

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

Fer-Rell Malone, Sr., an individual, **Oneida Oliver-Sanders**, an individual, and **Natasha Fabian**, an individual,

Plaintiffs,

vs.

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

Defendant.

Case No.

Verified Complaint

Nature of the Case

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

Jurisdiction and Venue

2. This Court has original jurisdiction over this case under Article III of the U.S. Constitution and 28 U.S.C. §§ 1331 and 1343(a)(3).

3. This suit is authorized by 42 U.S.C. § 1983.

4. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in the Northern District of Georgia under 28 U.S.C. § 1391(b) and in the Atlanta Division under Local Rule 3.1.

Parties

6. Plaintiff Fer-Rell Malone, Sr. is an African-American resident and registered voter within the Waycross Judicial Circuit. He is the designated chairperson of the petition to recall Barnhill.

7. Plaintiff Oneida Oliver-Sanders is a African-American resident and registered voter within the Waycross Judicial Circuit. She is a sponsor of the petition to recall Barnhill.

8. Plaintiff Natasha Fabiene is an African-American resident and registered voter in Henry County, which is not within the Waycross Judicial Circuit. She is a supporter of the petition to recall Barnhill and wants to be able to circulate the petition within the Waycross Judicial District.

9. Defendant Brad Raffensperger is the Secretary of State of the State of Georgia (hereinafter, the “Secretary”). He is charged by statute with enforcing the voter-registration requirement for the petition to recall Barnhill. When enforcing the voter-registration requirement, the Secretary exercises his authority under color of state law within the meaning of 42 U.S.C. § 1983. He is sued in his official capacity only.

Background

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

10. Ahmaud Arbery was a 25-year-old African-American resident of Glynn County, Georgia.

11. On February 23, 2020, an unarmed Arbery was fatally shot while jogging in the Satilla Shores neighborhood near Brunswick, Georgia.

12. 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.

13. A third white man, William “Roddie” Bryant, was following Arbery in a second vehicle and recorded the fatal shooting on video.

14. On February 24, 2020, 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.

15. 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.

16. On April 2, 2020, 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.

17. On April 7, 2020, 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."

18. On May 5, 2020, video of the Arbery shooting was posted online and quickly went viral.

19. The Georgia Bureau of Investigation arrested the McMichaels two days later and charged them with felony murder and aggravated assault.

20. Barnhill's handling of the Arbery case sparked national outrage.

21. On May 9, 2020, 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.

22. On May 10, 2020, Attorney General Carr asked the U.S. Department of Justice to conduct an investigation into 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.

23. 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

24. 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.

25. 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.

26. 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).

27. 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).

28. The election superintendent then has 5 days to review the application. O.C.G.A. § 21-4(f)(2).

29. 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).

30. 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).

31. The election superintendent then has 30 days to review the petition. O.C.G.A. § 21-4-11(a).

32. 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. § 21-4-11(d).

33. 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

34. 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.*

35. 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.

36. 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).

37. 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

38. 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.

39. Proponents of the Barnhill recall 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). They need to begin organizing petition circulators immediately.

40. 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.

41. 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.

42. 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.

43. 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.

Relief

44. A real and actual controversy exists between the parties.

45. The plaintiffs have no adequate remedy at law other than this action for declaratory and equitable relief.

46. The plaintiffs are suffering irreparable harm as a result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

Claim One

47. Georgia's voter-registration requirement for circulators of a recall petition violates rights guaranteed to these plaintiffs by the First and Fourteenth Amendments to the U.S. Constitution, as enforced by 42 U.S.C. § 1983.

WHEREFORE, the plaintiffs respectfully pray that this Court:

- (1) assume original jurisdiction over this case;
- (2) enter a declaratory judgment that Georgia's voter-registration requirement for circulators of a recall petition violates rights guaranteed to these plaintiffs by the First and Fourteenth Amendments to the U.S. Constitution, as enforced by 42 U.S.C. § 1983;
- (3) enjoin the Secretary of State from enforcing O.C.G.A. §§ 21-4-10 and 21-4-8(e) to the extent that they require circulators of the

Barnhill recall petition to be qualified electors in the Waycross
Judicial Circuit in order for signatures to be counted;

(4) award the plaintiffs the costs of this action together with their
reasonable attorneys' fees and expenses under 42 U.S.C. § 1988;

and

(5) retain jurisdiction of this action and grant the plaintiffs any
further relief which may in the discretion of the Court be
necessary and proper.

Respectfully submitted this 15th day of June, 2020.

/s/ Bryan L. Sells

Attorney Bar No. 635562

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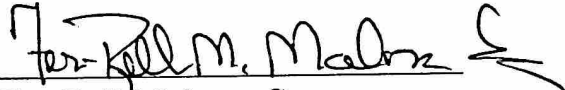
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Verification

Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury that the facts contained in the foregoing VERIFIED COMPLAINT are true and correct. Executed this 14th day of June, 2020.



Fer-Rell Malone, Sr.
Waycross, Georgia

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2020, I electronically filed the foregoing COMPLAINT 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).

/s/ Bryan L. Sells

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