State's entire system of voting must be considered when assessing the burden imposed by a challenged voting rule." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339, 210 L. Ed. 2d 753 (2021). After all, "every voting rule imposes a burden of some sort," including burdens on time and travel, and casting a vote "requires compliance with certain rules." *Id.* at 2338. With the passing of SB 202 in 2021, the State of Georgia (the "State") implemented the "pen and ink rule," (the "Rule") requiring all persons applying for an absentee-by-mail ballot to affix "his or her usual signature with a pen and ink" upon the application. O.C.G.A. § 21-2-381(a)(1)(C)(i). The Rule serves an indispensable and material purpose in the application process, as it creates a permanent, verifiable, and objective record of whether the applicant is, in fact, who they purport to be. Far from a "meaningless technicality," the Rule serves as a deterrent against voter fraud, prevents the disenfranchisement of *registered* voters who may have their identity and their vote stolen, and allows the State to rebut or prosecute cases of voter fraud by presenting concrete evidence of who requested the absentee ballot.

Since the Rule's passing, thousands of Georgians have obtained an absentee ballot without incident. What's more, Plaintiffs could not identify a single individual who failed to obtain an absentee ballot, even among the mere

54 individuals who experienced an initial application rejection. (Mayer Dep. at 114:25 - 115:13). And, despite bare assertions to the contrary, Plaintiffs have provided *no evidence* to suggest that the Rule has a disparate impact on any protected class of individuals or that its enforcement by Defendants is done in an arbitrary manner.[1] (Grimsley Dep. at 17:16 - 18:6; Hailey Dep. at 229:22 - 230:18). Plaintiffs' contention that the Rule is meaningless or harmful is erroneous and unsupported by evidence.

Turning to the alleged injuries, Plaintiffs have failed to show that the Rule creates "costly procedural hoops" for Plaintiffs' members and constituents, offering no evidence—none—as to what those costs might be. Even more concerning is Plaintiffs' attempt to bury the fact that not a single member or constituent is even required to print the absentee-ballot application, as a hardcopy will be mailed to them upon request from their local election office. (Williams Dep. at 122:5-123:1). This same fact negates the contention that Plaintiff Vote.org ("Vote.org") will suffer any future injuries due to any decision it might make to voluntarily implement a "print-and-mail" campaign. As to Plaintiff Priorities USA ("PUSA"), PUSA has never run a

[1] Plaintiffs assert County Defendants accept absentee ballot applications with no signature, while simultaneously rejecting applications not signed in with pen and ink. (Smith Dep. At 85:9 - 86:24). To substantiate this claim, Plaintiffs identify instances where this *may* have occurred, yet make no effort to show that if this actually did occur in a few isolated instances it was not simply attributable, as Dekalb County has suggested, to human error.

single ad within the State of Georgia specifically addressing the Rule and has only engaged in general "get-out-the-vote" ad buys. (Grimsley Dep. 147:23-148:10). Nor has PUSA run any election-related ads within the State since the 2022 runoff election and can point to no particularized, concrete injuries it stands to endure. (Grimsley Dep. 136:18-137:6, 149:10-14). Indeed, the injuries alleged by Plaintiffs range from utter trifles to self-inflicted injuries, none of which entitles Plaintiffs to standing, let alone relief.

Finally, the Rule does not run afoul of 52 U.S.C. § 10101(a)(2)(B), as codified by the Civil Rights Act of 1964 and the subsequent Voting Rights Act Amendments of 1982 (the "Materiality Provision"), for three reasons. First, in order for a rule to violate the Materiality Provision, the "error or omission" complained of must actually "deny the right" of an individual to vote. Notably, Plaintiffs have failed to produce any evidence that the Rule has prevented a single person from voting. Second, the Materiality Provision does not apply to the Rule, because whereas the Materiality Provision concerns acts requisite to voter *qualification*, the Rule only governs how a registered voter may cast an absentee ballot. Third, even assuming the Materiality Provision is applicable to absentee ballot applications, the Rule is material to ensuring that the applicant is the registered voter they purport to be and therefore qualified by virtue of their previous registration.

