No. 10-14901

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Hassan Swann,
Appellant,
v.
Brian Kemp, et al.,
Appellees

Appeal from the United States District Court
for the Northern District of Georgia

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ORAL ARGUMENT

Plaintiff requests oral argument because this case involves the fundamental right to vote and counsel believe the Court would benefit from an oral presentation of the facts and legal arguments the parties raise on appeal.

JURISDICTIONAL STATEMENT

This is an appeal of the district court's October 18, 2010 order denying Plaintiff's motion for summary judgment and granting summary judgment for Defendants. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 42 U.S.C. § 1983. Plaintiff timely filed a notice of appeal on October 21, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether, in light of the statutory prohibition in O.C.G.A. § 21-2-381(a)(1)(D) against election officials mailing absentee ballots directly to inmates confined in their county of residence, the district court erred in requiring Plaintiff to list the jail's address on his absentee ballot application in order to challenge the constitutionality of O.C.G.A. § 21-2-381(a)(1)(D) as applied to him?

II. Whether O.C.G.A. § 21-2-381(a)(1)(D), which permits absentee ballots to be mailed directly to eligible voters confined outside their home county, but prohibits mailing absentee ballots to eligible voters confined in their county of

residence, denied Plaintiff the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution?

STATEMENT OF THE CASE

Plaintiff Hassan Swann, a registered voter and resident of DeKalb County, Georgia, challenges the application of O.C.G.A. § 21-2-381(a)(1)(D) to inmates confined in their county of residence under the Equal Protection Clause. Section 21-2-381(a)(1)(D) provides:

> Except in the case of physically disabled electors residing in the county or municipality, no absentee ballot shall be mailed to an address other than the permanent mailing address of the elector as recorded on the elector's voter registration record or a temporary out-of-county or out-of-municipality address.

Georgia law protects the right of incarcerated pre-trial detainees and misdemeanants to vote, but their only means of voting is by absentee ballot. The central constitutional issue in this case is the unequal denial of the right to vote based on whether a jail inmate eligible to vote is confined in his home county rather than somewhere else in Georgia. The Defendants have enforced O.C.G.A. § 21-2-381(a)(1)(D) in a manner that allows them to mail absentee ballots to jails on behalf of inmates confined outside their county of residence, but not to inmates confined in their county of residence.

The challenged statute, as enforced by Defendants, prevented Plaintiff from getting a ballot. If he had been confined in another county, his election

superintendent would have been required to mail him a ballot. Also, inmates from other counties confined in the same jail as Plaintiff could get their ballots mailed to them. By refusing to send an absentee ballot directly to Plaintiff, Defendants stripped Plaintiff of his only means of voting. Moreover, Defendants have not identified a governmental interest, compelling or otherwise, that justifies this severe burden on Plaintiff's right to vote.

The parties submitted cross-motions for summary judgment, and the district court granted the Defendants' motion and denied Plaintiff's motion. Plaintiff appeals the district court's decision as erroneous.

STATEMENT OF FACTS

Plaintiff Hassan Swann is a citizen of Georgia and a resident of DeKalb County. R. 56(4). From September 2008 until December 17, 2008, Plaintiff was confined in the DeKalb County jail for a misdemeanor conviction. R. 56(6) and 56(7). While in the jail, officers organized a voter registration drive and also allowed inmates to complete absentee ballot application forms. R. 26(9)-9, 11, 12; R. 66-6. Plaintiff, along with several hundred other inmates, completed an absentee ballot application form. R. 56(15); R. 67-9, 10, 15, 16, 17, 18, 19. He did not know the jail's address so he left the section in the application for setting forth an alternate mailing address blank. R. 67-16.

Jail officers were instructed not to answer any questions regarding the voting process, but did tell Swann and the other inmates that they would receive their ballots in time for the November 4, 2008 general elections. R. 67-16. After collecting the completed applications, the officers delivered them to Jeff Mann, the Chief Deputy Sheriff for DeKalb County who manages the day-to-day operations at the jail. R. 66-8. In total, Mann delivered 376 absentee ballot applications and 441 voter registration applications to the DeKalb County election office. R. 56(9)-11, 12. However, during discovery, the Defendants only produced 84 out of the 376 absentee ballot applications Mann delivered to the election office. R. 56(12). Out of those 84 applications, at least 15 inmates listed the jail as their mailing address, but the overwhelming majority of them left the mailing address section blank like Plaintiff. Id.

