

2019-2020 YOUNG LITIGATORS  
BENCH BRIEF

No. 19-0490

In The United States Supreme Court

Kevin Hall, in his official capacity as Secretary of State of Georgia

*Appellant*

v.

COMMON CAUSE GEORGIA, as an organization

*Appellee*

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**On Appeal to the  
United States Supreme Court**

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Appeal to the United States Supreme Court is granted, limited to the following questions:

1. Whether Ga.Code Section 21-2-418, 419, which states provisional ballots will not be counted for voters whose names are not found on the voter registrations list, denies the right of eligible Georgia citizens to vote in violation of the Fourteenth Amendment's Due Process Clause?
2. Whether the District Court erred in granting the Temporary Restraining Order requested by appellee COMMON CAUSE GEORGIA.

## THE RELEVANT LAWS

### United States Constitution

14<sup>th</sup> Amendment Due Process Clause

### 52 U.S.C. § 21083(a)(1)(A)

Requires jurisdictions to implement a single centralized, computerized, statewide voter registration list containing the name and registration information of every legally registered voter in the state.

### 42 U.S.C. § 15482

Voters have the right to cast provisional ballots.

### O.C.G.A. § 21-2-418

Once a provisional ballot is cast, it will be counted if and only if the person is later determined to have been entitled to vote.

### O.C.G.A. §21-2-419

Sets for the timing of the counting and process for verifying provisional ballots.

## SUMMARY OF THE FACTS

According to Appellee's Complaint, information in the State's voter registration server, used at the polls to determine whether voters are eligible to vote, is vulnerable to multiple security breaches and exploitable by manipulation of voter data. Appellee alleges that Kevin Hall, as Secretary of State, failed to maintain the security of voter information despite known vulnerabilities leading up to the 2018 election. Appellee further alleges that the Secretary knows maintenance of an unsecure, unreliable voter registration database increased the risk that eligible voters have been and will be unlawfully removed from the State's voter registration database or will have their voter registration information unlawfully manipulated or mismanaged in a manner that prevents them from casting a regular ballot. Under the State's existing provisional ballot

scheme, a voter whose name is not found on the voter registration list may only vote by casting a provisional ballot, and such ballot will not be counted if the voter's eligibility cannot be verified because the voter's name is not found on the voter registration list maintained by the Secretary of State. As a result of the Secretary's actions, Appellee alleges that eligible voters who have taken the required steps to register and maintain their registrations may – through no fault of their own – arrive at the polls and not be permitted to cast a regular ballot and therefore suffer disenfranchisement from the voting process. Appellee sought an injunction on the basis that the State's existing provisional balloting scheme: (1) infringes upon the fundamental right to vote and imposes an undue burden on eligible voters in violation of the due process clause of the Fourteenth Amendment; and (2) violates the Help America Vote Act ("HAVA") requiring the State to count provisional ballots if voters are eligible to vote.

According to the information provided by the Secretary in connection with this case, a total of 21,190 provisional ballots were cast in the November 2018 general election in Georgia. This is compared to 12,151 provisional ballots cast in 2014, and 16,739 provisional ballots cast in 2016. Director of Elections, David Williams, testified that only about 50% of provisional ballots cast will likely be counted based on past experience. According to news reports on Saturday, November 10, 2018, the number of provisional ballots cast statewide is closer to 27,000 (based on a county-by-county canvas), a difference of nearly 5,000 from the total provided to this Court by the Secretary of State's office. According to Defendant, as of 10:20 am on November 11, 2018, 92 out of Georgia's 159 counties had certified their election results.

There are a number of reasons why a voter may be given a provisional ballot. They include problems such as: a voter's registration not showing up in the registration database or having been removed from the database; voters without photo identification, voters without

proof of citizenship or with citizenship documentation that either had not been reviewed and entered into the state voter database; voters who showed up to vote at the wrong polling precinct or county; voters who cast their ballots during extended polling hours or after the polls had closed; or problems with a signature mismatch on an absentee ballot. When a person votes by provisional ballot, poll workers mark the ballot envelope with a code that indicates the reason for the provisional ballot. According to appellant, the total number of provisional ballots cast is not enough to swing the gubernatorial election.

Appellee offered declaration evidence from a variety of sources regarding various issues with voter registration. Several people had similar stories to Grace Owens who is a United States citizen and resident of Gwinnett, County, Georgia who is eligible to vote. She previously registered to vote using her current address and voted in the 2016 presidential election at the polling place at Union Baptist Church. Owens had not moved or changed her address since 2016. On Election Day, on November 6, 2018, Owens went to her polling place at Union Baptist Church at 7:00 a.m. to vote and was told by a poll worker that there was no record of her registration in the system. Owens was not provided with a provisional ballot and left the polling place without voting. Owens returned to the same polling place at 5:45 pm and requested a provisional ballot. She was provided a provisional ballot on which she cast her votes but received no confirmation of whether her vote would be counted.

