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

GEORGIA MUSLIM VOTER PROJECT and ASIAN-AMERICANS ADVANCING JUSTICE-ATLANTA, Plaintiff, vs. BRIAN KEMP, in his official capacity as the Secretary of State of Georgia; and GWINNETT COUNTY BOARD OF VOTER REGISTRATION AND ELECTIONS, on behalf of itself and similarly situated boards of registrars in all 159 counties in Georgia, Defendants.	Civil Action No.: 1:18-cv-04789-LMM

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs seek emergency relief to stop an ongoing constitutional train wreck that threatens to disenfranchise potentially hundreds, if not thousands, of voters casting absentee ballots leading up to this year's November 2018 general election. In the alternative, Plaintiffs respectfully request an immediate hearing. The relief should be granted for the reasons set forth in Plaintiffs' accompanying memorandum of law.

"No right is more precious in a free country than having a voice in the election of those who make the laws under which, as good citizens, we must live." *Reynolds v. Sims*, 377 U.S. 533, 560 (1964). But, in Georgia, this sacred right can be stripped from certain voters without constitutionally mandated due process. Georgia law requires county elections officials, lay people not handwriting experts, to reject an absentee ballot when they subjectively determine that the signature on the ballot does not match the signature on file. The voter does not get any pre-rejection notice or an opportunity to be heard, or any opportunity for appeal. O.C.G.A. § 21-2-386(a)(1)(B)-(C). Another Georgia statute similarly requires the rejection of absentee ballot applications where there is an alleged signature mismatch without providing pre-rejection notice or an opportunity to be heard. O.C.G.A. § 21-2-381(b)(1)-(3). This is a violation of the Due Process Clause.

Given the urgency of the upcoming elections, and in response to these recent reports, Plaintiffs seek a temporary restraining order that:

1) immediately enjoins elections officials from rejecting any absentee ballots due to an alleged signature mismatch unless the voter is given pre-rejection notice, an opportunity to resolve the alleged signature discrepancy, such as by confirming identity by providing photo identification by e-mail, fax, mail, or in-person, and an opportunity to appeal, pursuant to the existing notice

and opportunity procedures for other absentee voters set forth in O.C.G.A. § 21-2-230(g). The voter should have the opportunity to do so within three days after Election Day or three days after they receive pre-rejection notice, whichever is later; with an opportunity to appeal;

2) also extends to absentee ballot applications that are rejected due to a signature mismatch, limited to the period of time during which absentee ballot applications may be filed; and

3) requires elections officials to provide pre-rejection notice within one day of the signature mismatch rejection decision for both ballot or ballot applications.

Injunctive relief need only be entered against the Secretary of State's Office, which has the power to issue guidance to all elections officials throughout the State. If this Court believes that to be insufficient, Plaintiffs request injunctive relief specifically against all county officials (Gwinnett County Board of Voter Registration & Elections and the putative defendant class of county officials they represent) responsible for implementing O.C.G.A. § 21-2-386(a)(1)(B)-(C) and O.C.G.A. § 21-2-381(b)(1). Courts may issue class-wide preliminary injunctive relief prior to class certification. *See, e.g.*, *Strawser v. Strange*, 105 F. Supp. 3d 1323, 1330 (S.D. Ala. 2015) ("Courts in this District and others have previously

issued a preliminary injunction . . . even prior to fully certifying a class."); *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012) ("there is nothing improper about a preliminary injunction preceding a ruling on class certification."). Should this Court deem temporary class certification to be necessary, Plaintiffs submit that a defendant class should be temporarily certified for the reasons set forth in Paragraphs 41 to 45 of the Complaint.

Respectfully submitted,

this 17th of October, 2018

s/ Sean J. Young

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**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. On October 16, I e-mailed a copy of the Complaint to the general counsel for the Secretary of State's Office, Ryan Germany (rgermany@sos.ga.gov), as well as the head of the Law Department for Gwinnett County, William J. Linkous III (William.linkous@gwinnettcounty.com). Mr. Linkous replied by e-mail on October 16 discussing the possibility of waiver of service, thus confirming that he received the e-mail. Mr. Germany replied by e-mail on October 17 discussing the mechanics of formal service, thus confirming that he received the e-mail as well. An attorney from the State Attorney General's Office, Cris Correia (ccorreia@law.ga.gov), who was CC'd by Mr. Germany, also responded on October 17 asking that I e-mail a copy of the TRO papers to her as soon as I file them. I then hired a process server to formally serve the Complaint, the Motion for a Temporary Restraining Order and related filings on Defendants. Immediately upon filing this motion, I will e-mail a copy of the TRO papers to Mr. Germany, Ms. Correia, and Mr. Linkous, followed by a phone call to Ms. Correia and Mr. Linkous alerting them to the filing and the e-mail. I will also mail copies of the Complaint and TRO papers via same-day delivery or, if it is too late, next-day

delivery to Mr. Linkous at 75 Langley Drive, Lawrenceville, GA 30046 and to Ms. Correia at 40 Capitol Square SW, Atlanta, GA 30334.

Date: October 17, 2018

s/ Sean J. Young

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

Plaintiffs seek emergency relief to stop an ongoing constitutional train wreck that threatens to disenfranchise potentially hundreds, if not thousands, of voters casting absentee ballots leading up to this year's November 2018 general election. In the alternative, Plaintiffs respectfully request an immediate hearing.

"No right is more precious in a free country than having a voice in the election of those who make the laws under which, as good citizens, we must live." *Reynolds v. Sims*, 377 U.S. 533, 560 (1964). But in Georgia, this sacred right can be stripped from certain voters without constitutionally mandated due process. Georgia law requires county elections officials, laypersons who are not handwriting experts, to reject an absentee ballot when they subjectively determine that the signature on the ballot does not match the signature on file. The voter does not get any pre-rejection notice or an opportunity to be heard, or any opportunity for appeal. O.C.G.A. § 21-2-386(a)(1)(B)-(C). Another Georgia statute similarly requires the rejection of absentee ballot applications where there is an alleged signature mismatch without providing pre-rejection notice or an opportunity to be heard. O.C.G.A. § 21-2-381(b)(1)-(3). This violates the Due Process Clause.

These statutes' lack of adequate due process for absentee voters based on an alleged signature mismatch contrasts starkly with the notice and opportunity to be heard provided to absentee voters whose ballots are challenged on other grounds,

i.e., on grounds that the voter is ineligible to vote. *See* O.C.G.A. § 21-2-230(g). Plaintiffs simply ask that the same notice and opportunity to be heard afforded to other absentee voters under Georgia law also be extended to voters whose ballots or applications are rejected because of an alleged signature mismatch.

Though early voting in Georgia for the 2018 general election has just started, over 500 absentee ballots or ballot applications have already been rejected under these signature-matching provisions. An October 12 news article further suggests that Gwinnett County is responsible for a disproportionate share of these rejections.[1] Given the urgency of the upcoming elections, and in response to these recent reports, Plaintiffs seek a temporary restraining order directing the relief described below and in the accompanying motion and proposed order.

FACTUAL BACKGROUND

This motion rests solely on Plaintiffs' procedural due process challenge to O.C.G.A. § 21-2-386(a)(1)(B)-(C), the signature matching process for accepting completed absentee ballots (Count One); and Plaintiffs' procedural due process

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[1] Jordan Wilkie, "Exclusive: High Rate of Absentee Ballot Rejection Reeks of Voter Suppression," *Who.What.Why.*, October 12, 2018, *found at:* https://whowhatwhy.org/2018/10/12/exclusive-high-rate-of-absentee-ballot-rejection-reeks-of-voter-suppression/ (last visited October 16, 2018).

challenge to O.C.G.A. § 21-2-381(b)(1)-(3), the signature matching process for reviewing applications for an absentee ballot (Count Two).

Signature Matching at the Absentee Ballot Application Stage

Georgia law allows voters to cast an absentee ballot through the mail before Election Day regardless of whether they are capable of voting in-person. O.C.G.A. § 21-2-380. Nevertheless, some voters have no choice but to vote by absentee ballot because they cannot vote in-person whether because of physical disability, lack of transportation, or out-of-town travel. To vote by absentee ballot, a voter must first submit an absentee ballot application via mail, fax, e-mail, or in-person. O.C.G.A. § 21-2-381. The application can be submitted as early as 180 days and as late as the Friday before Election Day (since absentee ballots cannot be mailed the day before Election Day). *See* O.C.G.A. §§ 21-2-381(a)(1)(A); 21-2-384(a)(2).

When an absentee ballot application is received, the county registrar[2] determines whether the voter is eligible. O.C.G.A. § 21-2-381(b)(1). This provision, however, does not set a time limit by which the county registrar must process the received application. When evaluating an application, the county

[2] This brief uses the term "county registrar" as a shorthand to include any board of registrars or absentee ballot clerks, who are charged with enforcing the statutes at issue in this litigation.

registrar is required to compare the signature on the absentee ballot application to the signature on file. *See id.* ("the registrar or absentee ballot clerk shall . . . compare the signature or mark of the elector on the application with the signature or mark of the elector on the elector's voter registration card."). Georgia law, however, does not require elections officials to become handwriting experts, nor does the law provide any guidance whatsoever on how to determine whether the signatures qualify as a match. Likewise, there is no provision requiring or even allowing registrars to consider extrinsic evidence that might help them confirm the identity of the absentee ballot applicant before rejecting the application solely on the basis of a subjective determination about signature similarities.

If the registrar subjectively deems the signatures not to match, "the board of registrars shall deny the application by writing the reason for rejection in the proper space on the application and shall promptly notify the applicant in writing of the ground of ineligibility." O.C.G.A. § 21-2-381(b)(3). Though the law requires that the rejection notice be sent "promptly," there is no specific time limit set.

At least 493 absentee ballot applications have been rejected thus far for the 2018 general election on this basis. *See* Exhibit A (Ali Decl.) ¶ 7.

Signature Matching at the Absentee Ballot Stage

If the applicant's eligibility is confirmed, the registrar mails an absentee ballot to the voter (with exceptions not relevant here). O.C.G.A. § 21-2-381(b)(2). Such ballots are mailed from 49 days before Election Day up to the Friday before Election Day. O.C.G.A. § 21-2-384(a)(2). There is no time limit as to when the registrar must send the absentee ballot once the application has been processed.

When the absentee voter receives an official absentee ballot, they receive two envelopes. The completed absentee ballot must be put in the smaller envelope. The back of the larger envelope has an oath swearing to eligibility (among other matters), as well as a line for the voter's signature. O.C.G.A. § 21-2-384(c)(1). The smaller envelope must be placed in the larger and returned to the county registrar.

Once the absentee ballot is received, the county registrar "shall compare the signature or mark on the oath with the signature or mark on the absentee voter's voter registration card or the most recent update to such absentee elector's voter registration card and application for absentee ballot or a facsimile of said signature or mark taken from said card or application." O.C.G.A. § 21-2-386(a)(1)(B). If the "signature does not appear to be valid, . . . the registrar or clerk shall write across the face of the envelope 'Rejected,' giving the reason therefor. The board of registrars or absentee ballot clerk shall promptly notify the elector of such

rejection." O.C.G.A. § 21-2-386(a)(1)(C). Again, Georgia law does not require elections officials to become handwriting analysis experts or permit them to consider extrinsic evidence. And while elections officials must "promptly" notify voters that their ballot was rejected there is no specific time limit to do so.

