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

JAMES L. COOPER, III, an individual, MARTIN COWEN, an individual, and the GEORGIA GREEN PARTY, an unincorporated political body,	*	Civil Action No. 1:20-cv-1312-ELR
Plaintiffs,	*	
v.	*	
BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State,	*	
Defendant.	*	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendant Brad Raffensperger, Georgia Secretary of State ("the Secretary"), responds to Plaintiffs' Motion for Preliminary Injunction as follows.

INTRODUCTION

Plaintiffs' lawsuit is the most recent in a series of attempts to overturn Georgia's ballot access requirements for political body candidates, this time under the pretext of the public health emergency due to COVID-19.[1] Despite numerous

[1] The related case of *Cowen, et al. v. Raffensperger*, No. 1:17-cv-04660-LMM (N.D. Ga. Sep. 23, 2019) (*See* Doc. 11-18), also involving Plaintiff Martin Cowen,

attempts to have Georgia's petition requirements enjoined, however, courts repeatedly have upheld the requirements as constitutional. *See, e.g., Jenness v. Fortson*, 403 U.S. 431 (1971); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002); *Coffield v. Handel*, 599 F.3d 1276 (11th Cir. 2010).

Based on this controlling precedent, the Court's determination of Plaintiffs' request for injunctive relief must start with the assumption that Georgia's petition requirements are facially constitutional. The only issue to be determined, then, is whether the intervening public health emergency caused by COVID-19 requires the Court to enjoin the state's otherwise constitutional petition requirements in their entirety. Plaintiffs have not demonstrated that such extraordinary relief is warranted.

To be sure, the COVID-19 outbreak has presented a challenge for election officials, candidates, and voters alike. However, to alleviate these burdens, the Secretary extended the deadline an extra 31 days for political bodies and their candidates to submit nomination petitions. This extension gives aspiring candidates a total of 7 months to conduct a signature campaign. With this amount of time, Plaintiffs cannot show that Georgia's petition requirements, even in the context of the current public health emergency, impose a severe burden on their constitutional

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is currently on appeal to the Eleventh Circuit Court of Appeals following a grant of summary judgment in favor of the Secretary of State.

rights that outweighs the State's recognized interest in requiring that candidates show a "significant modicum of support" as a pre-condition for ballot access. *See Jenness*, 403 U.S. at 442.

For these reasons, and those discussed further below, the Secretary respectfully requests that the Court deny Plaintiffs' motion to enjoin Georgia's petition requirements for political body candidates in their entirety. Alternatively, the Secretary asks that the Court fashion a remedy that reduces the petition signature requirement, for the November 2020 general election only, in proportion with the added burdens associated with COVID-19, taking into account the 31-day extension already granted by the Secretary. Such a remedy would be proportionate with the alleged harm, equitable to all candidates who will be on the ballot in the general election, and consistent with remedies fashioned by courts in similar cases in other states.

FACTUAL BACKGROUND

I. Georgia's Ballot Access Laws

Georgia's election code provides for ballot access based primarily on a showing of support within the electorate.[2] A "political party," for example, is defined

[2] Candidates must also file a notice of candidacy and qualifying fee. O.C.G.A. § 21-2-132(d). The qualifying fee must be paid by all candidates—whether political party, third party, or independent.

under Georgia law as a political organization whose nominee received at least 20% of the vote in the last gubernatorial or presidential election. O.C.G.A. § 21-2-2(25). Based on that substantial showing of support, political parties may obtain ballot access by nominating a candidate via primary election. O.C.G.A. § 21-2-130(1). Currently, only the Republican and Democratic parties meet this definition.

The Green Party and the Libertarian Party are "political bodies" under Georgia law, which is defined as any political organization that does not meet the definition of a "political party." O.C.G.A. § 21-2-2(23). Political body candidates do not have to win a majority of votes in a primary election or expend resources running a primary campaign to be nominated for the general election ballot. Rather, political body candidates may be nominated at their organization's convention, and included on the general election ballot by demonstrating voter support in other ways.

For *statewide* offices, a political body can qualify to have its nominees appear on the general election ballot by submitting a qualifying petition signed by at least 1% of the total number of registered voters at the last general election; or (b) nominating a candidate for statewide office who received votes totaling at least 1%

of the total number of registered voters at the last general election. O.C.G.A. §§ 21-2-170(b); 21-2-180.[3]

For *non-statewide* offices, including Georgia's Congressional districts, political body candidates may 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).

Finally, O.C.G.A. § 21-2-170(b) provides that political-body candidates for *president* must submit a nominating petition signed by at least 1% of the total number of registered voters at the last general election. However, that statutory requirement was reduced to 7,500 signatures by court order in 2016, as the result of a prior challenge by the Green Party. *See Green Party v. Kemp*, 171 F. Supp. 3d 1340, 1372 (N.D. Ga. 2016) *aff'd* 674 Fed. Appx. 974 (11th Cir. 2017).

Georgia law places very few restrictions on the signature-gathering process. Candidates have 180 days (six months) to collect signatures. O.C.G.A. § 21-2-

[3] In 1988, the Libertarian Party qualified under O.C.G.A. § 21-2-180 to nominate candidates for statewide offices when it submitted a qualifying petition signed by more than 1% of the total number of registered voters in the preceding general election. Since then, the party has retained that qualification in each election cycle by nominating at least one candidate for statewide public office who received votes totaling at least 1% of the total number of registered voters in that election. However, the Libertarian Party is still required to meet the petition requirements for ballot access for non-statewide offices under O.C.G.A. § 21-2-170.

170(e). Since the nomination petition is due by the second Tuesday in July (this year, July 14), aspiring candidates in 2020 or their political body organizations could have begun gathering signatures as early as mid-January. O.C.G.A. § 21-2-132(e). Candidates are not required to wait until after they receive their party's nomination to begin gathering signatures. And unlike most states' more burdensome rules, which often restrict voters from signing more than one petition, the only restriction on signing is that no person may sign the same petition more than once. O.C.G.A. § 21-2-170(c).

II. Plaintiffs' Prior Attempts to Seek Ballot Access.

Plaintiffs are no strangers to Georgia's ballot access requirements—both individual plaintiffs and the Georgia Green Party have attempted to qualify for the general election ballot in Georgia in the past and have been involved in prior litigation challenging Georgia's petition requirements.

Mr. Cooper previously attempted to qualify for the general election ballot in 2018 as the Green Party candidate for Georgia's Eighth Congressional District. (*See* Doc. 11-19, at 37 ¶ 96.) He attempted a petition drive but only "gathered 171 signatures in January and February 2018 before abandoning his efforts." (*Id.*)

Mr. Cowen previously attempted to qualify for the general election ballot in 2018 as the Libertarian Party candidate for Georgia's Thirteenth Congressional

District. (*See* Doc. 11-19, at 35 ¶ 93.) By his own account, he attempted a petition drive over a period of 40 days (out of the permissible 180), but only collected 620 signatures. (*Id.*)

Mr. Cowen is also the named plaintiff in prior litigation against the Secretary seeking to enjoin Georgia's petition requirements for political body candidates for U.S. House of Representatives. (*See* Doc. 11-18 [summary judgment order in *Cowen, et al. v. Raffensperger*, 1:17-cv-04660].) In that action, Mr. Cowen advanced many of the same arguments made here—namely, that Georgia's petition requirements present a severe burden on candidates' voting and associational rights in violation of the First and Fourteenth Amendment. This Court, however, granted summary judgment in favor of the Secretary based upon controlling Supreme Court and Eleventh Circuit precedent upholding the constitutionality of Georgia's petition requirements. (*See id.* at 15.) As discussed further below, that precedent is also controlling here.

The Green Party has also sought reduction of Georgia's petition requirements for presidential candidates in prior litigation. *See Green Party*, 171 F. Supp. 3d at 1344. In that action, the court reduced the signature requirements to 7,500 for presidential candidates "until the legislature imposes a permanent requirement." *Id.* at 1373. However, the legislature has not enacted any such changes to the election

code since the *Green Party* decision in 2016. Despite the reduction in the signature requirement, the Green Party still did not qualify a candidate for the ballot in Georgia in the 2016 presidential election.

