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

Fer-Rell Malone, Sr., et al.,

Plaintiffs,

vs.

Brad Raffensperger, in his official capacity as Secretary of State of the State of Georgia,

Defendant.

Case No. _____

Plaintiffs' Motion for a Temporary Restraining Order

The plaintiffs respectfully move the Court for a temporary restraining order prohibiting the Secretary of State from enforcing Georgia's requirement that circulators of a recall petition be registered voters eligible to vote in the recall election. That requirement, enacted in 1989, is patently unconstitutional under the Supreme Court's decision in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), and a mountain of other cases.

An expedited decision is necessary in this matter because of the short deadlines involved in a recall petition—in this instance, the plaintiffs have only 45 days to collect the tens of thousands of signatures they need. The plaintiffs therefore need to begin organizing petition circulators immediately in order to have any chance of success.

Background[1]

This is an action challenging the constitutionality of Georgia's requirement that circulators of a recall petition be registered voters eligible to vote in the recall election. The plaintiffs are proponents of a petition to recall the District Attorney for the Waycross Judicial Circuit, George E. Barnhill, who was involved in the investigation of the fatal shooting of Ahmaud Arbery. The plaintiffs allege that the voter-registration requirement, which requires circulators of their recall petition to be registered voters in the Waycross Judicial Circuit, unconstitutionally burdens their rights under the First and Fourteenth Amendments to the U.S. Constitution, and they seek declaratory and

[1] Unless otherwise noted, all facts come from the verified complaint filed with this motion.

injunctive relief prohibiting the Secretary of State from enforcing that requirement here.

I. The Killing of Ahmaud Arbery and the Misconduct of District Attorney George Barnhill

Ahmaud Arbery was a 25-year-old African-American resident of Glynn County, Georgia. On February 23, 2020, an unarmed Arbery was fatally shot while jogging in the Satilla Shores neighborhood near Brunswick, Georgia. Arbery had been pursued and confronted by two white men, Travis McMichael and his father Gregory McMichael, who were armed and driving a pickup truck. A third white man, William "Roddie" Bryant, was following Arbery in a second vehicle and recorded the fatal shooting on video.

On February 24, the District Attorney for the Waycross Judicial Circuit, George Barnhill, who had not yet been assigned to the case, advised the Glynn County Police Department to make no arrests in the case. Barnhill officially took over the case on February 27, 2020, after the Brunswick District Attorney recused herself from the case due to connections between her office and Gregory McMichael.

On April 2, in a letter announcing his intention to recuse himself from the case due to ties between Gregory McMichael and Barnhill's son, Barnhill again advised the Glynn County Police Department to make no arrests. Five days later, Barnhill officially requested recusal due to the conflict and asked Georgia's Attorney General, Chris Carr, to assign another prosecutor. In his recusal request, Barnhill indicated that he had learned of the conflict "about 3-4 weeks ago."[2]

On May 5, video of the Arbery shooting was posted online and quickly went viral. The Georgia Bureau of Investigation arrested the McMichaels two days later and charged them with felony murder and aggravated assault.

Barnhill's handling of the Arbery case sparked national outrage. On May 9, the National District Attorneys Association issued a statement condemning Barnhill's handling of the Arbery case, and particularly his April 2 letter opining on the case after he determined that he had a conflict of interest. The next day, Attorney General Carr asked the U.S. Department of Justice to conduct an investigation into

[2] *Carr Requests DOJ to Conduct Investigation into Handling of Ahmaud Arbery Case* (May 10, 2020), https://law.georgia.gov/press-releases/2020-05-10/carr-requests-doj-conduct-investigation-handling-ahmaud-arbery-case.

the handling of the Arbery case by Barnhill. Two days later, Attorney General Carr asked the Georgia Bureau of Investigation to launch a similar investigation into the conduct of the District Attorneys for the Brunswick and Waycross Judicial Circuits.

Shortly thereafter, residents of the Waycross Judicial Circuit led by Pastor Fer-Rell Malone, Sr., launched an effort to recall Barnhill because of his misconduct in the Arbery case.

II. An Overview of Georgia's Recall Process

The Recall Act of 1989, which is codified in Chapter 4 of Title 21 of the Georgia Code, sets forth the procedures for the recall of state and local elected officials. *See* O.C.G.A. §§ 21-4-1, -2. Under the act, the recall of any official is a three-step process. First, citizens must successfully file an application for a recall petition. Second, citizens must successfully file a recall petition. And, third, the voters must vote to recall the official in a recall election.

In the first step, proponents of a recall must obtain an application for a recall petition from the appropriate election superintendent. O.C.G.A. § 21-4-5(b)(2). For the Barnhill recall, the appropriate election superintendent is the Secretary of State. O.C.G.A. § 21-4-3(3)(A).

