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

MARTIN COWEN, ALLEN BUCKLEY, AARON GILMER, JOHN MONDS, and the LIBERTARIAN PARTY OF GEORGIA, INC., a Georgia nonprofit corporation,	*	CASE NO.: 1:17cv04660-LMM
Plaintiffs,	*	
v.	*	
BRAD RAFFENSPERGER, Georgia Secretary of State,	*	
Defendant.	*	

DEFENDANT'S RESPONSE IN OPPOSITION TO REMEDIES PROPOSED BY PLAINTIFFS

Defendant Secretary of State Brad Raffensperger submits this response in opposition to Plaintiffs' proposed remedies (Doc. 160). In their brief, Plaintiffs ask this Court to enjoin the Secretary from enforcing the qualifying petition and the qualifying fee/pauper's affidavit requirements against independent and third-party candidates and leave the rewriting of those statutory provisions to the General Assembly. Alternatively, Plaintiffs suggest that the Court provide an interim remedy in the form of an injunction requiring the Secretary to qualify independent or third-

party candidates for the ballot if those candidates either pay the qualifying fee or submit a qualifying petition containing 500 signatures.

For the reasons set forth below, the remedies proposed by Plaintiffs are neither appropriate nor workable. Any remedy considered by the Court should account for the "important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Plaintiffs ignore this interest entirely in proposing remedies that would undermine the State's "undoubted right" to require candidates demonstrate "a preliminary showing of substantial support" before placing them on the ballot. *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983). In fact, Plaintiffs' proposed remedies would eliminate the need for non-party candidates to demonstrate any support beyond a *de minimus* level among the electorate. While the Secretary maintains that Georgia's 5% petition requirement is constitutional based upon controlling precedent and should not be altered, he further objects to each of Plaintiffs' proposed remedies for the reasons shown below.

I. The Secretary should not be enjoined from enforcing Georgia's ballot access requirements.

First, the record before the Court does not support enjoining the enforcement of Georgia's ballot access requirements because every court analyzing these same requirements have held them to be valid and constitutional. *See Jenness*, 403 U.S. at

438 ("[W]e cannot say that Georgia's 5% petition requirement violates the Constitution."); *McCrary v. Poythress*, 638 F.2d 1308, 1311-13 (11th Cir. 1981) (relying on *Jenness* to uphold the 5% petition requirement); *Coffield v. Handel*, 599 F.3d 1276, 1277 (11th Cir. 2010) ("Our Court and the Supreme Court have upheld Georgia's 5% rule before."); *Cartwright v. Barnes*, 304 F.3d 1138, 1141 (11th Cir. 2002) (recognizing that the analysis in *Jenness* "still equally pertains today" and that Georgia's 5% petition requirement is not severely burdensome).

Indeed, less than one year ago, this Court recognized that "[d]uring normal circumstances, Georgia's signature collection requirements for an individual to gain a place on the ballot as a third-party candidate constitute reasonable, nondiscriminatory burdens." *Cooper v. Raffensperger*, 472 F. Supp. 3d 1282, 1292 (N.D. Ga. 2020). And it was only due to the current COVID-19 pandemic that the Court found the burdens rose to a "moderate" level, so that a 30% reduction of the signature requirement was appropriate for the 2020 election. *Id.* at 1293.

In fact, outside of Georgia, courts routinely hold that similar ballot access requirements are constitutionally permissible. *See*, *e.g.*, *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 27 (1st Cir. 2016) (New Hampshire's 3% signature requirement); *Swanson v. Worley*, 490 F.3d 894, 912 (11th Cir. 2007) (Alabama's 3% signature requirement); *Rainbow Coalition of Okla. v. Okla. State Election Bd.*,

844 F.2d 740, 744 (10th Cir. 1988) (Oklahoma's 5% signature requirement); *Populist Party v. Herschler*, 746 F.2d 656, 660 (10th Cir. 1984) (Wyoming's 5% signature requirement); *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 795 (11th Cir. 1983) (Florida's 3% signature requirement); *Dart v. Brown*, 717 F.2d 1491, 1510 (5th Cir. 1983) (Louisiana's 5% signature requirement to be recognized as a political party); *Parker v. Duran*, Civil No. 14-cv-617 MV-GBW, 2014 U.S. Dist. LEXIS 181033, at *30 (D.N.M. Aug. 17, 2014) (New Mexico's 3% signature requirement).

Since the United States Supreme Court upheld the constitutionality of Georgia's ballot access requirements, "[t]he pertinent laws of Georgia have not changed materially." *Coffield*, 599 F.3d at 1277. Plaintiffs have not presented sufficient evidence of a "severe" burden to warrant the elimination of all requirements for ballot access for third-party candidates, and an order enjoining the Secretary from enforcing Georgia's ballot access requirements would be an extreme and improper remedy.