III. The Secretary's Response to COVID-19 in the 2020 Election Cycle.

On March 14, 2020, following the outbreak of COVID-19, Governor Kemp declared a public health state of emergency in the State of Georgia. (*See* Doc. 11-6.) On April 2, Governor Kemp issued a temporary "shelter in place order," which eventually concluded (except as to the most at-risk individuals) by April 23. (*See* Doc 11-8.) The Governor's public health state of emergency is currently scheduled to expire on June 12, 2020. (*See* Doc. 11-9.)

On the same date as the Governor's declaration of a public health state of emergency, the Secretary began taking significant steps to alleviate the impact of COVID-19 on Georgia's election process for the 2020 election cycle. First, he postponed Georgia's presidential preference primary and general primary to June 9. (Harvey Dec. ¶ 8, attached as Exhibit 1). Next, the Secretary mailed absentee ballot request forms to Georgia voters statewide, and implemented social distancing measures in polling places for the primary election. (*See* Doc. 11-11.)

Finally, and most relevant here, the Secretary sent notice to all third-party and independent candidates who filed a declaration of candidacy and qualifying fee that

the deadline for submitting nominating petitions would be extended to August 14, 2020. (Harvey Dec. ¶ 12.) This extension increased the signature-gathering period from 180 to 211 days, in order to account for the difficulties candidates would face in gathering signatures due to COVID-19. (*Id.*)

The August 14 deadline is the longest period of time the deadline can be extended and still allow time for signatures to be verified before the November ballots need to be finalized. (Harvey Dec. ¶ 13.) Georgia's elections are governed by strict timelines to ensure that military and overseas voters receive ballots in time to vote in each election. (*Id.* ¶ 9.) Federal law requires absentee ballots to be sent to overseas and military voters no later than 45 days prior to any election. *See* 52 U.S.C. § 20302(a)(8). Ballots have to be built, proofed, and printed, and then mailed starting at 49 days prior the November 3, 2020 general election in order to meet the 45-day deadline (by September 19, 2020) under federal law to send ballots to military and overseas voters. (Harvey Dec. ¶ 9.)

Once the Secretary of State's office receives the nomination petitions, the signature pages are sent to the appropriate counties to verify the voters' identities and signatures. (Harvey Dec. ¶ 13.) This is a time-consuming process, and the August 14 deadline only gives counties approximately two weeks to complete it before they need to begin building the ballots. (*Id.*) After the signatures on

nominating petitions are verified, any political body or independent candidates that qualify for the general election will be placed on the general election ballot. (*Id.* ¶ 14.)

Accordingly, elections officials must have the final candidate names for the general election ballot by August 28, 2020, in order to build and proof ballot databases so that absentee ballots can be printed and sent to overseas and military voters by the federal deadline. (Harvey Dec. ¶ 10.) This is an aggressive schedule for these activities, but achievable. However, any further delay endangers Georgia's compliance with federal law and the opportunity for military and overseas voters to participate in the November general election. (*Id.*)

STANDARD OF REVIEW

A preliminary injunction in advance of trial is an extraordinary measure. *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). For that reason, plaintiffs have the burden of establishing their entitlement to a preliminary injunction. *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1217 (11th Cir. 2009). In order to prevail on a motion for preliminary injunction, the movant must show: [1] a substantial likelihood of prevailing on the merits; [2] that the plaintiff will suffer irreparable injury unless the injunction issues; [3] that the threatened

injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and [4] the injunction would not be adverse to the public interest. *Duke v. Cleland*, 954 F.2d 1526, 1529 (11th Cir. 1992); *Baker v. Buckeye Cellulose Corp*., 856 F.2d 167, 169 (11th Cir. 1988).

A preliminary injunction is a drastic remedy "which should not be granted unless the movant clearly carries the burden of persuasion." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (11th Cir. 1974). Moreover, in election cases, the burden imposed on plaintiffs is higher still and increases as an election approaches. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Because Plaintiffs cannot meet any of the preliminary injunction factors here, their motion should be denied.

ARGUMENT

I. Plaintiffs are Not Likely to Prevail on the Merits.

Plaintiffs cannot show a substantial likelihood of success on the merits of their claim because long-standing precedent has upheld the constitutionality of Georgia's nomination petition requirements under similar challenges. *See Jenness v. Fortson*, 403 U.S. 431 (1971); *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir. 1981); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002); *Coffield v. Handel*, 599 F.3d 1276 (11th Cir. 2010). Therefore, the Court's analysis of the Plaintiffs' claims must

start with the premise that Georgia's petition requirements are facially constitutional. To the extent that the intervening public health emergency has impeded Plaintiffs' petition efforts, those burdens have not been caused by any actions attributable to the Secretary, who has acted within the scope of his authority to alleviate any such burdens. Moreover, any added burdens due to COVID-19 are not outweighed by the State's important interest in requiring candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.

A. Georgia's petition requirements are constitutional under Supreme Court and Eleventh Circuit precedent.

The Supreme Court first upheld Georgia's 5% signature requirement for nomination petitions for Georgia's Congressional districts, which are challenged by the individual plaintiffs here, in the *Jenness* decision. In that case, the Court held that nothing in Georgia's requirements "abridges the rights of free speech and association secured by the First and Fourteenth Amendments." 403 U.S. at 440. The Court looked at the burden imposed by the 5% petition requirement and reasoned that, although it is "somewhat higher" than other states, Georgia imposes few restrictions on the signature collection process. *Id.* at 442. Specifically, voters may sign a petition for more than one candidate; voters are not required to state that they intend to vote for that candidate in the election; and voters who previously voted in a party primary are still eligible to sign a petition. *Id.* at 438-39. Additionally,

Georgia law does not fix an unreasonably early filing deadline for candidates and allows them 6 months to conduct a signature-gathering campaign. *Id.* at 438.

The Court next looked at the state's interest, acknowledging that there is an "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—the interest, if no other, in avoiding confusion, deception, even frustration of the democratic process at the general election." *Id.* at 442. Weighing this important interest against the burden imposed by the 5% petition requirement, the Court concluded that any resulting burden was "balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." *Id.*

Since *Jenness*, the Eleventh Circuit also has upheld Georgia's 5% petition requirement in three separate decisions. *See Coffield v. Kemp,* 599 F.3d 1276, 1277 (11th Cir. 2010) (upholding dismissal of a challenge to the 5% petition requirement by an independent candidate for Congress because "[t]he pertinent laws of Georgia have not changed materially since the decisions in *Jenness* and *Cartwright*"); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002) (finding that the Supreme Court's reasoning in *Jenness* "still equally pertains today"); *See also McCrary v. Poythress*, 638 F.2d 1309, 1312-13 (5th Cir. 1981) (holding based on *Jenness* that

Georgia's 5% petition signature requirement does not violate the First and Fourteenth Amendment). And, as noted above, this Court recently rejected a challenge seeking to enjoin the 5% petition requirement for Congressional candidates in the related action of *Cowen, et al. v. Raffensperger*, 1:17-cv-04660. (See Doc. 11-18, at 15) ("The Court is bound by the clear rulings of both the Eleventh Circuit and the Supreme Court").

With respect to the petition requirement for presidential candidates, while the 1% signature requirement required under O.C.G.A. § 21-2-170(b) has been reduced by judicial decision, the Eleventh Circuit reviewed and affirmed that order setting the petition requirement for presidential candidates at 7,500 "until the legislature imposes a permanent requirement." *See Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1373 (N.D. Ga. 2016), *aff'd* 674 Fed. App'x 974 (11th Cir. 2017). This judgment necessarily holds that such a requirement is not unconstitutionally burdensome, and balances the rights of political body candidates against the state's interests. *Id.* Thus, while this order was based on a judgement that the *previous* requirement was unduly burdensome, that does not and cannot mean that the imposed remedy (still presently in effect) is constitutionally infirm.

