DOCKET NO. 16-15880-PJM

UNITED STATES COURT OF APPEALS
FOR THE
ELEVENTH CIRCUIT

ROQUE "ROCKY" DE LA FUENTE

Plaintiff-Appellant,

v.

BRIAN P. KEMP,
in his official capacity as
Secretary of State of the State of Georgia

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
IN CIVIL DOCKET FOR CASE #: 1:16-CV-02937-MHC

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Appellant Roque "Rocky" De La Fuente hereby certifies that the following persons have an interest in the outcome of this case:

Benavidez, Nora M., Attorney for Plaintiff/Appellant

Cohen, Hon. Mark H., District Court Judge

De La Fuente, Roque, Plaintiff/Appellant

Heidt, Josiah B., Attorney for Defendant/Appellee

Kemp, Brian P., Secretary of State, Defendant/Appellee

Olens, Samuel S., Attorney for Defendant/Appellee

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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents for the Court's consideration a fundamental question of constitutional law in the context of a hotly contested presidential election. This Court has previously found election law cases of particular import that ought to be given uniquely thorough review. For these reasons, the Plaintiff/Appellant respectfully suggests that oral argument would be of assistance to the Court in resolving these important constitutional issues.

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STATEMENT OF JURISDICTION

The United States Courts of Appeals have jurisdiction over appeals from interlocutory orders of the district courts of the United States refusing to grant requests for preliminary injunction relief under 28 U.S.C. § 1292 (a)(1). The district court had subject-matter jurisdiction because this case presents a federal question. 28 U.S.C. § 1331.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it denied the Plaintiff/Appellant's motion for a preliminary injunction based on a finding that Georgia's early deadline for an independent presidential candidate to file a slate of presidential electors is justified by the State's important regulatory interests.

STATEMENT OF THE CASE

Georgia is the only State in the nation that requires independent candidates for President of the United States to file their slate of presidential electors before August 1 of the presidential election year. ECF 1:6; 9-2:3.[1]

[1] In its opinion, the district court relies on a website for its finding that four states have an earlier deadline. ECF 21 at 15 n.11. However, it is readily apparent that the court was mistaken. The page it cites contains a listing of the deadlines for an independent presidential candidate to file a nominating petition, not a slate of electors. There is no evidence in the record to support the district court's finding, and counsel for De La Fuente is unaware of any

Under O.C.G.A. § 21-2-132 (d)(1), the deadline this year was 12:00 Noon on July 1, 2016.

In this presidential cycle, Georgia's deadline came just three weeks after the final round of primary elections at which the presidential nominees of the Democratic and Republican parties finally became clear, and it came almost a month before those candidates, Hillary Clinton and Donald Trump, were officially nominated at their party conventions.

Georgia's early filing deadline is purely ministerial. Georgia does not print the names of any presidential electors on its general election ballots, and the filing does not trigger any other administrative or regulatory function. ECF 1:6-7.

Georgia also requires independent presidential candidates to file a nominating petition signed by a sufficient number of registered voters. O.C.G.A. § 21-2-170. This year, that number was 7,500,[2] and the deadline was 12:00 Noon on July 12, 2016.

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state other than Georgia that requires an independent presidential candidate to file a final slate of presidential electors before August 1 of the presidential year.

[2] In *Green Party of Ga. v. Kemp*, No. 1:12-CV-1822-RMS, 2016 WL 1057022, at *26 (N.D. Ga. Mar. 17, 2016), the Secretary of State was permanently enjoined from enforcing the signature requirement set out in O.C.G.A. § 21-2-170, and the court afforded interim equitable relief so that a candidate for President of the United States "may access the ballot by

Appellant Roque "Rocky" De La Fuente is an independent presidential candidate whose name is on the general election ballot in more than 22 states. ECF 1:4; 18-1:1-2. He mounted a petition drive in Georgia and submitted petitions containing approximately 15,000 signatures to the Appellee, Georgia Secretary of State Brian P. Kemp, on July 12, 2016. ECF 18-1:2. He also submitted his slate of presidential electors on the same day. *Id.* The Secretary of State accepted De La Fuente's petitions but rejected his slate of electors as untimely. *Id.*

After a subsequent attempt at negotiation failed, De La Fuente filed this action on August 12. ECF 1. He claims that Georgia's deadline for an independent presidential candidate to file a slate of electors violates rights guaranteed to him by the First and Fourteenth Amendments to the United States Constitution. ECF 1:8. He sought preliminary injunctive relief requiring the Secretary to accept his slate of electors.

