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

James L. "Jimmy" Cooper, III, et al.,

Plaintiffs,

vs.

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

Defendant.

Case No. 1:20-cv-01312-ELR

Plaintiffs' Motion for a Preliminary Injunction

The plaintiffs respectfully move the Court for a preliminary injunction prohibiting the Secretary of State from enforcing Georgia's signature requirements for independent and third-party candidates in light of the current public health emergency caused by the novel coronavirus.

Background

This lawsuit seeks to ensure that independent and third-party candidates have a reasonable opportunity to qualify for the ballot without endangering their own lives and the lives of others. Georgia's ballot-access laws require such candidates to submit nomination petitions containing many thousands of signatures gathered over a 180-day period. With the state on lockdown as a result of a global pandemic arising from a highly communicable infectious disease, they cannot lawfully or safely gather the signatures necessary to meet that requirement.

The plaintiffs are two third-party candidates and the Georgia Green Party. They have met, or will have met, all of Georgia's ballot-access requirements other than the petition. They allege that, under these unprecedented circumstances, Georgia's signature requirements unconstitutionally burden their rights under the First and Fourteenth Amendments to the U.S. Constitution, and they seek declaratory and injunctive relief for the 2020 general election.

I. The Novel Coronavirus Presents a Threat to Public Health

In December 2019, an outbreak of respiratory disease caused by a novel coronavirus emerged in Wuhan, China. (Ex. 1: Exec. Order 03.14.20.01 at 1.) It is an infectious disease, now known as "COVID-19," that can spread from person to person and can result in serious illness and death. (*Id.*) According to the Centers for Disease Control and Prevention, older adults (particularly those over 65) and people of any age who have serious underlying medical conditions (including asthma, heart disease, cancer, and diabetes) may be at higher risk for severe illness from COVID-19.[1]

On January 30, 2020, after the coronavirus outbreak had spread well beyond China, the World Health Organization (WHO) declared that COVID-19 constituted a Public Health Emergency of International Concern. (Ex. 14: WHO statement at 4.) The next day, as a result of confirmed cases of COVID-19 in the United States, Health and Human Services Secretary Alex M. Azar II declared a nationwide public health

[1] Centers for Disease Control and Prevention, *People Who Are at Higher Risk for Severe Illness*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited May 8, 2020).

emergency retroactive to January 27, 2020. (Ex. 16: Azar determination.)

Immediately thereafter, public health officials in the United States began taking aggressive measures to stop the spread of the disease.[2] They began to warn the public about the possibility of severe disruption from COVID-19 outbreaks in the United States, and they urged cities and towns to begin preparing for social-distancing measures like school closures and meeting cancellations.[3]

On March 11, the World Health Organization declared COVID-19 to be a global pandemic. (Ex. 15: WHO director's remarks at 2.) Two days later, the President of the United States declared a national emergency (retroactive to March 1, 2020) due to the COVID-19 outbreak in the United States. (Ex. 17: Presidential Proclamation at 2.)

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[2] *See, e.g.,* Julie Bosman and Denise Grady, *U.S. Officials Promise 'Aggressive Measures' to Contain Coronavius*, N.Y. Times, Feb. 3, 2020, *available at* https://nyti.ms/2Or1seZ; Shraddha Chakradhar, *To fight coronavirus spread, the U.S. may expand 'social distancing' measures. But it comes at a cost*, STAT, Feb. 3, 2020, *available at* https://www.statnews.com/2020/02/03/coronavirus-spread-social-distancing-us/.

[3] *See, e.g.,* Helen Branswell, *CDC director: More person-to-person coronavirus infections in U.S. likely, but containment still possible,* STAT, Feb. 12, 2020, *available at* https://www.statnews.com/2020/02/12/cdc-director-more-person-to-person-coronavirus-infections-in-u-s-likely-but-containment-still-possible/; Peter Belluck and Noah Weiland, *C.D.C. Officials Warn of Coronavirus Outbreaks in the U.S.,* N.Y. Times, Feb. 25, 2020, *available at* https://nyti.ms/2uu1r30; Megan Thielking, *CDC expects 'community spread' of coronavirus, as top official warns disruptions could be 'severe'*, STAT, Feb. 25, 2020, *available at* https://www.statnews.com/2020/02/25/cdc-expects-community-spread-of-coronavirus-as-top-official-warns-disruptions-could-be-severe/.