Proponents of the recall then have 15 days within which to circulate the application and to obtain the signatures of a certain number of sponsors of the petition, each of whom must have been registered and eligible to vote in the last election for the official to be recalled. O.C.G.A. §§ 21-4-5(f), 21-4-3(9). For the Barnhill recall, proponents need 100 sponsors. O.C.G.A. § 21-4-5(c). The election superintendent then has 5 days to review the application. O.C.G.A. § 21-4(f)(2).

If the election superintendent determines that an application contains the required number of signatures and otherwise meets the legal requirements, the superintendent issues a recall petition. O.C.G.A. § 21-4-5(h). Proponents of the recall then have a certain number of days to circulate the petition and to obtain the required number of signatures of registered voters who would be eligible to vote in the recall election. For the Barnhill recall, proponents have 45 days to obtain signatures equal to at least 30 percent of the registered voters in Barnhill's last election—a figure that is estimated to be approximately 22,000 registered voters. O.C.G.A. §§ 21-4-11(2), 21-4-11, 21-4-8(a). The election superintendent then has 30 days to review the petition. O.C.G.A. § 21-4-11(a).

If the election superintendent determines that a petition contains the required number of signatures and otherwise meets the legal requirements, the superintendent notifies the Governor or other appropriate official who calls a recall election. O.C.G.A. § 21-411(d). The question of whether to recall the official is then put to the voters, and if more than half of the votes cast on the question are in favor of the recall, the office immediately becomes vacant. O.C.G.A. § 21-4-13(f).

III. The Voter-Registration Requirement

The Recall Act of 1989 provides that "no person other than an elector of the electoral district of the officer sought to be recalled shall circulate a recall application or petition." O.C.G.A. § 21-4-10. All signatures obtained by any person who is not qualified to circulate a recall petition "shall be void and shall not be counted in determining the legal sufficiency of the petition." *Id.* The petition form includes an affidavit that must be signed by the circulator attesting that he or she is "an elector registered to vote in the recall election herein petitioned for." O.C.G.A. § 21-4-8(e). The circulator must also provide his or her residential address. The Recall Act defines "elector" as "any person who

possesses all of the qualifications for voting … and who has registered in accordance with Chapter 2 of this title." O.C.G.A. § 21-4-3(4).

As a result of these provisions, no person who is not a registered voter in the Waycross Judicial Circuit may lawfully circulate the Barnhill petition. Any signatures obtained by such a person will not be counted by the Secretary of State.

IV. The Barnhill Recall Petition

Proponents of the Barnhill recall obtained a recall application from the Secretary of State on Monday, June 8, 2020. They have circulated the application in the Waycross Judicial Circuit and have obtained the signatures of approximately 200 sponsors. They have an appointment with the Secretary of State's office to submit the recall application at 3:00 p.m. on Monday, June 15, 2020. They plan to begin circulating the petition as soon as the Secretary approves their application, which could be anytime thereafter, but no later than Monday, June 22, 2020, unless the recall application is challenged in court. *See* O.C.G.A. § 21-4-6 (providing for review of the grounds for a recall petition). And they need to begin organizing petition circulators immediately.

Because of the large number of signatures required and the relatively short time within which to obtain them, proponents of the Barnhill petition believe that they will need to use circulators who are not registered voters in the Waycross Judicial Circuit in order to obtain enough signatures to be assured that the petition will succeed. In addition, because the Arbery case gained national attention, and because of on-going nationwide protests over the brutal killings of other unarmed African Americans such as George Floyd, Breonna Taylor, and Rayshard Brooks, proponents of the Barnhill petition regard their efforts as part of a national movement for racial justice. The recall petition is a part of that movement, and they want to enlist other supporters of the movement in circulating their petition even if the supporters are not registered voters in the Waycross Judicial Circuit.

Circulating the Barnhill recall petition will involve interactive communication concerning political change. Specifically, circulators will educate potential signers about Barnhill's misconduct, its connection to the racial-justice movement, and why removing Barnhill from office is important for that movement.

Georgia's voter-registration requirement for recall-petition circulators reduces the number of persons, both volunteer and paid circulators, who would otherwise be in the pool of potential circulators. It excludes millions of potential circulators in Georgia alone and hundreds of millions of potential circulators across the nation. It likely excludes more than 99 percent of potential circulators.

Legal Standard

A plaintiff seeking a temporary restraining order must demonstrate that: (1) there is a substantial likelihood of success on the merits; (2) it will suffer irreparable injury if relief is not granted; (3) the threatened injury outweighs any harm the requested relief would inflict on the non-moving party; and (4) entry of relief would serve the public interest. *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Windsor v. United States*, 379 F. App'x 912, 916-17 (11th Cir. 2010) (standard for obtaining TRO is identical to that for a preliminary injunction).

