IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

STEPHEN P. CURTIS, et. al. **Case No. 1:20-CV-00748**

Plaintiffs

v.

MAGGIE TOULOUSE OLIVER

Defendant

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION WITH VERIFIED COMPLAINT IN SUPPORT

Plaintiffs, by and through Counsel, move this Court for an Order granting them a Preliminary Injunction and/or a Temporary Restraining Order. This Motion is supported by the attached Memorandum in Support, and the Plaintiffs' Verified Complaint. Because election deadlines will soon be upon us, Plaintiffs respectfully request emergency and expedited relief in this matter.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

Introduction

This lawsuit challenges the practices of the Defendant and her office in connection with the 2020 primary election process, and the write-in candidacy of Stephen Curtis for Court of Appeals Judge. The candidacy of Mr. Curtis was backed by the New Mexico Libertarian Party, who organized and spent resources around that race. The evidence indicates that the usage of certain voting systems, in particular counties, failed to count write-in votes that were actually cast for Mr. Curtis, leaving Mr. Curtis just a few votes short of making the cutoff. In other words, if the ballots were counted, Mr. Curtis would have achieved the threshold to move on to the general election. Defendant and her staff were aware of these issues, and persisted in ignoring them. Even worse, when Mr. Curtis demanded a recount, they demanded that he pay over $3,573,400.00 to vindicate the recount of the few Libertarian ballots at issue. Their actions, and the application of New Mexico law that enabled them, are unconstitutional as applied.

I. FACTS

Plaintiff Stephen Curtis is a duly registered Libertarian voter in New Mexico, and was and is a candidate for New Mexico Court of Appeals. (Pl's Verified Compl., RE#1, ¶2). He brings this challenge as both a Libertarian voter, and the candidate for New Mexico Court of Appeals. *Id.* Plaintiff Libertarian Party of New Mexico is New Mexico's third largest political party, which exists to run candidates for public office in New Mexico, and consists of groups of voters who have come together to achieve political objectives. *Id.* at ¶3.

Plaintiff Chris Luchini is the Chair of the Libertarian Party of New Mexico, who brings this challenge as a registered voter in New Mexico, who cast a ballot for Mr. Curtis, and who, it appears, did not have his ballot initially counted. *Id.* at ¶4. Plaintiff Ranota Q. Banks is a

Libertarian New Mexico voter who cast a ballot for Mr. Curtis, and who did not have her ballot counted (we know this based on the county and precinct she voted in and the fact that no such votes were counted for Mr. Curtis in that county and precinct). *Id.* at ¶5.

Defendant Maggie Toulouse Oliver is the New Mexico Secretary of State who, among other things, has statutory responsibilities for the administration and enforcement of New Mexico's election laws. Id. at ¶6. She is sued in her official capacity only. *Id.*

Mr. Curtis filed to run and qualify as a Libertarian candidate for Court of Appeals Judge. *Id.* at ¶9. To move on to the General Election, he needed to obtain 230 write-in votes. *Id.*

Due to concerns about holding an in-person election during the coronavirus pandemic, and pursuant to a New Mexico Supreme Court order, the Secretary of State's office mailed applications for absentee ballots to all voters registered with a major party in the State of New Mexico in or about May, 2020. *Id.* at ¶10.

On May 5, 2020, early voting opened in the 2020 primary elections. *Id.* at ¶11. On June 2, 2020, the primary election was formally held, and the unofficial results were announced. *Id.* at ¶12.

Approximately 1,570 ballots were cast in the Libertarian Party primary election in New Mexico. *Id.* at ¶13. Prior to that election, the Libertarian Party of New Mexico spent resources to promote Mr. Curtis' race, by undertaking an expensive direct mail campaign to its registered voters. *Id.* at ¶14. The feedback that the party received from its members reveals that numerous voters, well above the 230-vote threshold, cast votes for Mr. Curtis, and, as a consequence, that Defendant and others administering the elections were therefore not appropriately counting the votes. *Id.* at ¶15.

Unofficial returns reflected that Stephen P. Curtis did not receive the 230 write-in votes required to be put on the general election ballot as the Libertarian Party's nominee for Court of Appeals. *Id.* at ¶16.

The total votes reflected for Mr. Curtis on the "Unofficial results" page on the Secretary of State's website fluctuated, and increased by several votes between when the unofficial results were first reported on June 2, 2020, and when the State Canvassing Board met on June 23, 2020, to certify the results of the primary election. *Id.* at ¶17.