Over 100 absentee ballots have been rejected so far in this election. *See* Exhibit A (Ali Decl.) ¶ 7.

Georgia Law Does Not Provide Adequate Due Process Guarantees in Either Phase of the Absentee Ballot Process

Georgia law does not provide the absentee ballot applicant with an alleged signature mismatch pre-rejection notice or an opportunity to be heard, *i.e.*, to confirm their identity or otherwise explain the alleged mismatch. Similarly, at the absentee ballot stage, Georgia law also does not provide the voter casting an absentee ballot with an alleged signature mismatch pre-rejection notice or an opportunity to be heard, *i.e.*, to confirm their identity or otherwise explain the alleged mismatch. There is no procedure by which a voter can contest a registrar's decision that the voters' two signatures do not match, nor are there any additional layers of review of that decision, either by a court or by the Secretary of State. In other words, the registrar's decision is final.

Other Absentee Voters in Similar Circumstances Are Provided Due Process

Notably, other Georgia laws provide absentee votes with notice and an opportunity to be heard in similar circumstances. For absentee voters whose ballots are challenged on grounds that the voter is allegedly unqualified to vote, Georgia law requires notice, a hearing "on an expedited basis," and an opportunity for judicial appeal to resolve whether that ballot should be counted. *See* O.C.G.A. § 21-2-230(g). These procedural protections must be provided, moreover, even if they cannot be completed prior to the close of the polls on Election Day. *See id.* These protections do not apply, however, to the provisions challenged here.

ARGUMENT

Plaintiffs urgently seek a TRO pursuant to Fed. R. Civ. P. 65(b) that will prevent elections officials from rejecting absentee ballots or absentee ballot applications on the basis of an alleged signature mismatch without providing pre-rejection notice and an opportunity to be heard. A TRO is warranted if the movant demonstrates: (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that an injunction would not disserve the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Faircloth v. Baden*, No. 1:11-

CV-86 (WLS), 2011 WL 7640351 (M.D. Ga. Aug. 1, 2011) (standards for obtaining a TRO is identical to that for obtaining a preliminary injunction).

As discussed below: I) Plaintiffs are substantially likely to succeed on the merits of their procedural due process challenge to the signature matching procedure at the absentee ballot stage (Count One), just as several other courts have struck down similar signature matching procedures in other states for lack of due process; II) Plaintiffs are substantially likely to succeed on the merits of their procedural due process challenge to the signature matching procedure at the absentee ballot application stage (Count Two); and III) the remaining TRO factors are satisfied in this case.[3]

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF COUNT ONE'S PROCEDURAL DUE PROCESS CHALLENGE

Plaintiffs are substantially likely to succeed on the merits of Count One's procedural due process challenge against O.C.G.A. § 21-2-386(a)(1)(B)-(C), which

[3] Plaintiffs are organizations who are actively involved in voting and voter registration activities and would divert resources from its regular activities to educate and assist voters in guarding against wrongful removals on grounds of criminal conviction. *See* Exhibits A, B. Plaintiffs thus have organizational standing to bring this action. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350-51 (11th Cir. 2009) (voter registration organizations had standing to vindicate individuals' voting rights due to diversion of resources).

mandates the rejection of absentee ballots when an elections official subjectively determines that the voter's signatures do not match without pre-rejection notice or an opportunity to be heard. As discussed below, numerous courts have struck down signature matching requirements that fail to provide due process.

The Due Process Clause of the Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Plaintiffs must satisfy "three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *J.R. v. Hansen*, 736 F.3d 959, 965 (11th Cir. 2013) ("*Hansen I*").

The first two elements are plainly satisfied here. The challenged statute deprives registered voters of a constitutionally-protected liberty interest in the right to vote. Over 50 years ago, the Fifth Circuit[4] recognized that the right to register to vote is protected by procedural due process guarantees, because "[t]he right to vote is one of the most important and powerful privileges which our democratic form of government has to offer." *United States v. Atkins*, 323 F.2d 733, 743 (5th Cir.

[4] Decisions issued by the Fifth Circuit prior to September 30, 1981 are binding on the present-day Eleventh Circuit courts. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

1963). Thus, for example, *Atkins* held that "the Board [can]not deprive a person of the right to register to vote on the basis of secret evidence without affording notice and an opportunity for hearing." *Id.* Several courts have also recognized that the "right to vote . . . implicates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment." *Miller v. Blackwell*, 348 F. Supp. 2d 916, 921 (S.D. Ohio 2004); *see also, e.g.*, *Bell v. Marinko*, 235 F. Supp. 2d 772, 777 (N.D. Ohio 2002) (citing cases, including signature matching cases). As for the second element, Defendants cannot dispute that the statute requires state action.

Where, as here, the first two elements are satisfied, "the question becomes what process is due." *Grayden v. Rhodes*, 345 F.3d 1225 (11th Cir. 2003). To make that determination, courts use the test from *Mathews v. Eldridge*, which requires the balancing of the following considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976); *see Hansen I*, 736 F.3d at 966.

The Eleventh Circuit has also set out the standard for assessing facial procedural due process challenges. Where, as here, plaintiffs argue that a statute

lacks adequate due process on its face, courts "look[] to the statute as written to determine whether the procedure provided comports with due process. [Courts do not] simply rely on the defendant's description of how the statute operates in practice." *Hansen I*, 736 F.3d at 966.

A. The Private Interest Affected Is of Paramount Importance

The private interest affected by the challenged statute is of paramount importance because the rejection of a voter's absentee ballot implicates that individual's very right to participate in our democracy. The right to vote has been ranked by the Supreme Court as the most "precious" of all rights because it is "preservative of all rights." *Yick Wo v. Hopkins*, 18 U.S. 356, 370 (1886); *Atkins*, 323 F.2d at 743 ("The right to vote is one of the most important and powerful privileges which our democratic form of government has to offer."). This first *Mathews* factor thus weighs strongly in Plaintiffs' favor. *See Saucedo v. Gardner*, No. 17-cv-183-LM, 2018 WL 3862704, at *10 (D.N.H. Aug. 14, 2018) (giving factor "significant weight" in striking down signature matching requirement).

B. The Risk of Erroneous Removal Is Substantial, and Applying the Same Safeguards for Other Absentee Voters Can Significantly Reduce that Risk

The next *Mathews* factor examines "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335.

1. *The risk of a voter's absentee ballot being erroneously rejected is substantial*

The risk of a voter's absentee ballot being erroneously rejected is substantial, for multiple reasons.

First, O.C.G.A. § 21-2-2386(a)(1)(B)-(C) permits a single registrar to unilaterally reject absentee ballots solely based on a subjective, standardless determination of a signature mismatch without any check on that process. Voters are provided no pre-rejection notice or adversarial opportunity to challenge the rejection, creating a high risk of error. *See, e.g.*, *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1267 (11th Cir. 2011) (facially unconstitutional "trespass ordinance causes a substantial risk of erroneous deprivation of liberty because it is seemingly easy for the City . . . to issue a trespass warning and because no procedure is provided for the recipient of a trespass warning to challenge the warning or for the warning to be rescinded."); *Saucedo*, 2018 WL 3862704, at *11 (similar signature-matching requirement creates high risk of disenfranchisement where there is no

opportunity to "object to a determination" or any "appeal or review process"); *Doe v. Rowe*, 156 F. Supp. 2d 35, 48 (D. Me. 2001) (disenfranchising "mentally ill" persons without notice or opportunity to be heard created a "high risk" of error).

There are also no audit procedures or review processes to determine whether a county registrar's unilateral determinations are correct, further exacerbating the risk. *See, e.g.*, *J.R. v. Hansen*, 803 F.3d 1315, 1324-25 (11th Cir. 2015) (civil detention statute "constitutionally infirm [on its face] because it does not require periodic review of continued involuntary commitment" to determine whether the bases for detention continue to hold). Even statutory schemes with judicial backstops have been found not to mitigate the risk of error. *See id.* at 1326 (habeas corpus backstop insufficient). Here, there is no judicial backstop at all.

In a case challenging a similar signature-matching procedure, the federal district court found an unacceptably high risk of disenfranchisement for these same reasons. *See Saucedo*, 2018 WL 3862704, at *11-13.

Second, the statute forces untrained laypersons to become handwriting experts. Entrusting laypersons to conduct a task that only experts can do is inherently risky. *See id.* at *11 ("the task of handwriting analysis by laypersons . . . is fraught with error").

Third, the statute vests registrars with virtually limitless discretion to determine whether two signatures match. Georgia law and regulations provide no guidance on how county registrars are to determine a match. Such expansive discretion is bound to contain a high risk of error. *See, e.g.*, *Catron*, 658 F.3d at 1267 (facially unconstitutional ordinance "provides a lot of discretion to many different city agents to issue trespass warnings for a wide range of acts"); *LULAC of Iowa v. Pate*, No. CVCV056403 (Iowa Dist. Ct. July 24, 2018) (Exhibit C), at 18 (stating that "there is potential for erroneous determinations of a mismatch" under Iowa signature-match requirement for absentee ballots, where election officials had "unbridled discretion to reject ballots based on signatures they find do not match," but did not have "official guidance or handwriting expertise") *aff'd in part*, No. 18-1276, 2018 WL 3946147 (Iowa Aug. 10, 2018).

Fourth, existing cure opportunities do not adequately mitigate the risk of erroneous deprivation. Though affected voters are theoretically permitted to "cure" their ballot rejection by trying to successfully navigate the absentee voting process a second time or voting in-person, Ga. Admin. Code § 183-1-14-.09(2), this cure opportunity is illusory for many would-be voters. Even for voters willing and able to try the absentee process again, there is no reason to believe that a voter's signature will be found to match on a second try. In-person voting is denied to

absentee voters who cannot vote in-person, whether because of physical disability, lack of transportation, or out-of-town travel. It is also denied to the many voters do not receive notice of their rejection until on or after Election Day, when it is too late to vote in-person to cure the error. *See LULAC of Iowa v. Pate*, No. CVCV056403 at 8 (Iowa Dist. Ct. July 24, 2018) (Exhibit C) ("Voters whose ballots are erroneously deemed defective under the signature matching provision . . . will be harmed" due to additional obstacles and late rejections). Because the law fails to provide any time frame for when absentee ballots must be processed after they are received, nor a time limit as to when county officials must send notices of rejection, would-be voters who are disenfranchised include not just those who cast absentee ballots near Election Day, but also some who cast ballots well in advance of Election Day.

Fifth, the risk of erroneous rejection is high because the same person can have different signatures for any number of innocent reasons. "[I]nnocent factors—such as body position, writing surface, and noise—affect the accuracy of one's signature." *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016). Unintentional factors include "age, physical and mental condition, disability, medication, stress, accidents, and inherent differences in a person's neuromuscular coordination and stance."