On March 14, Georgia Governor Brian Kemp declared a Public Health State of Emergency in the State of Georgia due to the public health emergency from the spread of COVID-19. (Ex. 1: Exec. Order 03.14.20.01 at 1.) The Governor's order observed that COVID-19 "is proliferating via 'community spread,' meaning people have contracted the virus in areas of Georgia as a result of direct or indirect contact with infected persons." (*Id.*) That same day, Secretary of State Brad Raffensperger postponed Georgia's presidential preference primary from March 24 to May 19, 2020, due to the public health emergency from COVID-19. (Ex. 10: Raffensperger announcement of March 14, 2020, at 1.) In announcing the postponement, Secretary Raffensperger noted that older Americans face an increased risk from COVID-19 and that "[a]ll individuals should practice social distancing and minimize contact with others . . . ." (*Id.*)

Two days later, the Governor closed all public schools through March 31, 2020. (Ex. 2: Exec. Order 03.16.20.01) He later extended the closures through April 24 (Ex. 4: Exec. Order 03.26.20.02 at 2), and then he closed them for the remainder of the school year in order to stop the spread of COVID-19 (Ex. 5: Exec. Order 04.01.20.01 at 2).

On March 20, due to the COVID-19 public health emergency, Secretary Raffensperger invoked his authority under O.C.G.A. § 21-2-50.1 to extend the deadline for independent and third-party candidates to submit nomination petitions until 12:00 noon on Friday, August 14, 2020. (Ex. 13: letter from Harvey to Cowen.)

On March 23, Governor Kemp issued an order closing all bars, banning gatherings of more than 10 people, and ordering "medically fragile" residents to shelter in place. (Ex. 3: Kemp Exec. Order 03.23.20.01 at 2.) The order also directed the Department of Public Health to undertake a public information campaign to encourage businesses to "limit personal interaction" during transactions. (*Id.* at 3.)

On March 24, 2020, Secretary Raffensperger announced unprecedented steps to protect public health and safety in the election process as a result of COVID-19. (Ex. 11: Raffensperger announcement of March 24, 2020, at 1.) Those steps include mailing absentee ballot request forms to Georgia's 6.9 million active voters, encouraging as many voters as possible to vote by mail, and implementing social-distancing measures in polling places during the primary election. (*Id.*)

On April 2, Governor Kemp issued an executive order requiring "[t]hat all residents and visitors of the State of Georgia" shelter in place between April 3 and April 13. (Ex. 6: Exec. Order 04.02.20.01 at 2.) Less than a week later, the Governor extended the state of emergency in Georgia until May 13 and extended the shelter-in-place order through April 30. (Ex. 7: Exec. Order 04.08.20.02 at 1-2.)

On April 9, Secretary Raffensperger postponed the primary election from May 19 to June 9. (Ex. 12: Raffensperger announcement of April 9, 2020, at 1.) His press release announcing the delay stated that "challenges will certainly remain on June 9" but the additional time would permit officials "to shore up contingency plans, find and train additional poll workers, and procure supplies and equipment necessary to clean equipment and protect poll workers." (*Id.*)

On April 23, Governor Kemp issued an executive order which, among other things, ordered "all residents and visitors in the State of Georgia" to practice social distancing and sanitation in accordance with the guidelines published by the Centers for Disease Control and Prevention; encouraged residents and visitors to wear masks in public to prevent the spread of COVID-19; continuing to require high-risk

individuals, including everyone over age 65, to shelter in place; and prohibited such people from receiving visitors. (Ex. 8: Exec. Order 04.23.20.02 at 2-6.) The lockdown and social-distancing provisions in the order are effective from May 1 through May 13. (*Id.* at 2.)