There is significant and substantial evidence that write-in votes for Mr. Curtis were not correctly tallied. *Id.* at ¶18. For example, a Bernalillo County website reflects that 270 write-in votes were case in the Libertarian Party Primary for Court of Appeals. *Id.* Mr. Curtis was the only write-in candidate in that election. Id. Mr Curtis Received **zero (0)** votes from the 170 machine tallied Absentee ballots, and one (1) vote from the 'hand counted' Absentee Ballots. *Id.* All of the remaining 40 votes came from the 100 in person, or early ballots. *Id.* However, the Secretary of State's office and State Canvassing Board only credited Mr. Curtis with 41 votes from Bernalillo County. *Id.*

Similarly, in Los Alamos, Mr. Curtis was initially reported to only have received 4 write-in votes, in the Los Alamos County Canvas. *Id.* at ¶19. However, those numbers were later revised to reflect that he received 18 votes reported by the State Canvassing Board, more than four times the number initially reported. *Id.*

Phone communication with the Los Alamos County Clerk, and the Clerks staff revealed that the machine counted Absentee ballots were properly selected for review, and the votes tallied, however errors in the voting machines prevented those machine counted Absentee Ballot

results from being added to the in person and early voting totals. *Id.* at ¶20. Los Alamos County detected this error before the meeting of the State Canvassing Board. *Id.*

The voting errors with the machines in Los Alamos County permeated throughout the state. *Id.* at ¶21. Rather than directing the county clerks throughout New Mexico to go back and recount these ballots, Defendant, aware of these voting machine errors, deliberately ignored these errors statewide, and undercounts for Mr. Curtis permeated the state. *Id.*

In the end, as a result of the Defendant's malfeasance, and despite her awareness of voting machine errors, including those in Los Alamos County, Mr. Curtiss was credited with receiving only 204 votes by Defendant, 26 votes short of the number required. *Id.* at ¶22.

On June 19, 2020, the Chair of the Libertarian Party of New Mexico e-mailed the Secretary of State's office to advise them that the Stephen P. Curtis campaign intended to seek a recount of the primary election, and inquired what amount would need to be deposited for the recount. *Id.* at ¶23. In an apparent attempt to "run out the clock", the Secretary of State did not respond to this inquiry. *Id.* at ¶24.

Also on June 19, 2020, Stephen P. Curtis e-mailed the Secretary of State's office, stating that he intended to apply for a recount and inquiring what the estimated cost of the recount would be. *Id.* at ¶25. Yet again, in an apparent attempt to "run out the clock", the Secretary of State did not respond to this inquiry. *Id.* at ¶26.

On June 25, 2020, Mr. Curtis submitted a letter to the Secretary of State's office, applying for a recount of the primary election results, and requesting that the Secretary of State's office notify him of the amount of cash or surety bond that would need to be deposited with the

Secretary of State's office to accomplish the recount. *Id.* at ¶27. In yet another apparent attempt to "run out the clock", the Secretary of State did not respond to this inquiry. *Id.* at ¶28.

On June 29, 2020, the Chair of the Libertarian Party of New Mexico sent an e-mail to the Secretary of State's office, requesting the wiring instructions for the recount deposit. *Id.* at ¶29.

On June 29, 2020, at 4:46 PM, the Secretary of State's office provided wiring instructions for the first time, and also, for the first time, stated that a deposit of $3,573,400 would be required to complete the recount. *Id.* at ¶30. This request amounted to a demand that the Stephen P. Curtis campaign deposit approximately $2,276.05 per ballot to be recounted. *Id.* The Secretary of State's office stated by e-mail that the funds would need to be received that day. *Id.*

On July 1, 2020, Mr. Curtis sent an e-mail to the Secretary of State's office limiting the requested recount to seven counties that appeared to have the greatest irregularities in their vote totals. Id. at ¶31. Those counties were Bernalillo, Sandoval, Dona Ana, Santa Fe, San Juan, Chaves, and Los Alamos. *Id.* Approximately 1,145 votes were cast in the Libertarian Party primary in those seven counties. *Id.*

On July 1, 2020, funds were wired to the Secretary of State's office in the amount of $23,800, amounting to $3,400 per county for which the recount was requested. *Id.* at ¶32. This amount was calculated based on the understanding that in 2018, a Libertarian candidate for governor had secured a recount by depositing $3,400 per county to be recounted. *Id.*

On July 2, 2020, the Secretary of State's office sent a letter denying the application for a recount, asserting that the funds tendered were untimely and insufficient to cover the required amount of the deposit. *Id.* at ¶33.

The voting machines in use in the challenged counties require additional steps to be taken to count write-in votes, which were not taken. *Id.* at ¶34. Defendant was aware of these issues, yet refused to direct the County Clerks to conduct the additional steps to ensure that the write-in votes were counted. *Id.*

N.M. Stat. Ann. § 1-14-15 requires a bond or cash to be posted to cover the cost of any recount proceeding. *Id.* at ¶35. Defendant has required the full amount to be posted for each precinct, in the amount of $3,573,400, even though there are only 1,570 ballots at issue that would yield additional votes (those from the Libertarian primary election). *Id.* In other words, the Defendant is requiring Plaintiffs to post a bond of $2,276 per ballot to recount, when there is substantial evidence of errors affecting the outcome of the election. *Id.*

Plaintiffs obtained quotations for bonding the amount in question; as it turns out, the bonding requirement actually requires obtaining more than $3,573,400, since the bond is treated as a supersedeas bond and requires coming up with more than the base amount. *Id.* at ¶36.