Saucedo, 2018 WL 3862704, at *1. "Variations are more prevalent in people who are elderly, disabled, or who speak English as a second language." *Id.* The current procedure fails to account for these common deviations.

All these factors combine to create a substantial risk of erroneous rejection. *See Saucedo*, 2018 WL 3862704, at *12 ("The natural variations in a person's handwriting—many of which are unintentional or uncontrollable, like mental or physical condition—when combined with the absence of functional standards, training, review, and oversight, create a tangible risk of erroneous deprivation.).

2. The probative value of additional procedural safeguards is significant

In addition to the risk of erroneous deprivation under the current process, the second *Mathews* factor examines the probative value of additional procedural safeguards, and here, the value is significant. The substantial risk of error would be be greatly reduced if absentee voters were given basic pre-rejection notice and an opportunity to contest the rejection. Voters could, for example, be permitted to confirm their identity through some form of identification, or otherwise resolve the alleged signature discrepancy with extrinsic evidence or other explanation, perhaps even by phone call. *See, e.g.*, *Grayden*, 345 F.3d at 1236 ("there is at least some value in conducting a hearing at which tenants can challenge a condemnation order"); *Saucedo*, 2018 WL 3862704, at *12 ("a procedure where by a moderator

simply reaches out to the voter in one form or another would be of great value," even if it is not a "perfect solution").

Courts adjudicating challenges to similar signature-matching procedures in other states have found such simple procedural safeguards to add significant probative value, even where the risk of an erroneous rejection was "not enormous." *See Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *9 (N.D. Ill. Mar. 13, 2006) (risk of erroneous deprivation "not enormous, but the probable value of an additional procedure is likewise great in that it serves to protect the fundamental right to vote."); *Saucedo*, 2018 WL 3862704, at *13 (same). And if county registrars still find that the signatures do not match, an appeal to the Georgia superior court can provide a neutral mechanism for resolving those disputes. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 606-07 (1979) ("some kind of inquiry should be made by a 'neutral factfinder'" to determine validity of detention).

The second *Mathews* factor thus weighs heavily in favor of Plaintiffs.

C. Additional Procedures Involve Minimal Administrative Burdens Because They Already Exist

The last *Mathews* factor examines "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

The State's interests would not be not harmed by the additional procedures requested. In fact, the additional procedures Plaintiffs seek would only help to better serve the State's interest in ensuring that no absentee ballot is erroneously rejected. Nor would additional procedures increase the potential for voter fraud, since additional procedures would not remove any of the identification requirements of Georgia law, and instead would simply ensure that voters have an opportunity to confirm their identity. *See, e.g.*, *Saucedo*, 2018 WL 3862704, at *13 ("additional procedures further the State's interest in preventing voter fraud while ensuring that qualified voters are not wrongly disenfranchised . . . [and] only serve to enhance voter confidence in elections").

The administrative burdens entailed by pre-rejection notice and an opportunity to be heard are "negligible," for the same reasons provided by the Eleventh Circuit in *Grayden*, 345 F.3d at 1236. Pre-rejection notice costs nothing extra since the statute already requires post-rejection notice; it is simply a matter of updating the notice language. *See id.* at 1237 (requiring pre-deprivation notice instead of post-deprivation notice adds "little extra cost"); *id.* at 1236 ("To include a one-sentence statement of a tenant's right to appeal the condemnation order in this notice to vacate would not be burdensome."). An opportunity to be heard also

imposes minimal burdens. *See id.* (summarily concluding that "[t]he burden of conducting a hearing" is "hardly daunting").

The burdens are especially low considering Georgia already has in place a system that provides pre-rejection notice and an opportunity to be heard, and judicial review, for other absentee voters, whose ballots are challenged on the basis of voter ineligibility. *See* O.C.G.A. § 21-2-230(g) ("If the challenged elector cast an absentee ballot and the challenge is based upon grounds that the challenged elector is not qualified to remain on the list of electors, the board of registrars shall proceed to conduct a hearing on the challenge on an expedited basis prior to the certification of the consolidated returns"); *id.* ("The elector making the challenge and the challenged elector may appeal the decision of the registrars in the same manner as provided in [O.C.G.A. § 21-2-229(e)]"); O.C.G.A. § 21-2-229(e) (appeal to be filed with the clerk of superior court). This existing procedure may take place up to 6 days after Election Day, or even beyond.[5]

[5] *See* O.C.G.A. § 21-2-230(g) (challenge hearings conducted up to date of certification of consolidated returns by election superintendent); O.C.G.A. § 21-2-493(k) (consolidated return certification occurs by Monday after Election Day); *but see* O.C.G.A. § 21-2-230(g) (consolidated returns may not be certified by election superintendent until challenges are resolved).

Given that the procedures Plaintiffs request are already provided to other absentee voters, extending the same process to absentee voters whose ballots are challenged on the basis of an alleged signature match would not be burdensome. *See, e.g.*, *Zinermon v. Burch*, 494 U.S. 113, 137 (1990) ("we cannot say that predeprivation process was impossible" where state "already has an established procedure"); *Saucedo*, 2018 WL 3862704, at *14 ("this is a case not of foisting wholly novel procedures on state election officials, but of simply refining an existing one . . . . [P]rocedures already exist which could be readily extended to provide basic guarantees of due process to voters . . . ."); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016) ("there is no rational explanation for why it would impose a severe hardship on Defendant to provide the same procedure for curing mismatched-signature ballots as for no-signature ballots").

In addition, Plaintiffs ask that absentee voters whose ballots are rejected be given up to 3 days after Election Day, or 3 days after receipt of pre-rejection notice, whichever is later, to resolve the discrepancy by, for example, sending a copy of identification (provided through e-mail, fax, mail, or in-person) confirming the voter's identity. This suggested relief is modelled after O.C.G.A. § 21-2-417, Georgia's voter ID law. The only purpose that Georgia's signature match

requirement serves is to verify a voter's identity. Presenting photo identification at the polls serves a similar purpose for voters who vote in-person, and under the voter ID law, in-person voters have until 3 days after Election Day to confirm their identity if they failed to provide photo identification at the polls.[6] There is no reason absentee voters should not likewise have at least until 3 days after Election Day (or 3 days after receipt of pre-rejection notice, if later) to resolve any concerns about their identity.

For these reasons, the third *Mathews* factor also weighs in Plaintiffs' favor.

* * *

"For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005) (citations and quotations omitted). For this reason, numerous courts have struck down signature matching requirements that fail to provide due process. *See, e.g., Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. supp. 1354 (D. Ariz. 1990); *LULAC of Iowa v. Pate*, No. CVCV056403

[6] Absentee voters are exempt from the voter ID requirement, unless the voter registered by mail without including ID and is voting for the first time. *See Common Cause / Georgia v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009).

(Iowa Dist. Ct. July 24, 2018) (Exhibit C); *La Follette v. Padilla*, No. CPF-17-515931 (Cal. Super. Ct. Mar. 5, 2018) (Exhibit D). This principle readily applies here, where all three *Mathews* factors point in Plaintiffs' favor. Absentee voters whose ballots are rejected based on a signature mismatch deserve the same pre-rejection notice and opportunity to be heard that Georgia law already provides to other absentee voters whose ballots are challenged on other grounds.

Given the importance of the right at stake, even if the risk of error were low—which is not the case here—the probative value of providing pre-rejection notice and an opportunity to be heard far outweigh the negligible burden to the State of requiring those minimal procedures. *See, e.g.*, *Grayden*, 345 F.3d at 1236 (violation of due process where "the risk of erroneous deprivation is relatively low," but where pre-deprivation notice and an opportunity to be heard is probative and involves "almost no additional financial or administrative burden"); *Saucedo*, 2018 WL 3862704, at *13-*14 (violation of due process even where "risk of erroneous deprivation . . . is not enormous," because where the additional procedures have "great" probative value and "would not entail significant administrative burdens" (citation omitted)); *Zessar*, 2006 WL 642646, at *9 (same).

Plaintiffs are thus substantially likely to succeed on their procedural due process challenge against O.C.G.A. § 21-2-386(a)(1)(B)-(C) (Count One).

II. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF COUNT TWO'S PROCEDURAL DUE PROCESS CHALLENGE

For the same reasons, Plaintiffs are also substantially likely to succeed on the merits of Count One's procedural due process challenge to O.C.G.A. § 21-2-381(b)(1)-(3), which similarly mandates the rejection of absentee ballots *applications* when an elections official subjectively determines that the voter's signatures do not match, without pre-rejection notice or an opportunity to be heard. Plaintiffs ask that the same remedy articulated above also be applied to absentee ballot applications, except that any opportunity to be heard would end the Friday before Election Day, which is the last day that absentee ballot applications are due.

III. THE REMAINING TEMPORARY RESTRAINING ORDER FACTORS WEIGH IN PLAINTIFFS' FAVOR

The remaining factors to be considered on a TRO motion are also satisfied here. "A restriction on the fundamental right to vote . . . constitutes irreparable injury." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Detzner*, 2016 WL 6090943, at *8. Monetary damages cannot compensate for the loss of the priceless right to vote, especially when elections have come and gone. *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)

("Courts routinely deem restrictions on fundamental voting rights irreparable injury" because "once [an] election occurs, there can be no do-over and no redress."). Hundreds of absentee ballots or applications have already been rejected, and the rate of disenfranchisement increases with each passing day that emergency relief is not ordered.

The balance of hardships favors Plaintiffs because the opportunity to correct an erroneous rejection substantially outweighs the minimal burdens involved in extending existing procedures to absentee voters whose ballots and/or ballot applications are identified as allegedly having signature mismatches. *See Obama for Am.*, 697 F.3d 423 at 436; *Detzner*, 2016 WL 6090943, at *8; *see also LWV of N. Carolina*, 769 F.3d at 244 (potential disenfranchisement "outweighs any corresponding burden on the State, which has not show that [it] will be unable to cope" with plaintiffs' requested relief). It is also unquestionably in the public's interest to ensure that no absentee ballots are erroneously rejected. *See Obama for Am.*, 697 F.3d at 436; *Detzner*, 2016 WL 6090943, at *8. Indeed, "[t]he public interest . . . favors permitting as many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437.

For these reasons, this Court should enter the relief detailed in Plaintiffs' accompanying motion for a TRO and proposed order.

CONCLUSION

Absentee voters are entitled to due process before their right to vote is stripped away. For the reasons stated above, this Court should enter a temporary restraining order entering the relief detailed in Plaintiffs' accompanying motion for a TRO and proposed order.