ARGUMENT

I. Plaintiffs lack standing because neither they, nor their members, have suffered an injury.

Plaintiff Georgia Alliance for Retired Americans ("GARA") and Plaintiff Communications Workers of America ("CWA") have failed to show associational standing because none of their members have been injured, nor have they shown a cognizable risk of injury in the future. Similarly, PUSA has failed to assert organizational standing as it puts forward only bare assertions of hypothetical future economic harm. Finally, Vote.org has failed to show any injuries sufficient to sustain a claim of organizational standing as all of its alleged future expenditures would be self-inflicted injuries.

a. GARA and CWA cannot show associational standing because none of their members have been injured or face a realistic danger of future injury.

For an organization to claim associational standing, it must satisfy three elements: (1) that its members would otherwise have standing to sue in their own right; (2) that the interests it seeks to protect are germane to the organization's purpose; and (3) that neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023) (quoting *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977)).

Neither GARA nor CWA can identify a single member who has suffered an injury. In their attempt to manufacture standing, Plaintiffs have put forward three members of GARA and CWA, who Plaintiffs allege face a realistic danger of future injury under the Rule: Stephen Isom, Teresa Simmons, and Walter Andrews. But the undisputed facts show that none of the three have or will suffer any cognizable injury.

Mr. Isom concedes that the Rule does nothing to prevent him from voting, rather it is simply not his preferred method of requesting an absentee ballot. For example, when asked by Defendants why Mr. Isom began voting in-person since 2020, *prior* to the Rule becoming law, Mr. Isom responded, "Well, it seems like, every year, there was some changes made, and *I didn't want to take the time to learn them*." (Isom Depo. at 22:3-14). What's more, Mr. Isom concedes that he would not need a printer to obtain an absentee ballot application, and he understands that his county election office will mail him an application on request. (Isom Depo. at 23:12 – 24:7.) Nevertheless, Mr. Isom contends that he prefers not to receive the application by mail, as he does not want to "trust my mail to my voting." (Isom Depo. at 24:2-7). Since Mr. Isom would necessarily have to trust the mail to deliver both his application and ballot were he to vote absentee, his idiosyncratic, on-and-off views on the reliability of the postal service makes no sense whatsoever and under no circumstance constitutes a cognizable threat of future harm sufficient to

support standing. *See, e.g., Link v. Diaz*, 669 F. Supp. 3d 1192, 1199-1200 (S.D. Fla. 2023) (holding that plaintiffs lacked standing because their theory was "nonsensical").

As for Ms. Simmons, her deposition not only reveals that she consistently voted absentee throughout every election in 2022, but that she filled out all her applications by hand, with the possible exception of one during the Covid pandemic. (Simmons Depo. at 28:1 – 29:9). Furthermore, despite her extensive history of absentee voting, Ms. Simmons could not point to any ballot request rejected by the State, even when she requested an absentee ballot subject to the Rule.[2] As with Mr. Isom, Ms. Simmons can also obtain a copy of her absentee ballot application by mail—no printer required—and, because she is over the age of 65, need only submit one absentee ballot application per cycle. It is thus clear Ms. Simmons has never been injured by the Rule, nor has she shown that she will be injured by the Rule in the future.

Finally, Mr. Andrews' deposition shows that he has not been, and will not be, harmed by the Rule. Although Plaintiffs point to his lack of a printer, as previously shown a printer is *not* required to obtain an absentee ballot application, since a hardcopy version will be mailed upon request, and no more

[2] According to her deposition, only one ballot was cited as being rejected. That ballot was requested by Ms. Simmons four (4) days prior to the election and Ms. Simmons failed to return the ballot.

effort is required to submit an absentee ballot application than to submit an absentee ballot.

In light of the above, GARA and CWA have failed to show *any injury*, or threat of future injury, to any of their members. GARA and CWA's purported injuries are nothing more than generalized grievances that are insufficient to support a claim of standing under Article III of the United States Constitution. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) ("[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

b. Vote.org and PUSA lack organizational standing because they can show no injury traceable to the Rule.

