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

FAIR FIGHT ACTION, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official Capacity as Secretary of State of Georgia, *et al.*, Defendants.	)	Civil Action File No. 1:18-cv-05391-SCJ

DEFENDANTS' BRIEF IN SUPPORT OF RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants submit this Reply Brief in Support of their Renewed Motion for Summary Judgment. Plaintiffs now acknowledge that their Section 2 claim is limited to HAVA-Match, yet their own evidence shows that: (1) only **one voter** had an issue with HAVA-Match; (2) the policy presents no issue for **98%** of Georgia voters; (3) this is true across racial populations, as 97.86% of Black voters and 98.18% of Latino voters passed HAVA Match; and (4) the small number of individuals flagged by HAVA Match need only show their identification to vote (as all Georgia voters must do prior to voting). Doc. No. [238] at 17; 19-22. As such, Plaintiffs have failed to overcome summary judgment on their Section 2 vote-denial claim. Doc. No. [617] at 70-71.

Beyond these fatal factual shortcomings, Plaintiffs misinterpret the holding of Brnovich v. Democratic National Committee, 141 S. Ct. 2321 (2021), in an attempt to downplay its significance. Brnovich is not limited to time, place, and manner regulations; it is about statutory interpretation and rooted in a "careful consideration of the text" of the Voting Rights Act. Id. at 2333.

PLAINTIFFS' FACTS

Plaintiffs' Brief relies heavily on rhetorical generalizations. Their evidence, however, points to only one voter being unable to cast a ballot, and that was due to a county election official's erroneous decision on a provisional ballot. Even with Plaintiffs' best evidence, any purported burdens associated with the policy do not affect 98% of Georgians. And, the alleged burdens purportedly imposed by HAVA-Match are no different from that of every other Georgia voter.

HAVA-Match. Plaintiffs' Brief identifies only eight individual voters allegedly affected by HAVA-Match; only one, Kia Carter, is alleged to have been unable to vote.[1] SAMF ¶¶ 443-45, 456, 500, 515. Ms. Carter's story, like

[1] Plaintiffs point to Kia Carter; Ngoc Ahn Thi Tran; G. Saleh; Phoebe Rachel Einzig-Roth; Eduwardo Antonio Feliz Minaya; Vanessa Alva; Casey Brooks; and Gabrielle Marisa Hernandez. Of those seven, several are based solely on inadmissible hearsay (Saleh, Feliz Minaya, Alva, Marisa Hernandez). SAMF ¶¶ 443-45, 500. One of the seven, Ms. Einzig-Roth, does not claim to be a voter of color, and complained of an issue with the county administration of

so many in this litigation, is about decisions made at the county level and not by the State Defendants. Specifically, Ms. Carter was not offered a provisional ballot despite qualifying for one. SAMF ¶ 521.

Other than these few anecdotes discussed above, Plaintiffs provide no concrete evidence of a vote being denied or even burdened by the HAVA-Match policy. Doc. No. [627] at 23. Indeed, one of the individuals alleged in the Second Amended Complaint to have been burdened by HAVA-Match testified in his deposition that he voted within ten minutes of arriving at the polling location. SMF at ¶ 156 (Dr. Del Rio); see also SMF ¶¶ 137-38.

Under these circumstances, Plaintiffs' claim that the HAVA-Match policy is "inherently flawed" is just wrong. Doc. No. [627] at 10. The allegation is based on the expert report of Dr. Mayer, who could not state whether individuals were wrongly flagged by HAVA-Match. SMF at ¶ 169. Thus, there is no evidence that the policy is not working, but Dr. Mayer did opine that it works for over 98% of Georgia voters who have zero issue with HAVA-Match. Doc. No. [238] at 17; 19-22.

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provisional ballots, which this Court has already decided is not traceable to the Defendants' training efforts. More specifically, Ms. Einzig-Roth appears to have cast a provisional ballot. SAMF ¶¶ 514-15. When she went to "confirm her ballot" she was told that she lacked the proper paperwork to do so. Id.

The low numbers are not surprising. Failing to match records of the Georgia Department of Driver Services ("DDS") or United States Social Security Administration ("SSA") through HAVA-Match places voters in "Active-MIDR" status, which does not impose a burden on the voter. See O.C.G.A. § 21-2-220.1(b); 52 U.S.C. § 21083(a)(5) (requiring database check). Voters classified as Active-MIDR are placed on the rolls as an active voter and can vote with the same identification materials (e.g., photo identification) as any other voter. See O.C.G.A. § 21-2-220.1(b). Thus, voters with Active-MIDR status are treated no differently than the 98% of Georgians who have not been flagged. Code Section 21-2-220.1 requires no more than HAVA would require even without the corresponding state law that Plaintiffs challenge.