On April 30, Governor Kemp renewed the public health emergency due to COVID-19 and extended the shelter-in-place and no-visitors requirements for high-risk individuals and those over 65 through Friday, June 12. (Ex. 9: Exec. Order 04.30.20.01 at 1-2.) On May 1, this Court extended its coronavirus-prevention measures though May 29. (ECF 9.) And on May 4, the Georgia Supreme Court announced its intention to extend the statewide judicial emergency due to the coronavirus through June 12.[4]

As of the date of this motion, Georgia is among the states hardest hit by COVID-19. There are at least 32,016 confirmed cases and 1,391 confirmed deaths from the disease in the state.[5] And the Centers for

[4] Georgia Supreme Court, *Chief Justice Will Extend Statewide Judicial Emergency* (May 4, 2020), https://www.gasupreme.us/extend-judicial-emergency/ (last visited May 8, 2020).
[5] Georgia Dep't of Pub. Health, *COVID-19 Daily Status Report*, https://dph.georgia.gov/covid-19-daily-status-report (last visited May 8, 2020).

Disease Control and Prevention continue to recommend that members of the public wear masks and practice social distancing.[6]

II. Georgia's Ballot-Access Restrictions

Georgia's ballot-access laws distinguish between three kinds of candidates for partisan public offices: (1) candidates nominated by a political party; (2) candidates nominated by a political body; and (3) independent candidates.

A "political party" is any political organization whose nominee received at least 20 percent of the vote in the last gubernatorial or presidential election. O.C.G.A. § 21-2-2 (25). Political parties choose nominees in partisan primaries, and the candidate nominated by the party appears automatically on the ballot for any statewide or district office. O.C.G.A. § 21-2-130(1).[7]

A "political body" is any political organization other than a political party. O.C.G.A. § 21-2-2 (23). Political bodies must nominate

[6] Centers for Disease Control and Prevention, *How to Protect Yourself and Others*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited May 8, 2020).

[7] The only political parties that meet the current definition of "political party" under Georgia law are the Democratic Party of Georgia and the Georgia Republican Party.

candidates for partisan public offices by convention. O.C.G.A. § 21-2-170(g).

Political-body candidates for *non-statewide offices*, including the office of U.S. Representative, do not appear automatically on the ballot. In order to appear on the general-election ballot, such candidates must submit: (1) a notice of candidacy and qualifying fee, O.C.G.A. § 21-2-132(d); and (2) a nomination petition signed by five percent of the number of registered voters eligible to vote for that office in the last election, O.C.G.A. § 21-2-170(b). The notice of candidacy and qualifying fee for non-statewide candidates is due during the thirty-fifth week before the election (a date that in 2020 fell on March 6). O.C.G.A. § 21-2-132(d). The nomination petition for non-statewide candidates is due no later than noon on the second Tuesday in July (which this year is July 14). O.C.G.A. § 21-2-132(e). The Secretary's recent order extends that deadline for the 2020 election to noon on Friday, August 14, 2020. (Ex. 13: letter from Harvey to Cowen).

The nomination petition must be on sheets of uniform size and different sheets must be used by signers residing in different counties or municipalities. O.C.G.A. § 21-2-170(d). Each sheet of the nomination

petition must also contain a sworn and notarized affidavit of the circulator attesting, among other things, that each signature on the sheet was gathered within 180 days of the filing deadline. *Id.* The 180th day before the new filing deadline was February 16, 2020.

For the 2020 election, a political-body candidate for U.S. Representative in Georgia's Eighth and Thirteenth Congressional District, where plaintiffs Jimmy Cooper and Martin Cowen seek to run, must submit at least 20,719 and 24,503 valid signatures, respectively, in order to appear on the general-election ballot.[8] The qualifying fee is $5,220.[9]

Political-body candidates for *President of the United States* do not appear automatically on the ballot.[10] In order to appear on the general election ballot, such candidates must submit: (1) a notice of candidacy and qualifying fee, O.C.G.A. § 21-2-132(d); and (2) a nomination petition containing 7,500 signatures. O.C.G.A. § 21-2-170(b); *Green Party v.*

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[8] Ga. Sec'y of State, *Number of Signatures Required for 2020 Nomination Petitions*, https://sos.ga.gov/admin/files/2020_Nomination_Signatures_Required.pdf (last visited May 8, 2020).

[9] Ga. Sec'y of State, *Qualifying Fees for State and Federal Candidates for 2020 Elections in Georgia*, https://sos.ga.gov/admin/files/2020%20QUALIFYING%20FEES.pdf (last visited May 8, 2020).