Discussion

I. The plaintiffs are highly likely to succeed on the merits.

To determine whether Georgia's voter-registration requirement for recall-petition circulators violates the First and Fourteenth Amendments, this Court must apply the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983):

> First, a court must evaluate the character and magnitude of the asserted injury to rights protected by the First and Fourteenth Amendments. Second, it must identify the interests advanced by the State as justifications for the burdens imposed by the rules. Third, it must evaluate the legitimacy and strength of each asserted state interest and determine the extent to which those interests necessitate the burdening of the plaintiffs' rights.

Bergland v. Harris, 767 F.2d 1551, 1553-54 (11th Cir. 1985) (paraphrasing *Anderson*); *accord Buckley,* 525 U.S. at 187.

Under this test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of the scale, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460

U.S. at 788, 788-89 n.9). But when the law places "severe" burdens on the rights of political parties, candidates, or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id*. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

The plaintiff bears the burden of proof on the first step in the *Anderson* test, and the defendant bears the burden on the second and third. *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Nader v. Brewer,* 531 F.3d 1028, 1039-40 (9th Cir. 2008); *Lopez Torres v. New York State Bd. of Elections,* 462 F.3d 161, 203 (2d Cir. 2006), *rev'd on other grounds* 552 U.S. 196 (2008); *Patriot Party v. Allegheny Cnty. Dept. of Elections*, 95 F.3d 253, 267-68 (3d Cir. 1996).

A. The Character and Magnitude of the Injury

The First Amendment provides that Congress "shall make no law … abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." This amendment protects "the right of individuals to associate for the advancement of political beliefs," *Williams v. Rhodes,* 393 U.S. 23, 30 (1968), as well as the right "freely to engage in

discussions concerning the need for [political] change," *Meyer v. Grant*, 486 U.S. 414, 421 (1988). It also "protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Id.* at 424. The Fourteenth Amendment makes the First Amendment applicable to the State of Georgia.

The circulation of a recall petition involves speech that is protected by the First Amendment. It "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer*, 486 U.S. at 421. As a result, "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'," where the protection of the First Amendment is "at its zenith." *Id.* at 422, 425.

Georgia's voter-registration requirement for circulators of a recall petition burdens core political speech in at least two ways. First, "it limits the number of voices who will convey" the messages of the Barnhill recall, "and, therefore, limits the size of the audience they can reach." *Id.* at 422-23. Second, "it makes it less likely that [proponents of the Barnhill recall] will garner the number of signatures necessary to

place the matter on the ballot, thus limiting their ability to make the matter the focus of … discussion." *Id.* at 423. *See also Buckley*, 525 U.S. at 194-95.

Those burdens are unquestionably severe and warrant strict scrutiny. In 1999—ten years after the General Assembly adopted the voter-registration requirement at issue here—the Supreme Court addressed a nearly identical voter-registration requirement for initiative petition circulators in *Buckley* and concluded that strict scrutiny should apply because the requirement impinged upon core political speech. 525 U.S. at 192 n.12; *see also Bogaert v, Land*, 572 F. Supp. 2d 883, 897-901 (W.D. Mich. 2008) (applying *Meyer* and *Buckley* in the context of a recall petition). Since then, "a consensus has emerged" among the circuit courts that even less restrictive residency requirements for petition circulators are also subject to strict scrutiny analysis because they necessarily implicate core political speech.[3] *Wilmoth v. Sec'y of New Jersey*, 731 F. App'x 97, 102 (3d Cir. 2018) (applying strict scrutiny to New Jersey's residency requirement for circulators of nomination

[3] Residency requirements generally mandate that a petition circulator be a resident of a particular jurisdiction but do not require the circulator to be a registered voter in the jurisdiction.

petitions). *See Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 316–17 (4th Cir. 2013) (applying strict scrutiny to Virginia's residency requirement for circulators of nomination petitions); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1030–31 (10th Cir. 2008) (applying strict scrutiny to Oklahoma's residency requirement for circulators of initiative petitions); *Nader v. Blackwell*, 545 F.3d 459, 475–76 (6th Cir. 2008) (applying strict scrutiny to Ohio's residency requirement for circulators of nomination petitions); *Nader v. Brewer*, 531 F.3d 1028, 1038 (9th Cir. 2008) (applying strict scrutiny to Arizona's residency requirement for circulators of nomination petitions); *Chandler v. City of Arvada, Colo.*, 292 F.3d 1236, 1241 (10th Cir. 2002) (applying strict scrutiny to a city's residency requirement for circulators of initiative, referendum, and recall petitions); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616–17 (8th Cir. 2001) (applying strict scrutiny review to North Dakota's residency requirement for circulators of initiative petitions); *Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 146 (2d Cir. 2000) (applying strict scrutiny to New York's residency requirement for circulators of nomination petitions).