After a hearing, the district court denied De La Fuente's motion for preliminary relief on August 30. ECF 21. In evaluating De La Fuente's claim, the court applied the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 429 (1992). It found that Georgia's early deadline did not impose a severe

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submitting 7,500 signatures on a petition that otherwise complies with Georgia law." *Id*.

burden on De La Fuente because it fell (1) after Georgia's presidential preference primary and (2) after the final primary election at which the major parties' nominees became known. ECF 21:13-14. The court also found that the deadline was justified by Georgia's important regulatory interests. ECF 21:20. The court did not, however, indicate precisely what those interests are, nor did it explain how those interests are served by the early deadline.

The court identified five interests asserted by the Secretary of State to justify the early deadline:

- The need for election ballots to be timely and accurately prepared by Kennesaw State University's Center of Elections System ("KSU") and provided to Georgia's 159 county election officials.

- Requiring candidates to submit their notices of candidacy eleven days prior to the deadline for submission of nomination petitions allows counties to "know how many petitions to expect so they can prepare for the additional workload, which can be substantial."

- The Secretary of State needs sufficient time to sort the pages of a nomination petition by county, and then scan and forward all pages to the appropriate county so that county registrars can verify each signature verify signatures on nominating petitions.

- The verification of signatures on nomination petitions can take one to five weeks to complete, depending on the number of signatures submitted.

- County election officials are required to transmit absentee ballots for the presidential election to any Georgia military or overseas civilian voter by no later than forty-five days prior to the date of the election, which for this year's November 8, 2016, general election would be no later than Friday, September 23, 2016. *See* 52 U.S.C. § 20301 *et seq.* (requiring that an absentee ballots be transmitted to military and civilian overseas voters no later than forty-five days prior to any federal election).

ECF 21:17-18 (footnotes omitted). The district court did not indicate which of these asserted interests justifies the early deadline, and its opinion contains no analysis or citation to the record linking any of the interests to the early deadline in any functional or commonsense way.

At the hearing on De La Fuente's motion for a preliminary injunction, counsel for the Secretary of State also could not articulate a link between Georgia's early deadline and any of the asserted interests: "[T]hese deadlines are necessarily somewhat arbitrary. That the state has an interest in setting them at some point. A deadline had to be chosen." ECF 28:20-21. When asked by the district court whether there is anything in the Secretary's affidavits to explain why the July 1 deadline is necessary, the Secretary's attorney replied, "no." *Id.* at 19.

De La Fuente appealed the district court's order on September 2.[3] ECF 22. He sought an emergency injunction pending appeal in this Court, but the emergency motions panel denied the injunction in a one-sentence order.

STANDARD OF REVIEW

The denial of a motion for preliminary injunctive relief is reviewed by this Court for an abuse of discretion. *Siegel v. Lepore*, 234 F.3d 1163 (11th Cir. 2000); *Mitek Holdings, Inc. v. Arce Engag. Co., Inc.*, 189 F.3d 840, 842 (11th Cir. 1999). By definition, an abuse of discretion is committed when the district court makes an error of law. The district court strays outside its range of permissible decision-making and commits an abuse of its discretion when it fails to consider a relevant factor that should be given significant weight. *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005).

SUMMARY OF THE ARGUMENT

Because they implicate fundamental constitutional rights, State restrictions on ballot access—particularly in presidential elections—must have some justification in fact. The severity of those restrictions will dictate

[3] De La Fuente is also challenging the Secretary of State's review of his nominating petition. That case is currently pending in state court. *De La Fuente v. Kemp*, Docket No. S17A0424 (Ga., Oct. 17, 2016).

how compelling that justification must be and how narrowly-tailored the restriction must be to achieve that justification. But even at the low end of the sliding scale of constitutional scrutiny in ballot-access cases, a court must identify the precise state interests involved and consider the extent to which those interests make the restrictions necessary.

In this case, the district court realized that Georgia's filing deadline for presidential electors is arbitrary because counsel for the Secretary of State conceded that it was. That should have ended this matter. Instead, the district court found, without any support whatsoever in the record, that the filing deadline for presidential electors is justified by asserted interests that have nothing to do with presidential electors. In so finding, the court failed to fulfill its obligation under the relevant balancing test, and its finding is clearly erroneous.

Moreover, in accepting validity of the State's asserted interests without any support in the record, the district court ran afoul of the Supreme Court's recent analysis in *Whole Woman's Health v Hellerstedt*, ___U.S.____ (June 27, 2016), that courts must affirm the constitutional burden placed on a plaintiff absent evidence offered by a responding party to bolster a state's argument.

Finally, this case is a near re-run of *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985), where this Court reversed the lower court's grant of defendant's motion to dismiss the challenge to Georgia's July election deadlines to submit election petitions and papers because the state failed to offer any evidence in support of the asserted state interest sufficient to impose early July election deadlines. Accordingly, in the absence of any evidence in support of a state interest to impose an early July 1 deadline on independent candidates to file their slate of presidential electors, the court below abused its discretion in denying appellant's emergency motion for injunctive relief.