II. Prohibiting enforcement of the current ballot access requirements until the General Assembly chooses to amend those provisions is not a workable remedy.

Enjoining the Secretary from enforcing the current ballot access requirements until the General Assembly chooses to amend those provisions is an unworkable and

unreasonable remedy. "[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973); *see also Curling v. Raffensperger*, Civil Action No. 1:17-cv-2989-AT, 2020 U.S. Dist. LEXIS 188508, at *163 (N.D. Ga. Oct. 11, 2020) (noting that in fashioning equitable relief, the court should consider whether "an impending election is imminent and [whether] a State's election machinery is already in progress.").

The General Assembly will not meet again in regular session until January 10, 2022. *See* GA. CONST. art. III, § IV, par. I ("The General Assembly shall meet in regular session on the second Monday in January of each year, or otherwise as provided by law, and may continue in session for a period of no longer than 40 days in the aggregate each year."). The period for gathering signatures for the petition begins on January 14, 2022. *See* O.C.G.A. § 21-2-132(e) ("Each candidate required to file a notice of candidacy … shall, no earlier than 9:00 A.M. on the fourth Monday in June immediately prior to the election and no later than 12:00 Noon on the second Tuesday in July immediately prior to the election … file with the same official with whom he or she filed his or her notice of candidacy a nomination petition…"); O.C.G.A. § 21-2-170(e) ("No nomination petition shall be circulated prior to 180

days before the last day on which such petition may be filed, and no signature shall be counted unless it was signed within 180 days of the last day for filing the same.").

Based on these deadlines (which are not currently at issue in this case), the General Assembly will not have the opportunity to meet, discuss, prepare, and pass legislation addressing these ballot access requirements before the signature-gathering period begins. As an additional complicating factor, the General Assembly will take up redistricting in a special session later this year. While the General Assembly theoretically may have the opportunity to consider changes to the ballot access petition requirement if the procedural thresholds for consideration in special session are met, the realities of the situation with the significantly delayed release of census numbers during the current year likely means that redistricting for Congressional, General Assembly, county, and municipal offices will occupy the entirety of the General Assembly's focus during special session.

Accordingly, Plaintiffs' proposed remedy of enjoining the Secretary from enforcing the ballot access requirements will inevitably result in *no* meaningful ballot access requirements for the 2022 election cycle, despite this Court finding that, even in the height of the global pandemic with the attendant concern and shelter-in-place directives, no more than a 30% reduction in signature requirements was required to satisfy the applicable constitutional standard. Plaintiffs' proposed

remedy clearly ignores the State's legitimate interest in requiring a "preliminary showing of a significant modicum of support" before allowing a candidate to appear on the ballot.

III. Plaintiffs' proposed remedy requiring 500 signatures *or* payment of the qualifying fee similarly does not create a workable alternative that accounts for the State's legitimate and constitutional interest in preventing ballot overcrowding and voter confusion.

Alternatively, "Plaintiffs propose an injunction which requires the Secretary of State to qualify such candidates for the ballot if they, by the existing deadlines, *either* pay the qualifying fee … *or* submit a qualifying petition containing 500 signatures." (Doc. 160, at 5-6.) This proposed remedy is unworkable and unfair for at least two reasons.

First, the qualifying fee is the same for *every* candidate, whether that candidate is running on behalf of a political party or a political body. O.C.G.A. § 21-2-132(d). It would be inequitable to allow some candidates to opt out of this fee requirement when party candidates are required to pay the fee. Moreover, if a candidate is unable to pay the fee, the candidate has the option of filing a pauper's affidavit. O.C.G.A. § 21-2-132(g). Given this alternative, the Secretary submits that the Court must preserve the qualifying fee requirement for each and every candidate.

Second, the 500-signature proposal does nothing to preserve the State's interest in requiring a candidate to show a "significant modicum of support" before

appearing on the ballot. The current ballot-access requirements allow political body and independent candidates to appear on the general election ballot if they submit a nominating petition signed by 5% of the number of registered voters eligible to vote for that office in the last election. O.C.G.A. § 21-2-170(b). Plaintiffs' proposed remedy of 500 signatures is an extraordinary *98% reduction* in the current requirements. In Georgia's most populous district, 500 signatures is only 0.08% of the eligible voters.[1] (*See* Doc. 154-1.) In Georgia's least populous district, 500 signatures makes up 0.11% of the eligible voters in that district. (*Id.*) Plaintiffs' proposal is also significantly less than the petition requirement for any individual state Senate or House district (*see* Doc. 135-4 ¶ 3 & Ex. A), making it far easier to gain ballot access for U.S. Congress—representing a much larger district—than any state office. Such a result is unnecessarily drastic and fails to preserve the State's interest in leaving frivolous candidates off of the ballot.

