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

GEORGIA STATE CONFERENCE OF THE NAACP, as an organization, et al.,

Plaintiffs,

- v. -

STATE OF GEORGIA, et al.,

Defendants.

Civil Action
Case No. 1:17-cv-01397-TCB

PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hearing date: May 4, 2017
Time: 2:00 PM
Courtroom: 2106, Atlanta

In their Brief in Opposition, Defendants do not dispute that the NVRA, by its terms, requires that registration for any election for federal office—expressly including a runoff election—must remain open until 30 days before the date of the election. Remarkably, Defendants claim that the NVRA does not apply at all here, because the registration deadline in the Georgia Constitution for a runoff election is not a "time, place or manner" provision that can be supplanted by federal law. Georgia's position is directly contrary to the Supreme Court's holding in *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013) ("*ITCA*"), which stands unequivocally for the proposition that Congress has the final authority under

the Elections Clause to set procedural requirements for registering to vote in federal elections.

Defendants' position would swallow the NVRA whole. Indeed, taking Georgia's position to its logical extreme, a state could legislate that any federal election, runoff or not, could avoid federal registration deadline requirements, simply by calling compliance with a registration procedure a "qualification." This is not and cannot be the law. When Congress determines "how" a federal election is to be run, the states must comply.

Defendants also complain that the administrative burden of re-opening the voter registration rolls is so great that the Court should deny the preliminary relief Plaintiffs seek. This claim is not only greatly exaggerated, but also largely of Defendants' own making. Defendants have been on notice since March 31 that they were in violation of the NVRA, but took no steps to alleviate the problem. To the contrary, Defendants failed to enforce their own rule to continue to process registration applications after the original deadline for registration had passed, thereby contributing to the backlog they now complain will be burdensome to cure.

In any event, there is no reason that Defendants could not update the State's electronic poll book; there is ample time to do so, and Defendants

successfully made two similar remedial changes immediately before the November 2016 election without incident. Moreover, Defendants neglect to inform the Court that it is *routine* in the conduct of Georgia elections for election officials to be provided with a supplemental voter list, which includes, for example, the names of voters who registered by the deadline but whose names were not processed in time to be included in the principal voter roll. There is no reason that Defendants cannot add the additional eligible voters who have registered since the original March 20 deadline to a supplemental voter list provided to each precinct.

Rather than a reason to deny the injunction, the size of the backlog—by Defendants' own calculations, potentially in the thousands—is a primary reason to grant the injunction. The minor administrative inconvenience Defendants cite pales in comparison to the loss of the right to vote of the magnitude suggested by Defendants' numbers. The right to vote and to choose your representative in Congress is one of our most fundamental rights, and the alleged administrative burdens that Defendants cite provide

no basis for disenfranchising thousands of eligible voters from exercising that right.[1]

I. ARGUMENT

A. The NVRA controls the setting of deadlines for voter registration for federal elections.

The Elections Clause gives Congress the power to regulate the "Times, Places and Manner" of holding elections for federal office, and Congress in the NVRA has exercised the power to regulate the "Times" of federal elections by requiring that they be held no more than 30 days after voter registration is closed. As Justice Scalia emphasized for the Court in *ITCA*, this power to regulate the conduct of federal elections is "comprehensive," and gives Congress "authority to provide a complete code for congressional elections." *Id.* at 2253 (quoting *Smiley v. Holm*, 285 U.S.

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[1] In a footnote, Defendants claim the State is not a proper defendant because it has Eleventh Amendment immunity, even in an action to enforce Plaintiffs' federal rights under the NVRA. Defendants' Brief in Opposition ("Opp.") at 2 n.1. They are wrong. *See United States v. Louisiana*, 196 F. Supp. 3d 612, 657 (M.D. La. 2016) ("[O]nce Congress enacted the NVRA pursuant to its authority under the Elections Clause, the Eleventh Amendment could no longer immunize a state from any liability.") (collecting cases). However, as Defendants acknowledge, there is no reason for the Court to address the issue at this time, since Defendants concede that this action is properly brought against Secretary of State Kemp, Georgia's "chief election official." *See* 52 U.S.C. § 20510(b).