[10] Georgia law provides a second method by which a political body can place candidates for statewide offices on the general election ballot. *See* O.C.G.A. § 21-2-180. That method is not at issue here.

Kemp, 171 F. Supp. 3d 1340, 1372 (N.D. Ga. 2016) (reducing the number of signatures from one percent of registered voters to 7,500), *aff'd* 674 F. Appx. 974 (11th Cir. 2017) (mem). The notice of candidacy and qualifying fee for presidential candidates is due in late June—this year on June 26, 2020. O.C.G.A. § 21-2-132(d). The nomination petition for presidential candidates is due no later than noon on the second Tuesday in July (July 14, 2020). O.C.G.A. § 21-2-132(e). The Secretary's recent order extends that deadline for the 2020 election to noon on Friday, August 14, 2020. The qualifying fee for each presidential elector is $1.50.

Independent candidates do not appear automatically on the ballot for any office unless the candidate is an incumbent. Non-incumbent candidates must follow the same rules as political-body candidates.

III. The Burdens of Georgia's Ballot-Access Restrictions

Even in normal times, Georgia's ballot-access restrictions on independent and third-party (or "political-body") candidates for U.S. Representative are incredibly burdensome. In fact, no third-party candidate for U.S. Representative has ever satisfied the requirements to appear on Georgia's general-election ballot, despite many attempts to do so, since the five-percent signature requirement was adopted in 1943.

(Ex. 18: Order, *Cowen v. Raffensperger*, Civ. No. 1:17-CV-4660-LMM at 6 (N.D. Ga. Sept. 23, 2019) (ECF 113).) Georgia requires more signatures for third-party candidates for U.S. Representative to appear on the general-election ballot than any other state in the nation, both as a percentage of votes cast, and as an absolute number of signatures. (*Id.* at 5.) Among states with a mandatory petition for ballot-access, Georgia's qualifying fees are also higher than any other state in the nation. (*Id.* at 4.) And Georgia's signature requirements are higher, in absolute terms, than any signature requirement that an independent or third-party candidate for U.S. Representative has ever overcome in the history of the United States. (Ex. 19: Def's Resp. to Pls. Statement of Undisputed Material Facts, *Cowen v. Raffensperger*, Civ. No. 1:17-CV-4660-LMM at ¶¶83-91 (N.D. Ga. Aug. 07, 2019) (ECF 97) (hereinafter "Ex. 19: *Cowen* ECF 97").)

Aside from the amount of the qualifying fee and the number of signatures required, several other factors contribute to the difficulty of Georgia's ballot-access restrictions for independent and third-party candidates. For example, the Secretary of State's signature-validation process results in signatures being improperly rejected and validation

rates below 50 percent. (Ex. 19: *Cowen* ECF 97 ¶¶ 146, 148; Ex. 23: Esco decl. ¶10.) One recent petition by an independent candidate for U.S. Representative resulted in a validation rate of only two percent. (Ex. 19: *Cowen* ECF 97 ¶ 147.) As a result, independent and third-party candidates must gather signatures far in excess of the number of valid signatures required in order to be reasonably assured of obtaining ballot access under Georgia law. (Ex. 23: Esco decl. ¶ 10.)

Gathering signatures, moreover, is slow and difficult work. (Ex. 19: *Cowen* ECF 97 ¶¶ 150-157.) Experienced signature-gatherers report being able to gather only about 5 signatures per hour going door-to-door over the course of a week. (*Id.*; Ex. 21: Cooper decl. ¶ 16; Ex. 22: Cowen decl. ¶ 19.) At that rate, a full-time petitioner could collect only 4,800 raw signatures over the course of the entire 180-day petitioning period, well short of the number required of a single independent or political-body candidate for President or U.S. Representative.

Another factor is the combined effect of the cost of petitioning and the impact of federal campaign-finance law. Professional petition circulators typically charge $2-$5 per signature collected, plus expenses for travel, lodging and incidentals. (Ex. 23: Esco decl. ¶ 12.) A petition

for U.S. Representative could cost tens of thousands or even hundreds of thousands of dollars. But federal campaign-finance law prohibits a political party or other large donor from contributing enough money to a candidate to cover a substantial number of signatures. (Ex. 19: *Cowen* ECF 97 ¶¶ 162-71.) A candidate's petition drive must therefore either be self-funded or be funded by many donors.