Separately, an applicant may be placed in "pending" status if information on file with DDS affirmatively indicates that the applicant has provided documents to DDS in the past showing that he or she is not a United States citizen. See O.C.G.A. § 21-2-216(g). Similar to voters on Active-MIDR status, an applicant placed in "pending" status may still cast a ballot if he or she provides documentation on or before election day establishing his or her citizenship, which includes a REAL ID, non-limited term Georgia driver's license, among other options. O.C.G.A. § 21-2-216(g)(1); O.C.G.A. § 21-2-216(g)(2); SEB Rule 183-1-6-.06 (listing additional acceptable documentation).

At the very least, a voter who does not "match" can re-register to vote using the same name on the DDS or SSA databases. And, this Court has already held that the burden of re-registering to vote is not "severe." Doc. No. [188] at 27. Perhaps because of this minimal burden, Plaintiffs manage to identify only two voters—Ms. Carter and Ms. Tran—who they claim were "burdened" by the HAVA-Match policy, and only Ms. Carter testified that she could not vote. Doc. No. [627] at 23.[2]

Georgia's Political History. This Court has already taken judicial notice of the fact that, prior to the 1990s, Georgia's election laws included racist policies. Doc. No. [617] at 70-71. Nevertheless, Plaintiffs attempt to portray today's Georgia as no different from the one governed by Gene Talmadge. Plaintiffs are wrong. Putting aside the election of United States Senator Raphael Warnock, it is telling that Plaintiffs ignore that former Labor Commissioner Michael Thurmond and Attorney General Thurbert Baker – Black statewide elected officials – were each twice reelected to statewide office. Plaintiffs also expressly ignore that Georgians have reelected several Black candidates to Statewide offices on the Court of Appeals and Supreme Court since at least 1984. Further, their citation to statements of a congressional

[2] Plaintiffs included a string cite to six other voters' experiences, which are discussed above. Each could vote; and several relied on inadmissible hearsay.

candidate's spouse is unavailing, particularly given that the Congresswoman at issue lost her next election to Congresswoman Lucy McBath, a Black candidate. Doc. No. [627] at 8. The same is true of references to Michael Williams's last-place gubernatorial campaign and his "deportation bus" stunt, and "ousted congressman" Paul Broun's gun giveaway: both candidates lost by significant margins in their respective primaries.[3] Id. Contrary to Plaintiffs' descriptions of Georgia politics, it is undeniable that "things [in Georgia] have changed dramatically." Shelby Cty., Ala. v. Holder, 570 U.S. 529, 547 (2013).

ARGUMENT AND CITATION TO AUTHORITY

Plaintiffs appropriately framed the question before the Court: "[t]he sole question before this Court regarding Section 2 is whether Plaintiffs' challenge to [HAVA-]Match can proceed." Doc. No. [627] at 14. The answer is an unqualified "no" and for several reasons. First, as an initial matter and contrary to Plaintiffs' arguments, Brnovich is of critical importance in analyzing Plaintiffs' Section 2 claim. Second, Plaintiffs' evidence cannot

[3] The quotation from Governor Perdue in 2006 is unremarkable. Doc. No. [627] at 8. It stands for the obvious position that only United States citizens should vote in federal and state elections. See Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 231 (1989) (deciding states have a "compelling interest in preserving the integrity of its election process"). Plaintiffs' citation to an anonymous robocall is not only inadmissible hearsay, but there is also no indication as to its source or whether it came from Georgia. See SAMF ¶ 1148.

withstand the analysis that Brnovich demands. And third, even the dated Gingles factors provide Plaintiffs no avenue for relief.[4]

1. Brnovich Matters.

Plaintiffs' Section 2 claim is a statutory one, and the Brnovich decision is a "statutory interpretation case[]." 141 S. Ct. at 2337. Despite this, Plaintiffs read the Brnovich opinion too narrowly and claim it is limited to challenges to laws that regulate the time, place, and manner of elections. Doc. No. [627] at 17-18. It is not. Brnovich's guideposts sharpen the "totality of circumstances" requirement of Section 2 for vote-denial cases. 141 S. Ct. at 2338. The analyses provided in the five guideposts never mention "time, place, and manner," which makes sense given the textual focus of the opinion. Id. at 2338-40. In fact, Brnovich examines the text, legislative history, and precedent to articulate the "touchstone" of Section 2 and not a subset of claims that may arise under the statute.[5] Id. at 2338.