355, 366 (1932)); *see also Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1195 (10th Cir. 2014). The analysis required of the Court in this case is therefore simple and straightforward. *See Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012) (providing a framework for determining whether the NVRA supersedes a state law).

Defendants attempt to avoid the mandates of the NVRA by conflating voter qualifications with registration requirements. There is no dispute that the States retain the power to set substantive voter qualifications under the Elections Clause. Opp. at 4 (citing *Kobach*, 772 F.3d at 1195). But voter qualifications are broad, categorical definitions of who is and is not permitted to vote, such as age, citizenship, or residency. *See, e.g.*, *ITCA*, 133 S. Ct. at 2257–59, 2258 n.8 (discussing citizenship qualifications, and states' power—before the Twenty-Sixth Amendment—to require voters be at least 21 years old); *Dunn v. Blumstein*, 405 U.S. 330, 337 n.7 (1972) (recognizing that states may require voters to be residents).

Voter registration, by contrast, is the procedure by which individuals apply for and gain membership in the group of persons who may cast a valid ballot in a given election. *See Kobach*, 772 F.3d at 1195 (distinguishing between procedural requirements for registration and substantive voter

qualifications). As the Supreme Court recognized in *ITCA*, voter registration is a question of "*how* federal elections are held." 133 S. Ct. at 2257. A registration deadline to vote in federal elections fits easily within "the mechanics of congressional elections." *See Foster v. Love*, 522 U.S. 67, 69 (1997).

The Georgia scheme challenged here is not a substantive "qualification" to vote. The state laws at issue do not specify what qualification voters must possess, such as their age or whether they are a United States citizen, but instead focus on whether they complied with a procedural requirement—*i.e.*, the date they applied to register to vote. The timing of when one registers, much like the requirement of documentary proof of citizenship when registering to vote at issue in *ITCA*, has nothing to do with the substance of whether one is qualified to vote.

The qualifications for a Georgia voter are set out in Section 21-2-216 of the Georgia Code, entitled "elector's qualifications": she must be a citizen, be at least 18 years old, not be under sentence for a felony conviction, etc. In contrast, the provisions cited by Defendants relating to runoff elections are inherently procedural. For example, Section 21-2-501(a)(10), explicitly provides that "[o]nly the electors who were duly

registered to vote" in the first round may vote in the runoff. *Id*. (emphasis added). Section 21-2-501 thus prohibits persons who are qualified to vote from voting solely because of non-compliance with the State's procedural registration requirements—*not* based on failure to satisfy the substantive qualifications set out in Section 21-2-216.

There is no question that the NVRA, by its plain language, applies to runoff elections, 52 U.S.C. § 20502(1) (adopting the definition of "election" in 52 U.S.C. § 30101(1), which includes a "runoff election"), and prohibits states from closing their registration books more than 30 days before a federal runoff. *Id.* § 20507(a). Defendants' argument that it can evade the requirements of the NVRA by the simple expedient of labeling its voter registration requirement a "qualification" for voting would effectively read the word "runoff" out of the statute, and would mean that the NVRA would never apply to a federal runoff election. Indeed, taking the State's argument to its logical conclusion, the State could always avoid the NVRA's requirements by simply claiming that compliance with its voting procedures is a "qualification" for voting. There is no principle limiting the State's argument to runoff elections or to the 30-day requirement of Section 8.

The requirements of federal law cannot so easily be evaded. The courts have routinely held that state laws or administrative decisions affecting voter eligibility are subject to Section 8 of the NVRA. *See, e.g., A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 706 (6th Cir. 2016) (Section 8 of the NVRA provides "an exhaustive list" of the circumstances permitting removal of voters from the registration rolls); *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 381–82, 384 (6th Cir. 2008) (Michigan voter verification program is subject to Section 8 of the NVRA, and adding that "[r]eceipt of the original voter ID card is not a requirement for eligibility"); *Bell v. Marinko*, 367 F.3d 588, 591 (6th Cir. 2004) (Subsections 8(a)(3), 8(a)(4), and 8(d) of the NVRA "set[ ] limits on the removal of registrants from the voter registration rolls").