On September 29, 2008, Maxine Daniels, the director and supervisor of elections for DeKalb County, emailed Star Morris, an employee at the DeKalb County jail, to inform Morris that the election office could not mail absentee ballots directly to the jail. Defendant Daniels relied upon O.C.G.A. § 21-2-381(a)(1)(D) and stated, "[Georgia] law requires that we can only send ballots to a non-disabled voter to the home address or and [sic] out of county address." R. 65-13; R. 56(14). Mann responded to Daniels' email the next day and wrote: "[I]f I understand you correctly you are saying you CANNOT send absentee ballots to the

jail as the temporary residence of a registered voter? If not, then it seems the best way is for you to send it to the address as registered." R. 56(14). Because DeKalb County jail did not set up a polling place in the jail, and because it is against the jail's policy to allow inmates to vote in person at their designated polling place, absentee voting was the only means by which the inmates could vote. R. 66-26.

After exchanging several more emails, Mann and Daniels agreed that the county election office would mail the absentee ballots to the inmates' permanent home addresses, and Mann agreed to set out a box in the front lobby of the jail for family members to drop off an inmate's ballot. R. 56(16). However, neither Mann nor any other jail officials ever distributed any public education materials or written announcements about the drop box. R. 56(9)-11. Jail officials also never informed inmates who were residents of DeKalb County that the county election office would not be mailing their absentee ballots directly to the jail and that those inmates would have to rely upon a family member to deliver their ballot. R. 56(9)-9; R. 67-1, 26. Swann was unaware of the drop box and expected the election office to mail his absentee ballot to the jail given that he would still be confined on election day. R. 67-18.

Daniels could not confirm the date on which the county election office mailed Swann's absentee ballot to his home address, nor could she confirm that the ballot actually was delivered to Swann's home address. R. 65-11, 12, 15, 16.

Regardless, Swann never received his absentee ballot and, as a result, was unable to vote in the November 4, 2008 general elections. R. 67-25; R. 56(4).

On November 24, 2008, Swann submitted a grievance to DeKalb County jail officials regarding the denial of his right to vote as well as the rights of other inmates who also did not have an opportunity to vote. R. 56(19). The jail finally submitted a response to Swann's grievance on December 16, 2008, but Swann never received the response because he already had been released from custody. Id.; R. 66-20, 21; R. 56(4); R. 56(7). Swann also contacted the DeKalb County election office upon his release from jail to find out what had happened to his ballot, but no one at the office ever responded to his inquiry. R. 67-18, 21, 22.

Plaintiff filed the instant lawsuit on September 29, 2009, naming as defendants Secretary of State Brian Kemp[1], the DeKalb County Board of Registrations and Elections, Maxine Daniels, and Jeff Mann. He asserted a violation of his right to vote under the Fourteenth Amendment's Equal Protection Clause, and a violation of his due process rights based on the Defendants' failure to inform him that the DeKalb County election office would not be mailing his absentee ballot to the jail. R. 1. He sought declaratory and injunctive relief, as well as nominal monetary damages. Id.

[1] Pursuant to Fed. R. Civ. P. 25(d), Plaintiff has substituted the name of Karen Handel for Secretary of State Brian Kemp.

The parties filed cross-motions for summary judgment. R. 52; R. 57; R. 60. The district court granted summary judgment in favor of the Defendants and dismissed all of Plaintiff's claims. R. 80.