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[4] Plaintiffs suggest in footnote 13 of their Brief that an intentional Section 2 claim exists. Notwithstanding that such a claim exists nowhere in the text of Section 2, Plaintiffs have never made an intentional discrimination claim under Section 2. See Doc. No. [582] at 84-91 (Second Amended Complaint); Doc. No. [490] at 49-57 (Pls.' Resp. In Opp. To Defs.' Mot. for Summ. J.).

[5] The dissenting Justices disagree with Plaintiffs' narrow reading. See Brnovich, 141 S. Ct. at 2351 (Kagan, J., dissenting) ("the Court undermines Section 2 and the right it provides … the majority … limit[s] Section 2 from

Plaintiffs seek to avoid Brnovich's impact by relying heavily on Thornburg v. Gingles, 478 U.S. 30 (1986). Doc. No. [627] at 11, 13, 17. But Gingles was undeniably a "vote-dilution case" that, according to Plaintiffs' logic, would have very little bearing on a vote-denial claim like this one. Brnovich, 141 S. Ct. at 2333; Doc. No. [617] at 89. More importantly, Brnovich addresses the Gingles factors and describes them as having grown "out of and … designed for use in vote-dilution cases." Brnovich, 141 S.Ct. at 2340. Thus, this Court was correct to conclude that Brnovich may have a "substantial or controlling effect on the claims" at issue in this lawsuit. Doc. No. [617] at 89 (citation omitted). Plaintiffs cannot escape the weight of the precedent by relying on irrelevant vote-dilution cases that Brnovich itself addressed.

2. Plaintiffs' HAVA-Match Claim Cannot Withstand The *Brnovich* Analysis.

The Parties agree on the five factors articulated by the Brnovich court. See Doc. No. [167] at 16. The only question is whether Plaintiffs have established a question of material fact for each of them. The answer is "no."

Size of Burden. The first Brnovich guidepost considers the "size of the burden imposed by the challenged voting rule," and it establishes that "mere

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multiple directions"), 2361 ("the very project of the statute … [is] damaged by this Court").

inconvenience [on voters] cannot be enough to demonstrate a violation of Section 2." 141 S. Ct. at 2338 (relying on Crawford v. Marion Cty. Elec. Bd., 553 U.S. 181, 198 (2008) (opinion of Stevens, J.)).

As shown, the only possible effect of being flagged by the HAVA-Match process is being identified as Active-MIDR or placed in pending status for citizenship. Neither imposes a material burden. For Active-MIDR status voters, the only burden is having to show an approved method of identification, like a photo ID. Such burdens are incidental and are shared by every Georgia voter (even those that pass HAVA-Match), and systems that are "'equally open' and that furnish[] and equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.'" Id. (citing Crawford, 553 U.S. at 198)). Similarly, presentation of a naturalization certificate or other document confirming U.S. citizenship resolves any issues for voters in "pending" status. O.C.G.A. § 21-2-216(g)(2); SEB Rule 183-1-6-.06. At worst, a voter can simply re-register to vote using the name provided to DDS or the SSA, which is not a "severe" burden. Doc. No. [188] at 27.

These conclusions are made all the more evident by Plaintiffs' cited evidence. Despite having 1,162 statements of additional material fact, over a year of discovery, and the production of over one million pages of documents by Defendants, Plaintiffs' case here collapses to one voter who was given

incorrect information by a county election office on provisional ballots. This is dispositive for two reasons. First, such a limited impact does not provide evidence of "obstacles and burdens that block or seriously hinder voting." Brnovich, 141 S. Ct. at 2338. Nor does it show that the HAVA-Match policy violates Section 2's "key requirement … that the political process leading to nomination and election … be 'equally open' to minority and non-minority groups alike." Id. at 2337 (citing Section 2(b)).

Second, the very limited evidence, involving the only person allegedly denied a vote—Ms. Carter—shows that the HAVA-Match policy did not "'result[] in' the denial or abridgement of the right to vote or that any such denial or abridgement of the right to vote was 'on account of race or color.'" Greater Birmingham Ministries v. Sec'y of State for State of Alabama, 992 F.3d 1299, 1330 (11th Cir. 2021). At most, the evidence shows the failure on the part of a county election official in not providing Ms. Carter with a provisional ballot. This Court has already decided that provisional-ballot errors are not traceable to Defendants. In sum, Plaintiffs' evidence shows no racial barrier, no causation, and no traceability to Defendants.