Respectfully submitted,

this 17th of October, 2018

s/ Sean J. Young

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**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. On October 16, I e-mailed a copy of the Complaint to the general counsel for the Secretary of State's Office, Ryan Germany (rgermany@sos.ga.gov), as well as the head of the Law Department for Gwinnett County, William J. Linkous III (William.linkous@gwinnettcounty.com). Mr. Linkous replied by e-mail on October 16 discussing the possibility of waiver of service, thus confirming that he received the e-mail. Mr. Germany replied by e-mail on October 17 discussing the mechanics of formal service, thus confirming that he received the e-mail as well. An attorney from the State Attorney General's Office, Cris Correia (ccorreia@law.ga.gov), who was CC'd by Mr. Germany, also responded on October 17 asking that I e-mail a copy of the TRO papers to her as soon as I file them. I then hired a process server to formally serve the Complaint, the Motion for a Temporary Restraining Order and related filings on Defendants. Immediately upon filing this motion, I will e-mail a copy of the TRO papers to Mr. Germany, Ms. Correia, and Mr. Linkous, followed by a phone call to Ms. Correia and Mr. Linkous alerting them to the filing and the e-mail. I will also mail copies of the Complaint and TRO papers via same-day delivery or, if it is too late, next-day

delivery to Mr. Linkous at 75 Langley Drive, Lawrenceville, GA 30046 and to Ms. Correia at 40 Capitol Square SW, Atlanta, GA 30334.

Date: October 17, 2018

s/ Sean J. Young

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DECLARATION OF STEPHANIE ALI

My name is Stephanie Jackson Ali and I am over the age of 18 and fully competent to make this declaration. Under penalty of perjury, I declare the following:

1. I am Board Secretary of the Georgia Muslim Voter Project.

2. Georgia Muslim Voter Project ("GMVP") is a civic organization whose mission is to assist in registering voters and increase voter engagement and turnout. GMVP is particularly active in Gwinnett County, which has one of the highest populations of United States citizens who are Muslim among the State of Georgia.

3. As a result of O.C.G.A. § 21-2-386(a)(1)(B)-(C), which fails to provide due process to absentee voters whose signatures allegedly do not match, and O.C.G.A. § 21-2-381(b)(1)-(3), which fails to provide due process to absentee ballot applicants whose signatures allegedly do not match, and in response to a recent news article indicating higher rates of rejection in Gwinnett County, GMVP must now divert more resources towards warning voters about this risk, especially voters who vote absentee closer to Election Day.

4. GMVP must also divert resources towards following up with voters to explore any possibility of ensuring that their ballot will be counted, such as placing calls to county registrars or expending more resources towards facilitating in-person voting to compensate for the risk of absentee ballots not being counted.

5. These resources are diverted away from its regular voting and voter registration activities.

6. If an injunction is not immediately issued, the Georgia absentee voters with whom GMVP works may lose their right to vote because they may have their ballots rejected when it is too late to cure by voting in-person—which also may not be an option for absentee voters who are unable to vote in-person.

7. I calculated how many absentee ballot applications and how many absentee ballots were rejected due to a signature mismatch based on public information in an Excel sheet at http://elections.sos.ga.gov/Elections/voterabsenteefile.do. I believe that at least 493 absentee ballot applications have been rejected thus far for a signature mismatch, and that over 100 absentee ballots have been rejected thus far for the same reason. Every county appears to record the reason for an absentee ballot application or ballot rejection using slightly different terms. I rearranged the Excel sheet to isolate the rejection explanations that reference signatures to arrive at these numbers.

I declare under penalty of perjury that the forgoing is true and correct.

Stephanie Jackson Ali

10/17/18
Date

DECLARATION OF STEPHANIE CHO

My name is Stephanie Cho, and I am over the age of 18 and fully competent to make this declaration. Under penalty of perjury, I declare the following:

1. I am the Executive Director of Asian Americans Advancing Justice-Atlanta ("Advancing Justice-Atlanta").

2. Advancing Justice-Atlanta is a civic organization whose mission includes increasing civic engagement and voter turnout among Asian Americans in Georgia by, among other activities, assisting with registering voters.

3. Advancing Justice-Atlanta is particularly active in Gwinnett County, which has one of the highest populations of United States citizens who are Asian-American in the State of Georgia.

4. As a result of O.C.G.A. § 21-2-386(a)(1)(B)-(C), which fails to provide due process to absentee voters whose signatures allegedly do not match, and O.C.G.A. § 21-2-381(b)(1)-(3), which fails to provide due process to absentee ballot applicants whose signatures allegedly do not match, and in response to a recent news article indicating higher rates of rejection in Gwinnett County especially among Asian Americans, Advancing Justice-Atlanta must now divert more resources towards warning voters about this risk, especially voters who vote absentee closer to Election Day.

5. Advancing Justice-Atlanta must also divert resources towards following up with voters to explore any possibility of ensuring that their ballot will be counted, such as placing calls to county registrars or expending more resources towards facilitating in-person voting to compensate for the risk of absentee ballots not being counted. These resources are diverted away from its regular voting and voter registration activities.

6. If an injunction is not immediately issued, the Georgia absentee voters with whom Advancing Justice-Atlanta works may lose their right to vote because they may have their ballots rejected when it is too late to cure by voting in-person—which also may not be an option for absentee voters who are unable to vote in-person.

I declare under penalty of perjury that the forgoing is true and correct.

Stephanie Cho

10/17/18

Date

E-FILED 2018 JUL 24 3:01 PM POLK - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA; and TAYLOR BLAIR, **Plaintiffs,** **vs.** **IOWA SECRETARY OF STATE PAUL PATE,** **Defendant.**	**Case No. CVCV056403** **RULING ON PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION**

On June 27, 2018, Plaintiffs League of United Latin American Citizens of Iowa and Taylor Blair (collectively "Plaintiffs") filed a Motion for a Temporary Injunction and Expedited Relief. On July 5, Defendant Iowa Secretary of State Paul Pate ("the State") filed a resistance to the Motion. On July 6, the Court held a contested hearing on the Motion for a Temporary Injunction. Attorneys Bruce Spiva, Brian Marshall, and Gary Dickey appeared on behalf of Plaintiffs. Solicitor General Jeffrey Thompson and Assistant Attorneys General Matthew Gannon and Thomas Ogden appeared on behalf of Defendant. Having considered the court file, filings of parties, and arguments of counsel, the court enters the following ruling.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2017, House File 516 ("HF 516") was passed by the Iowa legislature and signed into law by Governor Terry Branstad. HF 516 altered Iowa's election procedures. First, it altered the process for obtaining, submitting, and counting absentee ballots. The measure shortens the voting period for absentee ballots from forty (40) days preceding a general or primary election to twenty-nine (29) days. This change removes two weekends available to voters to cast an absentee ballot. Next, it requires that county auditors verify that the voter's signature on the

absentee ballot request and the absentee ballot return envelope matches the voter's signature on record. If a county auditor find that the signatures that do not match, the county auditor is to notify the voter. The voter is then eligible to request a new ballot or vote on election day. However, if the ballot was received after 5:00 PM on the Saturday preceding the election, the voter receives no notice of the ballot defect and their vote will not be counted. The voter will not have the ability to cure the alleged defect and cast a ballot. HF 516 also requires a voter to include his or her voter verification number, which is typically a driver's license number or a nonoperator's identification card number, on requests for absentee ballots. If a voter does not have a driver's license or other Iowa-issued identification card, the voter must use an identification number assigned to the voter by the Secretary of State.[1]

HF 516 also requires voters to present specified types of identification when voting in person, beginning in 2019. However, recent advertisements and publications created and published by the State have indicated that photo identification is required to vote in elections in 2018. The State refers to this as a "soft roll out" of the identification requirement.

On May 30, 2018, a Petition in Law and Equity and for Judicial Review of Agency Action was filed. A Motion to Dismiss was filed on June 11, 2018. In response, the Plaintiffs filed a Resistance to the Motion to Dismiss on June 21, 2018, arguing the appropriate remedy for misjoinder of claims is severance, not dismissal. Plaintiffs also filed a Motion to Sever requesting that Count V of the original Petition, the count asserting a Petition for Judicial Review, be considered in a separate case. On July 6, 2018, the Court denied the Defendant's Motion to Dismiss and granted Plaintiffs' Motion to Sever. The Clerk assigned case number

[1] Part of the Plaintiffs' original petition challenged an administrative rule adopted by the Secretary of State that related to the county auditor's ability to supplement missing information to voters' requests for absentee ballots. This claim has been severed and will be addressed in the ruling on Plaintiffs' petition for judicial review in the case now numbered CVCV056608.

CVCV056608 to the petition for judicial review that has been severed from this case. This Ruling therefore does not address Plaintiffs' Motion with respect to the regulation challenged by Count V of the original petition.

The remaining aspects of the Plaintiffs' Motion for a Temporary Injunction seek to enjoin particular provisions of House File 516 ("HF 516"), including (1) the provision that shortens the absentee voting period from 40 days to 29 days, (2) the provision that provides for the rejection of absentee ballot applications and returned absentee ballots based on county auditors determination that a voter's signature does not match the signature in the registration records, and (3) the provision requiring an absentee ballot application include a voter verification number. It also seeks to enjoin two actions of the Secretary of State in implementing the law: (1) language included on the absentee ballot application form stating that providing an identification number is required for an absentee ballot to be issued and (2) advertisements stating "[b]eginning in 2018, Iowa voters will be asked to show a form of valid identification when voting" and advertisements containing an image depicting "ID" as a step in the voting process. Plaintiffs argue that these actions mislead voters and creates a substantial risk of discouraging voter participation.

II. LEGAL STANDARD

There are three circumstances in which a court may grant a temporary injunction under Iowa Rule of Civil Procedure 1.1502: (1) when it "pertains to an act causing great or irreparable harm," (2) when it "pertains to a violation of a right tending to make the judgment ineffectual," or (3) when the court is statutorily authorized. *Max 100 L.C. v. Iowa Realty Co., Inc.*, 621 N.W.2d 178, 181 (Iowa 2001) (internal citations and quotations omitted). "Generally, the issuance of an injunction invokes the equitable powers of a court and courts apply equitable

principles." *Id.* To prove that they are entitled to a temporary injunction, Plaintiffs must show that (1) in the absence of the injunction they will suffer irreparable harm, (2) they are likely to succeed on the merits, and (3) injunctive relief is warranted considering the circumstances confronting the parties and "balance[ing] the harm that a temporary injunction may prevent against the harm that may result from its issuance." *Id.*

"[T]emporary injunctions require a showing of the *likelihood* of success on the merits whereas permanent injunctions require *actual* success." *PIC USA v. North Carolina Farm Partnership*, 672 N.W.2d 718, 723 (Iowa 2003) (citing *Max 100 L.C.*, 621 N.W.2d at 181) (emphasis in original). "Rules of evidence are applied more strictly on final hearing of a cause than on an application for temporary injunction, when evidence that would not be competent to support a perpetual injunction may properly be considered." *Id.* (quoting *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985)). Ultimately, "the decision to issue or refuse 'a temporary injunction rests largely [within] the sound judgment of the trial court.'" *Max 100 L.C.*, 621 N.W.2d at 181.

III. ANALYSIS

Plaintiffs argue they will suffer irreparable damage if certain aspects of HF 516 and certain State actions are not enjoined, that they will likely succeed on the merits of their claims that the challenged provisions HF 516 and actions of the State violate the Iowa Constitution, and that, issuing an injunction is proper when balancing the potential harm to the parties. Plaintiffs pursue claims under the Iowa Constitution exclusively.