Finally, and relevant to the analysis here, the Defendant, and the State of New Mexico, also restricts the Plaintiffs' ability to fundraise the amount in question, with fundraising limitations. N.N. Stat. Ann. § 1-19-25 to 1-19-36. *Id.* at ¶37. In effect, these requirements foreclose all but extremely wealthy candidates from being able to handle and demand a recount, even where there is significant evidence of error, or even fraud. *Id.* at ¶38.

II. LAW AND ARGUMENT

A. Preliminary Injunction Standard and the second, third, and fourth factors

To succeed on a typical preliminary-injunction motion, the moving party needs to prove four things: (1) that he's "substantially likely to succeed on the merits," (2) that he'll "suffer irreparable injury" if the court denies the injunction, (3) that his "threatened injury" (without the injunction) outweighs the opposing party's under the injunction, and (4) that the injunction isn't

"adverse to the public interest." *Beltronics USA, Inc. v. Midwest Inventory Distrib.*, LLC, 562 F.3d 1067, 1070 (10th Cir. 2009).

The Tenth Circuit disfavors certain kinds of preliminary injunctions.[1] Disfavored preliminary injunctions don't merely preserve the parties' relative positions pending trial. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258-59 (10th Cir. 2005). Instead, a disfavored injunction may exhibit any of three characteristics: (1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win. *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012). To get a disfavored injunction, the moving party faces a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors: He must make a "strong showing" that these tilt in his favor. *Fish v. Kobach*, 840 F.3d 710, 724 (10th Cir. 2016).

But the analysis in constitutional cases, such as this one, turns solely on whether or not the Plaintiffs have demonstrated a constitutional violation.

On the second prong, irreparable injury, "[m]ost courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019), *see, also, Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). "Any deprivation of any constitutional right fits that bill." *Free the Nipple-Fort Collins*, 16 F.3d 792, 806.

As for the third prong, the weighing of harms, "[w]hen a constitutional right hangs in the balance, though, 'even a temporary loss' usually trumps any harm to the defendant." *Id.* Further, as to the last factor, the Government "has no interest in keeping an unconstitutional law on the

[1] Plaintiffs respectfully submit that this distinction is found nowhere in Supreme Court jurisprudence, and the United States Supreme Court made no such distinctions in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008), which involved one of these disfavored preliminary injunctions.

books." *Id.* And, as to the last factor, it is "always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 807.

As such, Plaintiffs must make a strong showing that they are likely to succeed on the merits.

B. Defendant has violated the First Amendment

The First Amendment of the U.S. Constitution provides, in relevant part, that "Congress shall make no law ... abridging the freedom of speech..." The Fourteenth Amendment has incorporated the First Amendment to apply to the states, including the State of New Mexico, under *Gitlow v. New York*, 268 U.S. 652 (1925).

The burden in question, namely the requirement to post a multi-million-dollar bond or cash, to obtain a recount to vindicate the candidate's and voters' interests, particularly with substantial evidence of error, imposes a severe burden on the Plaintiffs' associational interests, and the rights of voters to cast ballots. *Anderson v. Celebrezze*, 460 U.S. 760 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). As such, strict scrutiny was triggered, and the requirement in question is not necessary or narrowly tailored to meet any state interest.

In the alternative, if the Court finds that the recount provision, facially and as applied to Plaintiffs, do not constitute a severe burden on the rights of the Plaintiffs, then they constitute more than a minimal burden, and do not pass muster under the flexible analysis that weighs the burdens of Plaintiffs against the State's asserted interest and chosen means of asserting it, under the prevailing U.S. Supreme Court cases of *Anderson*, 460 U.S. 760 and *Burdick*, 504 U.S. 428.

Two U.S. Supreme Court cases suggest that the excessive bond requirement here, particularly where there is evidence of fraud, or at least significant error, cannot be sustained. First, in *Lubin v. Panish*, 415 U.S. 709, 717 (1974), the Court observed that "[a] large filing fee may serve the legitimate function of keeping ballots manageable but, standing alone, it is not a

certain test of whether the candidacy is serious or spurious." Thus, "[a] wealthy candidate with not the remotest chance of election may secure a place on the ballot by writing a check." *Id.* Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candidates without regard to their economic status. *Id.* at 717-718. The Supreme Court then concluded that "we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Id.* at 719.