Plaintiffs have chosen 500 as the magic number for the simple reason that it is the number they believe Libertarian Party candidates will be able to achieve. However, setting the bar low enough for any aspiring candidate for U.S. Congress

[1] This figure is based upon the number of eligible voters for the 2020 general election. (Doc. 154-1.) Preliminary census data that was recently released shows that Georgia's population has grown significantly. As a result, Georgia's congressional districts will be even larger for the 2022 general election, making Plaintiffs' 500-signature proposal an even smaller fraction of the total eligible voters.

to appear on the ballot is not the proper legal standard for whether a ballot access requirement is unconstitutionally burdensome, and no court has ever held as much. To the contrary, as the Supreme Court has made clear, the State does not have a "constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." *Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (a state "need not remove all of the many hurdles third parties face in the American political arena today"). Georgia's petition requirements should not be a race to the bottom that permits all would-be candidates to be granted access to the ballot, and Plaintiffs' proposed requirement of 500 signatures falls far short of the "significant modicum of support" that the State has a right to require.

IV. Plaintiffs' wait-and-see approach with respect to the issue of ballot overcrowding flies in the face of established Supreme Court precedent.

Instead of providing the Court with evidence to support the alternative remedy, Plaintiffs attempt to place that burden on the Secretary, by contending "[t]here is no evidence in the record to support a finding that any more than 500 signatures would be reasonably necessary to prevent Georgia's ballots from becoming overcrowded with frivolous candidacies." (Doc. 160, at 8.) Incredibly,

Plaintiffs go on to state "[s]hould such evidence emerge in the future, the Court could always adjust the interim remedy." (*Id.* at 8.)

But it is not the State's burden to prove the existence of voter confusion or ballot overcrowding. In *Munro*, the Supreme Court specifically held: "[w]e have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." 479 U.S. at 194-95. The reason for this is clear:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-96; *see also Burson v. Freeman*, 504 U.S. 191, 209 (1992) ("[T]his Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question") (quoting *Munro*, 479 U.S. at 195).

This same rationale should guide the Court's decision on the appropriate remedy in this case. Plaintiffs cannot in good faith argue "there is no evidence" of ballot overcrowding based on their arbitrary 500-signature proposal, because such an astoundingly low requirement has never yet been tried. The fundamental problem with Plaintiffs' proposal is that it requires "[the] State's political system [to] sustain some level of damage" and will "invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State" of voter confusion and ballot overcrowding. *Munro*, 479 U.S. at 195. Once the Secretary puts up evidence of ballot overcrowding based upon the arbitrarily low 500-signature requirement, Plaintiffs will dispute the sufficiency of that evidence and the Court will have to revisit the remedy yet again. This is neither a workable alternative nor a permissible one under Supreme Court precedent, and the Court should reject Plaintiffs' proposed interim remedy.

V. The statutory process for validating petition signatures should not be disturbed.

Plaintiffs additionally ask the Court to "order the Secretary of State to take concrete steps to improve the signature-validation rate." (Doc. 160, at 9.) Not only is this proposal unworkably vague, it rests on the erroneous assumption that there is something improper with the existing process for validating petitions. It is the candidate's responsibility to obtain *valid* signatures from eligible voters within the

district in which the candidate seeks to run. The Elections Code makes clear that the validation process is to be rigorous to ensure that petitions meet the legal requirements and do not contain any errors, defects, alterations, or fraudulent entries. *See* O.C.G.A. § 21-2-171(a) and (b). The legislature takes the validity of petitions so seriously that fraudulent entry on a nominating petition is a felony offense for which a petition canvasser or candidate can be prosecuted. O.C.G.A. § 21-2-563. Accordingly, it would not be proper for the Secretary of State—or this Court—to loosen the statutory requirements for petitions in order to achieve an arbitrarily lower rejection rate, which would only defeat the purpose of the review process and invite error and fraud by petition canvassers or candidates.[2]

More importantly, county election superintendents play the primary role in the validation of petition signatures. *See* O.C.G.A. § 21-2-171 (requiring the Secretary of State or county elections superintendents to review petitions). While the Secretary of State's office conducts a preliminary review to determine if each petition has a complying number of signatures, it is county election officials who verify each signature based upon their voter files. (*See* Doc. 69-26, at 7-8.) Signatures can be rejected by county officials for any number of reasons, including

[2] To the extent that a candidate believes a petition has been wrongfully rejected, there is a judicial review process available. *See* O.C.G.A. § 21-2-171(c).

if the signature does not match the voter file, if the signatory is not a registered voter, or if the signatory does not reside within the appropriate district.[3] Because this process is a county responsibility, an injunction directed at the Secretary of State would be unworkable and ineffective, even assuming that the Court has jurisdiction to do so. *See Jacobson v. v. Fla. Sec'y of State*, 974 F.3d 1236, 1253 (11th Cir. 2020) (holding that plaintiffs lacked standing to seek injunction against the Florida Secretary of State when the injury complained of was the responsibility of county officials not under the Secretary's control).