ARGUMENT

Restrictions on access to the ballot implicate two fundamental rights: "the right of individuals to association for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23. 30 (1968). Limitations on these rights "strike at the heart of representative government" and must be carefully examined. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Ordinarily, state laws that impinge upon fundamental liberties are automatically subject to strict judicial scrutiny. *See, e.g., Shapiro v.*

Thompson, 394 U.S. 618 (1969). The Supreme Court has recognized, however, that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). For this reason, the Court has adopted a special balancing test for evaluating constitutional claims against state election laws, all of which inevitably affect the fundamental rights of political parties, candidates, and voters:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. 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.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). 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)).

I. The interests asserted to justify Georgia's early filing deadline have no connection to a slate of presidential electors.

The district court in this case found itself in a pickle. The court properly recognized that the *Anderson/Burdick* balancing test requires even mild restrictions on the fundamental right to vote to be justified by important state interests. But it apparently could think of no justification for requiring an independent presidential candidate to file a slate of presidential electors so far in advance of the election when those electors are not even printed on the ballot:

> THE COURT: … So the question becomes, even doing the *Anderson Burdick* balancing test, even assuming I don't apply strict scrutiny, I mean it's got to be a reasonable regulation. Give me something to hang my hat on. I'm having a little trouble on it, I'll be honest with you.

ECF 28:20. In response, counsel for the Secretary of State essentially conceded that the deadline is "arbitrary." *Id.* at 20-21.

Rather than rely on the Secretary of State's position at oral argument, the district court found instead that the early deadline is justified by the State's "important regulatory interests." ECF 21: 18. The court listed the

interests set out in the Secretary's affidavits, *id.* at 17-18, but it did not indicate which of those interests meets the constitutional minimum.

In fact, none of them do. The first asserted interest is the need to prepare and print ballots. *Id.* at 17. But Georgia does not print the names of presidential electors on the ballot. There is simply no connection between ballot-printing and the name of the electors that requires a deadline so far in advance of when the ballots will actually be printed.

The second asserted interest is that the deadline gives counties advance notice of how many nominating petitions they can expect, so they can prepare for the additional workload. *Id.* at 17. Here again, there is no connection between a slate of electors and a county's workload in validating signatures on a nominating petition. A county's workload would be determined by how many signatures on the nominating petition are from voters residing in that county, something that cannot be known before the petition signatures are turned in. For example, if 10 slates of presidential electors are filed in the Secretary of State's office, there is no way to tell election officials in Clarke County what to prepare for. There is no way to tell from the slate of electors whether even a single signature will be coming their way.

The third asserted interest is that the Secretary of State needs to sort the nominating petition by county and then scan and email the appropriate pages to county officials. *Id.* at 17. This has nothing to do with the slate of electors whatsoever. Full stop.

The fourth asserted interest is that the verification of signatures on a nominating petition can take some time. *Id.* at 18. This, again, has nothing whatsoever to do with a slate of presidential electors. If anything, it suggests that a much later deadline for filing electors would be appropriate, because a slate would only be necessary if the petition contains enough valid signatures.

The fifth and final asserted interest to justify Georgia's July 1 deadline for filing a slate of presidential electors is the need to print absentee ballots by September 23. *Id.* at 18. This is merely a repeat of the first asserted interest, and it has nothing to do with presidential electors, whose names are not necessary to print the ballots.

Of course, the district court knew all of this, which is likely why it expressed such skepticism at oral argument and why it did not make any effort in its opinion to link the asserted interests to the early deadline for filing electors. There simply is no such link.

Under these circumstances, the district court's finding that Georgia's early deadline for filing a slate of presidential electors is justified by at least one of those five interests is clearly erroneous. There is no evidence in the record to support the finding, nor could there be. The court's conclusory treatment of the extent to which the State's interests *actually* justify the challenged restriction falls short of what *Anderson* and *Burdick* require. This Court should therefore reverse.

II. The State offered no evidence to support its asserted interest.

An asserted state interest, without more, is not enough to justify burdens on fundamental constitutional rights. The Supreme Court made that clear just a few months ago in *Whole Woman's Health v Hellerstedt*, 579 U.S. ____ (June 27, 2016).