B. Even under the *Anderson-Burdick* framework, Georgia's petition requirements are not unconstitutionally burdensome.

Plaintiffs' motion completely ignores the *Jenness* decision, the Eleventh Circuit precedent cited above, and this Court's recent order in the *Cowen* case rejecting a related challenge. Instead, Plaintiffs urge this Court to analyze their claim anew under the *Anderson-Burdick* balancing test. (*See* Doc. 11, at 23.) Under this test, courts are to employ a flexible standard that weighs the "character and magnitude of the asserted injury" against the state's asserted interests. *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1982). Heightened scrutiny should be applied where the injury is greater. *See id.* But where only "reasonable, nondiscriminatory restrictions" are involved, a state's regulatory interests are generally sufficient. *Id.* at 788. *See also Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Controlling precedent notwithstanding, even under the *Anderson/Burdick* framework, Plaintiffs still cannot show that the State has imposed any *new* burdens on their voting and associational rights under the First and Fourteenth Amendment. As an initial matter, Plaintiffs have not identified any actual "state action" required to assert a claim under Section 1983. Rather, Plaintiff's alleged burdens have been caused by the COVID-19 virus, which is wholly outside of the state's control. Furthermore, Plaintiffs cannot show that any burden on their ability to conduct a signature gathering campaign is severe enough to outweigh the state's significant

regulatory interests in managing its elections and keeping frivolous candidates off of the ballot.

1. The asserted burden on Plaintiffs' petition efforts is due to COVID-19 and not the result of restrictions imposed by State election laws or policy.

In order to state a claim under 42 U.S.C. § 1983, Plaintiffs must show "the violation of a right secured by the Constitution and laws of the United States," and "that the alleged deprivation was committed by a person acting under color of state law." *Cummings v. DeKalb County*, 24 F.3d 1349, 1355 (11th Cir. 1994). Accordingly, Plaintiffs are required to point to some statute, regulation, or policy enforced by the Secretary that has interfered with their recognized rights. Plaintiffs have not identified any offensive statutes or regulations other than the existing petition requirements already upheld as constitutional. Instead, Plaintiffs point to the public health risks associated with conducting a signature-gathering campaign as the source of their increased burden. (*See* Doc. 11, at 26-27).

However, this type of argument was recently rejected in an elections case seeking to require the Secretary to implement a number of changes to Georgia's election procedures due to COVID-19. This Court dismissed the action based in part on the lack of any state action that burdened the plaintiffs' voting rights:

> The real problem here is COVID-19, which all but the craziest conspiracy theorists would concede is not the result of any act or failure by the government. And that fact is important when weighing the

> Defendants' management of the election. Specifically, ***this is not a case in which the state applied its own policy, adopted a rule, or enacted a statute that burdened the right to vote***. In other words, this is not *Burdick or Takushi*, 504 U.S. 428 (1992), or *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The former involved an Ohio statute that imposed an early filing deadline for independent candidates; the latter involved Hawaii's state-imposed policy against write-in voting. ***Here, the underlying burden on the right to vote emanates from a virus, which obviously was not created or imposed by Defendants.*** While Plaintiffs contend the Defendants have done a poor job of responding to that virus, the fact that the virus's provenance was not through Defendants further increases, in this Court's opinion, the impropriety of judicial intervention. All of the election cases cited by Plaintiffs in which injunctive relief was granted involved a burden on the right to vote that was created by the Government. Not so here.

Coalition for Good Governance, et al. v. Raffensperger, et al., Civil Action No. 1:20-cv-01677-TCB, slip op. at * 10 n. 2 (N.D. Ga. May 14, 2020) (emphasis added).[4]

As correctly noted in that decision, the *Anderson-Burdick* analysis has not been applied outside the context of specific state action, and Plaintiffs have not cited to any cases holding otherwise. This is fatal to Plaintiffs' Section 1983 claim, and warrants denial of Plaintiffs' motion.

2. Georgia's petition requirements do not impose a severe burden on candidates, and the Secretary has taken steps to mitigate any additional burdens imposed on Plaintiffs due to COVID-19.

Even if Plaintiffs could point to some state action that has imposed new burdens on their First and Fourteenth Amendment rights, Plaintiffs still must

[4] The *Coalition* slip opinion is attached as Exhibit 2.

demonstrate under *Anderson-Burdick* that the petition requirements impose a burden that is outweighed by the State's interests. Plaintiffs cannot make this showing.

In assessing the severity of the burden imposed by Georgia's petition requirements under the *Anderson-Burdick* framework, the Court's analysis must start with the recognition that the Supreme Court and the Eleventh Circuit have held that Georgia's petition requirements do not present a severe burden and are not subject to heightened scrutiny. *See, e.g., Jenness*, 403 U.S. at 442; *Anderson*, 460 U.S. at 788 (citing Georgia's petition requirements as an example of "reasonable, nondiscriminatory restrictions" that are justified by the "state's important regulatory interests"); *McCrary*, 638 F.2d at 1312-13.

Indeed, the Supreme Court has expressly rejected Plaintiffs' argument that petition requirements such as Georgia's are subject to strict scrutiny. Noting that "[e]lection laws will invariably impose some burden upon individual voters," the Court in *Burdick* rejected the argument that "a law that imposes any burden on the right to vote must be subject to strict scrutiny." 504 U.S. at 433. Such a result "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.*

Accordingly, relying on *Jenness*, *Anderson*, and *Burdick*, the Eleventh Circuit and other courts consistently have held that state petition requirements for ballot

access are reasonable, non-discriminatory restrictions that impose minimal burdens on the rights of candidates, and are justified by a state's regulatory interests. *See, e.g., Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983) (upholding Florida's 3% petition requirement and declining to apply a heightened level of scrutiny); *Swanson v Worley*, 490 F.3d 894, 903-904 (11th Cir. 2007) (upholding Alabama's 3% petition requirement); *Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085, 1093 (9th Cir. 2019) (holding that a state can allow signature requirements of up to 5% without imposing a "severe burden" triggering heightened scrutiny); *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 26 (1st Cir. 2016) ("Neither the Supreme Court nor any circuit court has struck down a statewide ballot-access regime on the grounds that a signature requirement of 5% (or less) is too much, or that 6 months (or more) is too little time within which to gather the signatures from a pool of substantially all voters."); *Rainbow Coalition of Okla. v. Okla. State Election Bd.*, 844 F.2d 740, 743 (10th Cir. 1988) (rejecting the argument that strict scrutiny should be applied in upholding Oklahoma's 5% petition requirement for party status).

Plaintiffs cite a number of recent decisions in which other courts have found that, due to COVID-19, state petition requirements should be analyzed with a heightened level of scrutiny. However, in all of those cases, the petition deadlines

fell during or shortly after state-imposed shelter-in-place orders, where the signature-gathering process would have been more severely burdened. *See, e.g, Faulkner v. Virginia Dep't of Elections et al*., No.: CL 20-1456, slip op. at 2 (Va. Cir. Mar. 27, 2020) (deadline fell less than two weeks after state of emergency was declared); *Warren v. Griswold*, No. 20CV31077, slip op. at 1 (Colo. Dist. Ct. Apr. 21, 2020) (deadline fell 7 days after state of emergency declared);[5] *Garbett v. Herbert*, No. 2:20-cv-245, 2020 U.S. Dist. LEXIS 75853 at *5-7 (D. Utah Apr. 29, 2020) (deadline fell during "stay at home" order which had been in place for two weeks, and a state of emergency in place for a month); *Esshaki v. Whitmer*, No. 2:20-CV-10831-TGB, 2020 U.S. Dist. LEXIS 68254 at *2 (E.D. Mich. Apr. 20, 2020) (deadline fell during stay-at-home order that had been in place for a month); *see also Goldstein v. Secretary of the Commonwealth,* 142 N.E.3d 560, 568 (Mass. 2020) (deadline would fall during the "stay-at-home advisory" that had been in place for more than a month, and state of emergency in place for roughly two months); *Libertarian Part of Ill v. Pritzker*, No. 20-CV-2112, 2020 U.S. Dist. LEXIS 71563 at *4 (N.D. Ill. Apr. 23, 2020) (although the petition deadline fell in June, the

[5] The *Faulkner* slip opinion is attached as Exhibit 3. The *Warren* slip opinion is attached as Exhibit 4.

window for gathering signatures opened at nearly the same time as the state's "stay at home" order took effect and duration of order was unclear).