A. Irreparable Harm

Plaintiffs argue they will suffer irreparable harm if the certain challenged provisions of HF 516 are not enjoined prior to the general election in November of 2018. A harm is irreparable when there is

no other adequate remedy at law. *See In re Langholz*, 887 N.W.2d 770, 779 (Iowa 2016). Furthermore, "'[t]o succeed in demonstrating a threat of irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.'" *Fort Des Moines Church of Christ v. Jackson*, 215 F.Supp.3d 776, 803 (S.D. Iowa 2016) (quoting *S.J.W. ex rel. Wilson v. Lee's Summit R–7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012)) (further quotations omitted). "A restriction on the fundamental right to vote . . . constitutes irreparable injury." *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

1. Absentee Voting Time Period

HF 516 reduces the period for absentee voting from 40 days preceding a primary or general election to 29 days. Iowa Code §§ 53.8(1), 53.10(1), 53.11(1)(a). The Plaintiffs cite to data from the 2016 general election, which showed that between forty and 30 days prior to the election, 88,163 absentee ballots were cast and received. Burden Decl. ¶ 48. Professor Barry Burden, a political scientist, opined that "[v]oters accustomed to voting between the 40th and 29th day before the election will now be required to change the date and/or method by which they vote." *Id.* He further provided that disruptions to voting habits raise costs and deter participation." *Id.* The Plaintiffs also argue that, aside from the burden upon individual voters, the shortened timeframe to cast absentee ballot will cause the League of United Latin American Citizens of Iowa (LULAC) to divert time and resources to help educate voters on HF 516's new requirements and aid voters in complying with them. The State argues that the Plaintiffs cannot show irreparable harm from the decreased time period to cast absentee ballots, considering that more absentee ballots were cast in the June 2018 primary than any other primary in Iowa's history. Williams Aff. ¶ 8. The State also mentions that Iowa's absentee voting laws are some of the most favorable to voters in the nation, noting that Iowa is one of only a handful of states that have

ever allowed voters to cast an absentee ballot more than 29 days prior the date of a primary or general election.

The court does not find data from the June 2018 primary persuasive nor indicative of how the changed absentee voting period would affect voters in a general election. Voters in a primary election must be registered with a particular party, whereas in a general election there is no such requirement. Therefore, the voter pool is markedly different in a primary election versus a general election. Voters who cannot vote during the newly established time period to cast absentee ballots will suffer harm if the law continues to remain in effect. Based upon the number of voters who cast ballots during the time unavailable to cast ballots under HF 516 and the information provided by Professor Burden, the court finds that voters will be harmed if this shortened time frame continues to remain in effect for the 2018 election. Once such harm occurs, it cannot be repaired, as voters cannot go back and cast a ballot after the election is held. A voter disenfranchised by this change has no remedy. The Plaintiffs have proved that they will suffer irreparable harm if this provision of the law is not temporarily enjoined.

2. Absentee Voting Signature-Matching Provisions

The Plaintiffs argue that HF 516's signature-matching requirements burdens, and may even eliminate, Iowa voters' right to vote. HF 516 allows county auditors to reject both applications for absentee ballots and absentee ballots themselves "if it appears to the commissioner that the signature on the application/envelope [respectively] has been signed by someone other than the registered voter, in comparing the signature on the application to the signature on record of the registered voter named on the application." Iowa Code §§ 53.2(5); 53.18(3). If either the request or the return envelope are deemed defective due to mismatching signature, the commissioner is to notify the voter, but only if the ballot was received by 5:00 P.M. on the Saturday preceding the election. *Id.* §§ 53.2(3), 53.18(3). Thus, if a county auditor deems a ballot defective due to mismatching signature and the ballot was received after

5:00 P.M. on the Saturday preceding election, that voter's vote will not be counted without notice to the voter. *Id.* 53.2.

Voters who are notified of a defect in their absentee ballot due to a signature mismatch have the ability to cure the defect by either requesting a new absentee ballot and returning it by the election day deadline or voting in person on election day. *Id.* § 53.18(3). Because voters must mail a request for an absentee ballot eleven days prior to an election, any voter who was not informed of the signature defect before this deadline will lose the opportunity to apply for an absentee ballot by mail. *See id.* §§ 53.2, 48A.9. However, a voter may request an absentee ballot in person at the commissioner's office or any location designated by the commissioner up until the day before election day. *See id.* § 53.2. For voters who request to vote absentee due to an inability to vote in person, this may cause disenfranchisement.

The Plaintiffs presented a declaration by Dr. Linton Mohammed, a handwriting expert, who explained non-experts are more likely to conclude that two signatures do not match one another, and they are more likely to erroneously conclude that two signatures do not match. Mohammed Decl. ¶ 33. Dr. Mohammad also stated voters who are younger, older, or do not speak English as a first language are more likely to have their signatures rejected for failing to match. *Id*. at ¶ 31. The Plaintiffs note, in Iowa, these groups are more likely to vote for Democrats. Burden Decl. ¶ 67. Further, the Plaintiffs also point out that in the 2016 election, 9 percent of all absentee ballots case were received after Saturday at 5 P.M. Burden Decl. ¶ 60. Thus, any voter whose ballot is received after 5 P.M. on the Saturday before an election and deemed defective, correctly or not, will be disenfranchised. *See* Iowa Code § 53.18(3) ("If the affidavit envelope or the return envelope marked with the affidavit contains a defect that would cause the absentee ballot to be rejected by the absentee and special voters precinct board, . . . the voter's absentee ballot shall not be counted [unless the defect is timely cured]."). Voters who are not aware their

absentee ballot was deemed effective will not act to cure a defect, and therefore their ballot will not be counted unbeknownst to them.

In response, the State again points to previous county-wide special elections held throughout the state and the June 2018 primary election in which the signature matching provision was in effect. The State notes the Plaintiffs have not identified a single individual whose vote was not counted because it was received after 5:00 P.M. on the Saturday before the election and contained a signature defect.[2]

Voters whose ballots are erroneously deemed defective under the signature matching provision of 516 will be harmed if the law is not temporarily enjoined, either because they will be required to overcome further obstacles in order to cast an absentee ballot, or in some cases, their ballot may not be counted at all. Based on sheer probability and the amount of absentee ballots previously received after the Saturday at 5 P.M. deadline, it is nearly certain at least one voter will be disenfranchised as a result of the handwriting matching provision. Once such harm occurs, it cannot be repaired, as voters cannot go back and cast a ballot after the election is held. The Plaintiffs have proved that they will suffer irreparable harm if this provision of the law is not temporarily enjoined.

3. Voter Identification Number on Absentee Ballot Requests Requirement

HF 516 now requires that a registered voter include their voter verification number on applications for absentee ballots. Iowa Code § 53.2(4)(a)(4). A voter's verification number is either their driver's license number, nonoperator's identification card number, or voter identification number assigned to them by the state commissioner pursuant to section 47.7 subsection (2). *Id.* § 53.2(4)(c). However, the same statute provides that "[i]f insufficient information has been provided, including the absence of a voter verification number, either on a prescribed form or on an application created by the applicant, the commissioner shall, by the best means available, obtain the additional necessary

[2] At the hearing, the Plaintiffs discussed they would have no way of knowing whether any individuals were so affected, nor would the voters themselves, unless that information was provided to them by the State because the voter would never be notified the vote was not counted.

information." *Id.* § 53.2(4)(b). Nonetheless, the actual absentee ballot application form states that the voter verification number is required. Ex. G.

Plaintiffs argue that requiring registered voters to include their voter verification number on applications for absentee ballots dissuades voters from completing applications for absentee ballots, either because they do not know their voter verification number offhand or because they are reluctant to share the number on either the application or with a canvasser who is helping them complete an application. *See e.g.*, Henry Decl. ¶ 9 (stating that when encouraging voters to sign up for absentee ballots through canvassing for LULAC, many voters declined to fill out absentee ballot applications once they were requested to provide a voter identification number). Plaintiffs also argue that all materials disseminated by the State that state that a voter verification number is required on all applications for absentee ballots is misleading and an inaccurate depiction of the law, considering a county auditor may supply that information on applications for absentee ballots pursuant to Iowa Code section 53.2(4)(b).

Under the law as it is written, a voter is and should be eligible to apply for an absentee ballot without providing a voter verification number. The evidence presented establishes that some voters are dissuaded from applying for absentee ballots if they are required to provide their voter identification number. Registered voters who do not request absentee ballots because they are led, by the State's efforts, to believe they are unable to request an absentee ballot without providing a voter verification number will be harmed if this state action is not temporarily enjoined. This particularly affects registered voters who are unable to vote on election day or can otherwise only vote by absentee ballot, and it imposes an additional obstacle for voters to cast a ballot. Once such harm occurs, it cannot be repaired, as voters cannot go back and cast a ballot after the election is held. The Plaintiffs have proved that they will suffer irreparable harm if this State action is not temporarily enjoined.

4. The State's Public Education Efforts

HF 516 requires registered voters who are voting in person to present proof of identification beginning in 2019. Iowa Code § 49.78(1). This law is to go into effect in 2019. *Id.* Iowa Code section 49.78(2) outlines the types of permissible identification. For elections conducted in 2018, poll workers will ask voters for identification, but registered voters who do not present identification will be permitted to vote a regular ballot "upon signing an oath attesting to the voter's identity." Iowa Code § 49.78(8). HF 516 requires the Secretary of State to "develop and implement a comprehensive and statewide public education plan, including multimedia advertising" to inform voters about new election day requirements. HF 516 § 75. The Plaintiffs argue the State's public education efforts have been misleading.

As part of the public education campaign, the Secretary of State developed a logo that depicts a list with checkmarks, consisting of: (1) register, (2) ID, and (3) vote. Ex. H; Ex. I; Ex. J. The Plaintiffs argue this may dissuade voters who do not have the requisite identification, but would be permitted to vote by signing an oath attesting to their identity, from voting. This contention was supported by Professor Burden. Burden Decl. ¶ 75.

Voters who do not possess a required form of identification, but would be eligible to vote by attesting to their identity, will be harmed if they are led by the efforts of the State to believe they are ineligible to vote. Such disenfranchisement is a certain and great harm. Once such harm occurs, it cannot be repaired, as voters cannot go back and cast a ballot after the election. The Plaintiffs have proved that they will suffer irreparable harm if this State action is not temporarily enjoined.

B. Likelihood of Success on the Merits

Plaintiffs must next show they have a likelihood of succeeding on the merits. The parties disagree as to what legal standard the court must employ when considering whether the challenged provisions HF 516 and associated State actions violate the Iowa Constitution. The Plaintiffs argue the law must be evaluated either under the *Anderson-Burdick* standard, which was developed by the United

States Supreme Court to evaluate restrictions on the right to vote under the United States Constitution's Equal Protection Clause and First Amendment, or under a more exacting standard, considering that the right to vote is enumerated in Article II, section 1 of the Iowa Constitution and has consistently been deemed a fundamental right by Iowa courts.[3]

1. Level of Scrutiny

Because the federal constitution has no clause directly protecting the right to vote, the United States Supreme Court has found that the right to vote is protected by the Equal Protection Clause and the First Amendment of the United States Constitution. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *Anderson v. Celebrezze*, 460 U.S. 780, 786–95 (1983). Federal courts have developed a flexible framework known as *Anderson-Burdick* to evaluate whether restrictions on the right to vote are constitutional under the federal constitution. Under this standard, the court makes the following considerations:

> [T]he court must first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate. Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. Finally, it must determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Ohio Democratic Party v. Husted, 834 F.3d 620, 626–27 (6th Cir. 2016) (*quoting Green Party of Tennessee v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015)). The amount of deference to afford to the state voting law depends on the severity of the restriction.

