

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

Martin Cowen, et al.,

Plaintiffs,

vs.

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

Defendant.

Case No. 1:17-cv-04660-LMM

**Plaintiffs' Reply in
Response to the Court's
March 29 Order**

The plaintiffs respectfully submit this reply to the Secretary of State's response in opposition to the remedies proposed by the plaintiffs. (ECF 163.) In his response, the Secretary steadfastly maintains that this Court and the Eleventh Circuit were wrong when they ruled against him, and he therefore offers no remedial proposals of his own. His attacks on the plaintiffs' remedial proposals are unsupported by any evidence, based on untrue assertions of fact, and without merit.

I. An injunction is the appropriate remedy.

The Secretary first argues that the Court should not enjoin Georgia’s ballot-access scheme because “every court analyzing these same requirements have [sic] held them to be valid and constitutional.” (ECF 162 at 2.) Of course, that’s not true. In fact, this very Court has held them to be unconstitutional or likely unconstitutional twice within the last year. *See Cowen v. Raffensperger*, Civ. No. 1:17-cv-4660-LMM (N.D. Ga. Mar. 29, 2021) (ECF 159) (granting summary judgment); *Cooper v. Raffensperger*, 472 F. Supp. 3d 1282, 1295 (N.D. Ga. 2020) (granting a preliminary injunction). And the Eleventh Circuit has already rejected the Secretary’s argument that the cases on which he relies compel the conclusion that Georgia’s scheme is constitutional. *Cowen v. Ga. Sec’y of State*, 960 F.3d 1339, 1345 (11th Cir. 2020).

The Secretary also suggests that an injunction isn’t warranted because the plaintiffs “have not presented evidence of a ‘severe’ burden” on their constitutional rights. (ECF 163 at 4.) This argument apparently overlooks this Court’s recent ruling, which found that “Georgia law imposes a severe burden on [the plaintiffs’] First and Fourteenth Amendment rights.” (ECF 159 at 15.) If the Secretary or the Court need

evidence of that burden, the plaintiffs incorporate the extensive summary-judgment record here. Much of that evidence is cited in the Court's ruling on summary judgment.

The Secretary does not address the plaintiffs' argument that a permanent injunction is the usual and appropriate remedy for a constitutional violation of the kind found here. (ECF 160 at 1-2.) He does not discuss or even cite the cases upon which the plaintiffs rely. He just ignores the argument and thus concedes the point. *See Resol. Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995).

II. The General Assembly has plenty of time to devise a remedy if it chooses to do so.

The Secretary next argues that a permanent injunction is not a workable or reasonable remedy because the Georgia General Assembly "will not have the opportunity to meet, discuss, prepare, and pass legislation addressing these ballot access requirements before the signature-gathering process begins." (ECF 163 at 6.) This is also not true.

As the Secretary concedes, the General Assembly is likely to meet in one or more *special sessions* before the signature-gathering period would normally begin next January. (*Id.*) At least one special session

will occur after the Census Bureau releases redistricting data in October. The special session will mainly be for the purpose of redrawing boundary lines for Georgia's congressional and legislative districts, but there is no reason why fixing an unconstitutional ballot-access scheme could not be included in the call for a special session. *See* Ga. Const. art. V, § 2, ¶ 7. Such legislation would be easy to draft, and work on it could begin now, while the General Assembly waits for the federal government to release the census data necessary for redistricting. The legislature does, therefore, have the opportunity to meet, discuss, prepare, and pass legislation addressing the ballot-access requirements before the signature-gathering process begins.

It also would not be the end of the world if the General Assembly chose to fix the problem at its next *regular session*, which begins on January 10, 2022. As the record demonstrates, courts routinely pro-rate the ballot-access requirements when circumstances limit the time available for collecting signatures. (ECF 69-19 ¶ 8; ECF 97 ¶ 81.) This Court could do likewise if the General Assembly decides to re-impose a signature requirement with the same 180-day collection period.