This is not the case here in Georgia. At most, Plaintiffs can point to the Governor's shelter-in-place order that was effective during the month of April as a time in which the government imposed additional burdens on Plaintiffs' ability to conduct a signature-gathering campaign. However, the Secretary has already increased the deadline for submitting nomination petitions by 31 days to account for this—more than the time the shelter-in-place order was in effect.

To be sure, the Secretary is not claiming that Plaintiffs should have jeopardized their health or the health and safety of others by conducting a public signature-gathering campaign between mid-March and April. However, the state has been in the process of reopening throughout the month of May, and there is still significant time remaining to gather the required signatures. Georgia designed a ballot access system permitting one of the longest signature gathering periods (if not the longest) in the nation. In this way, Georgia's system builds in ample time for political bodies to gather signatures, providing a cushion in case andidates lose days or weeks to unforeseen circumstances. While COVID-19 is certainly unprecedented, Georgia's signature-gathering period (even before the Secretary extended the

deadline and added days) is long enough to account for at least some days, or even weeks, lost.

Additional facts ameliorate the burden here or cast doubt on its severity going forward:

- Nearly two months of the original 180-day period (mid-January through mid-March) were unaffected by COVID-19 or any state related action.
- The Secretary's decision to extend the deadline to August 14 increased the total number of days from 180 to 211 during which candidates may gather signatures.
- As of the beginning of May, the Governor's shelter-in-place order is no longer in effect for most voters.
- Early voting for the primary is underway and voters will be voting at polling locations for the June 9th primary, where candidates can collect signatures as they previously intended (*see* Doc. 11-22, at 3), within legally permissible limits.

Thus, while the petition requirements may be more burdensome under the present circumstances than in the usual case, the somewhat condensed time period to meet the required numbers does not present the "severe" burden requiring a heightened level of scrutiny as Plaintiffs contend.

3. The State still has an overriding interest in requiring candidates to make a preliminary showing of a significant modicum of support before placing their names on the ballot.

Even acknowledging that there are some additional burdens placed on Plaintiffs' ability here to meet the petition signature requirements (due to a virus entirely outside of the State's control), those burdens must be weighed against the State's "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with frivolous candidates." *Anderson*, 460 U.S. at 788 n. 9. *See also Jenness*, 403 U.S. at 442 ("There is surely an 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—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) ("in order to avoid burdening the general election ballot with frivolous candidacies, a State may require parties to demonstrate 'a significant modicum of support' before allowing their candidates a place on that ballot.").

The State furthermore has a generalized interest in the orderly administration of elections. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("as a practical matter,

there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process").

These legitimate state interests have not become any less compelling due to COVID-19. The Secretary has already extended both the deadline for Plaintiffs to submit their nomination petitions and the total petitioning days allowed to account for any time lost during the Governor's shelter-in-place order. However, the state has strong interests in maintaining the previously-upheld petition requirements "in order to avoid burdening the general election ballot with frivolous candidates." *Jones*, 530 U.S. at 572. To permit Plaintiffs to be placed on the ballot without making *any* showing of a "modicum of support" among the electorate would severely undermine the state's interests and introduce confusion and chaos into the general election process.

In sum, based on controlling precedent upholding the constitutionality of Georgia's petition requirements, and assessing any new burdens associated with COVID-19 under the *Anderson-Burdick* framework, Plaintiffs cannot show a likelihood of success on the merits.

II. Plaintiffs Have Not Shown Irreparable Harm.

To succeed under the second preliminary injunction factor, Plaintiffs must show "a substantial likelihood of irreparable injury" absent a preliminary injunction. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). As the Eleventh Circuit has emphasized, the asserted irreparable injury "must be neither remote nor speculative, but actual and imminent." *NE Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Here, Plaintiffs have not shown how their asserted rights will be irreparably harmed absent injunctive relief, other than a vague assertion that they will lose the opportunity to be candidates and voters will not have the opportunity to vote for them. (Doc. 11, at 30-31.)

However, it remains entirely speculative the Plaintiffs will not be able to meet the petition requirements with the extended deadline of August 14. Plaintiffs still have over two months (11 weeks) to gather signatures. In past efforts to gain ballot access, the individual plaintiffs admit that their signature-gathering campaigns were conducted over a much shorter period of time. (*See* Doc. 11-19, at 37 ¶ 96; Doc. 11-19, at 35 ¶ 93.) And although they fell far short of meeting the petition requirement in the prior election cycle, this is likely a reflection of the level of support they have among voters in their respective districts.

But even knowing that the petition requirements would require significant time and effort based on past experience, Plaintiffs failed to gather *any* signatures during the first two months of the 180-day period, from mid-January until the public health state of emergency declaration on March 14. Any resulting harm is therefore, at least in part, caused by Plaintiffs' own lack of reasonable diligence. *See Libertarian Party of Florida v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983) (stating that the "focal point of this inquiry is whether a reasonably diligent candidate can be expected to satisfy the signature requirements") (citation omitted). Accordingly, Plaintiffs cannot establish that they will suffer irreparable harm, and this factor weighs against granting injunctive relief.

III. The Balance of Equities and Public Interest Favors the Enforcement of Georgia's Ballot Access Requirements.

Courts in this district have considered the remaining two factors, balancing the equities and public interest, together in election cases. *See Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018). Both of these factors clearly weigh in favor of the Secretary.

Because States are "primarily responsible for regulating federal, state, and local elections," they have a "strong interest in their ability to enforce state election law requirements." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011). *See also Esshaki*, 2020 U.S. Dist. LEXIS 68254 at *26 ("The Supreme

Court has consistently recognized that states have a strong interest in seeing their laws effectuated.") For this reason, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm*., 140 S.Ct. 1205, 1207 (April 6, 2020) (per curiam) (citations omitted).

As this Court has recently noted, there is "a public interest in the Court promoting certainty with elections and not entering orders that create 'voter confusion and consequent incentive to remain away from the polls.'" *Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elections*, No. 1-20-cv-00912-SDG, 2020 U.S. Dist. LEXIS 36702 at *28-29 (N.D. Ga. Mar. 3, 2020). Here, ballot access requirements serve the state's recognized interests in "in avoiding confusion, deception, and even frustration of the democratic process." *Jenness*, 403 U.S. at 442. Accordingly, the public interest weighs against enjoining the State's petition requirements.

IV. Plaintiffs' Proposed Remedy Seeks to Eliminate All Requirements for Ballot Access for Political Body Candidates.

As shown above, Plaintiffs' motion for a preliminary injunction should be denied because Plaintiffs failed to meet the requisite showing that the requested relief is warranted.

Alternatively, the Secretary requests that the Court partially grant Plaintiffs' motion and fashion a remedy that reduces the petition signature requirements of O.C.G.A. § 21-2-170(b), for the November 2020 general election only, by 30%. Such a remedy is appropriate for several reasons. *First*, it is proportionate to the asserted harm, and a 30% reduction would account for the approximately 60 days under which the State was under a declaration of a public health emergency (as currently set by the Governor's executive orders). That Plaintiffs ask the Court to eliminate the petition requirements entirely suggests that their motion is less about the health risks associated with COVID-19 and more about eliminating any and all restrictions to ballot access by third-party candidates.

Second, the proposed 30% reduction would be equitable to all candidates who will be on the ballot in the general election, while still respecting the State's interest in regulating ballot access. Plaintiffs seek to run candidates in contested Congressional districts, where members of both political parties will be nominated through a primary process. The political party candidates have faced the same burdens associated with campaigning during the current public health emergency, and still must undergo the statutory process of nomination through a primary election. It would be fundamentally inequitable for the State to maintain statutory

requirements for ballot access for one set of candidates, while waiving the statutory requirements entirely for Plaintiffs.

Third, the proposed reduction is consistent with remedies fashioned by courts in similar cases in other states, which have reduced—rather than eliminated—the challenged petition requirements. *See, e.g., Faulkner*, slip op. at 4 (reducing petition requirement for Republican candidate for U.S. Senate from 10,000 to 3,500 signatures); *Warren*, slip op. at 25 (reducing signature requirement by 50%); *Garbett*, 2020 U.S. Dist. LEXIS 75853 at *5-7 (reducing signature requirement by 32% to account for 33 lost days of petitioning); *Goldstein*, 142 N.E.3d at 575 (reducing signature requirement by 50%). This alternative remedy appropriately balances the burdens associated with COVID-19 and the State's interest in conditioning ballot access upon a showing of a significant modicum of voter support, unlike the Plaintiffs' proposed injunction, which would effectively eliminate all requirements for ballot access.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Plaintiffs' motion for preliminary injunction be denied, or granted in part with a 30% reduction of the petition requirements set forth in O.C.G.A. § 21-2-170, as outlined above.