"Organizations may have standing under a 'diversion-of-resources' theory when they divert financial resources or personnel time to counteract unlawful acts of a defendant, thereby impairing the organizations' ability to engage in typical projects." *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1177 (N.D. Ga. 2022) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, (1982); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014)). To create a concrete injury, the diversion must cause a perceptible

impairment of organizational activities. *Jacobson v. Florida Secretary of State*, 974 F.3d at 1249 (11th Cir. 2020). And to show a concrete injury, the organization must identify the specific activities from which it diverted or is diverting resources. *Id.* at 1250. Finally, "a controversy is not justiciable when a plaintiff independently caused his own injury." *Wasser v. All Mkt., Inc.*, 329 F.R.D. 464, 470 (S.D. Fla. 2018). (quoting *Swann v. Secretary, Ga.*, 668 F.3d 1285, 1288 (11th Cir. 2012)*; Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402, 418, n.7, (2013)); *see also Clapper*, 568 U.S. at 416 (A plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending"). Neither Vote.org nor PUSA may claim organizational standing under a diversion of resources theory because neither Vote.org nor PUSA have shown concrete injuries will result from the Rule in the future. To the extent Plaintiffs have identified claimed injuries, those injuries are self-inflicted, and relief is not warranted.

PUSA lacks organizational standing because PUSA has made only bare, speculative assertions as to potential future injuries. Plaintiffs allege only that PUSA spent a million dollars on two digital advertising programs in advance of Georgia's 2022 senate race and that it may incur additional, unspecified expenses in the coming years. Significantly, none of these ad buys directly addressed the Rule. Rather, those ads were general "get-out-the-vote-ads" that

addressed all methods of voting and directed voters to the Secretary of State's website. (Grimsley Dep. at 147:23–149:9). Furthermore, PUSA testified it has not run any election ads in Georgia since 2022. (Grimsley Dep. at 149:10-14).

Nevertheless, Plaintiffs contend that at least half of the monies spent in the lead up to the 2022 Georgia senate race were necessitated because of the Rule. Specifically, PUSA claims it was forced to run ads for twelve (12) days longer than it would have but for the Rule. (Grimsley Dep. at 45:1-18). Yet, the Rule became law well over a year before the 2022 Senate race and PUSA had ample time to address the Rule in a cost-effective manner. That PUSA waited until a mere 20 days before the election to run their ads is a self-inflicted injury traceable only to themselves. Furthermore, it is unlikely and unproven that PUSA will need to divert additional resources to address the Rule in the future. Rather, PUSA admits that they have no idea whether the Rule will require a diversion of resources in the future and more "research" would be required to make that determination. (Grimsley Dep. at 136:18-137:9).

Similarly, Vote.org lacks organizational standing because it has not been injured by the Rule and the alleged injuries identified by Vote.org were entirely self-inflicted. Specifically, Vote.org claims it was "forced" to launch a "print-and-mail program" during the 2022 senate race to provide voters with absentee ballot applications, allegedly costing Vote.org $60,000. (Hailey Dep. at 42-10-19). What Plaintiffs fail to acknowledge, however, is that the State performs

this exact function and will mail a printed application to an applicant upon request. (Williams Dep. at 122:5-123:1). This glaring fact undermines any allegation that Vote.org was "forced" to engage in a print-and-mail program, whether previously or in the future. It is therefore undeniable that the alleged previous injuries sustained by Vote.org were purely self-inflicted and any future "injuries" would be no different. Vote.org has therefore not been injured by the Rule, nor are their alleged injuries traceable to the Rule.

c. Vote.org and PUSA cannot claim third-party standing because they cannot identify an injured third-party.

For a Plaintiff to claim third-party standing, that Plaintiff must show: (1) an injury in fact, thus establishing a "sufficiently concrete interest" in the outcome of the dispute; (2) a close relationship to the third-party; and (3) a hindrance to the third-party's ability to protect his or her own interest. *Harris v. Evans*, 20 F.3d 1118, 1122 (11th Cir. 1994). However, the Supreme Court of the United States has long held that "a plaintiff raising only a generally available grievance about government. . . does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–74 (1992). Here, Plaintiffs have failed to establish any of the elements to prove third-party standing and have asserted no grievance apart from what might be available to the public at large.