Under *Buckley*, and because Georgia's voter-registration requirement restricts core political speech, strict scrutiny is warranted here.

B. Asserted State Interests and Narrow Tailoring

Because Georgia's voter-registration requirement for recall-petition circulators imposes a severe burden on core political speech, the Secretary of State has the burden of demonstrating (1) that Georgia's asserted interests in upholding the constitutionality of the requirement are compelling; and (2) that the requirement is narrowly tailored to advance those interests. Although it remains to be seen what interests, if any, the Secretary will assert to justify the challenged requirement, he faces a burden that the Supreme Court has described as "well-nigh insurmountable." *Meyer*, 486 U.S. at 425.

The Secretary's burden, moreover, cannot be met with mere conjecture. Although a State need not present "elaborate, empirical verification" of the weight of its purported verification with then burden is moderate, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997), it must come forward with compelling evidence when the burden

is heavier, *see Buckley*, 525 U.S. at 203-04; *Meyer*, 486 U.S. at 425-28. *See, e.g., Wilmoth*, 731 F. App'x at 103-05.

Here, Georgia's voter-registration requirement for recall-petition circulators serves no obvious purpose except to limit the means and quantum of speech. And any legitimate purposes can likely be achieved through less restrictive means, as the Secretary has broad rule-making power under the Recall Act. O.C.G.A. § 21-4-17.

In short, because enforcement of Georgia's voter-registration requirement for recall-petition circulators is not narrowly tailored to advance a compelling state interest, it is highly likely that the plaintiffs will succeed on the merits of their claim.

II. The plaintiffs will suffer irreparable harm in the absence of a preliminary injunction.

Harm is irreparable for purposes of a preliminary injunction when "it cannot be undone through monetary means." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981). Harms that touch upon the constitutional and statutory rights of political parties, candidates, and voters are generally not compensable by money damages and are therefore considered irreparable. *See, e.g., Elrod v. Burns*, 427

U.S. 347 373 (1976) (plurality opinion); *League of Women Voters v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *Ga. State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1347 (N.D. Ga. 2015). *See also Cate v. Oldham*, 707 F.2d 1176, 1188-89 (11th Cir. 1983) (direct penalization of First Amendment rights constitutes irreparable injury).

In this case, the irreparable nature of the injuries is obvious. Money cannot compensate the plaintiffs for restricting their core political speech. It cannot compensate them for limiting the size of their audience, denying them the opportunity to join their efforts with the racial-justice movement outside of the Waycross Judicial Circuit, and making it less likely that the Barnhill recall petition will succeed. If their petition does not succeed, they must wait at least six months before trying again, O.C.G.A. § 21-4-14(b), and the current political moment may have changed.

Time, moreover, is of the essence. Proponents of the Barnhill recall will have only 45 days to collect tens of thousands of signatures. They need to begin organizing an army of circulators immediately.

This *Winter* factor therefore weighs in favor of granting the injunction.

III. The balance of harms favors the plaintiffs.

The third *Winter* factor requires the Court to consider the potential impact that the requested injunction might have upon the Secretary of State, and to balance that potential with the considerable and irreparable harms that the plaintiffs would suffer should their request be denied. There is no question that the balance of equities tips in the plaintiffs' favor here.

The Secretary of State will suffer no harm if the injunction is granted. It will have no impact on his ability to verify recall-petition signatures. Nothing unusual or additional would be required of the Secretary.

IV. A preliminary injunction would serve the public interest.

The public interest in this case is clear. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1131–32 (10th Cir. 2012)),

aff'd 134 S. Ct. 2751 (2014); *accord League of Women Voters of N.C.,* 769 F.3d at 247. The requested injunction will also make it more likely that voters in the Waycross Judicial Circuit have the opportunity to vote on Barnhill's recall—a matter which, if the petition garners enough signatures, is obviously of substantial public concern. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (recognizing the public has a "strong interest in exercising the fundamental political right to vote" (citations omitted)). The requested injunction, if granted, would therefore favor the public interest.

Conclusion

For the foregoing reasons, the Court should issue a temporary restraining order enjoining the Secretary of State from enforcing Georgia's voter-registration requirement for circulators of the Barnhill recall petition.

Respectfully submitted this 15th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER was prepared in 13-point Century Schoolbook in compliance with Local Rules 5.1(C) and 7.1(D).

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2020, I electronically filed the foregoing PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

[none]

I have also sent a copy of this filing by email to Russell Willard, Senior Assistant Attorney General and Section Chief for Government Services and Employment in the Office of Attorney General Chris Carr (rwillard@law.ga.gov) and to Ryan Germany, General Counsel for Secretary of State Brad Raffensperger (rgermany@sos.ga.gov).

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