Respectfully submitted, this 29th day of May, 2020.

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Counsel for Defendant

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
Charlene S. McGowan
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **DEFENDANT'S RESPONSE IN OPPOSTION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel for Plaintiffs via electronic notification:

Bryan L. Sells
bryan@bryansellslaw.com

Dated: May 29, 2020.

/s/ Charlene S. McGowan
Charlene S. McGowan
Assistant Attorney General

EXHIBIT 1

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

JAMES L. COOPER, III, an individual, MARTIN COWEN, an individual, and the GEORGIA GREEN PARTY, an unincorporated political body,	*	Civil Action No. 1:20-cv-1312-ELR
Plaintiffs,	*	
v.	*	
BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State,	*	
Defendant.	*	

DECLARATION OF CHRIS HARVEY

Pursuant to 28 U.S.C. § 1746, I, Chris Harvey, make the following declaration:

1.

My name is Chris Harvey. I am over the age of 21 years, and I am under no legal disability that would prevent me from giving this declaration. If called to testify, I would testify under oath to these facts.

2.

I currently am the Director of Elections for the State of Georgia. I have held that position since July 2015. From August 2007 to July 2015, I was the Chief Investigator and Deputy Inspector General for the Secretary of State's office, investigating, among other things, potential violations of state election law. For more than a decade, I have acquired firsthand knowledge of Georgia's election processes at both the state and county level.

3.

Georgia's elections are governed by strict timelines to ensure that military and overseas voters receive ballots in time to vote in each election, including runoffs. Federal law requires absentee ballots to be sent to overseas and military voters no later than 45 days prior to any election. 52 U.S.C. § 20302(a)(8).

4.

The 2020 election cycle began with the Presidential Preference Primary, which was originally set to be held on March 24, 2020—a date set by the Secretary of State under his statutory authority. Early voting (absentee-in-person) voting for the Presidential Preference Primary began on March 2, 2020.

5.

On March 13, 2020, as the COVID-19 pandemic began to take hold, President Trump declared a national state of emergency. On March 14, 2020, Governor Kemp declared a public health emergency for the state of Georgia in Executive Order 03.14.20.01.

6.

Also on March 14, 2020, the Secretary of State utilized his authority to suspend in-person early voting for a 43-day period, to April 27, 2020, which was then the start of early voting for the May 19, 2020 general primary election.

7.

On April 8, 2020, Governor Kemp extended the public health emergency declaration for an additional 30 days via Executive Order 04.08.20.02. That extension meant that Georgia would still be under a public health emergency within the period for in-person early voting for the general primary.

8.

On April 9, 2020, the Secretary of State again utilized his authority under O.C.G.A. § 21-2-50.1 to delay the general primary, which now also included the Presidential Preference Primary, from May 19, 2020 to June 9, 2020.

9.

Because of the statutory and practical deadlines, June 9, 2020 is the latest practicable date for the general primary for it not to negatively affect the rest of the elections to be held this year. Ballots have to be built, proofed, and printed in sufficient time for them to begin going out to overseas and military voters. Ballots start going out 49 days prior the November 3, 2020 general election (which is September 15, 2020) in order to meet the 45-day deadline under federal law to send ballots to military and overseas voters. This year, the 45-day deadline falls on September 19, 2020.

10.

Accordingly, elections officials must have the final candidate names for the general election ballot by August 28, 2020, in order to build and proof ballot databases so that absentee ballots can be printed and sent to overseas and military voters by the UOCAVA deadline. This is an aggressive schedule for these activities, but achievable. However, any further delay endangers Georgia's compliance with federal law and the opportunity for military and overseas voters to participate in the November election.

11.

While the nominees of Georgia's two political parties are selected through the primary process (and any subsequent run-off election, if necessary), third party and independent candidates qualify for ballot access by submitting a nomination petition with the required number of valid signatures as determined by O.C.G.A. § 21-2-170. Candidates have 180 days (six months) to collect signatures, which are due by the second Tuesday in July (this year, July 14). Aspiring candidates in 2020 could have begun gathering signatures as early as mid-January. Candidates are not required to wait until after they receive their party's nomination to begin gathering signatures.

12.

On March 20, 2020, I sent letters to all third-party and independent candidates who filed a declaration of candidacy and qualifying fee notifying them that the Secretary of State was exercising his authority to extend the deadline to submit nomination petitions an additional 31 days, from July 14 to August 14, 2020.

13.

The August 14th deadline is the longest period of time the deadline can be extended and still allow time for signatures to be verified before the November ballots need to be finalized. Once the Secretary of State's office receives the nomination petitions, the signature pages are sent to the appropriate counties to

verify the voters' identity and signature. This is a time-consuming process, and the August 14th deadline only gives counties approximately two weeks to complete it before they need to begin building the ballots.

14.

After the signatures on nominating petitions are verified, any candidates that qualify for the general election will be placed on the general election ballot.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of May, 2020.

CHRIS HARVEY

EXHIBIT 2

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

COALITION FOR GOOD GOVERNANCE; RHONDA J. MARTIN; JEANNE DUFORT; AILEEN NAKAMURA; B. JOY WASSON; and ELIZABETH THROOP,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Secretary of State of the State of Georgia; and REBECCA N. SULLIVAN, DAVID J. WORLEY, MATTHEW MASHBURN and AHN LE, in their official capacities as members of the Georgia State Election Board,

Defendants.

CIVIL ACTION FILE

NO. 1:20-cv-1677-TCB

ORDER

I. Background

This case involves challenges to Georgia's upcoming June 9 primary election in light of the COVID-19 outbreak. Plaintiffs Coalition for Good Governance, Rhonda Martin, Jeanne Dufort, Aileen Nakamura, Joy Wasson, and Elizabeth Throop filed this case against Defendants Brad Raffensperger in his official capacity as Secretary of State, along with Rebecca Sullivan, David Worley, Matthew Mashburn, and Ahn Le in their official capacities as members of the Georgia State Election Board.

Plaintiffs seek postponement of the election until June 30, along with myriad other changes to the voting process. Specifically, Plaintiffs seek an order requiring polling locations to use paper ballots rather than the new touchscreen ballot marking device ("BMD") component of the State's new Dominion Voting System.[1] Plaintiffs contend that the touchscreens are not suitable for use during the COVID-19 outbreak

[1] The BMD is the subject of another lawsuit in this Court. *See Curling v. Raffensperger*, No. 1:17-cv-2989-AT (N.D. Ga. filed Aug. 8, 2017).

because the virus can survive for two to three days on plastic and on stainless steel, and cleaning a BMD screen requires powering it down, disinfecting it with special chemicals, drying, and rebooting, which would need to occur after each use.

Plaintiffs also allege various problems with absentee voting that would render it an unacceptable alternative to in-person voting. Specifically, they argue that the lack of secrecy envelopes in some absentee ballots violates the right to a secret ballot. They also allege that the unreliability and delays in the United States Postal Service lead to a likelihood that absentee ballots will not be as effective as in-person votes.

Plaintiffs request various forms of relief related to absentee voting. Specifically, they seek an extended deadline for receipt of the ballots; facilitated distribution and acceptance; speed processing (requiring the Secretary to allow superintendents to process and prepare mail ballots beginning the Monday before Election Day, and for tabulation not before the close of the polls); counted non-duplicated March ballots; a corrected My Voter webpage about when the ballots

were issued; mailed ballots to corrected addresses; information and instruction sheets and secrecy inner envelopes; letters with instructions and date/deadline information mailed to voters who have previously been mailed a ballot that has not yet been completed and received, along with secrecy inner envelopes and instructions for ballot packets; a statewide press release explaining the election date; instructions for completing and timely delivering completed ballots; and instructions for using secrecy envelopes.