[3] Article II section 1 of the Iowa Constitution Provides:

> Every citizen of the United States of the age of twenty-one years, who shall have been a resident of this state for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law. The general assembly may provide by law for different periods of residence in order to vote for various officers or in order to vote in various elections. The required periods of residence shall not exceed six months in this state and sixty days in the county.

> If a state imposes severe restrictions on a plaintiff's constitutional rights (here, the right to vote), its regulations survive only if narrowly drawn to advance a state interest of compelling importance. On the other hand, minimally burdensome and nondiscriminatory regulations are subject to a less-searching examination closer to rational basis and the State's important regulatory interests are generally sufficient to justify the restrictions. Regulations falling somewhere between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a flexible analysis, weighing the burden on the plaintiffs against the state's asserted interest and the chosen means of pursuing it.

Id. at 627 (citations and quotations omitted).

However, the Plaintiffs pursue claims exclusively under the Iowa Constitution. Iowa courts "subject laws to different levels of review based on their classifications and the rights they affect." *State v. Simmons*, 714 N.W.2d 264, 277 (Iowa 2006). "If a statute affects a fundamental right . . . it is subjected to strict scrutiny. The State must prove it is narrowly tailored to the achievement of a compelling state interest." *Id.* (quoting *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005)). "Conversely, if the right at stake is not fundamental, [Iowa courts] apply the 'rational-basis test,' which considers whether there is a 'reasonable fit between the government interest and the means utilized to advance the interest.'" *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, No. 17-1579, --- N.W.2d ---, 2018 WL 3192941, at *21 (Iowa June 29, 2018) (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002)). However, "reasonable regulations that do not directly and substantially interfere with [a fundamental] right may be imposed." *McQuiston v. City of Clinton*, 872 N.W.2d 817, 833 (Iowa 2015).

"Voting is a fundamental right in Iowa . . . . It occupies an irreducibly vital role in our system of government by providing citizens with a voice in our democracy and in the election of those who make laws by which we must all live." *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014) (citations omitted). Nonetheless, "[a]s with all rights, the right to vote is not absolute." *Id.* at 849.

The court must now decide how to frame the issue. The State contends that the court must consider whether the fundamental right to vote extends to the right to vote by absentee ballot. Accordingly, the State argues that it does not, and therefore strict scrutiny does not apply. In the same vein, the State also argues that the challenged provisions of HF 516 and associated State actions do not directly and substantially interfere with the right to vote, as they only affect the right to vote by absentee ballot. The Plaintiffs urge the court to adopt a more broad view of the right to vote and find that any restriction implicating such a fundamental right, including restrictions on the right to vote by absentee ballot and misleading campaigns information about voter verification number requirements, are subject to strict scrutiny. The Plaintiffs alternatively argue that they are likely to succeed on the merits of their claim even under the *Anderson–Burdick* framework developed and used by federal courts. The State points out the United States Supreme Court has explicitly found that the federal constitution does not protect the right to vote by absentee ballot. *See McDonald v. Board of Election Com'rs of Chicago*, 394 U.S. 802, 807–808 (1969). However, this is not dispositive of the issue, as the Iowa Constitution is routinely construed to more broadly protect the rights of Iowans than does the United States Constitution. *See, e.g.*, *Planned Parenthood of the Heartland*, 2018 WL 3192941. Furthermore, the federal constitution does not contain an explicit clause protecting the right to vote.

The Plaintiffs also argue that the signature matching provision of HF 516 denies voters the right to procedural due process under Article I, section 9 of the Iowa Constitution, as it may deny voters the right to cast a ballot without the opportunity to be heard. In making this argument, the Plaintiffs are referring to voters whose absentee ballots are not received by the county auditor until after 5:00 P.M. on the Saturday preceding an election and whose ballots are deemed defective, as these voters' ballots will not be counted without notice to the voter and

without the opportunity for the voter to cure the defect. The Plaintiffs further argue the signature matching requirement violates the right to equal protection under the Iowa Constitution, as voters in each county may be treated differently based on differences in how different county auditors conduct signature matching.

The court finds, under the Iowa Constitution, it is well settled that voting is a fundamental right. Thus, any law imposing restrictions on exercising this fundamental right or state actions affecting this fundamental right, must be subject to strict scrutiny. The court finds that, when considering the number of Iowans who utilize absentee voting,[4] the challenged provisions of HF 516 and the actions taken by the State in publicizing HF 516's changes to Iowa's voting procedures substantially and directly interfere with Iowans' constitutional right to vote. Absent voters laws have been on the books in Iowa nearly a century. *See* Compiled Code of Iowa, Title IV, Ch. 9, §§ 521-534 (1919). The law has evolved over the last century but the constraints put on the right to vote absentee by the challenged provisions of HF 516 are a clear burden on the longstanding fundamental right to vote.

The State argues that a heightened standard of review will deter the Iowa Legislature from experimenting with different voting systems and regulations and expanding voters' rights, as once the voters' rights are expanded, any return to the status quo will be difficult to obtain if the law is subject to strict scrutiny analysis. This court does not find the argument persuasive. The legislature is not entitled to a limitless ability to regulate fundamental rights. This is true with all rights deemed fundamental under the Iowa Constitution. *See, e.g.*, *Planned Parenthood of the Heartland*, 2018 WL 3192941 (finding that laws restricting a woman's fundamental right to terminate a pregnancy, derived from the fundamental right to privacy and bodily autonomy,

[4] In the 2016 general election, 41 percent of the total votes cast in Iowa were submitted as absentees. Burden Decl. ¶ 16.

are subject to strict scrutiny); *Hernandez-Lopez*, 639 N.W.2d at 238 (finding that laws implicating an individual's interest in freedom from bodily restraint are subject to strict scrutiny); *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001) (finding that laws affecting parents' ability to decide who, outside of their nuclear family, may have visitation with their children directly and substantially interfered with the fundamental right to parent and were thus subject to strict scrutiny).

The court will now analyze whether the Plaintiffs are likely to succeed on the merits of their claim when a strict scrutiny analysis is applied to the challenged provisions of HF 516 and other actions taking by the State that affect Iowans' fundamental right to vote.

a. Absentee Voting Time Period

HF 516 reduced the period to cast absentee ballots, either by mail or in person, from 40 days to 29 days, removing two weekends available to voters to cast ballots. The 40 day rule has been in effect since 2003. *See* House File 2472 §§ 62, 63 (2002); Iowa Code §§ 53.10, 53.11. In 2016, by the 29th day preceding the presidential election, over 88,000 absentee ballots had already been received by county auditors. Burden Decl. ¶ 48. Clearly, many Iowans utilized these eleven days which are unavailable to them under HF 516. The Plaintiffs assert that many voters maintain voting habits, and disruptions to such habits may result in decreased voter participation. *Id.* at ¶ 21. Iowans have had these extra eleven days to cast absentee ballots for over ten years, and the evidence shows that a significant amount of the electorate have utilized them. The court finds retracting eleven days, including two weekends, from the window of time to submit absentee ballots is a substantial burden on the fundamental right to vote.

The State can prevail by showing that shortening the time available to submit absentee votes by eleven days is narrowly tailored to serve a compelling government interest. The State

argues it has a compelling interest in preserving the integrity of its elections, deterring and eliminating voter fraud, and ensuring all elections are fair. The court agrees this is indeed a compelling government interest. However, the State has not even attempted to explain how reducing the time frame for voters to cast absentee ballots will ensure fairness or preserve the integrity of Iowa's elections. The State has not indicated the eleven extra days previously available to voters to cast absentee ballots negatively impacted the integrity or fairness of Iowa's elections in any capacity. The law is not narrowly tailored to serve a compelling government interest. The Plaintiffs are likely to succeed on the merits on their claim related to this provision of HF 516 and Iowa Code sections 53.8(1), 53.10(1), and 53.11(1)(a).

b. Absentee Voting Signature Matching Requirement

HF 516 also allows county auditors to reject requests for absentee ballots and absentee ballots that have been returned if the county auditor determines that the signature contained on either the request or the return envelope do not match the signature of record for the registered voter. Voters voting by absentee ballot are only entitled to be notified that their ballot is defective if it is received by 5:00 PM on the Saturday preceding the election. Iowa Code §§ 53.2, 53.18(3).

The signature matching provision provides no methods by which county auditors are to evaluate whether signatures match. As stated above, people who are not handwriting experts are more likely to erroneously conclude that two signatures do not match than are trained handwriting experts. Mohammed Decl. ¶¶ 28–36. Absentee voters whose ballots are deemed defective may lose the opportunity to request an absentee ballot if they are unable to request a ballot in the allotted time or if they are unable to obtain one from the commissioner's office in person. *See* Iowa Code § 53.2(1) (stating registered votes may request an absentee ballot in person at the commissioner's office any day before election day or

may make a written application for an absentee ballot any day between 120 days before the election and 10 days prior to an election). Absentee ballots that are received after 5:00 P.M. on the Saturday preceding the election which are deemed defective are not counted with no notice to the voter.

Voters whose ballots are erroneously deemed defective will have to overcome another obstacle to vote. Either they must submit a new request by mail, if time permits, and if not, they must go to the commissioner's office in person to request a ballot or vote on election day. Voters often request to vote by absentee ballot because they are unable to vote in person on election day or because they are otherwise unable to request a ballot at the commissioner's office. Burden Decl. ¶¶ 61–61. This may impose a heavy burden on a voter, or it may entirely disenfranchise them. Furthermore, refusing to allow voters whose absentee ballots are received after 5 P.M. on the Saturday preceding an election an opportunity to cure an alleged defect in their ballot not only substantially burdens their fundamental right to vote, it entirely eliminates it. Over 60,000 absentee ballots were received after the 5 P.M. deadline in the 2016 presidential election. If county auditors have unbridled discretion to reject ballots based on signatures they find do not match, and considering these analyses will be done by county officials with no official guidance or handwriting expertise, there is potential for erroneous determinations of a mismatch. This is a substantial burden on Iowans' fundamental right to vote.