Paul B. Holmes is a Georgia resident, U.S. citizen by birth, had never been convicted of a crime, and has a valid Georgia driver's license. He resided in Roswell, Georgia, where he has lived and been registered to vote for 17 years. Holmes registered to vote decades ago in Atlanta, Georgia. He is a regular voter and rarely misses voting in federal elections. His polling place is at the United Methodist Church. Because he is a regular voter, Holmes did not check his voter

registration status on the Secretary of State's website prior to attempting to vote during the early voting period for the 2018 general election. Holmes attempted to vote on the first day of early voting at his regular polling place. According to Holmes, the lines were long, the poll workers were flustered and having a difficult time answering the questions of the voters, and it was taking a very long time to process each individual voter due to problems with the computers failing to locate voter registration information in the system. Holmes was informed by a poll worker that he could not vote because he was not registered. Holmes protested, but ultimately left the polling place, and was not offered a provisional ballot. Holmes called Election Protection, a non-partisan voter protection hotline, and was advised to return to his precinct with documentation. Holmes returned to vote a few days later at his same polling location with his driver's license and his Fulton County vehicle registration receipt showing his address. He waited in line for 45 minutes but was again told he was not a registered voter. He asked for and was given a provisional ballot. He did not receive any information about how to cure his provisional ballot or to determine whether it will be counted. Holmes called the Fulton County Election Board and was told there was nothing he could do to cure his registration issue because according to their records he was not registered and therefore his provisional ballot would not count. Before November 9, and within the time to cure his provisional ballot, Holmes emailed Harriett Smith and Ronnie Price at the Fulton County Election Board and in response was informed there was no record of his ever having voted in Fulton County or the State of Georgia. Holmes is extraordinarily upset by his experience in attempting to vote in the 2018 general election. He was disturbed to learn that his voter registration information and history has been erased despite his regular voting history for decades.

The appellee's produced a number of declarations very similar to the ones above where voters had voted in previous elections, were told that they were not registered or that they had been purged from the system, and that their provisional ballots would not be counted.

Appellee requested that the District Court enter a temporary restraining order ("TRO") enjoining the rejection of any provisional ballots cast during the 2018 general election on the basis that the voter's name was not found on the voter registration list, pending a decision on the permanent relief requested in this case.

### PROCEDURAL HISTORY

On November 5, 2018, the day before the November, 2018 gubernatorial election in the State of Georgia, Appellee Common Cause Georgia filed an action against the Georgia Secretary of State seeking emergency injunctive relief (Temporary Restraining Order and Declaratory relief) to ensure that provisional ballots cast by eligible registered voters in the 2018 general election are properly counted and that the state voter registration database due to security vulnerabilities violate the Due Process Clause and impose a severe burden on the right to vote.

Because Appellee did not know how many people's rights were violated, the Appellee requested the Secretary (Hall) to produce, or cause to be produced, the following information to Appellee: (1) documents sufficient to show the number of provisional ballots cast in each county during the November 2018 general election; (2) for each provisional ballot cast in the November 2018 general election, documents sufficient to show the reason why that voter was required to use a provisional ballot; (3) all guidance provided by the Appellant to county officials regarding the counting of provisional ballots or assessing the eligibility of voters who voted by provisional ballots; and (4) all coding sheets or similar documents used in the review of provisional ballots and ascertaining the eligibility of voters who voted by provisional ballots.

The Court held a hearing on Appellee's Motion on November 8, 2018. At the hearing, Appellee presented oral argument and Appellant presented the testimony of David Williams, the Secretary of State's Elections Director, and Lynn Howard, the Secretary of State's Chief Information Officer. The Parties offered additional evidence following the hearing.

On November 12, 2018, the United States District Court for the Northern District of Georgia found held in favor of the Appellee Common Cause and Granted Appellee's Motion for an emergency Temporary Restraining Order and Expedited Discovery. The court determined that this remedy was necessary and warranted, based on the nature of the evidence in the record, the fundamental importance of the interest of the voters that cannot be remedied after final certification, and the urgency of the situation. The remedy has been narrowly crafted and does not disturb the status quo for election certification deadline.

The Supreme Court has asked the parties to address the following issues:

1. Whether Ga.Code Section 21-2-418, 419, which states provisional ballots will not be counted for voters whose names are not found on the voter registrations list, denies the right of eligible Georgia citizens to vote in violation of the Fourteenth Amendment's Due Process Clause?
2. Whether the District Court erred in granting the Temporary Restraining Order requested by appellee COMMON CAUSE GEORGIA.\

**Cases for addressing issues:**

1(a). *United States v. Classic*, 313 U.S.299, (1941). (Historical grounds for what the law protects)

1(b). *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 2008. (More recent work of how a law can infringe)

2(a). *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, (11<sup>th</sup> Cir. 2008). (Who can bring a claim)

2(b). *McDonald's Corp v. Robertson*, 127 F.3d 1301, (11th Cir. 1998). (What is must prove)