In addition, Plaintiffs seek various forms of relief regarding in-person voting such as adjusting the number of voting stations, expanding early voting, implementing curbside voting and temporary mobile voting centers, streamlining voter check-in, offering state-provided personal protective equipment ("PPE"), and increasing physical distancing.

Plaintiffs have moved [11, 20, 27] for a temporary restraining order or preliminary injunction granting them the relief they seek. Defendants have moved [32] to dismiss Plaintiffs' claims. On May 14, after notifying the parties that they should be prepared to discuss all

grounds raised in Defendants' motion to dismiss, the Court held a hearing on the parties' motions.

II. Legal Standards

A. Motion to Dismiss

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a

> "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324–25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555–56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Thus, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

B. Preliminary Injunction

To obtain a preliminary injunction, Plaintiffs must demonstrate that (1) their claims have a substantial likelihood of success on the merits; (2) they will suffer irreparable harm in the absence of an injunction; (3) the harm they will suffer in the absence of an injunction would exceed the harm suffered by Defendants if the injunction is issued; and (4) an injunction would not disserve the public interest. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246–47 (11th Cir. 2002). The likelihood of success on the merits is generally considered the most important of the four factors. *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

III. Discussion

The Court assumes, without deciding, that Plaintiffs have standing. Nonetheless, their claims will be dismissed because they present a nonjusticiable political question.

"A federal court has no authority to review a political question." *McMahon v. Pres. Airways, Inc.*, 502 F.3d 1331, 1357 (11th Cir. 2007) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). "The

political question doctrine protects the separation of powers and prevents federal courts from overstepping their constitutionally defined role." *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)). A case may be dismissed on political question grounds if it would require the Court to decide a question with one of the following characteristics:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 1357–58 (quoting *Baker*, 369 U.S. at 217).

Here, at least two of the characteristics are present: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, and (2) a lack of judicially discoverable and manageable standards for resolving it.

It is especially important during crises such as the present one involving a medical pandemic that the Court hew closely to the

Constitution's original imperatives. This starts with the Elections Clause, which commits the administration of elections to Congress and state legislatures—not courts. The Framers of the Constitution did not envision a primary role for the courts in managing elections, but instead reserved election management to the legislatures. Absent pellucid proof provided by plaintiffs that a political question is not at issue, courts should not substitute their own judgments for state election codes. No such proof has been adduced here.

Moreover, Plaintiffs acknowledge that executive-branch officials at all levels have undertaken measures to slow the spread of the coronavirus. And obviously, Plaintiffs are unsatisfied with those efforts. But whether the executive branch has done enough is a classic political question involving policy choices. Thus, it is not properly before the Court.

Even if the Court could address the question, answering it with any degree of certainty would be impossible, as there are no judicially discoverable and manageable standards for resolving it. This is why courts should not second-guess coordinate branches of government on

matters explicitly committed to them. In this sense, this case is much like *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), in which the Supreme Court rejected efforts to have federal courts articulate the definition of "fairness" and "how much is too much" in the context of partisan gerrymandering.

In a recent Eleventh Circuit case, Judge William Pryor noted that a nonjusticiable political question should preclude jurisdiction where "[t]here are no discernable and manageable standards 'to answer the determinative question': How much partisan advantage from ballot order is too much?" *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 2049076, at *18 (11th Cir. Apr. 29, 2020) (William Pryor, J., concurring) (quoting *Rucho*, 139 S. Ct. at 2501). Similarly here, there are no discernable and manageable standards to decide issues such as how early is too early to hold the election or how many safety measures are enough.[2]

[2] The real problem here is COVID-19, which all but the craziest conspiracy theorists would concede is not the result of any act or failure to act by the Government. And that fact is important when weighing the Defendants' management of the election. Specifically, this is not a case in which the state applied its own policy, adopted a rule, or enacted a statute that burdened the right to vote. In other words, this is not *Burdick v. Takushi*, 504 U.S. 428 (1992), or

Ultimately, ordering Defendants to adopt Plaintiffs' laundry list of so-called "Pandemic Voting Safety Measures" would require the Court to micromanage the State's election process. The relief Plaintiffs seek bears little resemblance to the type of relief plaintiffs typically seek in election cases aimed to redress state wrongs.

Because Plaintiffs' claims present a nonjusticiable political question, Defendants' motion to dismiss will be granted.[3]

IV. Conclusion

For the foregoing reasons, Defendants' motion [32] to dismiss is granted. Plaintiffs' motions [11, 20, 27] for a preliminary injunction or

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Anderson v. Celebrezze, 460 U.S. 780 (1983). The former involved an Ohio statute that imposed an early filing deadline for independent candidates; the latter involved Hawaii's state-imposed policy against write-in voting. Here, the underlying burden on the right to vote emanates from a virus, which obviously was not created or imposed by Defendants. While Plaintiffs contend that Defendants have done a poor job of responding to that virus, the fact that the virus's provenance was not through Defendants further increases, in this Court's opinion, the impropriety of judicial intervention. All of the election cases cited by Plaintiffs in which injunctive relief was granted involved a burden on the right to vote that was created by the Government. Not so here.

[3] Even if the Court were not inclined to dismiss Plaintiffs' claims, it would not grant the injunctive relief Plaintiffs request. Because of the lack of judicially discoverable and manageable standards discussed above, Plaintiffs have not carried their burden of showing that they are likely to succeed on the merits.

temporary restraining order are denied. The Clerk is directed to close this case.

IT IS SO ORDERED this 14th day of May, 2020.

Timothy C. Batten, Sr.
United States District Judge

EXHIBIT 3

Virginia:
In the Circuit Court of the City of Richmond, John Marshall Courts Building

OMARI FAULKNER FOR VIRGINIA, **OMARI FAULKNER,** Plaintiffs, **v.** **VIRGINIA DEPARTMENT OF ELECTIONS,** **VIRGNIS STATE BOARD OF ELECTIONS,** **ROBERT H. BRINK,** **JOHN O'BANNON,** **JAMILAH D. LECRUISE,** **CHRISTOPHER E. PIPER,** **JESSICA BOWMAN,** **THE REPUBLICAN PARTY OF VIRGINIA** **JACK R. WILSON** Defendants.	)	**Case No.: CL 20-1456**

ORDER

On March 25, 2020, the parties appeared, represented by Counsel via telephone conference, on Plaintiff's Emergency Motion for Preliminary Injunction. The Republican Party of Virginia and the Commonwealth Defendants have taken no position on the relief sought in the preliminary injunction. However, Gade for Virginia, Inc. filed a Motion for Intervention, which was granted, and they also filed a response opposing the relief sought in the preliminary injunction.

In Virginia, in order for a Court to grant a preliminary injunction, the party seeking the injunction must establish they would "suffer irreparable harm without the injunction, and that the party has no adequate remedy at al." *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 17-18 (2019). Beyond this showing, "granting or denying a temporary injunction is a discretionary act arising from the court's equitable powers." *Id.* Accordingly, courts across the Commonwealth have applied a balancing test similar to that articulated federally in *Winters v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Namely, courts evaluate (1) the likelihood of success on the merits,

(2) the likelihood of irreparable harm, (3) the balance of the equities, and (4) the public interest in issuing the injunction.

In evaluating the likelihood of success on the merits to this as-applied challenge to Va. Code § 24.2-521(1), we must consider the burden placed on the Plaintiff by the statute. "The right to vote is a 'precious' and 'fundamental' right." *Florida Democratic Party v. Scott*, 215 F.Supp.3d 1250, 1256 (2016). Additionally, the "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. The right to associate with the political party of one's choice is integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). However, because the regulation of the time, place, and manner of elections is vested with the states, a "more flexible standard" is required when evaluating those regulations. *See Burdick v. Taskushi*, 504 U.S. 428, 434 (1992). Specifically, "courts considering a challenge to state election laws 'must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the *precise interests put forward by the State* as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Florida Democratic Party*, 215 F.Supp.3d at 1256 (quoting *Burdick*, 504 U.S. at 434). As a preliminary matter, there has been no "precise interest[] put forward by the State" in this case. *Id.*

In normal circumstances, a signature requirement in order for an individual to be placed on the ballot is a light burden. *See New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008); *see also Norman v. Reed*, 502 U.S. 279 (1992). However, the circumstances as they exist in the Commonwealth of Virginia and across the United States are not normal right now. On March 12, 2020, Governor Northman declared a state of emergency for the Commonwealth pursuant to Va. Code § 44-146.13 *et seq.* in response to the continued spread of COVID-19. Executive Order Number Fifty-One (Northam) (2020). This declaration was clarified by guidance issued on March 17, 2020 which prohibited the non-essential gathering of more than ten people in any one location at any time. Press Release, Office of the Governor, Governor Northam Announces New Measures to Combat COVID-19 and Support Impacted Virginians (March 17, 2020). Under these circumstances, and as applied to the Plaintiff, and necessarily to all other Republican candidates for the 2020 primary election ballot for U.S. Senate in Virginia, the burden imposed by Va. Code

§ 24.2-521(1) is significant, as it precludes them from freely associating at the highest level with the political party of their choice.