A lack of access to voters is yet another factor. In Georgia, petition-circulators may not lawfully solicit signatures on private property without the permission of the property owner. (*Id.* ¶ 173.) Virtually all of the places where large numbers of people congregate, like grocery stores and shopping malls, are on private property. Petition-circulators are relegated to gathering signatures on public sidewalks, which are often far away from where voters park to enter the stores. (*Id.* ¶ 174; Ex. 23 Esco decl. ¶ 11; Ex. 22: Cowen decl. ¶ 20.)

One final factor that makes Georgia's ballot-access requirements virtually impossible to meet—even in normal times—is widespread public concern about disclosing confidential information to petitioners. (Ex. 19: *Cowen* ECF 97 ¶¶ 181-84.) The form of a nomination petition calls for a voter to provide a residential address, which is considered

confidential, personally identifying information under Georgia law. O.C.G.A. § 21-2-225(b).[11] (*Id.* ¶¶ 181-83.) Potential petition-signers have expressed reluctance to sign, have provided incomplete information, or have refused to sign altogether, because of the information called-for by the form and the possibility that it could be used for identity theft or other nefarious purposes. (*Id.* ¶ 184-88; Ex. 22: Cowen decl. ¶ 20; Ex. 23: Esco decl. ¶ 11.)

IV. The Coronavirus Pandemic Increases the Burdens of Georgia's Ballot-Access Restrictions

But these are not normal times. The public-health emergency caused by COVID-19 has made it virtually impossible to gather petition signatures. Government and public-health officials at virtually every level have encouraged people to stay at home, to practice social distancing, and to avoid being within six feet of other people. Gathering signatures during the COVID-19 outbreak endangers public health and the lives of petition-circulators and potential signers.

[11] Until this year, the petition form also called for a voter to provide a birth date. Now, it only requires a birth year. This change will likely make it more difficult for election officials to validate signatures because there are likely to be many Georgia voters with identical names and birth years.

From April 2 through April 30, it was clearly unlawful for anyone to gather signatures because of Governor Kemp's shelter-in-place order. It continues to be unlawful for Plaintiff Cowen to gather signatures because he is over the age of 65 and remains subject to the shelter-in-place order through at least June 12. (Ex. 22: Cowen decl. ¶¶ 1, 14-16.) It also continues to be unlawful for high-risk individuals and anyone over the age of 65 to open his or her door to a signature-gatherer because of the continuing no-visitors order. And it is at best questionable whether it is lawful now for anyone else to engage in the petition process—either as a petition-circulator or as a petition-signer—because of the social-distancing requirements that remain in effect through at least May 13.

Aside from its legality, moreover, petitioning continues to contravene the best advice of America's most trusted public-health officials. The Centers for Disease Control and Prevention continue to encourage social-distancing and isolation, and prominent public health officials have vocally criticized states, including Georgia, that have begun to ease such restrictions.[12] Dr. Deborah Birx, the White House's

[12] *See, e.g.,* Alyson Chiu, *Fauci warns states rushing to reopen: 'You're making a really significant risk'*, Wash. Post, May 1, 2020, *available at* https://www.washingtonpost.com/nation/2020/05/01/fauci-open-states-coronavirus/; Keren Landman, *Georgia Went First. And It Screwed Up.* N.Y. Times. Apr. 30, 2020, *available at*

coronavirus task force coordinator, recently said on national television that "social distancing will be with us through the summer to really ensure that we protect one another as we move through these phases."[13]

Even if it were feasible to gather signatures during the current public health emergency, it is unlikely that petition-circulators would be able to gather very many signatures because there are fewer people congregating in public places and fewer people are likely to open their doors to strangers who come knocking. Indeed, that was precisely the experience of one independent candidate for the state legislature who saw his door-to-door response rate drop off in March—before the President or the Governor declared public-health emergencies—as the public became aware of the impending crisis. (Ex. 24: Reed decl. ¶¶ 9-12.) He then announced a signature-gathering event in his district in the middle of March. But the announcement yielded such a negative

https://www.nytimes.com/2020/04/30/opinion/georgia-coronavirus-reopening.html; *Opinion: It's just too soon to reopen Ga.*, Atlanta Journal-Constitution, May 1, 2020, *available at* https://www.ajc.com/news/opinion/opinion-just-too-soon-reopen/UUJUrsM06vJ45y5wPV0pWK/.