Of course, it is also possible that the General Assembly might choose a different remedy or even leave a permanent injunction in place. The Secretary suggests that this would be a horrible result. (ECF 163 at 6.) But if that is the General Assembly's choice, then that is the General Assembly's choice. The Supreme Court has indicated that a federal court should allow elected officials to remedy an unlawful election law "wherever practical," *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), and the Secretary has not shown that giving the legislature that choice would be impractical here.

III. The plaintiffs' proposed interim remedy is neither unworkable nor unfair.

The Secretary next argues that the plaintiffs' proposed interim remedy is "unworkable and unfair." (ECF 163 at 7.) He claims that it is unfair to major-party candidates, because the proposed remedy would not require independent and third-party candidates to pay the same qualifying fee that is required of them. (*Id.*) And he claims that the proposed remedy is unworkable because 500 signatures is "astoundingly low" and "has never been tried." (*Id.* at 11.) He suggests that it would open the floodgates to frivolous candidacies.

The plaintiffs sincerely hope that the irony of the Secretary's insistence on equal treatment for major-party candidates is not lost on this Court. Georgia's current ballot-access scheme gives major-party candidates a distinct advantage: they have only one hurdle to clear before appearing on the ballot, and that is the qualifying fee.

Independent and third-party candidates, by contrast, have two hurdles: the qualifying fee *and* the qualifying petition. It is thus not unfair or inequitable to reduce the number of hurdles for independent and third-party candidates from two to one.

Moreover, the record shows that neither the qualifying fee nor a 500-signature requirement would be unworkable as an interim remedy or would lead, as the Secretary implies, to crowded ballots. As this Court has recognized, most other states do not require third-party candidates to submit both a filing fee and a petition. (ECF 159 at 23.) This makes sense. The qualifying fee and the nomination petition serve the same purpose: to limit ballots to a reasonable length. There is no need to require both.

Georgia's special elections prove the point. In special elections for U.S. Representative, the only ballot-access requirements are a notice of

candidacy and the qualifying fee. (ECF 97 ¶ 228.) No nomination petition is required. And ballots have not been crowded with independent and third-party candidates. In 2020, there was one independent candidate and one political-body candidate on the ballot in the special election in Georgia's Fifth Congressional District.¹ In 2017, there were two independent candidates on the ballot in the special election in the Sixth Congressional District. (*Id.* ¶ 231.) In 2010, there was one independent candidate on the ballot in the special election in the Ninth Congressional District. In 2007, there was one political-body candidate on the ballot in the special election in the Tenth Congressional District. (*Id.* ¶ 233.) Georgia's own experience thus shows that the qualifying fee alone is high enough to keep the number of independent and third-party candidates low.

Georgia's own experience also shows that 500 signatures is enough to keep the number of independent and third-party candidates low. No such candidates have yet satisfied the court-imposed signature requirement for presidential electors. That requirement is 7,500

¹ <https://results.enr.clarityelections.com/GA/105036/web.259135/#/summary>

signatures, which averages out to 536 signatures for each of Georgia's 14 congressional districts. The record also shows that, in 2020, eleven independent or third-party candidates timely submitted a notice of candidacy for *any office* and paid the required qualifying fee for the office they sought. (ECF 138-9.) But only three of those candidates submitted as many as 500 valid signatures, and one of those did so under unique circumstances. (ECF 159 at 20.) The reason for this is plain: gathering signatures is hard, slow work, and gathering even 500 valid signatures takes a lot of time and resources. (ECF 159 at 22-28.) The record thus shows that 500 signatures is not "astoundingly low," as the Secretary claims. (ECF 163 at 11.)

It is also not something that "has never been tried." (*Id.*) Between 1922, when Georgia first used government-printed ballots, and 1943, when the petition requirement was first enacted, Georgia law provided that an independent candidate, or the nominee of any part, could appear on the general-election ballot as a candidate for any office with no petition and no fee. (ECF 159 at 2.) And yet, between 1922 and 1943, Georgia never had more than three candidates appear on the general-election ballot in any of its congressional districts. *See* Michael J. Dubin,

United States Congressional Elections, 1788-1997 442-543 (1998). With even lower ballot-access requirements than the plaintiffs now propose, Georgia never had a problem with crowded ballots.