SUMMARY OF THE ARGUMENT

The district court ruled that, under O.C.G.A. § 21-2-381(a)(1)(D), election officials are not allowed to mail absentee ballots to county jails to inmates incarcerated in their county of residence. R. 80-6. Even though the district court determined that O.C.G.A. § 21-2-381(a)(1)(D)'s application to such inmates is automatic, the court nevertheless found that Plaintiff should have listed the jail's address on his absentee ballot application in order to raise an equal protection claim. R. 80-7, 8. The district court's decision contradicts the well-established principle that a plaintiff may raise an as-applied constitutional challenge to a statute prior to taking any administrative or procedural step if doing so would be futile.

By ruling against Plaintiff on this narrower issue, the district court failed to consider the merits of Plaintiff's equal protection claim and, thus, never addressed the gravamen of Plaintiff's complaint. Section 21-2-381(a)(1)(D) unduly restricted Plaintiff's access to the only voting method available to him and forced Plaintiff to rely upon a family member to deliver his ballot – something which never happened. Furthermore, if Plaintiff had been confined in any other county, or had

been a resident of any other county while confined in DeKalb County jail, he would have been able to receive an absentee ballot at the jail. Therefore, the Defendants' application of O.C.G.A. § 21-2-381(a)(1)(D) is arbitrary, capricious, and serves no governmental interest, compelling or otherwise.

For these reasons, Plaintiff was entitled to summary judgment as a matter of law, and the district court's ruling in favor of the Defendants was erroneous. Plaintiff respectfully requests that this Court reverse the district court's decision and remand the case for further proceedings.

ARGUMENT AND CITATIONS OF AUTHORITY

I. STANDARD OF REVIEW

A district court's grant of summary judgment is subject to de novo review. Abel v. Southern Shuttle Serv., Inc., 620 F.3d 1272, 1273 n.1 (11th Cir. 2010); Tana v. Dantanna's, 611 F.3d 767, 772 (11th Cir. 2010). The court must view the material facts in a light most favorable to the non-moving party. Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1303 (11th Cir. 2009). Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Equity Inv. Partners v. Lenz, 594 F.3d 1338, 1345 (11th Cir. 2010).

II. THE DEFENDANTS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE O.C.G.A. § 21-2-381(a)(1)(D), AS APPLIED TO INMATES CONFINED IN THEIR COUNTY OF RESIDENCE, IMPOSES AN UNDUE BURDEN ON THE INMATES' ONLY METHOD OF VOTING IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Plaintiff does not seek to invalidate O.C.C.A. § 21-2-381(a)(1)(D) in its entirety. Instead, he contends O.C.C.A. § 21-2-381(a)(1)(D) should be held unconstitutional to the extent it restricts election officials from directly mailing absentee ballots to inmates confined in their county of residence. See Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 329 (2006) ("[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985))).

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and requires that all similarly-situated persons be treated alike. U.S. Const. amend. XIV, § 1; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). The right to vote is fundamental and protected by more constitutional amendments than any other right we enjoy as Americans, i.e., the First, Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth. See Reynolds v. Sims, 377 U.S. 533, 555 n.28 (1964) (noting the "expansion of the

right of suffrage" by the various constitutional amendments as well as the civil rights legislation enacted by Congress in 1957 and 1960). As the Court held in Wesberry v. Sanders, 376 U.S. 1, 17 (1964): "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." Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," the Supreme Court has consistently characterized the right to vote as a "fundamental political right." Reynolds v. Sims, 377 U.S. at 562 (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

A. Plaintiff was not required to list the jail's address on his absentee ballot application form in order to sustain his equal protection claim.

The district court construed O.C.G.A. § 21-2-381(a)(1)(D) as allowing "inmates jailed in a county other than their county of residence [to] receive absentee ballots at the jail where they are confined. Inmates, like Swann, however, jailed in the county where they reside cannot receive absentee ballots at the jail." R. 80-6. Despite reaching this legal conclusion, the court determined that Plaintiff nevertheless was required to put the jail's address on his absentee ballot application form in order to raise an equal protection claim. Id. at 7-8. Given the statutory language and Defendants' position on implementing the statute, it is unequivocally clear that if Plaintiff had indeed requested on his absentee ballot

application that his ballot be mailed to him at the DeKalb County jail, nothing different would have happened. There is nothing Plaintiff could have done to get his ballot mailed to him where he was confined.