As shown above, Plaintiffs have failed to establish an injury in fact which is traceable to the Rule. Thus, Vote.org and PUSA have failed to satisfy the

first element of third-party standing. As to the second element, Vote.org and PUSA merely name "their constituents" as the alleged third-party they represent, claiming those constituents "benefit from their work" and share a core interest in preserving the rights of "minority and overlooked voters." (Plaintiffs' MSJ at pg. 12). Yet, neither Vote.org nor PUSA have offered any evidence as to what interests "their constituents" may share with them, and the deposition transcripts cited by Plaintiffs merely offer self-serving statements as to their own alleged priorities. To wit, Plaintiffs cite three exhibits to substantiate this claim: Plaintiffs' SUMF ¶¶ 41, 58; Hailey Dep. at 35:14-18; and Grimsley Dep. at 35:1-14. Not only do none of these exhibits discuss what Plaintiffs' constituents believe or expect, but the Grimsley deposition merely contains a recitation of PUSA's own pleading. Even assuming Vote.org and PUSA share a common interest with their constituents in preserving the rights of "minority and overlooked voters," neither Vote.org nor PUSA are aware of any evidence which would suggest that the Rule disproportionately impacts said individuals. (Grimsley Dep. at 17:13-18:6; Hailey Dep. at 229:22-231:6).

As to the third element, Plaintiffs failed to produce any evidence which might show that "their constituents" are hindered from protecting their own interests. To support their claim, Plaintiffs cite the deposition of Sarah Stambler to evidence the supposed burdens the Rule imposes. In actuality, Ms.

Stambler admits the Rule discourages her from voting only because she is "not a morning person" and going to the library before class would therefore be "next to impossible." (Stambler Dep. at 39:4-7). Although Ms. Stambler has many college courses near the library, leaving "five minutes early [to print the application] is hard to do, 20 minutes would be very difficult." (Stambler Dep. at 37:24-40:13). Such trifles are consistent with the usual burdens imposed by voting and as contemplated by the Supreme Court in *Brnovich*, *supra*.

II. The Rule does not violate the Materiality Provision.

The Rule does not violate the Materiality Provision and Plaintiffs have failed to produce any evidence to the contrary. In accordance with 52 U.S.C. § 10101:

> (2) No person acting under color of law shall –
>
> (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

Thus, the Rule cannot violate the Materiality Provision unless: (1) an individual is *denied* the right to vote; (2) the denial is due to an error or omission on any record or paper relating to any application, registration, or other act *requisite* to voting; and (3) such error or omission is immaterial to determining whether an individual is *qualified* under State law to vote. In consideration of these elements, the Rule does not violate the Materiality

Provision because: (1) the Rule does not deny the right to vote; (2) the Materiality Provision is not applicable to the Rule; and (3) the Rule is material to determining a voter's identity when applying to vote absentee.

a. The Rule has not denied a single Georgian the right to vote.

As Plaintiffs concede, at least one element of a Materiality Provision claim is that an individual be denied the right to vote. (Plaintiffs' MSJ at pg. 15). But application of the Rule does not result in denial of the right to vote. "[A] voter who fails to abide by state rules prescribing how to make a vote effective is not 'den[ied] the right ... to vote' when his ballot is not counted." *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, No. 23-3166, 2024 WL 1298903, at *8 (3d Cir. Mar. 27, 2024). "Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." *Id.* (quoting *Brnovich*, 141 S. Ct. at 2338). There is simply no authority that "the 'right to vote' encompasses the right to have a ballot counted that is defective under state law." *Id.*

The Rule cannot "deny" the "right … to vote," because election officials enforcing it do not "disqualify potential voters," remove them from the voter-registration list, or prevent future voting. *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). Instead, they do not accept or immediately count noncompliant mail-ballot applications "because [individuals] did not follow the

rules for" completing the application. *Ritter v. Migliori*, 142 S. Ct. 1824, 1825, (2022) (Alito, J., dissenting). Such individuals are not denied the right to vote: instead, they remain free to vote in any election on equal terms with, and according to the same rules applicable to, all other voters. *See id.*

In any event, Plaintiffs have failed to identify a single absentee voter who failed to obtain an absentee ballot when requested. (Mayer Dep. at 114:25 - 115:13). Although a mere 54 individuals experienced some form of initial rejection due to noncompliance with the Rule, all of those individuals ultimately received a ballot. Nor were Plaintiffs able to identify a single voter who did not cast a vote because of a pen and ink rejection. (Mayer Dep. at 47:7-12). Necessarily, the Rule *cannot* be violative of the Materiality Provision if it does not, in fact, deny any individual the right to vote.

Plaintiffs claim two individuals—Ms. Stambler and Dr. Joona Trapp ("Dr. Trapp")—*were* denied the right to vote and that the Rule "disenfranchises Georgians who are physically unable to vote in person." But these claims are unsupported by the record in this case.