It has also been tried in other states. One nearby state, Mississippi, requires *neither* a filing fee *nor* a petition for a third party to obtain ballot access for a full slate of candidates. (ECF 69-25 at 18-20.) Rather, a third party need only file a list of party officers, and Mississippi has not had crowded ballots. It had zero independent or third-party candidates for U.S. Representative on the ballot in 2020.² In 2018, no ballot was longer than three candidates.³ And, in 2016, no ballot was longer than four candidates.⁴

² Office of the Clerk of the United States House of Representatives, *Statistics of the Presidential and Congressional Election of November 3, 2020* 41 (2021), available at

https://clerk.house.gov/member_info/electionInfo/2020/statistics2020.pdf (hereinafter “2020 Statistics”).

³ Office of the Clerk of the United States House of Representatives, *Statistics of the Congressional Election of November 6, 2018* 26 (2019), available at https://clerk.house.gov/member_info/electionInfo/2018/statistics2018.pdf (hereinafter “2018 Statistics”).

⁴ Office of the Clerk of the United States House of Representatives, *Statistics of the Presidential and Congressional Election of November 8, 2016* 37 (2017), available at https://clerk.house.gov/member_info/electionInfo/2016/statistics2016.pdf (hereinafter “2016 Statistics”).

Iowa requires 300 signatures per candidate and no filing fee. (ECF 69-25 at 18-20.) It had one third-party candidate on its ballots in 2020.⁵ In 2018, Iowa had nine independent or third-party candidates across four districts.⁶ And in 2016, it had three independent or third-party candidates across four districts.⁷

Rhode Island requires 500 signatures and no filing fee. (ECF 69-25 at 18-20.) In 2020, the state had two independent candidates across its two districts and no ballot longer than three.⁸ In 2018, it had zero independent or third-party candidates.⁹ And, in 2016, it had two.¹⁰

Kentucky requires a modest filing fee of \$500 and a petition with 400 signatures. (ECF 69-25 at 18-20.) In 2020, it had a total of three independent candidates across six districts.¹¹ It also had three Libertarian candidates on its ballots, but the Libertarian Party is ballot-qualified in that state and therefore had to submit no petition. In 2018,

⁵ 2020 Statistics, *supra* note 2, at 26.

⁶ 2018 Statistics, *supra* note 3, at 16.

⁷ 2016 Statistics, *supra* note 4, at 22.

⁸ 2020 Statistics, *supra* note 2, at 60.

⁹ 2018 Statistics, *supra* note 3, at 45.

¹⁰ 2016 Statistics, *supra* note 4, at 64.

¹¹ 2020 Statistics, *supra* note 2, at 29-30.

it had 4 independent candidates and two ballot-qualified Libertarians.¹²

In 2016, it had zero independent or third-party candidates.¹³

We could go on. The Secretary's speculation that the plaintiffs' proposed interim remedy would be unworkable is just speculation. It does not square with the record, and the Court should give it no weight.

IV. Defects in the signature-verification process should not go unremedied.

The Secretary next argues that the Court should not require him, as part of any interim remedy, to improve his error-prone signature-verification process because "this process is a county responsibility" and an injunction against him would therefore be ineffective. (*Id.* at 13.) But this also isn't true. The Secretary has already admitted that it is *his duty* under Georgia law to check the validity of signatures on nomination petitions submitted by candidates for President, U.S. Senator, U.S. Representative, and all state offices. (ECF 97 ¶ 132.) *See* O.C.G.A. §§ 21-2-132(d), -171(a).