Although the court did not use the terms "standing" or "ripeness" when analyzing Plaintiff's equal protection claim, the court's reasoning focused on whether Plaintiff suffered any injury as a result of the Defendants' application of O.C.G.A. § 21-2-381(a)(1)(D). R. 80-7, 8. Plaintiff was not required to list the jail's address on his absentee ballot application in order to raise an equal protection claim because doing so would have been futile and, as an inmate ineligible to receive a ballot at the jail, he suffered a concrete injury.

In order to establish standing to raise an as-applied challenge to O.C.G.A. § 21-2-381(a)(1)(D), Plaintiff had "to demonstrate that a 'credible threat of an injury exists,' not just a speculative threat." <u>American Charities for Reasonable Fundraising Reg., Inc. v. Pinellas County</u>, 221 F.3d 1211, 1214 (11th Cir. 2000) (quoting <u>Kirby v. Siegelman</u>, 195 F.3d 1285, 1290 (11th Cir. 1999). In its order, the district court restricted the category of similarly situated persons to include only those inmates who listed the jail's address on their absentee ballot applications. R. 80-7. However, under the Equal Protection Clause, the term "similarly situated" refers to a class of persons being identical in all relevant aspects for purposes of establishing a prima facie case. <u>Griffin Indus., Inc. v. Irvin</u>,

496 F.3d 1189, 1204 (11th Cir. 2007); Grider v. City of Auburn, 618 F.3d 1240, 1264 (11th Cir. 2010). The district court's own legal conclusion established that, even if Plaintiff had listed the jail's address, it would have been futile because he still would have been ineligible to receive a ballot at the jail. Therefore, Plaintiff alleged an injury sufficient enough to maintain his equal protection claim.

Also, the Supreme Court repeatedly has ruled that a plaintiff need not exhaust administrative remedies or undergo any other action prior to challenging the denial of a constitutional right if doing so would be fruitless. See Blanchette v. Connecticut Gen. Ins. Corp., 419 U.S. 102, 143 (1974) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.") (internal quotation marks omitted). See also Florida State Conference of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1164 (11th Cir. 2008) ("The Supreme Court has long since held that where the enforcement of a statute is certain, a preenforcement challenge will not be rejected on ripeness grounds."). This exception to the doctrines of ripeness and exhaustion requires a plaintiff to show that undergoing a particular act would indeed be futile. Palazzolo v. Rhode Island, 533 U.S. 606, 622 (2001). The two primary factors a court considers are "the hardship to the parties of withholding court consideration and the fitness of the issues for judicial decision." Alabama Power Co. v. U.S. Dep't of Energy, 307 F.3d 1300, 1310 (11th Cir. 2002) (internal quotation marks

omitted). If taking a particular administrative step would not have changed the outcome, the plaintiff's claim is ripe for adjudication. See Ward v. County of Orange, 217 F.3d 1350, 1356 (11th Cir. 2000) ("[A] party need not seek a binding conclusive administrative decision where such an effort would be futile.").

The law of this Circuit is that a defendant bears the burden of showing that if the plaintiff had engaged in some additional act, the outcome would have been different. For example, in Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989), the plaintiff challenged a city council's denial of a permit to rezone certain property from single-family residential to mixed use development. The city argued the plaintiff should have reapplied to seek approval for the development project under the existing zoning classification. Id. at 1575-1576. This Court ruled the plaintiff's due process claim was ripe for review because the city had not presented any evidence at trial showing the property could have been developed under the existing zoning classification. Id. at 1576.

Florida State Conference of N.A.A.C.P. v. Browning is another case in which this Court found that a claim involving the application of a statute was ripe for adjudication if there is no doubt how the statute will be enforced. 522 F.3d at 1164. In Browning, three organizational plaintiffs sued to prevent the implementation of new voter registration laws which would have required voters to provide either their driver's license numbers or the last four digits of their social

security numbers. Id. at 1155-1156. The state would assign an identification number if a voter did not have either a driver's license or a social security card. Id. at 1156. This Court determined that the plaintiffs had alleged an injury sufficient enough to establish standing, and the plaintiffs' claims were ripe for adjudication even though the law had not yet been implemented. Id. at 1164. Specifically, this Court reasoned that, "[s]ince enforcement of Subsection 6 is automatic for all new voter registrants, there is no doubt that the statute will be enforced against some of plaintiffs' members." Id.