The State does not explicitly refer to a specific interest in allowing county auditors the ability to reject absentee ballot requests or returned absentee ballots based on mismatched signatures, but the court can surmise that the same interest in safeguarding elections and deterring and eliminating fraud apply. Again, the court finds protecting the integrity and fairness of elections is a compelling government interest. However, since this method is likely to substantially burden or eliminate more voters' ability to exercise their right to vote, and the State has not pointed to any evidence that the State experiences any

voter fraud whatsoever without such a system, the law is not narrowly tailored. The Plaintiffs have a likelihood of success on the merits on their claim the signature matching requirement is an unconstitutional restraint on the fundamental right to vote under the Iowa Constitution.[5]

c. Voter Identification Number on Absentee Ballot Requests Requirement

HF 516 now requires registered voters to include their voter verification number on requests for absentee ballots. This is either a driver's license number, a nonoperator's identification card number, or an actual voter verification number which is provided to voters who do not possess either of the previously specified forms of identification. HF 516 § 6; Iowa Code § 53.2(4)(a)(4) and (4)(c). According to the Iowa Secretary of State's website, the Secretary of State automatically sent out approximately 120,000 voter ID cards to registered voters who did not possess either a driver's license or nonoperator's identification card. Ex. J. Iowa Code section 53.2(4)(b) provides that if the voter does not include a voter verification number on an absentee ballot application, "the [county auditor] shall, by the best means available, obtain the additional necessary information." However, the absentee ballot form states: "[a]n absentee ballot cannot be issued until ID number is provided" and asterisks on the form indicate that an identification number is "required." Marshall Affidavit; Ex. G.

The Plaintiffs argue the misleading information on the absentee ballot request form constitutes a substantial burden on the right to vote, because many people do not have their identification numbers readily available or are reluctant to share them with canvassers who are signing them up to request absentee ballots. *See* Burden Decl. ¶ 47; Henry Decl. ¶ 9; Blair Decl. ¶¶ 7–10.

[5] That is not to say that all signature matching requirements are inherently unconstitutional. *See, e.g.*, Burden Decl. ¶¶ 62–63 (explaining Colorado and Oregon's extensive procedures guiding signature matching requirements and allowing voters the opportunity to cure so long as their ballot was submitted timely).

The State offers no justification for promulgating materials that seemingly only aim to promote an inaccurate depiction of current Iowa law. Likewise, the State does not offer a justification for requiring that an absentee ballot cannot be issued unless voters include their voter verification numbers on absentee ballot applications, even though county auditors are statutorily permitted to obtain this information and supplement applications accordingly. While the court can infer requiring voters to include their voter verification number on applications for absentee ballots may reduce administrative costs to some extent, this interest is not compelling. County auditors are able to ascertain whether individuals applying for absentee ballots are registered to vote, and they have done so successfully prior to the passing of HF 516. Voters are not required to supply a voter identification number to obtain an absentee ballot under Iowa law if the auditor can obtain the information by the best means available. Instructing voters they are required do so as a prerequisite to obtaining an absentee ballot is not narrowly tailored to serve any State interest. The effect of these efforts and the change on the absentee voter form harms voters and poses an additional and unnecessary obstacle in the way of exercising the right to vote. Furthermore, it has caused confusion among the electorate, state officials, and election volunteers. The Plaintiffs will likely succeed on the merits on their claim that the State's action promoting materials that state voters are required to provide voter verification numbers to obtain an absentee ballot and requiring voters to provide voter verification numbers on applications for absentee ballots is a violation of the fundamental right to vote, enumerated in Article II, section 1 of the Iowa Constitution.

d. The State's Public Education Campaign

HF 516 also requires the Secretary of State to "develop and implement a comprehensive and statewide public education plan, including multimedia advertising, in order to inform the

voters of this state of the election day identification requirements contained in" the law. The State has done so by promulgating various materials, one containing an image with three check boxes: one saying "register," the next saying "ID," and the next saying "vote." Ex. H; Ex. I. Plaintiffs argue this is misleading, considering an ID is not required to vote until 2019. Iowa Code § 49.78(8). The State argues that voters do need a form of identification to vote on election day in 2018, however the State also notes that voters have the alternate option to attest to their identity. The State says this is part of the "soft roll out" of HF 516, and it will help voters get used to bringing their ID to vote when it *is* a prerequisite to voting in 2019. The Plaintiffs contend it dissuades people from voting and confuses both voters and poll workers.

Presenting an identification card is not a requirement to vote if voters can vote without presenting such identification. A requirement can be defined as a) something wanted or needed, i.e., a necessity, or b) something essential to the existence or occurrence of something else, i.e., a condition. *See Requirement Definition*, Merriam–Webster, https://www.merriam-webster.com/dictionary/requirement (last visited July 19, 2018). If a registered voter may cast a ballot without showing an identification card, then it is neither a condition of voting nor is it a necessity. Thus, providing an identification card is not a requirement to casting a ballot until 2019. The media promulgated by the State would clearly lead voters to believe that some form of identification is required to vote in an election in 2018. Leading voters to believe they will be unable to cast a ballot without displaying one of the permitted identification cards, contrary to the laws of the State, does not serve a compelling State interest, nor is it narrowly tailored to serve any compelling State interest if one did exist. The Plaintiffs are likely to succeed on the merits of their claim that the State's public education efforts misleads voters by stating proof of

identification is required to vote in elections in 2018, and thus unconstitutionally restricts the fundamental right to vote enumerated in Article II, section 1 of the Iowa Constitution.

C. Balancing the Harms

"Before granting an injunction, the court should carefully weigh the relative hardship which would be suffered by the enjoined party upon awarding injunction relief." *Ney v. Ney*, 891 N.W.2d 446, 451 (Iowa 2017). The Plaintiffs argue the State will not suffer any harm if the temporary injunction is put in place because the temporary injunction will merely restore the status quo of Iowa's voting laws. The State asserts issuing the injunction will not restore the status quo, as HF 516 has been in place for all of 2018, and further, the State asserts it will be harmed because it has already invested substantial resources in retraining county officials and volunteers to comply with the new regulations. As stated above, the State has suggested no real threat to the integrity of Iowa's voting system without the new regulations contained in HF 516, so aside from the costs of directing the county officials and volunteers to return to the procedures in place before HF 516 was in effect, the harm to the registered voters who may become disenfranchised or experience substantial obstacles in voting is greater than any harm to the State. Because the State has not presented any evidence that Iowa elections will be subject to fraud if the provisions in HF 516 do not go into effect, the harm Plaintiffs will suffer substantially outweighs any harm the State may suffer.

IV. BOND

Iowa Rule of Civil Procedure 1.1508 provides that an "order directing a temporary injunction must require that before the writ issues, a bond be filed, with a penalty to be specified in the order, which shall be 125 percent of the probable liability to be incurred." In its brief, the State estimated that it would cost between $500,000 and $1.8 million to revert to the voting laws in place before HF 516 was implemented. The State pointed to the costs of revising systems and materials, retraining election

officials, and updating voters. See Williams Affidavit ¶ 15. Thus, the State agued this court should impose a bond of $2.25 million, which would be 125 percent of the highest possible estimated cost. The State's high-end cost estimate is more than double its estimated costs to date of $724,000 to implement all provisions of HF 516. Williams Affidavit ¶ 15. It is inconceivable it would cost twice as much to instruct county auditors to revert to their prior way of operating on several provisions of the new laws as it did to train them on a completely new law. It seems an email to county auditors would suffice. Further, it is unlikely general election training for election day and election office workers has even occurred at this time. The purpose of bond is to indemnify the person or entity enjoined or restrained from damage through the use of the writ. *See PICA USA v. North Carolina Farm Partnership*, 672 N.W.2d 718 (Iowa 2003).

Federal courts applying the analogous Federal Rule of Civil Procedure 65(c) have declined to require the posting of any security when a party seeks to protect the right to vote. *See Georgia State Conference NAACP v. Georgia*, No. 1:17-CV-1397-TCB, 2017 WL 9435558, at *6 (N.D. Ga. May 4, 2017) (quoting *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009)) (concluding "[w]aiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right").

The court finds, based on the record in this case, it cannot reliably concluded implementing this Order would result in a "probably liability" to the Secretary of State at all, but certainly no more than $2,000. Therefore, a bond of $2,500 is appropriate.

V. ORDER

IT IS THE ORDER OF THE COURT that the Motion for a Temporary Injunction is GRANTED.

IT IS FURTHER ORDERED that House File 516's signature matching requirements for applications for absentee ballots, HF section 30; Iowa Code section 53.2(5) are hereby ENJOINED;

IT IS FURTHER ORDERED that House File 516's signature matching requirements on absentee ballot return envelopes, HF 516 section 31; Iowa Code section 53.18(3) are hereby ENJOINED.

IT IS FURTHER ORDERED that House File 516's shortening of the timeframe to cast absentee ballots from 40 to 29 days, HF sections 51, 52 and 53; Iowa Code sections 53.8, 53.10 and 53.11 are hereby ENJOINED.

IT IS FURTHER ORDERED that House File 516's requirement that an absentee ballot application include a voter verification number, HF 516 section 6; Iowa code section53.2(4) are hereby ENJOINED.

IT IS FURTHER ORDERED that the Secretary State is ENJOINED from including on the absentee ballot application language stating "[a]n absentee ballot cannot be issued until ID number is provided" or indicating that such information is "required";

IT IS FURTHER ORDERED that the Secretary State is ENJOINED from disseminating materials with the Voter Ready graphic or stating "Iowa voters will be asked to show a form of valid identification when voting," or similar words, without a clear statement that identification is not required to vote in 2018; and

IT IS FURTHER ORDERED that the temporary injunction will become effective upon Plaintiffs posting of a bond of $2,500 and will remain enjoined pending resolution of this case.

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State of Iowa Courts

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Case Number	**Case Title**
CVCV056403	LEAGUE OF UNITED LATIN AMER CITIZENS ETAL VS PAUL PATE ETAL

So Ordered

Karen A. Romano, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2018-07-24 15:01:22 page 25 of 25

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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ORDER

PETER LA FOLLETTE ET AL VS. ALEX PADILLA

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

PETER LA FOLLETTE; and THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA,

Plaintiffs,

vs.

ALEX PADILLA, in his official capacity as Secretary of State of the State of California; and William F. ROUSSEAU, in his official capacity as Clerk-Recorder-Assessor-Registrar of Voters for the County of Sonoma,

Defendants.

Case No. CPF-17-515931

ORDER GRANTING PLAINTIFFS' MOTION FOR WRIT OF MANDATE

Plaintiffs challenge the constitutionality of a state statute by which election officials reject mailed ballots bearing voter signatures that officials decide do not match signatures on file. This disenfranchisement occurs without notice to the voter or opportunity to cure or show that the ballot is proper. I GRANT the requested writ of mandate.

Findings of Fact

In the November 8, 2016 election, well over half of California's 14.6 million voters cast their ballots by mail. Sonoma County resident Peter La Follette tried to be one of those voters. However, unbeknownst to La Follette, county election officials acting under Elections Code §3019(c)(2) refused to count his votes because they decided his signature on his ballot envelope

did not match a signature they had on file. Officials never told La Follette about their rejection, nor does §3019(c)(2) require them to – or to provide a voter an opportunity to cure or to show that his[1] ballot was proper. La Follette only learned of his disenfranchisement eight months later, when he searched voting records on line.