Therefore, at this time, the regulation imposed by Va. Code § 24.2-521(1) is subject to strict scrutiny in order to satisfy the constitutional analysis. Meaning that the "regulation must be narrowly drawn to advance a state interest of compelling importance." *Norman*, 502 U.S. at 289. In their Response to the Plaintiffs' Emergency Motion for Preliminary Injunction, the Commonwealth articulates *no precise interest* supporting the application of this regulation in this circumstance. In fact, they neither consent nor object to the relief requested by the Plaintiff. Therefore, the Court has nothing to weigh against "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment." *See Florida Democratic Party*, 215 F.Supp.3d at 1256 (quoting *Burdick*, 504 U.S. at 434). Even were the Court to evaluate an interest in promoting the just and fair administration of primary elections, or providing "equal access to all citizens" as the Intervenor suggests, and assuming those interests are compelling, the regulation is not narrowly tailored to advance those interests as it does not provide for emergency circumstances, like those that currently exist.

Accordingly, the Court hereby **FINDS** that the regulation in Va. Code § 24.2-521(1) as it applies to the Plaintiff, and necessarily to all other Republican candidates for the 2020 primary election ballot for U.S. Senate in Virginia under these circumstances fails constitutional analysis under strict scrutiny. Thus, the Plaintiff has a considerable likelihood of success on the merits.

Further, this Court **FINDS** that there is a likelihood of irreparable harm to Plaintiff's constitutional rights if his name were omitted from the ballot because of the application of Va. Code § 24.2-521(1). Further, Plaintiff would be limited in his ability to engage in political dialogue or debate at the elevated level in which he seeks to engage in such discussion. Additionally, as the Commonwealth has not articulated any interest in support of the application of Va. Code § 24.2-521(1) to Republican candidates for the 2020 primary election ballot for U.S. Senate in Virginia under these circumstances, and Plaintiff has articulated a significant interest in Va. Code § 24.2-521(1) not being applied to Republican candidates for the 2020 primary election ballot for U.S. Senate in Virginia under these circumstances, the Court **FINDS** that the balance of equities tips in favor of the Plaintiff. Furthermore, the Court **FINDS** that reasonable and educated debate among all candidates for office advances the political conversation, promoting the public interest as it does so.

Therefore, the Court **FINDS** that Plaintiff has established a likelihood of success on the merits, there is no other adequate remedy available at law, and the equities tip in favor of the Plaintiff's Emergency Motion for Preliminary Injunction. Thus, the Court **GRANTS** the Emergency Motion for Preliminary Injunction. Specifically, Plaintiff has requested the Defendants allow his qualification for the Republican Primary ballot for U.S. Senate in the Commonwealth with no fewer than a total of 3,500 valid signatures with no fewer than 100 signatures in each and every congressional district. While the Court is not qualified to articulate the number of signatures that should be required in order for an individual to appear on a ballot, the Plaintiff has articulated the above figures and the Commonwealth has not objected to those figures. Therefore, the Court accepts those numbers and thereby **ORDERS** that Defendants allow the qualification of Republican candidates for the 2020 primary election ballot for U.S. Senate in Virginia with no fewer than 3,500 valid signatures and no fewer than 100 signatures in each and every congressional district.

This Order applies to the Plaintiff, and all Republican candidates for the 2020 primary election ballot for U.S. Senate in Virginia because the burden of the statute's eligibility requirements are equally injurious to Plaintiff and all other Republican candidates for the 2020 primary election, and the State Board of Elections is tasked with aiding local election boards and registrars in obtaining "uniformity in their practices and proceedings." Va. Code § 24.2-103. The Commonwealth did not object in their pleading or at oral argument to the broader application of the Court's ruling to all other Republican candidates. However, while the interest of maintaining such uniformity in ballot access procedures is an important interest, neither the Democratic Party, nor any other party holding a 2020 primary election, was noticed or served with the Verified Complaint or any other pleadings herein. Accordingly, the interests of those parties have not been adequately represented before the Court. Thus, the Court must limit its ruling to the Plaintiff and other Republican candidates for the 2020 primary election as those are the only individual's whose interests are before the Court.

The Plaintiff's Motion for Attorneys' Fees is **CONTINUED** pending further submissions by Counsel.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties' endorsement of this Order. The Court **NOTES** the objections of the Intervening Party.

The Clerk is directed to forward a certified copy of this Order to the parties.

It is so **ORDERED**.

ENTER: 3/25/2020

W. Reilly Marchant, Judge

EXHIBIT 4

District Court, City and County of Denver, Colorado City and County Building, Room 256 1437 Bannock Street Denver, CO 80202	DATE FILED: April 21, 2020 1:25 PM CASE NUMBER: 2020CV31077
Petitioner: **MICHELLE FERRIGNO WARREN** v. Respondent: **JENA GRISWOLD, in her official capacity as Colorado Secretary of State**	▲ COURT USE ONLY ▲ Case Number: 20CV31077 Division Courtroom 280
ORDER REGARDING PETITION FOR DECLARATORY RELIEF	

This matter comes before the Court on a Petition for Declaratory Relief filed by Michelle Ferrigno Warren ("Petitioner" or "Ms. Ferrigno Warren") on March 17, 2020. Ms. Ferrigno Warren seeks to be on the upcoming 2020 Democratic primary ballot as a candidate for United States Senate. To be on the ballot, Ms. Ferrigno Warren is required either to collect by petition at least 1,500 valid signatures from each of Colorado's seven congressional districts (for a total of at least 10,500 valid signatures) or to proceed through the Democratic Party's caucus and assembly process. Ms. Ferrigno Warren chose to proceed by petition. As such, the deadline for submitting her petition to the Colorado Secretary of State ("Respondent" or "Secretary") was March 17, 2020. Ms. Ferrigno Warren timely filed her petition that day but the petition contained only 8,378 "reviewable signature lines." Knowing she presented a deficient number of signatures, Ms. Ferrigno Warren filed for declaratory relief the same day. The Secretary subsequently reviewed the petition and issued a Statement of Insufficiency on April 15, 2020. The Statement reveals Ms. Ferrigno Warren collected 5,383 valid signatures.

In her Petition for Declaratory Relief, Ms. Ferrigno Warren asserts that the COVID-19 pandemic and the resulting state of emergency declared by Governor Jared Polis on March 10,

2020, prevented her from gathering the required number of signatures. Accordingly, Ms. Ferrigno Warren asks the Court for the following relief: 1) to suspend the petition process and extend the filing deadline for one week after Governor Polis lifts the state of emergency; or 2) to find she has substantially complied with the petition requirements based on the number of signatures she submitted and order the Secretary to place her name on the primary ballot. Ms. Ferrigno Warren argues she made a good faith effort to comply with the signature requirement and that technical or strict compliance is not required and runs counter to the statutory requirement that the Election Code be liberally construed to permit ballot access.[1] *See* § 1-1-103(1), C.R.S. In response, the Secretary filed a Hearing Brief on March 30, 2020. In her brief, the Secretary asserts the following: 1) the Court does not have jurisdiction to resolve this dispute under section 1-1-113, C.R.S., because in the face of an obvious deficiency in the number of petition signatures the Secretary's determination of insufficiency is required by the Election Code and, thus, does not amount to a breach or neglect of her duties or other wrongful act under the Code; and 2) if the Court does have jurisdiction to hear this matter, the Court should utilize a proposed mathematical formula that is capable of being applied neutrally and consistently to this and other candidate petitions that may have been affected by the pandemic to determine whether substantial compliance has been met. With these arguments in mind, the Court held an evidentiary hearing on April 16, 2020. The deadline for filing any additional challenges to the Statement of Insufficiency expired yesterday (April 20, 2020) without any new filings by Ms. Ferrigno Warren. The Court, having received and considered the various filings, the testimony of the witnesses, admitted exhibits, arguments presented by counsel, and applicable law, finds and orders as follows:

[1] The Court notes Ms. Ferrigno Warren also asserts an equal protection claim in her Petition for Declaratory Relief but she has withdrawn the claim. *See* Reply at page 12.