The district court correctly concluded Plaintiff was ineligible to receive an absentee ballot mailed directly to the jail because he was confined in his county of residence. R. 80-6. Plaintiff established that, regardless of whether an inmate listed the jail's address or not, the ballots of all DeKalb County residents confined in the jail were sent to the inmates' home addresses. R. 56(16); R. 66-14. The record shows Defendant Daniels informed jail officials that the election office would not be mailing any of the ballots to the jail because "[Georgia] law requires that we can only send ballots to a non-disabled voter to the home address or and [sic] out of county address." Id. Moreover, the Defendants did not present any evidence showing that, if Plaintiff had listed the jail's address on his application, election officials would have mailed the ballot to the jail. Consequently, Plaintiff

was not required to engage in such a futile act prior to raising his equal protection claim, and the district court should have addressed the merits of his claim.

B. Section 21-2-381(a)(1)(D) severely restricts the ability of inmates like Plaintiff to vote an absentee ballot and serves no compelling governmental interest.

Federal courts must carefully and meticulously scrutinize state laws which unduly burden and infringe on the rights of voters. Duncan v. Poythress, 657 F.2d 691, 700 (5th Cir. 1981).[2] When determining whether or not a state election law or policy violates the Equal Protection Clause, a court must first consider the character and magnitude of the asserted injury to the rights that the Fourteenth Amendment protects. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (applying strict scrutiny standard in ruling that an Ohio statute which required independent candidates running for President to file their nomination papers earlier than political party candidates violated equal protection clause). The court then should identify and evaluate the precise interests that the state puts forward to justify the burden that its law or policy imposes on a plaintiff. Id. "In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." Id.

[2] All decisions from the Fifth Circuit issued prior to October 1, 1981 are binding on all of the federal courts in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

Once a state election law subjects fundamental rights to "severe" restrictions, the state law must be "'narrowly drawn to advance a state interest of compelling importance.'" Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal citations omitted). See also Florida State Conference of N.A.A.C.P. v. Browning, 522 F.3d at 1185 (the equal protection clause "guarantees qualified voters a substantive right to participate equally with other qualified voters in the electoral process.") (Barkett, J., concurring in part and dissenting in part) (citing Reynolds v. Sims, 377 U.S. at 566) (emphasis in original).

Although pre-trial detainees and misdemeanants retain the right to vote in Georgia, see O.C.G.A. § 21-2-216(b), the challenged statute protects that right in a completely arbitrary manner. As a result of Defendants' application of O.C.G.A. § 21-2-381(a)(1)(D), Plaintiff was denied the fundamental right to vote. Because Defendants placed an undue burden on the only voting method available to Plaintiff, this Court should analyze Plaintiff's equal protection claim under the heightened standard of review required under Anderson v. Celebrezze, 460 U.S. 780 (1983), and Burdick v. Takushi, 504 U.S. 428 (1992).

In O'Brien v. Skinner, 414 U.S. 524, 530 (1974), the Supreme Court held that election officials cannot discriminate within the class of county jail inmates when it comes to voting. O'Brien involved an equal protection challenge to New York absentee ballot laws which prohibited inmates confined in their county of

residence from receiving an absentee ballot, but allowed inmates confined outside their county of residence to receive absentee ballots at the jail. Id. The result, the Court found, was that "two citizens awaiting trial – or even awaiting a decision whether they are to be charged – sitting side by side in the same cell, may receive different treatment as to voting rights." Id. at 529. The Court invalidated the statute under the equal protection clause as applied to inmates confined in their county of residence, reasoning that "[t]he New York statutes, as construed, operate as a restriction which is 'so severe as itself to constitute an unconstitutionally onerous burden on the . . . exercise of the franchise.'" Id. at 530 (quoting Rosario v. Rockefeller, 410 U.S. 752, 760 (1973)).