VI. Plaintiffs' alternative equal protection claim should be dismissed on summary judgment or dismissed as moot.

In its March 29, 2021, Order, the Court directed the parties to address whether the Court should dismiss as moot Plaintiffs' claim that Georgia's petition requirement violates the Equal Protection Clause of the Fourteen Amendment because it was adopted with a discriminatory purpose. (Doc. 159, at 46.) The Secretary respectfully requests that the Court reconsider its finding that the Secretary did not address this issue in his briefing (*id.*), which is not supported by the record.

[3] Plaintiffs' specific suggestion that the Court order the Secretary to allow voters to "sign" a petition using their driver's license number would only address the more subjective signature-matching issue—it does not cure other common defects such as petition signatures from unregistered voters or voters who do not live within the appropriate district. Nevertheless, this type of significant reform is a policy decision that is appropriately left to the legislature, not federal courts.

Plaintiffs' Complaint alleges only two counts: Count One alleging a violation of the First and Fourteenth Amendments and Count Two alleging a violation of the Equal Protection Clause. (Doc. 1, at 37.) The Secretary's Motion for Summary Judgment was clear that he was moving for summary judgment on "all counts of Plaintiffs' Complaint (Doc. 135)," and all of Plaintiffs' equal protection arguments were extensively briefed by the Secretary (*See* Doc. 135-1, at 21-25; Doc. 149, at 6-14).

As shown in the Secretary's briefing (Doc. 149, at 9-14), Plaintiffs' discriminatory purpose argument fails as a matter of law because evidence of discriminatory intent or purpose is only relevant to an equal protection claim where the statute or regulation at issue is facially neutral but allegedly causes a discriminatory impact. *See, e.g., Burton v. City of Belle Glade,* 178 F.3d 1175, 1188-89 (11th Cir. 1999) (claiming city's decision not to annex project was racially discriminatory); *U.S. v. Fordice,* 505 U.S. 717, 729 (1992) (alleging discrimination in state university system admissions); *Hunter v. Underwood,* 471 U.S. 222, 233 (1985) (alleging an Alabama law disenfranchising persons convicted of crimes of moral turpitude was racially discriminatory).

Here, the classifications are evident on the face of the challenged statutes (political parties versus political bodies and statewide versus non-statewide candidates). Therefore, evidence of a discriminatory purpose has no relevance to

Plaintiffs' Equal Protection count. *Shaw v. Reno,* 509 U.S. 630, 642 (1993) ("If the City's annexation decisions created an express racial classification, no inquiry into discriminatory purpose is necessary"); *see also Burton,* 178 F.3d at 1189.

Moreover, Plaintiffs only raised the discriminatory purpose claim as an alternative basis for the Court to apply strict scrutiny in its review of the State's petition requirements. (*See* Doc. 138, at 13.) However, under the *Anderson-Burdick* framework the level of scrutiny to be applied is dependent on the severity of the burden imposed by the regulation, not its intent. *See Independent Party of Fla. v. Secretary, State of Fla.,* 967 F.3d 1277, 1281 (11th Cir. 2020). And this Court has already found in its summary judgment order that the State's petition requirements present a severe burden triggering strict scrutiny under the *Anderson-Burdick* framework. (Doc. 159, at 36.)

Accordingly, there is simply no reason for the Court to entertain Plaintiffs' alternative equal protection theory following its summary judgment ruling because it will not change the outcome of the case or the available remedies. As Plaintiffs note, the only remedy they are seeking in this action is a permanent injunction (Doc. 160, at 11.) The Court has already found in favor of the Plaintiffs on Count I of their Complaint and is prepared to grant some form of injunctive relief. As Plaintiffs concede, they would not be entitled to additional remedies even if the Court ruled in

their favor on Count II's Equal Protection claim (*see id.*), which the Court has already denied in part. Therefore, the Court should either enter summary judgment in favor of the Secretary on Count II's Equal Protection Claim in its entirety or deny that claim as moot.

CONCLUSION

In sum, the Secretary maintains his objection to the Court's ruling that Georgia's petition requirements are unconstitutional under the First and Fourteenth Amendment and submits that no injunctive relief is warranted. To the extent the Court enters a permanent injunction over the Secretary's objection, any remedy imposed should preserve the requirement that candidates show a significant modicum of support among the electorate, consistent with the State's recognized interests. The Secretary respectfully requests that the Court deny any remaining claims as moot and enter a final judgment, in order for this case to be resolved in a timely manner to prepare for the 2022 election cycle, including all possible appeals.

Respectfully submitted, this 30th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing has been formatted using Times New Roman font in 14-point type in compliance with Local Rule 7.1(D).

/s/Charlene S. McGowan
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record in this case.

/s/Charlene S. McGowan
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