[13] Felicia Sonmez, Paige Winfield Cunningham, and Meryl Kornfield, *Social distancing could last months, White House coronavirus coordinator says*, Wash. Post, Apr. 26, 2020, *available at* https://www.washingtonpost.com/politics/social-distancing-could-last-months-white-house-coronavirus-coordinator-says/2020/04/26/ad8d2f84-87de-11ea-8ac1-bfb250876b7a_story.html.

reaction, with constituents accusing him of endangering public health, that he had to cancel the event.

The emerging crisis completely disrupted Plaintiff Cooper's signature-gathering plans. He had been in discussions with the Green Party's presidential candidates to fund as many as three full-time staffers to gather signatures and coordinate volunteers in his district, but those plans fell through with the virus emerged in the middle of March. (Ex. 21: Cooper decl. ¶ 11.)[14]

The postponement of the March 24 presidential preference primary also has had a negative effect on signature-gathering. Even though Georgia law prohibits canvassing for signatures within 150 feet of a polling place, it is still possible to gather signatures outside of that buffer zone at some polling locations, making them an especially attractive place to gather voters' signatures under normal circumstances. Plaintiff Cowen had planned a significant effort to collect signatures during the March 24 primary in Douglas County before the pandemic upended those plans. (Ex. 22: Cowen decl. ¶¶ 12-13.) The

[14] The pandemic also disrupted the signature-gathering plans of two independent candidates for state legislative offices, Scott Cambers and Joe Reed. (Ex. 20: Cambers decl. ¶¶ 8-10, 15; Ex. 24: Reed decl. ¶¶ 10-12.)

Secretary of State has also encouraged voters to make use of early voting and absentee voting in the upcoming elections, and that will likely reduce the number of voters present and available to sign petitions at the polls during the June 9 primary election.

Even after the public-health emergency subsides, the COVID-19 outbreak is likely to have a negative effect on signature-gathering. (Ex. 20: Cambers decl. ¶¶ 12-13; Ex. 21: Cooper decl. ¶¶ 12-17; Ex. 22: Cowen decl. ¶ 22; Ex. 23: Esco decl. ¶ 15; Ex. 24: Reed decl. ¶¶ 12-15.) Voters may remain wary of close physical contact for some time. There is absolutely no reason at the moment to believe that members of the public will greet door-knocking petitioners with open arms as soon as the President, the Governor, or public-health officials say that it is okay to do so. And that is particularly likely to be the case if the door-knockers are wearing masks for self-protection. Welcoming masked strangers at your door is inadvisable even in normal times.

Petitioning is thus likely to be unusually challenging for some time after the pandemic subsides, and we're not even there yet.

V. The 2020 Election

The individual plaintiffs in this case are third-party candidates for U.S. Representative. Both of them timely submitted a notice of candidacy and paid the $5,220 qualifying fee before the March 6 deadline. (Ex. 21: Cooper decl. ¶ 9; Ex. 22: Cowen decl. ¶ 10.) And both of them are the only independent or third-party candidate to have qualified in their respective district,[15] so the maximum number of candidates on the general-election ballot is three.

The other plaintiff is the Georgia Green Party. It has not yet paid the filing fee or filed a notice of candidacy for its presidential electors because the applicable qualifying period does not begin until June 22. But it is prepared to do so at that time.[16]

In total, there are fewer than a dozen independent or third-party candidates at the state or federal level who timely filed a declaration of candidacy and paid the required qualifying fee but who have not yet submitted a nomination petition required by Georgia law. There are also

[15] *See* Georgia Sec'y of State, *Qualifying Candidate Information*, available at https://elections.sos.ga.gov/GAElection/CandidateDetails (last visited May 8, 2020).
[16] The Green Party had planned to gather signatures for its slate of electors soon after its nominating convention on February 22, but the Secretary of State's office did not make the appropriate form available until March 24, 2020. (Ex. 23: Esco decl. ¶¶ 6-7.)

fewer than a dozen such candidates at the local level. Any relief ordered by this Court would therefore be limited, and it would not overwhelm Georgia's ballots with a laundry list of candidates.