Standard Practice. The Brnovich Court held that facially neutral voting practices with a "long pedigree or are in widespread use in the United States" are likely not violative of Section 2. 141 S. Ct. at 2339. Plaintiffs claim

that HAVA-Match is not such a policy, because Georgia previously used questions to establish a voter's identity, instead of relying on objective information. Doc. No. [627] at 24-25. But, HAVA-Match is required by federal law, and as importantly, Brnovich did not require a verbatim policy under this guidepost. Instead, the Court considered Arizona's modern law against the backdrop that states typically "tightly defined categories of voters [who can] cast absentee ballots." Brnovich, 141 S. Ct. at 2339. The same is true here, where Georgia has long made efforts to ensure that the person voting is who they say they are.[6]

Size of Disparities. Brnovich held that the size of a disparity "in a rule's impact on members of different racial or ethnic groups is also an important factor to consider." 141 S. Ct. at 2339. But, a "meaningful comparison is essential." Id. For this reason, the Court expressly rejected employing a disparate impact analysis that did not consider a rule's effect in absolute terms. Id. at 2340-41, 2344-45.

Plaintiffs' disparate impact evidence does not push them past summary judgment. As a threshold matter, Dr. Mayer does not testify that anyone

[6] Importantly, the Brnovich Court did not independently analyze the history of Arizona's challenged law and still upheld it against a Section 2 attack. 141 S. Ct. at 2344-48.

flagged as Active-MIDR is wrongly given that status. SMF ¶ 169. Moreover, Dr. Mayer's report identifies only 60,477 Georgians with MIDR status and an additional 3,073 flagged as noncitizens in January 2020. Doc. No. [238] at 19; 22. This is out of just under 6.8 million Georgians that were actively registered to vote. Doc. No. [238] at 17. Dr. Mayer even admits in his report that "the percentages of individuals in the active voter file in MIDR status or pending status is not large (on the order of 1% of registered voters) . . . ." Doc. No. [238] at 6. Those numbers show that 99.1% of registered Georgia voters had no issue with HAVA-Match, and the Court was clear that a "policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open." Brnovich, 141 S. Ct. at 2345. After Brnovich, it is this "absolute terms" analysis that controls, and it is fatal to Plaintiffs' claims. Id. at 2344-45. That over 98% of Georgians have no issue with the policy[7] also demonstrates that, contrary to Plaintiffs' description, the HAVA-Match policy is not one that "arbitrarily exclude[s] … [and represents] state dysfunction." Doc. No. [627] at 23. Finally, Plaintiffs'

[7] Only voters who previously provided documentary proof to DDS that they were *not* citizens but later registered to vote are flagged as pending for citizenship under this process, further indicating the lack of a burden.

reliance on (less than a dozen) voters' experiences that did not result in being unable to vote are irrelevant to a vote-denial claim.

Plaintiffs criticize Brnovich's approach, but not its conclusion. Further, even adopting Plaintiffs' approach, 97.86% of Black voters have no issue with HAVA-Match, 98.18% of Hispanic voters have no issue, and 99.80% of white voters have no issue. Doc. No. [238] at 17; 19-22.

Entire System of Voting. Brnovich requires consideration of "opportunities provided by a State's entire system of voting when assessing the burden imposed by the challenged provision." 141 S. Ct. at 2339. Defendants pointed out the numerous ways and places Georgians can register to vote. Doc. No. [623] at 14-15. More fundamentally, at worst, a voter flagged for MIDR or pending status can vote—like every other Georgian—by showing a piece of identification at the polls; there is no unique burden imposed by HAVA-Match.[8] O.C.G.A. § 21-2-220.1(b) (MIDR); O.C.G.A. § 21-2-216(g)(2) (pending); Ga. Comp. R. & Regs. 183-1-6-.06 (same). At worst, the voter can simply re-register, which does not constitute a "severe" burden. Doc. No. [188] at 27.

[8] In response, Plaintiffs claim the act of registration is seminal, so their "system"-based claim satisfies this guidepost. Doc. No. [627] at 27. Not so. Plaintiffs cannot, on the one hand, rely on a "system," and on the other hand disregard that the "system" works for over 98% of Georgians.