In the November 2016 election, an estimated 33,000 to 45,000 voters suffered the same fate under Evidence Code §3019(c)(2) that La Follette did. No evidence suggests that a significant number of the vote-by-mail ballots rejected for signature mismatch resulted from voter fraud.

Experts cite several reasons why a person's signature may differ on two occasions: physical disability, injury, a primary language that does not use Roman characters (*e.g.*, many Asian Americans), or simply the passage of time. Many Californians register to vote on computer touch pads, yielding signatures that differ in appearance from those made on paper ballot envelopes.

In contrast to allegedly mismatched signatures, Election Code §3019(f)(1)(a) allows voters who completely fail to sign their ballot envelope to cure that defect, and their mailed ballots are counted if they do. Also, in mail-only elections, election officials are required to "make a reasonable effort to inform a voter" (a) if their "ballot envelope is missing a signature" and (b) how the voter can correct that. (*Id.* at §4006.)

Plaintiffs La Follette and the American Civil Liberties Union of Northern California request that I: (1) hold that Elections Code §3019(c)(2) is facially unconstitutional and that no ballot may be rejected based on a mismatched signature without providing the voter with notice and an opportunity to cure before election results are certified; (2) issue a writ of mandate prohibiting California's secretary of state and Sonoma County's registrar of voters from

[1] I use "his," "he" and "him" in this order because La Follette is male.

rejecting vote-by-mail ballots for purportedly mismatched signatures without providing the voter with notice and an opportunity to show that the ballot is proper and (3) direct the secretary of state to inform election officials of these rulings.[2]

Standing

As an initial matter, defendants argue that plaintiffs lack standing to sue them. I disagree. La Follette has both direct and public interest standing. (*Raetzel v. Parks/Bellemont Absentee Election Bd.* (D. Ariz. 1990) 762 F.Supp. 1354, 1355-56; *Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166; *Common Cause v. Bd. of Supers.* (1989) 49 Cal. 3d 432, 439 (writ of mandate to compel officials to comply with election law).) The ACLU has public interest standing as well as taxpayer standing under Code of Civil Procedure §526a. (*Gilbane Bldg. Co. v. Sup. Ct.* (2014) 223 Cal.App.4th 1527, 1531.)

Conclusions of Law

Plaintiffs assert that Elections Code §3019(c)(2) fails to pass constitutional muster on a number of grounds. I need look no further than the first – the due process clauses of our federal and state constitutions – because voting is a fundamental right, and notice and an opportunity to be heard are fundamental to due process. (*U.S. v. State of Texas* (W.D. Tex. 1966) 252 F.Supp. 234, 250 ("right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause"); *Peterson v. City of San Diego* (1983) 34 Cal.3d 225, 229 ("right to vote, of course, fundamental"); *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 (notice and opportunity to contest deprivation of right); *Gray v. Sanders* (1963) 372 U.S. 368, 380 (right to vote includes right to have vote counted).)

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[2] La Follette and the ACLU style themselves "plaintiffs" and the secretary of state and registrar of voters "defendants." The secretary does the same. The registrar styles the sides "petitioners" and "respondents." Likewise, La Follette and the ACLU refer to this matter as a "motion for writ of mandate" rather than a "petition." No one suggests that these distinctions make a substantive difference. And a writ of mandate is a proper way to challenge a statute's constitutionality or validity. (*Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565, 570 n.2.)

These due process protections apply to mailed votes just as they do to traditional ballots. No one here contends that vote-by-mail is constitutionally required, but once a state creates such a regime, it "must administer it in accordance with the Constitution." (*Zessar v. Helander* (N.D. Ill. 2006) 2006 WL 642646 at *6.)

Thus, courts across the nation have invalidated statutes like Elections Code §3019(c)(2).

In *Zessar*, a voter challenged Illinois laws by which elections officials rejected mail-in absentee ballots if officials decided the signature on the ballot application did not match the signature in their records. Illinois law was more voter-friendly than California's §3019(c)(2) in at least requiring that voters be notified of ballot rejection after the fact, allowing them to have their votes counted in future elections – something §3019(c)(2) does not do. (*See id.* at *2-3, 6.) Still, a federal court held that the laws violated due process by failing to provide voters a chance "to remedy the loss of vote in *that* election." (*Id.* at *6-7, 10.)[3]

In *Detzner*, Florida election laws similar to those here and in *Zessar* were challenged, but with two differences. Unlike California, Florida law required elections officials to mail new registration applications to voters whose ballots had been rejected for signature mismatches. (*Fla. Democratic Party v. Detzner* (N.D. Fla. 2016) 2016 WL 6090943 at *2.) Like California, Florida treated no-signature ballots more favorably than mismatch ballots, by providing an opportunity to cure before the vote was lost for the current election. (*Id.*) Again, a federal court found the election laws unconstitutional.

In *Raetzel*, voters challenged Arizona election laws that provided no notice or hearing to voters whose absentee ballots were disqualified. A federal court ruled that the laws did "not comport with the constitutional requirements of due process," finding: "Parties whose rights are

[3] All emphasis in this order has been added.

to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (762 F.Supp. at 1358.)

Defendants cite no relevant contrary authority. The primary opinion they rely on – *Lemons v. Bradbury* (9th Cir. 2008) 538 F.3d 1098 – regards signature-gathering for a petition, not vote-by-mail signatures.

Defendants nonetheless claim Elections Code §3019(c)(2) "satisfies due process" with five arguments, all unavailing.

First, the secretary of state says the "injury" to citizens deprived of votes in the November 2016 election was "slight" in that "at most only 45,000 were rejected." However, that is the equivalent of a medium-size California city, and the U.S. Supreme Court does not consider voter disenfranchisement a "slight injury": "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." (*Wesberry v. Sanders* (1964) 376 U.S. 1, 17.)

Second, the secretary says a written directive "that the voter must sign the envelope in his or her own handwriting" is "*ample notice* of the importance of their signature." However, the constitutional concern here is that, under Elections Code §3019(c)(2), voters are given *no notice* when their signatures are deemed to mismatch.

Third, the secretary says "*if they so inquire*, voters are provided with notice regarding whether their signature matched." This "notice" is via the voter's search of an online database that election officials tell him about if he happens to inquire. How a voter is supposed to know to inquire is not indicated. Indeed, a voter could believe his ballots were being counted in election after election without ever learning they were not.

Fourth, the secretary claims "a compelling interest in preventing voter fraud." However, the declaration paragraphs he cites for that claim adduce no actual evidence of voter fraud.

Fifth, the Sonoma County voter registrar's main argument is that a "county elections official is required to implement Elections Code section 3019(c), even if she or he believes it is unconstitutional." Finding the statute unconstitutional will relieve officials of that quandary.

Rulings and Remedies

As requested, I do hold that Elections Code §3019(c)(2) facially violates the due process clauses of our federal and state constitutions. The statute fails to provide for notice that a voter is being disenfranchised and/or an opportunity for the voter to be heard. These are fundamental rights. The parties consume considerable ink disputing what test to use in determining unconstitutionality, but §3019(c)(2) does not pass any test cited.[4]

I also grant the further requested relief: (1) no ballot may be rejected based on a mismatched signature without providing the voter with notice and an opportunity to cure before the election results are certified; (2) plaintiffs are to submit a proposed writ of mandate and (3) the secretary of state is to inform election officials of these rulings. It is argued that these rulings might not provide enough time for election officials to act, but elections are not certified for 30 days, and, as noted above, the state legislature requires similar notice in a similar context – when voter signatures are missing entirely. (Elections Code §§15372(a), 4006.)

Dated: March 5, 2018

Richard B. Ulmer Jr.
Judge of the Superior Court

[4] For example, as demonstrated above, the "character and magnitude" of voter injury here far outweighs the "interests put forward by the State as justification for the burden." (*Burdick v. Takushi* (1992) 504 U.S. 428, 434.)

SUPERIOR COURT OF CALIFORNIA
County of San Francisco

PETER LA FOLLETTE; and THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA,

Plaintiffs,

vs.

ALEX PADILLA, in his official capacity as Secretary of State of the State of California; and William F. ROUSSEAU, in his official capacity as Clerk-Recorder-Assessor-Registrar of Voters for the County of Sonoma

Respondents,

Case No. CPF-17-515931

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, M. Goodman, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On March 5, 2018, I served the attached **ORDER GRANTING PLAINTIFFS' MOTION FOR WRIT OF MANDATE** by placing a copy thereof in a sealed envelope, addressed as follows:

MICHAEL RISHER, ESQUIRE.
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street, 2nd floor
San Francisco, CA 94111

WILLIAM DONOVAN JR.,
Cooley LLP
1333 2nd street, Suite 400
Santa Monica, CA 90401

CHRISTOPHER MAGANA
Deputy County Counsel
Office of Sonoma County Counsel
575 Administration Drive
Room 105-A
Santa Rosa, CA 95403

ENRIQUE MONAGAS
Deputy Attorney General
300 South Spring Street, Ste. 1702
Los Angeles, ca 90013

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: March 5, 2018

T. MICHAEL YUEN, Clerk

By: _____

M. Goodman, Deputy Clerk

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

GEORGIA MUSLIM VOTER PROJECT and ASIAN-AMERICANS ADVANCING JUSTICE-ATLANTA, Plaintiff, vs. BRIAN KEMP, in his official capacity as the Secretary of State of Georgia; and GWINNETT COUNTY BOARD OF VOTER REGISTRATION AND ELECTIONS, on behalf of itself and similarly situated boards of registrars in all 159 counties in Georgia, Defendants.	Civil Action No.: 1:18-cv-04789-LMM

[PROPOSED] ORDER

For the reasons set forth in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order, the Court hereby GRANTS Plaintiffs' Motion for a Temporary Restraining Order and ORDERS as follows:

The Secretary of State's Office shall issue the following instructions to all county boards of registrars, boards of elections, election superintendents, and absentee ballot clerks:

1) All county elections officials responsible for processing absentee ballots shall not reject any absentee ballots due to an alleged signature mismatch unless the voter is given pre-rejection notice, an opportunity to resolve the alleged signature discrepancy, such as by confirming identity by providing photo identification by e-mail, fax, mail, or in-person, and an opportunity to appeal, pursuant to the existing notice and opportunity procedures for other absentee voters set forth in O.C.G.A. § 21-2-230(g). The voter should have the opportunity to do so within three days after Election Day or three days after they receive pre-rejection notice, whichever is later; with an opportunity to appeal.

2) All county elections officials responsible for processing absentee ballot applications shall not reject any absentee ballot applications due to an alleged signature mismatch unless the voter is given pre-rejection notice an opportunity to resolve the alleged signature discrepancy, such as by confirming identity by providing photo identification by e-mail, fax, mail, or in-person, and an opportunity to appeal, pursuant to the existing notice and opportunity procedures for other absentee voters set forth in O.C.G.A. § 21-2-230(g). The voter should have the opportunity to do so up to the Friday before Election Day.

3) All county elections officials responsible for processing absentee ballot applications and absentee ballots must provide notice of potential rejection within one day of the rejection decision.

_____

The Honorable Leigh Martin May
United States District Judge

_____

Date