In that case, the Supreme Court considered whether Texas' restrictive regulations for abortion clinics—which had prompted dozens of clinics from closing due to being unable to meet the restrictive requirements—created a burden to women seeking services. Unequivocally, the Texas law did place a burden on these women. Yet, the State was unable to produce evidence that the law advanced Texas' legitimate interest in protecting women's health. *Whole Woman's Health v Hellerstedt*, 579 U.S. ___ (2016) (slip op. at 28). To the contrary, the Supreme Court noted "when directly asked at

oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case." *Id.*

The State's problem here is nearly identical to that of Texas in *Whole Woman's Health*. Here, the Secretary of State failed to offer any evidence that the July 1 deadline for independent candidates to file their slate of presidential electors actually serves any state interest. Evidence was neither produced in the Secretary's brief nor at oral argument on the plaintiff's motion. The district court appeared to struggle with the dearth of evidence, questioning counsel for the Secretary:

> As I read your brief, the only reason you've got that 11-day gap between the two [deadlines] is that when you – when the state gets the list [of presidential electors], they could somehow I guess determine well, we're under 6 or we're over 10 and, counties, get ready. I mean, that's kind of nebulous to me. I just don't understand – that's your argument. I understand that. I don't see – was there anything in either of the affidavits that was filed that talks about why that's necessary.

See ECF 28:18-19. The Secretary's counsel responds: "That particular window, no." *Id.* at 19. When asked about the State's activities and oversight during that eleven day window between July 1 and July 12, the Secretary's counsel failed to offer any evidence that (1) Georgia does anything with the slate of presidential electors between July 1 and July 12 or that (2) Georgia takes any needed action between July 1 and July 12 to assist

in the verification of nominating petition signatures. The Secretary's counsel explained the asserted state interest in a July 1 deadline as the following:

> Well I think what's important in this context is the fact that what the Eleventh Circuit recognized in *Swanson*, and the Supreme Court has also recognized in the *Monroe* case, is that these deadlines are necessarily somewhat arbitrary. That the state has an interest an interest in setting them at some point. A deadline had to be chosen.

Id. at 20.

While deadlines need to be set in the context of election petitions and other filings, deadlines set so far in advance of the general election that they are not tethered to any interest in the printing of ballots or the orderly conduct of the election are unconstitutional without some evidence that the selected deadline advances or supports an important regulatory interest. Yet such evidence was never offered to the district court. Without that evidence it was an abuse of discretion for the district court to find that Georgia's early filing deadline is constitutionally justified.

III. This Court cast serious doubt on Georgia's early filing deadlines in *Bergland v. Harris.*

Courts have long held that early filing deadlines, particularly those for independent candidates, impose burdens on fundamental rights that outweigh important State regulatory interests. In fact, the Supreme Court found in *Anderson* that early filing deadlines impose national burdens that extend beyond the individual plaintiffs seeking ballot access. *Anderson*, 460 U.S. at 795. (Ohio's early filing deadline burdened Ohio voters and also placed a "state-imposed restriction on a nationwide electoral process.").

In *Bergland v. Harris*, 767 F.2d 1551 (1985), the Eleventh Circuit reversed and remanded the district court's dismissal of the plaintiff's claim that Georgia's July deadline to file nominating petitions was unconstitutionally early. Applying the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court explained that State's justification for the July filing deadline to "allow adequate time to process and verify signatures on the nominating petitions and to provide rejected applicants an opportunity to obtain judicial review" and the requirement to print ballots in "mid-September" to "send ballots to the counties in time for them to print their ballots and make absentee ballots available 21 days prior to the November general election" was inadequate, without further proof, to sustain the district court's dismissal of plaintiffs' claim.

After this Court's *Bergland* decision, the Georgia legislature cut the number of signatures for statewide office from 2.5% to 1% and *moved the deadline to file nominating petitions to August*. *See* 1986 Georgia Session Laws, Ch. 1517, p. 892-894. Then, after the *Bergland* litigation concluded on remand, the Georgia legislature moved the filing deadlines for independent candidates back to July, where they are now. Thus, the Georgia legislature moved the July deadline to August to moot out the constitutional challenge in *Bergland* and then moved the filing deadlines back to July after the federal lawsuit was concluded.

At least two things are clear from *Bergland.* First, proof is necessary. *Bergland* rejected the district court's ruling based on more proof than we have here. Second, July deadlines in Georgia are constitutionally suspect. Although *Bergland* dealt with deadline for filing a nominating petition and this case deals with the deadline for filing a slate of electors, the constitutional principles are the same. And if the State could not, as a matter of fact, justify its July 12 deadline for filing nominating petitions, it seems doubtful that it could justify an even earlier deadline here. Both of these lessons from *Bergland* support reversal in this case.

CONCLUSION

This Court should reverse the district court's ruling and remand the case for further proceedings to develop the record. The Court should also clarify that the district court must consider on remand the extent to which the State's asserted interests *actually* make it necessary to impose a July 1 deadline for filing a slate of presidential electors.

Dated: October 17, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32 of the Federal Rules of Appellate Procedure. The brief uses Times New Roman 14-point typeface and contains 4,316 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2016, I electronically filed the foregoing Appellant's Brief with the Eleventh Circuit Court of Appeals using the CM/ECF system, which will automatically send email notification of the filing to the following attorneys for the Appellee:

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