To wit, Ms. Stambler's undisputed testimony shows: (1) she knowingly ignored the requirement to sign in pen and ink; (2) she did not respond to the letter dated September 21, 2022, from the Absentee Department; (3) she did not return the cure affidavit because she did not want to find a place to make a copy of her driver's license; (4) she never called DeKalb County to confirm

her application; (5) she never confirmed whether her ballot was counted; (6) that despite spending upwards of sixteen (16) hours traversing campus each week, it would be "next to impossible" to dedicate five (5) minutes at the library printers; (7) that notwithstanding her preferences otherwise, printing an application "is doable;" and (8) that the cure affidavit did not come by separate cover, but was included with the letter dated September 21, 2022. (Stambler Dep. at 22:7-14; 22:15-24; 28:4-9; 28:15-20; 28:21-29-4; 38:14-39:7; 40:6-13; 42:14-18). Contrary to Plaintiffs' assertions that Ms. Stambler was a disabled voter prejudiced by the Rule, the facts show Ms. Stambler simply couldn't be bothered to commit the minimal effort required to designate her status as an absentee voter and cast an absentee ballot.

As to Dr. Trapp, her undisputed testimony shows: (1) that the "real reason" she requested an absentee ballot is because she "was very busy" and "could not go stand in line for three or four hours;" (2) that she received a cure affidavit on May 19, five days before the election, and could have easily delivered it to her local election office; and (3) that she received a ballot to vote in the June runoff election, but did not recall requesting one and did not expect it in the mail. (Trapp Dep. at 33:24-34:9; 36:18-25; 38:11-39-25; 39:2-4). Significantly, no evidence cited by Plaintiffs supports the proposition that either Dr. Trapp or Ms. Stambler were "physically" disabled voters nor that they were disenfranchised by the Rule. Meanwhile, both GARA and CWA

admit they are aware of *no members* who were denied the opportunity to vote because of the Rule. (Clancy Dep. at 15:18-16:8).

Furthermore, although Plaintiffs claim 35.2% of voters who experienced a pen and ink rejection ultimately did not vote, neither Plaintiffs nor their purported expert, Kenneth Mayer, have offered any evidence as to *why* those individuals did not vote.[3] In fact, Mr. Mayer performed no analysis of the effect the pen and ink requirement has on a voter's likelihood of voting, nor did he contact any of the nineteen voters to make such a determination. (Mayer Dep. At 45:9-12; 45:13-16). Citing to Mr. Mayer, Plaintiffs claim "it is undisputed that 'interruptions to voting habits… can reduce the likelihood that someone votes.'" Not only is such a conclusion not "undisputed," but Plaintiffs fail to say what habits have been formed by voters with respect to absentee ballot applications. (Mayer Dep. at 93:3-101:1). Tens of thousands of voters successfully submitted absentee ballots under the Rule with no issues whatsoever. Assuming then, that "interruptions to voting habits" are likely to impact voter turnout, it stands to reason that eliminating the Rule would risk disrupting the habits of the thousands of absentee voters and would cause the harm Plaintiffs claim they are trying to prevent.

[3] In total, Plaintiffs were able to identify 54 individuals who experienced an initial rejection of their absentee ballot application. Nevertheless, all 54 individuals received an absentee ballot, and only 19 chose not to vote.

b. The Materiality Provision is not applicable to the Rule.

This Court should grant summary judgment for Defendants for the additional reason that the Materiality Provision simply does not apply to the Rule. While the Materiality Provision is concerned with *who* may vote, the Rule governs only *how* a registered voter exercises his franchise. This understanding of the scope of the Materiality Provision is consistent with how it was described by the Eleventh Circuit in *Schwier v. Cox*:

> This provision 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 potential voters.

340 F.3d 1284, 1294 (11th Cir. 2003) (emphasis added). We recognize that in declining to grant Defendants' Motion to Dismiss, this Court stated—based upon a brief analysis that did not mention *Schwier*—that the plain language of the Materiality Provision implicates absentee ballot applications as a record or paper relating to an application for voting. (ECF No. 59 at 17). We are also aware that this Court issued a similar ruling in the case of *In re Georgia Senate Bill 202*, wherein the Court limited its analysis to a plain reading of the statutory text and a citation to a similar analysis conducted by the United States District Court for the Western District of Pennsylvania. N.D. Ga. No. 1:21-CV-01259-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023) (citing

Pennsylvania State Conference of NAACP v. Schmidt, W.D. Pa. No. 1:22-CV-339, 2023 WL 3902954, at *7 (W.D. Pa. June 8, 2023)). We respectfully submit these decisions were incorrect.