Here, the district court ruled that the holding in O'Brien was inapplicable because there was no outright prohibition on Plaintiff's ability to cast an absentee ballot, and the court found the Supreme Court's decision in McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969), to be more on point. R. 80-7. In McDonald, pre-trial detainees challenged an Illinois statute which denied them the right to receive absentee ballots at the jail. 394 U.S. at 802. The Court dismissed their claim on the grounds that the plaintiffs had failed to show they had no alternative means of casting a ballot. Id. However, both O'Brien and McDonald were decided prior to the Supreme Court's decisions in Anderson v. Celebrezze and Burdick v. Takushi which set out the standard for assessing Fourteenth

Amendment claims regarding the right to vote. As noted above, under these later cases, a plaintiff need not show there was no possible way he could have overcome the barrier to his voting. Instead, a plaintiff may prevail by showing the challenged law is unduly burdensome and does not serve a compelling governmental interest. See Burdick v. Takushi, 504 U.S. at 434 (ruling that state election laws that impose severe restrictions on the right to vote must be narrowly drawn to advance a compelling state interest).

The right to vote is not limited to just having the right, but extends to the manner in which that right is exercised. See Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."); Kusper v. Pontikes, 414 U.S. 51, 59 (1973) ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."). In Kusper, the Court invalidated an Illinois statute that prohibited the plaintiff from voting in a political party's primary because she had voted in another party's primary in the preceding 23 months. Id. at 61. Although the law did not deprive the plaintiff of the right to associate with the party of her choice, and even though she could vote in the other party's primary after the 23-

month waiting period, the Court ruled that the law "substantially abridged" the plaintiff's associational rights during the statutory period. Id. at 58.

Likewise, in Williams v. Rhodes, 393 U.S. 23, 34-35 (1968), the Supreme Court struck down as violative of the equal protection clause various Ohio election laws that required third parties to have petitions signed by at least 15% of the number of ballots cast in the last gubernatorial election and also imposed upon them an early filing deadline. Even though one of the third parties was able to obtain a sufficient number of petition signatures, the Court still ruled that none of the state's purported interests justified "the very severe restrictions on voting and associational rights which Ohio ha[d] imposed." Williams v. Rhodes, 393 U.S. at 32.

More recently, in Buckley v. American Constitutional Law Found., Inc., 525 U.S. 182 (1999), the Supreme Court invalidated Colorado election laws which required the disclosure of identifying information of all petition circulators, required the circulators to wear badges, and required the circulators to be registered voters. Although some of the individual plaintiffs could have satisfied the state's requirements, the Court reasoned the restrictions unjustifiably inhibited the ballot initiative process. 525 U.S. at 206. After carefully analyzing the state's purported interests in enforcing the challenged laws, the Court ruled the state already had laws in effect which satisfied some of its interests and, therefore, the statutes at

issue were an unnecessary burden on the process. Id. at 196-204. In Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), the Supreme Court ruled that Connecticut's closed primary system was unconstitutional because it impermissibly burdened the First and Fourteenth Amendment rights of a political party and its members to associate with voters who may not be party members, but who share similar political beliefs. The Court held that a state's "power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote." 479 U.S. at 217. See also Norman v. Reed, 502 U.S. 279 (1992) (ruling that state law which imposed a higher signature requirement for non-established parties seeking to be placed on the ballot in multidistrict political subdivisions as compared to a statewide ballot was unconstitutional).

The DeKalb County defendants failed to demonstrate a rational, much less a compelling, state interest in their application of O.C.G.A. § 21-2-381(a)(1)(D) to inmates confined in their county of residence. Defendant Kemp contends the law guarantees ballots are sent to a voter's registered address which, arguably, "help[s] to assure that voters are (a) living where they claim to be living and registered (and hence where they are entitled to vote); and (b) preventing fraudulent balloting and voting by persons not the person registered to vote at that address." R. 60(2)-10. The application of O.C.G.A. § 21-2-381(a)(1)(D) to inmates confined in their

county of residence is not narrowly tailored to achieve the State's purported interests.