Legal Standard

A plaintiff seeking a preliminary injunction 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); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006). The decision as to whether a plaintiff carried this burden "is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion." *Int'l Cosmetics Exch., Inc. v. Gapardis Health & Beauty, Inc.*, 303 F.3d 1242, 1246 (11th Cir. 2002) (quoting *Palmer v. Braun*, 287 F.3d 1325, 1329 (11th Cir. 2002)) (internal quotation marks omitted).

Discussion

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

To determine whether Georgia's ballot-access restrictions violate 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 Stein v. Ala. Sec'y of State*, 774 F.3d 689, 694 (11th Cir. 2014); *Common Cause/Georgia v. Billups*, 554 F. 3d 1340, 1352 (11th Cir. 2009).

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

Georgia's signature requirements burden "two different, although overlapping kinds of rights—the right of individuals to associate 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). "Both of these rights, of course, rank among our most precious freedoms." *Id.*

The right to associate, which includes the "right of citizens to create and develop new political parties," is obviously diminished if a party can be kept off the ballot. *Norman*, 502 U.S. at 288; *see also Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979). Ballot-access restrictions also implicate the right to vote because, except for initiatives and referenda, "voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Id.* An election campaign is a platform for the expression of views on the issues of the day, and a candidate "serves as a rallying point for like-minded citizens." *Anderson*, 460 U.S. at 787-88.

Even in normal times, the burdens of Georgia's ballot-access restrictions on independent and third-party candidates for U.S. Representative are undoubtedly heavy. Those restrictions are by far the most stringent in the nation, and—despite many attempts—no third-

party candidate for U.S. Representative has appeared on the general-election ballot since the petition requirement was first enacted in 1943. As the Supreme Court has recognized, "[t]he right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'" *Anderson*, 460 U.S. at 787 (quoting *Lubin*, 415 U.S. at 716).

But, again, these are not normal times. Petitioning has been unlawful for a significant portion of the 180-day petitioning period. It continues to be unlawful for Plaintiff Cowen to petition, due to his age. And it continues to be unlawful for many potential signers to open their doors to petitioners.

Putting legality aside, it is simply not reasonable for signature requirements designed for normal times to govern access to the ballot when we are in the middle of a global pandemic caused highly communicable infectious disease. More than five months after the virus arrived in America, the pandemic remains a public health crisis without any modern equivalent, and the situation remains dynamic. Much is still unknown about the nature of the virus, its transmission, and its effects.

There is still no vaccine, no cure and no widely available treatment. Uncertainty, like the virus, hangs in the air.

Because it has been shown that one can carry and spread COVID-19 without any apparent symptoms, every encounter with another person—particularly a stranger—poses a risk of infection. And because it is not altogether clear how long the virus can survive on various surfaces, touching a pen, a clipboard, or a piece of paper that has recently been touched by another person also poses a risk of infection. Circulating a petition during this crisis risks the health and safety not only of the person requesting the signature but also the health and safety of the person who is signing the petition, the signer's family, and potentially the entire community.

Every federal court that has addressed this issue so far has found that signature requirements for ballot-access impose severe burdens on candidates' rights during the time of this pandemic. *See Garbett v. Herbert,* Civ. No. 2:20-cv-245-RJS, 2020 WL 2064101 at *12 (D. Utah May 1, 2020); *Libertarian Party of Ill. v. Pritzker*, Civ. No. 1:20-cv-2112, 2020 WL 1951687 at *4 (E.D. Ill. April 23, 2020); *Esshaki v. Whitmer*, Civ. No. 2:20-cv-10831, 2020 WL 1910154 at *6 (E.D. Mich. April 20,

2020), *aff'd in part and reversed in part*, No. 20-136, 2020 WL 2185553 at *1 (6th Cir. May 5, 2020)("The district court correctly determined that the [ballot-access restrictions] imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied…"). One state court that applies an analogous framework similarly found a severe burden. *See Goldstein v. Secretary of the Commonwealth*, 125 N.E.3d 560, 571 (Ma. 2020).

This Court should likewise conclude that Georgia's signature requirements impose a severe burden under current circumstances.