When reaching these decisions, this Court did not have the benefit of a recent holding by the Third Circuit, which addressed the very issues presented here and, in fact, reversed and remanded *Schmidt, supra*. *Pennsylvania State Conference of NAACP Branches v. Sec'y Commonwealth of Pennsylvania*, 3d Cir. No. 23-3166, 2024 WL 1298903, at *13 (3d Cir. Mar. 27, 2024). Rather, this Court was led into error by *Schmidt,* which expressly relied on a since vacated Third Circuit decision, *Migliori v. Cohen,* 36 F.3d 153, 156 (3d Cir. 2022), and was itself reversed by the Third Circuit just a month ago.

In rejecting *Migliori v. Cohen,* the Third Circuit relied upon a dissent filed by Justices Alito, Thomas, and Gorsuch from a denial of a stay of that case, in which the justices sharply criticized its holding, stating that it "broke new ground, and … is very likely wrong." *Ritter v. Migliori*, 142 S. Ct. 1824, 213 L. Ed. 2d 1034 (2022) (Alito, J., dissenting from denial of stay). More specifically, the justices rejected the Third Circuit's holding that the Materiality Provision applied to signature and date requirements applicable to absentee ballots, noting that "the Third Circuit made little effort to explain how its interpretation can be reconciled with the language of the statute." *Id.* at 1825. The justices identified five elements of the Materiality Provision:

> (1) the proscribed conduct must be engaged in by a person who is "acting under color of law"; (2) it must have the effect of "deny[ing]" an individual "the right to vote"; (3) this denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "related to [an] application, registration, or other act requisite to voting"; and (5) the error or omission must not be "material in determining whether such individual is qualified under State law to vote in such election."

Id. at 1825. They went on to observe that the Third Circuit's prior analysis disregarded at least two of these elements. With respect to the second element, the three justices noted "[w]hen a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.'" *Id.* Rather, "that individual's vote is not counted because he or she did not follow the rules for casting a ballot." *Id.* With respect to the fifth element, they stated "[t]here is no reason why the requirements that must be met in order to register (and thus be "qualified") to vote should be the same as the requirements that must be met in order to cast a ballot that will be counted. Indeed, it would be silly to think otherwise." *Id.*

As previously noted, the Supreme Court later granted certiorari, vacated *Migliori v. Cohen,* and remanded. The *Schmidt* court nonetheless chose to follow that vacated Third Circuit opinion. But on appeal, the Third Circuit reversed *Schmidt* and held that the Materiality Provision simply "does not apply to rules, like the date requirement, that govern *how* a qualified voter must cast his ballot for it to be counted" but rather "only applies when the State

is determining *who* may vote." *Pennsylvania State Conference of NAACP Branches v. Sec'y Commonwealth of Pennsylvania*, 3d Cir. No. 23-3166, 2024 WL 1298903, at *8 (3d. Cir. Mar. 27, 2024). As the Third Circuit explained:

> the enacting Congress was concerned with discriminatory practices during voter registration, thus in line with what the text reflects. So, in our view, the phrase "record or paper relating to application, registration, or other act requisite to voting" is best read to refer to paperwork used in the voter qualification process. It does not cover records or papers provided during the vote-casting stage.

Id. at *8. This Court should adopt the Third Circuit's careful analysis, which is consistent with this Circuit's statement in *Schwier* and the three justices' dissent in *Cohen*.

As Plaintiffs concede, an absentee ballot application "is *not* used to determine voter qualifications." (Plaintiffs' Brief in Support, pg. 21). Dispositively, Plaintiffs acknowledge that, "[n]otably, the determination of whether an individual is *qualified* to vote occurs through the voter registration process and is therefore complete before a voter ever receives an absentee ballot application." *Id.* Intervenor-Defendants agree with this assessment and that is precisely why the Rule lies outside the ambit of the Materiality Provision. Specifically, whereas a voter registration form is concerned with determining a voter's *qualifications*, an absentee ballot application only designates *how* a registered and qualified voter will cast his ballot. Therefore,

as a matter of law, this Court should find the Materiality Provision inapplicable to the Rule.

c. The Rule is material to determining voter identity.