The Secretary's reliance on *Jacobson v. v. Fla. Sec'y of State*, 974 F.3d 1236, 1253 (11th Cir. 2020), is misplaced. Unlike the ballot-order

¹² 2018 Statistics, *supra* note 3, at 17.

¹³ 2016 Statistics, *supra* note 4, at 24-25.

law at issue in that case, which tasked county officials with placing candidates on the ballot in the correct order, *see id.* at 1244, the statutes here task the Secretary of State with verifying signatures on nomination petitions for U.S. Representative. An injunction requiring the Secretary to fix his error-prone process, which currently includes delegating the duty to poorly trained county officials, would be directed at precisely the right official.

By rejecting signatures that should not have been rejected, the Secretary's error-ridden signature-verification process adds to the constitutional burden that this Court found to be severe. Any interim remedy, if it requires a candidate to submit signatures for verification, should not allow defects in that process to go unremedied. This case presents the Court with both an opportunity and a responsibility to fix the Secretary's broken process.

V. The Secretary did not properly raise his discriminatory-purpose argument.

The Secretary's final argument addresses the plaintiffs' discriminatory-purpose claim. (ECF 163 at 13-16.) The Secretary asks this Court both to reconsider its finding that the Secretary did not address that claim in his opening summary-judgment brief and now to

grant summary judgment in his favor on that claim. There is no basis to reconsider that finding, however, because the Secretary did not, in fact, address the discriminatory-purpose claim in his opening brief. (ECF 135-1.) The words “purpose,” “intent” and “motive” appear nowhere in that brief. The pages to which the Secretary cites as the location of that argument discuss not the discriminatory-purpose claim but a different claim altogether. (ECF 163 at 14 (citing ECF 135-1 at 21-25).)

The Secretary addressed the discriminatory-purpose claim for the first time in his summary-judgment reply brief (ECF 149 at 9-14), and “federal courts will not consider arguments that are presented for the first time in a reply brief.” *Merial LLC v. Fidopharm, Inc.*, 2104 WL 12042532 at *3 (July 23, 2014) (collecting cases). In addition, the portion of the Secretary’s reply brief that addresses the claim does not refer to anything in the plaintiffs’ summary-judgment response brief (ECF 139). Nothing in that brief addressed the discriminatory purpose claim, either. Instead, the Secretary’s reply cites the plaintiffs’ response to the Secretary’s motion to exclude the plaintiffs’ expert witness. (ECF 149 at 11 (citing ECF 138 at 13).) But that response brief expressly notes that neither side had sought summary judgment on the plaintiffs’

discriminatory-purpose claim. (ECF 138 at 5.) The Secretary was trying to shoehorn a new argument into a reply brief, and this Court was therefore right not to consider that argument when ruling on the motions for summary judgment. The Court should not now reconsider that ruling, either, because it would be an abuse of discretion to do so. *See Merial* at *3.

The plaintiffs have alleged that Georgia's petition requirement "was enacted with the discriminatory purpose of preventing Communist Party candidates from appearing on Georgia's ballots." (ECF 1 ¶ 18.) It was enacted, in other words, with the purpose of driving certain politically disfavored viewpoints out of the marketplace of ideas. The Secretary now argues that this purpose is irrelevant because the government is allowed to engage in such discrimination as long as it does so in statutes that are not facially neutral. (ECF 163 at 14-15.) But that is not the law. The cases on which the Secretary relies do not support that proposition, and they do not establish that the Secretary is entitled to judgment as a matter of law on the plaintiffs' discriminatory-purpose claim.

The Secretary also disputes the plaintiffs' factual allegation about the petition-requirement's purpose. (ECF 97 ¶ 27.) This is a genuine dispute that can only be resolved at trial—a trial that will be necessary only if this Court ultimately grants less relief on summary judgment than might be available under the discriminatory-purpose claim.

Respectfully submitted this 14th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **Plaintiffs' Reply in Response to the Court's March 29 Order** was prepared in 13-point Century Schoolbook in compliance with Local Rules 5.1(C) and 7.1(D).

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