Moreover, with 98% of Georgians being completely unaffected by HAVA-Match, it is unreasonable (and insufficient) to claim systemic failure.

Legitimate State Interest. Brnovich held that it "should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected." 141 S. Ct. at 2348. Plaintiffs disagree, and assert that a legitimate state interest is not furthered when a policy does not work as planned. Doc. No. [627] at 28-29. Once again, this is rhetoric. Dr. Mayer cannot identify a single voter who was wrongly identified by HAVA-Match. For their part, Plaintiffs have identified only one voter who did not vote (as a result of county election officials' purported error). The State satisfies Plaintiffs' standard, which is more stringent and not required by Brnovich. Moreover, that some states may have interpreted or applied HAVA differently does not mean that Georgia must follow suit. It is sufficient that Georgia's policy—based in federal law—is intended to prevent voter fraud. "Section 2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive mans would not adequately serve the State's interest." Brnovich, 141 S. Ct. at 2345-46. This ends the inquiry.

3. The Gingles Factors Do Not Save Plaintiffs.

As shown, the Gingles factors apply to vote-dilution claims, and they do not boost Plaintiffs over summary judgment's bar. Disparate impact has been

addressed, and after Brnovich, Plaintiffs' lack of "concrete evidence" is insufficient to overcome summary judgment. 141 S. Ct. at 2347. Indeed, even with the showing of a "a disparate burden caused by [HAVA-Match], the State's justifications would suffice to avoid § 2 liability. 'A State indisputably has a compelling interest in preserving the integrity of the election process.'" Id. (citing Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (*per curiam*)).

Regarding the other historical and political factors, Plaintiffs' comparison of modern-day Georgia (and Georgia political campaigns) to a time of poll tests and overt racist appeals again simply ignores reality. Doc. No. [627] at 19. As shown, Plaintiffs' claim collapses to one voter and over 98% of Georgia voters experiencing no burden whatsoever by the HAVA-Match policy. Brnovich now controls the analysis, but even if it did not, Plaintiffs cannot overcome summary judgment on this record.

CONCLUSION

Georgia's HAVA-Match policy has minimal impacts on voters; indeed, it is less restrictive than the Arizona policies approved of in Brnovich. Plaintiffs' evidence fails to overcome summary judgment because they cannot show that Georgia's elections are not equally open to all. Respectfully, therefore, this Court should grant Defendant's Motion and limit the claims at trial.

Respectfully submitted this 24th day of August, 2021.

Christopher M. Carr
Attorney General
GA Bar No. 112505
Bryan K. Webb
Deputy Attorney General
GA Bar No. 743580
Russell D. Willard
Senior Assistant Attorney General
GA Bar No. 760280
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334

/s/ Josh B. Belinfante
Josh B. Belinfante
Georgia Bar No. 047399
jbelinfante@robbinsfirm.com
Vincent R. Russo
Georgia Bar No. 242628
vrusso@robbinsfirm.com
Carey A. Miller
Georgia Bar No. 976240
cmiller@robbinsfirm.com
Brian E. Lake
Georgia Bar No. 575966
blake@robbinsfirm.com
Alexander F. Denton
Georgia Bar No. 660632
adenton@robbinsfirm.com
Melanie L. Johnson
Georgia Bar No. 466756
mjohnson@robbinsfirm.com
Robbins Ross Alloy Belinfante Littlefield LLC
500 14th Street N.W.

Atlanta, GA 30318
Telephone: (678) 701-9381
Facsimile: (404) 856-3255

Bryan P. Tyson
Georgia Bar No. 515411
btyson@taylorenglish.com
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@taylorenglish.com
Diane Festin LaRoss
Georgia Bar No. 430830
dlaross@taylorenglish.com
Loree Anne Paradise
Georgia Bar No. 382202
lparadise@taylorenglish.com
Taylor English Duma LLP
1600 Parkwood Circle
Suite 200
Atlanta, GA 30339
Telephone: 678-336-7249

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing **DEFENDANTS' BRIEF IN SUPPORT OF RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT** was prepared double-spaced in 13-point Century New Schoolbook font, approved by the Court in Local Rule 5.1(C).

/s/ Josh Belinfante
Josh Belinfante

CERTIFICATE OF SERVICE

This certifies that I have this date electronically filed the foregoing **DEFENDANTS' BRIEF IN SUPPORT OF RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record listed on the case.

This 24th day of August, 2021.

/s/ Josh Belinfante
Josh Belinfante