Even if the Materiality Principle applies, it does not invalidate the Rule. As a general rule, courts must give weight to evenhanded restrictions that protect the integrity and reliability of the electoral process itself. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189, 128 S. Ct. 1610, 1616, 170 L. Ed. 2d 574 (2008) (citing *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). Indeed, a state has an interest in securing the integrity of its elections, reducing fraud, and preventing the disenfranchisement of voters. As Supreme Court of the United States has held:

> One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.

Brnovich, 141 S. Ct. at 2340. In keeping with this principle, the Fifth Circuit held that original "wet signatures" are material requirements to confirming the identity of individuals *registering to vote* and do not violate the Materiality Provision. In *Vote.org v. Callanen*, that Court concluded:

> We answer, first, Texas's interest in voter integrity is substantial. Second, that interest relates to the qualifications to vote — are the registrants who they claim to be? Finally, most voter registration forms likely are completed far from any government office or

> employee. That limits the methods of assuring the identity of the registrant. Though the effect on an applicant of seeing these explanations and warnings above the signature block may not be dramatic, Texas's justification that an original signature advances voter integrity is legitimate, is far more than tenuous, and, under the totality of the circumstances, makes such a signature a material requirement.

89 F.4th 459, 489 (5th Cir. 2023). In support of this position, the Fifth Circuit determined that physical signatures, signed under penalty of perjury, carry "a solemn weight that merely submitting an electronic image of one's signature via web application does not." *Id.* at 308.

Plaintiffs contend that this Court need not follow the ruling of the Fifth Circuit because *Callanen, supra*, dealt with voter registration, whereas, here, a voter is already registered at the time an absentee ballot is requested. (Plaintiffs' Brief in Support, pg. 22-23). Such an assertion is backwards. Certainly, if the materiality provision is not violated by a "wet signature requirement" on voter registration forms—which lies at the heart of the Materiality Provision—then the same would be permissible on absentee ballot applications, which are far afield from "determining whether such individual is qualified under State law to vote."[4] 52 U.S.C. § 10101(a)(2)(B).

[4] Although absentee ballot applications do not seek to determine voter qualifications, the Rule does serve to establish the identity of the applicant and is therefore material.

Nevertheless, the Rule is material to an absentee ballot application because a hand-written signature reduces instances of fraud and verifies the identity of the requester. This fact is supported by the testimony of Defendant's expert, Dr. Aashish Srivastava ("Dr. Srivastava"), who argues handwritten signatures create a "social presence" of the signer within the document. This social presence increases accountability and therefore the seriousness of the document. (Srivastava Dep. at 17:12-18:20; 29:18-30:2; 35:8-36:18; 64:14-65:20).[5] This reasoning is shared by the Georgia State Election Board as well, which testified that a handwritten signature increases the seriousness of the application and that it uses the signature to verify whether or not the requester has committed an illegal act. (Lindsey Dep. at 41:7-42:23). If applications were accepted with typed signatures, there would be no way to verify whether fraud had occurred, and prosecution efforts would be hindered as a result. Furthermore, because absentee ballot applications can only be requested by a *registered* voter, any instance of fraud not only undermines election integrity, but disenfranchises actual, specific voters.

[5] Defendants' expert, Dr. Srivastava, has offered undisputed testimony that handwritten signatures increase the seriousness of a document and reduce rates of fraud. Plaintiffs have offered *no* evidence to the contrary and have merely speculated that it is not so. Furthermore, Plaintiffs' expert, Mr. Mayer, has offered no evidence, nor did he look into the question, of what type of signature is best able to reduce fraud.

Indeed, another court within the Eleventh Circuit recently upheld the validity of a wet signature requirement—similar to the Rule—and determined that it did not violate the Materiality Provision. Specifically, the United States District Court for the Northern District of Florida recently granted a Motion to Dismiss against Vote.org in a similar challenge to Florida's wet signature requirement. In reaching its decision, the Court reasoned:

> Plaintiffs' entire premise is that a copied, faxed, or otherwise non-original signature is equal in stature to an original, wet signature. But we know this not to be so. "Physically signing a voter registration form and thereby attesting, under penalty of perjury, that one satisfies the requirements to vote carries a solemn weight that merely submitting an electronic image of one's signature via web application does not.