Finally, the State implies that the NVRA as applied to Georgia runoff elections is unconstitutional and beyond the power of Congress. Opp. at 4–6. This argument must be rejected. Congress' power to regulate the conduct of federal elections under the Elections Clause is broad, *ITCA*, 133 S. Ct. at 2253, and the constitutionality of the NVRA and its preemption of inconsistent state procedures has been repeatedly upheld. *Id.* at 2256–57;

Kobach, 772 F.3d at 1198–99; *see also Fish v. Kobach*, 840 F.3d 710, 748–50 (10th Cir. 2016).

B. Absent an injunction, Plaintiffs will be irreparably injured, and any administrative burden Defendants may incur is far outweighed by the impact of disenfranchising thousands of eligible voters.

Plaintiffs clearly meet the well-recognized test for issuance of a preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). There is no question that the right to vote is fundamental. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1375–76 (N.D. Ga. 2005); *see also United States v. Georgia*, 952 F. Supp. 2d 1318, 1332–33 (N.D. Ga. 2013), judgment vacated and appeal dismissed for mootness, 778 F.3d 1202 (11th Cir. 2015). Courts have thus repeatedly found that "denying an individual the right to vote works a serious, irreparable injury." *Common Cause/Georgia*, 406 F. Supp. 2d at 1375–76; *see also Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When constitutional rights are threatened or impaired, irreparable injury is presumed.") (internal citations omitted). In the present case, Cobb County Director of Elections Janine Eveler reports that there are now 17,000 unprocessed registration applications pending in the County, and an additional 600 being filed every day. Eveler Decl., ECF No. 20-3, ¶ 10. Even if some percentage of these

applications fall outside the Sixth Congressional District, a failure to enjoin Defendants' current practice will undoubtedly result in many thousands of voters being disenfranchised.

Defendants argue that this palpable irreparable injury is outweighed by the administrative burdens that preliminary relief would impose upon the State. Opp. at 7–9. But the courts have repeatedly rejected this argument in similar contexts, and have found that assuring citizens of the right to vote "outweighs the cost and the inconvenience" that election officials might incur. *United States v. Georgia*, 952 F. Supp. 2d at 1332–33; *see also Common Cause/Georgia*, 406 F. Supp. 2d at 1375–76; *Georgia Coalition for the Peoples' Agenda, Inc. v. Deal*, No. 4:16-cv-269-WTM-GRS, 2016 WL 6039239, at *2 (S.D. Ga. Oct. 14, 2016). The same is true here.

Defendants argue that preliminary relief would require the State to make changes to the State's electronic voter registration and elections database that would be difficult to implement prior to the runoff. Opp. at 7–8. But, although it is not mentioned in the State's declarations, the State has already corrected similar problems before in the weeks leading up to prior elections, and there is no reason it could not be done now. The Secretary of State successfully made at least two large "hot fixes" to the

electronic registration system shortly before the November 2016 election. *See* Declaration of Helen Butler, dated May 2, 2017 ("Butler Decl.," submitted with this reply brief as Exhibit 7),¶¶ 35–41. Moreover, the electronic poll book submission deadline is more than two weeks *after* the May 22 deadline for voter registration mandated by the NVRA, leaving ample time for the State to update the electronic poll book after registration would be closed. *See* Butler Decl. ¶ 26.

Further, granting the relief sought by Plaintiffs would not require any "hot fix" at all. It is routine in the conduct of Georgia elections for election officials to be provided with a supplemental voter list, which includes the names of voters who are properly registered but who for one reason or another are not included in the electronic poll book, including voters who registered by the deadline but whose names were not processed in time to be included in the principal voter roll. *See* Butler Decl. ¶¶ 26–29, 31–34. There is no reason that Defendants cannot add the additional eligible voters who have registered since the original March 20 deadline to a paper supplemental voter list provided to each precinct—a method of ensuring that each voter has the right to vote in the runoff election without requiring any "fix" to the electronic poll book at all.