In *Morse v. Republican Party*, 517 U.S. 186 (1996), the Supreme Court again dealt with a wealth-based criterion in the election arena. Payment was required to participate in a political party's candidate nomination process. Again, the Supreme Court found that even private political parties could not charge a fee to participate in the voting process and have one's vote counted under the constitution and Voting Rights Act. *Id.*

To properly count 1,570 ballots, Defendant has demanded, through her application of the state statute, the advancement of the payment of $3,573,400. She has infringed on the rights of the voters who cast ballots for Mr. Curtis, including Plaintiff Ranota Q. Banks, who testified she personally cast a vote for Mr. Curtis, which was not counted. She has infringed on the associational rights of the Libertarian Party of New Mexico, and Mr. Curtis, who are entitled to have their associational rights as a political party vindicated. Plaintiffs have demonstrated a strong likelihood of success on the merits of this claim.

Courts have never found such requirements to be justified. *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1254 (D. Utah 2017) ("Courts have repeatedly rejected the argument that cost is a sufficient state interest in election cases."); *citing Belitskus v. Pizzingrilli*, 343 F.3d 632 (3rd Cir. 2003) (and collecting cases concerning costs not being a compelling state interest to justify fee or cost provisions).

C. Defendant has violated Equal Protection

Under *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." N.M. Stat. Ann. § 1-14-15 is such a standard and violates equal protection.

Further, "falsely certifying the count, deprived qualified voters of that right and of the equal protection of the laws guaranteed by the Fourteenth Amendment." *United States v. Classic*, 313 U.S. 299, 310, 315 (1941). "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. 98, 104, (2000) (per curiam). The right to vote necessarily includes the right to have the vote fairly counted. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("[Q]ualified voters have a constitutionally protected right . . . to have their votes counted"). (*citing United States v. Mosley*, 238 U.S. 383, 386 (1915))); *Classic*, 313 U.S. 299, 315 (right to vote includes right of "qualified voters within a state to cast their ballots and have them counted").

In addition to the vote of Ms. Banks (and we can identify other, specific voters who cast votes for Mr. Curtis, well in excess of the threshold for qualification whose vote was not counted), who Defendant has failed to count, the Plaintiffs can identify entire precincts that have not been appropriately counted: all through voting machine errors that do not appropriately count write in votes.

Plaintiffs request an evidentiary hearing on this matter. They have had discussions with County Clerks who have identified the specific issues with the voting machines, and desire, through compulsory process, to place these individuals under oath and obtain testimony to show, at a minimum, that the Defendant was well aware of these voting machine errors, and yet persisted in depriving hundreds of New Mexico voters of their votes.

Courts have never found such requirements to be justified. *United Utah Party*, 268 F. Supp. 3d 1227, 1254 ("Courts have repeatedly rejected the argument that cost is a sufficient state interest in election cases."); *citing Belitskus*, 343 F.3d 632 (and collecting cases concerning costs not being a compelling state interest to justify fee or cost provisions).

Plaintiffs have demonstrated a strong likelihood of success on this claim as well.

D. Defendant has violated Due Process

Due process is implicated "[i]f the election process itself reaches the point of patent and fundamental unfairness." *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *see also Marks v. Stinson*, 19 F.3d 873, 888 (3d Cir. 1994) ("[R]ejection of a ballot where the voter has been effectively deprived of the ability to cast a legal vote implicates federal due process concerns.").

Defendant's actions have deprived the voters for Mr. Curtis of their right to vote, despite knowledge of voting machine errors that were not counting votes, and in violation of due process. Courts have never found such requirements to be justified. *United Utah Party*, 268 F. Supp. 3d 1227, 1254 ("Courts have repeatedly rejected the argument that cost is a sufficient state interest in election cases."); *citing Belitskus*, 343 F.3d 632 (and collecting cases concerning costs not being a compelling state interest to justify fee or cost provisions).

Plaintiffs have demonstrated a strong likelihood of success on this claim as well.

E. Generally, Defendant's actions are an abuse of public office

Despite knowledge of voting machine errors that failed to count these write in votes, Defendant proceeded with the certification of the ballots, excluding Mr. Curtis from the general election ballot. She could have directed a precinct by precinct re-count of Libertarian ballots, in a matter of a few hours, in the affected counties. It strains credulity to believe that the state required over $3,500,000 to appropriately count less than 2,000 ballots. Instead, Defendant

engaged in a game of hide the ball, characterized by a failure to respond to inquiries regarding the process, to run out the clock.

III. CONCLUSION

A preliminary injunction, directing the recount in Bernalillo, Sandoval, Dona Ana, Santa Fe, San Juan, Chaves, and Los Alamos should be ordered. Because election deadlines will soon be upon us, Plaintiffs respectfully request emergency and expedited relief in this matter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon the Defendant and the New Mexico Attorney General, this 29 day of July, 2020, via U.S. mail, and have served same by filing the foregoing in the Court's CM/ECF System this same date.

Stephen P. Curtis, Esq.