Vote.org v. Byrd, N.D. Fla. No. 4:23-CV-111-AW-MAF, 2023 WL 7169095, at *6 (N.D. Fla. Oct. 30, 2023).

Furthermore, we note that strong support for our position is to be found in the final paragraph of the Alito, Thomas, and Gorsuch dissent from the denial of a stay in *Cohen v. Migliori*:

> The problem with the Third Circuit's interpretation can be illustrated by considering what would happen if it were applied to a mail-in voting rule that is indisputably important, namely, the requirement that a mail-in ballot be signed. Pa. Stat. Ann., Tit. 25, § 3150.16(a). Suppose a voter did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it using the standard notation employed when a letter is signed for someone else: "p. p. John or Jane Doe." Or suppose that a voter, for some reason, typed his or her name instead of signing it. Those violations would be material in determining whether a ballot should be counted, but they would not be "material in

> determining whether such individual is qualified under State law to vote in such election." Therefore, under the Third Circuit's interpretation, a ballot signed by a third party and a ballot with a typed name rather than a signature would have to be counted. It seems most unlikely that this is what 52 U.S.C. § 10101(a)(2)(B) means.

142 S. Ct. at 1826 (footnote omitted).

Finally, applying principles of statutory interpretation, "it is relevant that in 1982, States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots." *Brnovich* 141 S. Ct. at 2339. Since the passage of the Materiality Provision, the State has made absentee voting more accessible and more convenient than what was contemplated in 1982.[6] This fact alone serves to undermine Plaintiffs' arguments, as the State has gone above and beyond the baseline established by Congress in 1982. Nevertheless, Plaintiffs seek to dilute the legitimate and necessary practices which allows the State to provide this opportunity to its citizens.

CONCLUSION

For the reasons stated above, Plaintiffs have failed to establish facts sufficient to warrant relief in their favor and their Motion for Summary Judgment should be denied.

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[6] As admitted by Plaintiffs in their Statement of Undisputed Material Facts, "no-excuse absentee voting is available to all eligible, registered voters." (Plaintiffs' SUMF ¶ 9).

Dated: April 11, 2024

Respectfully submitted,

/s/ David A. Warrington
David A. Warrington*
Gary M. Lawkowski*
Gerald A. Urbanek, Jr. *
DHILLON LAW GROUP, INC.
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
Phone: 703.574.1206
Facsimile: 415.520.6593
dwarrington@dhillonlaw.com
glawkowski@dhillonlaw.com
gurbanek@dhillonlaw.com

*admitted pro hac vice

William Bradley Carver, Sr.
Georgia Bar No. 115529
Baxter D. Drennon
Georgia Bar No. 241446
HALL BOOTH SMITH, P.C.
191 Peachtree Street NE, Suite 2900
Atlanta, Georgia 30303
(404) 954-5000
(404) 954-5020 (Fax)

Harmeet K. Dhillon
DHILLON LAW GROUP, INC.
177 Post Street, Suite 700
San Francisco, California 94108
Telephone: 415.433.1700
Facsimile: 415.520.6593
harmeet@dhillonlaw.com

CERTIFICATE OF SERVICE AND CERTIFIATE OF COMPLIANCE WITH LOCAL RULE 5.1

Pursuant to N.D. Ga. L.R. 5.1 (C), I prepared the foregoing in the Century Schoolbook font and 13-point type. I electronically filed it using CM/ECF, thus electronically service all counsel of record.

Dated: April 11, 2024

Respectfully submitted,

/s/ David A. Warrington
David A. Warrington*
Gary M. Lawkowski*
Gerald A. Urbanek, Jr. *
DHILLON LAW GROUP, INC.
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
Phone: 703.574.1206
Facsimile: 415.520.6593
dwarrington@dhillonlaw.com
glawkowski@dhillonlaw.com
gurbanek@dhillonlaw.com

*admitted pro hac vice

William Bradley Carver, Sr.
Georgia Bar No. 115529
Baxter D. Drennon
Georgia Bar No. 241446
HALL BOOTH SMITH, P.C.
191 Peachtree Street NE, Suite 2900
Atlanta, Georgia 30303
(404) 954-5000
(404) 954-5020 (Fax)

Harmeet K. Dhillon
DHILLON LAW GROUP, INC.

177 Post Street, Suite 700
San Francisco, California 94108
Telephone: 415.433.1700
Facsimile: 415.520.6593
harmeet@dhillonlaw.com