Defendants also argue that they would need to hire temporary workers to process the "significant backlog of voter registration applications" prior to the start of advance voting. Opp. at 8. However, this is a problem of the Defendants' own making. As detailed in the Butler Declaration—and nowhere disclosed in Defendants' papers—in approximately March 2016, Secretary of State Kemp *terminated* the "90 day black-out period" policy previously in effect, pursuant to which county registrars had deferred the processing of voter registration applications during the 90 days between the close of voter registration for a primary or general election until the completion of runoffs for that election. *See* Butler Decl. ¶¶ 13–23. As a result, Director of Elections Harvey issued two Official Election Bulletins ("OEBs") urging county registrars not to delay the processing of new voter registration applications and to process them on a continuing basis, without delay. *See* Butler Decl. ¶¶ 16–19. In this light, Ms. Eveler's admission that the Cobb County registrar's office stopped processing applications, *see* Eveler Decl. ¶ 10, indicates that the County was violating State policy, and Defendants were not enforcing it.

As the State acknowledges, Cobb County's failure to process registration applications in the normal course has resulted in a backlog of

upwards of 17,000 unprocessed applications. Eveler Decl. ¶ 10. Defendants' claims of administrative burdens should an injunction issue must be weighed against the impact on thousands, if not tens of thousands of voters, should the injunction not issue. The burden of hiring a few extra workers to process these applications now, or training election workers, or performing a "hot fix" on the registration system, does not outweigh the disenfranchisement of thousands of voters whose applications should have been processed all along.

Also, as the Butler Declaration makes clear, pre-election training is common and could be accomplished relatively easily by providing updates to poll workers in the form of written bulletins and verbal instructions. See Butler Decl. ¶ 25; *see Common Cause/Georgia*, 406 F. Supp. 2d at 1375–76 (granting injunction despite Defendants' claims that a preliminary injunction would likely "result in confusion for voters, poll workers, and elections officials," and that local elections officials "lack sufficient time to conduct training for poll workers and to educate the public"). Again, the need for training does not outweigh the irreparable harm to voters.

Defendants also raise the hypothetical possibility that granting the relief sought by Plaintiffs—and bringing the State into compliance with the

NVRA—could lead to situations where elections officials might be compelled to administer federal and state runoff elections on the same day, with different eligibility requirements. Opp. at 8. First, this concern has no relevance to the federal runoff scheduled for June 20, when there is no state race taking place. Second, the courts have required such administrative burdens in the past where two separate ballots are necessary to protect the right to vote. *See Idaho Republican Party v. Ysursa*, 765 F. Supp. 2d 1266, 1276 (D. Idaho 2011) (where court found that rights of voters outweighed administrative burdens and costs associated with two separate ballots). Third, Georgia itself has used multiple ballots in past elections, most recently in the April 18, 2017 special election. *See* Butler Decl. ¶ 44. And if this is a genuine concern, the State could enact legislation to adopt the NVRA-compliant registration deadlines for use in both federal and state elections. In any event, this issue need not be addressed in the context of this motion for preliminary relief.

Finally, Defendants argue that the Court "should give consideration to the proximity of the election, and the potential for any voter confusion." Opp. at 7 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006)). The *Purcell* case, of course, merely requires the Court to consider the timing among all

the circumstances of the case, and does not establish any per se rule against granting preliminary injunctive relief shortly before an election. *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 367–68 (9th Cir. 2016).

Several factors militate strongly in favor of granting the injunction here. First, Defendants were placed on notice on March 31 of the NVRA violation, and had ample time to take steps to cure the problem. Second, inexplicably, at least one county board of elections failed to follow State policy and process registration applications received after the original registration deadline, creating a backlog that should otherwise not exist—and Defendants not only failed to enforce that policy but are now relying on its deliberate disregard. Third, as discussed above, there is ample time before the election to implement the relief that Plaintiffs seek, and no reason to believe that there will be any voter confusion. Indeed, allowing people to vote who registered up to 30 days before a federal election is the expected norm. And, as set forth above, it is the supreme law of the land.

III. CONCLUSION

Plaintiffs respectfully request that the Court enter an order granting their motion for a temporary restraining order and preliminary injunction, and such further relief as it deems just and proper.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing **PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

This 2nd day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 2nd day of May, 2017.

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