First, the concern the State has in making sure people vote in elections for which they are qualified applies to all inmates regardless of where they are confined. On the absentee ballot application form, inmates have to list the address where they are registered and the election office verifies that information from county records. Because the Defendants can confirm a voter's address as registered, there is no fundamental difference between sending a ballot to an inmate confined outside or inside his county of residence.[3] An inmate in either category will not be at his home residence to receive the ballot and sending the ballot directly to the inmate better ensures the proper person receives it.

Second, assuming the inmate will still be incarcerated on election day, as was the case with Plaintiff, the Defendants' application of O.C.G.A. § 21-2-381(a)(1)(D) actually increases the threat of election fraud. Unlike inmates confined outside their county of residence who know exactly when they received their ballot and have immediate possession of it, the ballot of an inmate in Plaintiff's situation is handled by multiple people. When more than just the voter

[3] Plaintiff also notes that Defendant's explanation is contrary to the concept of absentee ballots. Though some voters, of course, request their ballots be mailed to their home address if they are going to be out of town on election day, the basic function of absentee ballots for many voters is that the ballot will be sent to an address other than their permanent home address.

and the election office are involved in the process, the risk of someone posing as the inmate and voting, tampering with the ballot, misplacing it, or losing it grows. This is especially true given the system Defendants Daniels and Mann set up for inmates to receive absentee ballots at the jail. Under their scheme, there were at least four people who handled an inmate's ballot: (1) the person who received the ballot at the inmate's home; (2) the jail official who received the ballot from a family member and delivered it to the inmate; (3) the jail official (not necessarily the same person) who took the completed ballot and delivered it to Defendant Mann; and (4) Defendant Mann who delivered the ballots to the election office. Even if Plaintiff theoretically may have been able to vote, the facts show he never knew about the system the Defendants had devised and, thus, did not have an opportunity to take advantage of it. The burden on his right to vote was severe enough that he never received his absentee ballot and, thus, did not have an opportunity to vote. If the election office had delivered the ballot to Plaintiff directly, he could have cast his ballot and put it in the mail himself. This process would have been simpler, more efficient, and far less prone to fraudulent behavior. Given that Defendants' application of O.C.G.A. § 21-2-381(a)(1)(D) imposed a severe burden on Plaintiff's right to vote, Defendants bore the burden of establishing that the statute is narrowly tailored and that it serves a compelling governmental interest – a burden the Defendants have failed to satisfy.

Even if a less stringent standard were to apply to Plaintiff's claim, O.C.G.A. § 21-2-381(a)(1)(D) does not satisfy any legitimate governmental interest for the same reasons set forth above. When voting, whether in-person or by absentee ballot, there is a direct relationship between the voter and the election office. Although the state maintains this relationship when it comes to inmates confined outside their county of residence, the process becomes unnecessarily complicated for inmates like Plaintiff. This distinction, based solely on where an inmate is confined, is arbitrary and capricious, and the interests the State seeks to promote can be achieved through far less drastic means. Thus, O.C.G.A. § 21-2-381(a)(1)(D), as applied to Plaintiff and similarly situated inmates, violates the Equal Protection Clause.

III. CONCLUSION

Under Anderson v. Celebrezze, Burdick v. Takushi, and O'Brien v. Skinner, Plaintiff was entitled to summary judgment as a matter of law, and the district court erred in granting summary judgment in favor of the Defendants. Plaintiff respectfully requests that this Court reverse the district court's decision and remand the case for further proceedings.

/s/Nancy Abudu

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief is typed in 14 point Times New Roman and complies with the type-volume limitation of the rule, containing 5,417 words, excluding those sections of the brief that do not count toward that limitation, in accordance with Rule 32(a)(7)(B)(iii), as determined by the word processing systems used to prepare this brief.

/s/Nancy Abudu

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2010, a true and correct copy of the foregoing brief was served upon counsel for the defendants, by First-Class mail, postage prepaid, addressed as follows:

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