B. Asserted State Interests and Narrow Tailoring

Because Georgia's signature requirements impose a severe burden here, they must be narrowly drawn to advance a compelling state interest. Although it remains to be seen what interests, if any, the Secretary of State will assert to justify enforcement of the signature requirements under these circumstances, the State has no compelling interest in preventing independent and third-party candidates from running for office by enforcing insurmountable barriers to the ballot.

The Supreme Court held in *Storer v. Brown,* 415 U.S. 724, 736 (1974), that a state has a "compelling" interest in "the stability of its political system." But the Court held more recently that this interest

does not extend so far as to permit a state to protect existing parties from competition with independent or minor-party candidates. *Anderson*, 460 U.S. at 801-02. Indeed, "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment Freedoms." *Id.* at 802 (quoting *Williams*, 393 U.S. at 32).

The Supreme Court has also recognized that States have an important interest in minimizing the potential for voter confusion caused by "laundry list" ballots, which it described as ballots with more than 12 candidates for a single office. *See Lubin*, 415 U.S. at 715-18. But there is no danger of that here because only a small number of independent and third-party candidates timely filed a notice of candidacy and paid the applicable qualifying fee by March 6. Plaintiffs Coooper and Cowen have already demonstrated a significant modicum of support by gaining their respective party's nomination and paying the highest-in-the-nation qualifying fee.

In short, because enforcement of Georgia's signature requirements is not narrowly tailored to advance a compelling state interest under

present circumstances, 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).

Part of the reason for this treatment of political and voting harms is the special importance of the right to vote in the American democratic tradition:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right

> to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 561-62 (1962); *accord 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."). Money cannot fully compensate an individual for the loss of a right so fundamental. Part of the reason is also practical: a court simply cannot undo, by means of a special election or otherwise, all of the effects of an unconstitutional election. Tremendous practical advantages accrue to those who win even tainted elections, and a court simply has no way to re-level the playing field. *See, e.g., League of Women Voters of N.C.*, 769 F.3d at 247 ("Courts routinely deem restrictions on fundamental voting rights irreparable injury" because "once the election occurs, there can be no do-over and no redress.").

In this case, the irreparable nature of the injuries is obvious. Money cannot compensate the plaintiffs for the loss of their opportunity, as candidates, to play an important part in our democracy. *See Anderson*, 460 U.S. at 794 (discussing the importance of "political figures

outside the two major parties"); *Socialist Workers Party,* 440 U.S. at 185-86 (discussing "the significant role that third parties have played in the political development of the Nation"). 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. The plaintiffs have already qualified (or will qualify soon, in the case of the Green Party's presidential electors). 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 ensure that Georgia citizens have a greater opportunity to vote for candidates of their choice. Without an injunction, voter choices will be limited. In some instances, voters may have no choice at all. The public undoubtedly has a vital interest in a broad selection of candidates as well as the conduct of free, fair, and constitutional elections. *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.

Remedy

It is black-letter law that, "wherever practical," a federal court should give elected officials an opportunity to remedy an unlawful election law. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). In this case, because the Georgia General Assembly is still in session, this Court should enjoin enforcement of the signature requirements and give the

General Assembly an opportunity to enact ballot-access requirements that are constitutional under present circumstances.

Such was the result in Michigan, where the Sixth Circuit recently stayed part of the district court's preliminary injunction. *See Esshaki*, 2020 WL 2185553 at *2. The district court not only enjoined enforcement of the signature requirements—which the Sixth Circuit upheld—but it also re-wrote state statutes to impose a new signature requirement and to loosen other restrictions on the petitioning process. But the Sixth Circuit stayed the mandatory portions of the injunction out of concern for States' rights to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." Art. I, § 4, cl. 1. The court invited the state to devise a constitutionally permissible alternative system if it wished to do so.

And so should the Court here. If the General Assembly adopts an alternative system that this Court finds to be constitutional under the circumstances, the plaintiffs will do their best to comply with it. If the General Assembly chooses not to do so, then a preliminary injunction against the signature requirements would have the effect of granting a

place on the ballot to the plaintiffs for having complied with the remaining requirements for ballot access.

Conclusion

For the foregoing reasons, the Court should enjoin the Secretary of State from enforcing Georgia's petitioning requirements for independent and third-party candidates.

Respectfully submitted this 8th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION 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 May 8, 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:

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