BACKGROUND

In August 2019, Ms. Ferrigno Warren entered the race for United States Senate. During her campaign, Ms. Ferrigno Warren has raised over $100,000.00, participated in many debates and forums, and compiled a distribution list of more than 30,000 individuals with several more thousand contacts on social media. On January 5, 2020, Ms. Ferrigno Warren notified the Secretary of State of her decision to seek access to the primary election ballot as a Democratic candidate for United States Senate via the petition process. Under the Election Code, candidates seeking nomination by petition to the 2020 primary ballot had 57 days (from January 21, 2020 until March 17, 2020) to gather petition signatures. *See* § 1-4-801(5)(a), C.R.S. (2020), and H.B. 20-1359. To be nominated to the ballot, Ms. Ferrigno Warren must obtain valid signatures of at least 1,500 registered Democratic electors in each of the seven congressional districts in Colorado (for a total of 10,500 valid signatures). To this end, Ms. Ferrigno Warren utilized volunteer and paid circulators to gather signatures. Ms. Ferrigno Warren also retained the professional political firm Ground Organizing for Latinos in the hope that paid and experienced circulators would be able to gather at least one-half of the required signatures between March 5, 2020 and the deadline of March 17, 2020. Ms. Ferrigno Warren maintains most of these experienced circulators were unavailable until after "Super Tuesday" (i.e. March 3, 2020) because nearly all circulators in Colorado were working for large and wealthy campaigns such as those for Michael Bloomberg and John Hickenlooper and were being paid far above standard industry rates. On March 5, 2020, these experienced circulators finally were able to work for Ms. Ferrigno Warren's campaign and began to collect signatures in earnest. Such efforts, however, were short lived as the novel coronavirus had found its way to Colorado.

Per their Joint Statement of Stipulated Facts ("Stipulation") filed on April 10, 2020, Ms. Ferrigno Warren and the Secretary agree to the following facts concerning the pandemic for

purposes of resolving this dispute: 1) on December 31, 2019, the World Health Organization received its first report of a pneumonia of unknown cause, which later came to be known as Coronavirus (COVID-19); 2) on March 5, 2020, Colorado officials announced the first two positive cases of COVID-19 in our state; 3) on March 10, 2020, Governor Polis declared a state of emergency due to COVID-19; 4) on March 13, 2020, Colorado reported its first death related to COVID-19; and 5) on March 25, 2020, Governor Polis issued a statewide "stay at home" order. In light of these events, Ms. Ferrigno Warren asserts that starting the weekend of March 7th and greatly accelerating after the Governor's declaration on March 10th multiple circulators (both paid and volunteer) quit her campaign and a few volunteers who had collected signatures refused to turn them in for fear of exposure. In addition, Ms. Ferrigno Warren asserts some of her volunteers and staff began to exhibit symptoms or had family members with symptoms of COVID-19. Ms. Ferrigno Warren thus began to scale back her circulation efforts on March 13th and 14th due to these possible exposures and the health risks to her, her staff, the circulators, and the community. Ms. Ferrigno Warren maintains she also reduced her circulation efforts due, in part, to being informed on or about March 12th by the Secretary and the Colorado Democratic Party of pending legislation in the Colorado General Assembly that would include a remedy for petitioning candidates.[2] Ms. Ferrigno Warren ultimately decided to suspend circulation on the afternoon of March 14th even though she had gathered less than the required number of signatures.

On March 17, 2020, Ms. Ferrigno Warren submitted her petition to the Secretary for review. The Secretary's initial review of the petition showed 7,734 reviewable signature lines. After completing a closer review of the petition, the Secretary determined Ms. Ferrigno Warren

[2] The final product of this pending legislation is House Bill 20-1359. Governor Polis signed the bill at 5:29 p.m. on March 16, 2020. The bill is attached as Exhibit B to the Secretary's Hearing Brief.

actually submitted 8,378 reviewable signature lines. Per section 1-4-908(1), C.R.S., the Secretary subsequently reviewed all petition information and compared it against the voter registration records. On April 15, 2020, after the Secretary completed the required petition review, the Secretary notified Ms. Ferrigno Warren of the number of valid signatures and issued a "Statement of Insufficiency." These results are described below. In addition, on the same day, the Secretary provided Ms. Ferrigno Warren with the master record of each accepted and rejected signature entry. The master record contains the reason code for each rejected entry and the date on which the signature was collected.

FINDINGS OF FACT

1. The Court adopts the stipulated and admitted facts set forth in the Joint Statement of Stipulated Facts filed by the parties on April 10, 2020, as established facts in this matter.

2. Ms. Ferrigno Warren is the policy/advocacy director for a non-profit organization. Although Ms. Ferrigno Warren has never sought elective office before, she has considerable experience working within the political system.

3. Family, friends and colleagues encouraged Ms. Ferrigno Warren to run for United States Senate in the upcoming 2020 election. On August 6, 2019, Ms. Ferrigno Warren entered the race for United States Senate. During her campaign, Ms. Ferrigno Warren has worked seven days a week for a total of 40-50 hours per week just on her campaign, has raised over $100,000.00, participated in many debates and forums, and compiled a distribution list of more than 30,000 individuals with several thousand more contacts on social media.

4. On January 5, 2020, Ms. Ferrigno Warren notified the Secretary of State of her decision to seek access to the primary election ballot as a Democratic candidate for United States Senate via the petition process. Under the Election Code, candidates seeking nomination by

petition to the 2020 primary ballot had 57 days (from January 21, 2020 until March 17, 2020) to gather petition signatures. Ms. Ferrigno Warren took a two-month leave of absence from her job during this window to focus on her campaign and collecting signatures. Ms. Ferrigno Warren must obtain valid signatures of at least 1,500 registered Democratic electors in each of the seven congressional districts in Colorado (for a total of 10,500 valid signatures). Ms. Ferrigno Warren and approximately 100 volunteers thus began collecting signatures on the first day of the collection window (i.e. on January 21, 2020).

5. Ms. Ferrigno Warren and her campaign team developed a sound strategy for collecting the required number of signatures. Ms. Ferrigno Warren planned to use a combination of both volunteers and paid circulators to collect signatures. Ms. Ferrigno Warren decided to use the paid circulators to help gather signatures in the 3rd, 4th, 5th, and 7th congressional districts given she had a large group of volunteers to gather signatures in the other three districts.

6. In mid-December 2019, Ms. Ferrigno Warren consulted with John Edward Soto about hiring his firm to gather signatures. Mr. Soto is the owner of Ground Organizing for Latinos, a field and petition company that specializes in collecting signatures for ballot initiatives and for candidates in national, state, and local elections. Mr. Soto is experienced in such collection efforts as he has been providing this service since at least 2004.

7. Ms. Ferrigno Warren and Mr. Soto entered into a $40,000.00 contract for Mr. Soto's firm to acquire 10,000 valid signatures. Mr. Soto advised Ms. Ferrigno Warren that based on his professional experience he expected the signature collection to follow a "hockey stick" model – collection would start at a slow pace in the first two months and then increase significantly during the final two weeks before the filing deadline. This model is based, in part, on the fact that signature collection in colder months like January and February can be tempered

by the weather and fewer potential electors being outdoors. In addition, Mr. Soto was unable to hire a large number of circulators until after "Super Tuesday" (March 3, 2020) because most paid circulators in the state were working for other campaigns (such as Michael Bloomberg, Bernie Sanders, and John Hickenlooper) and being paid three to four times the average rate of pay.

8. During her testimony, Ms. Ferrigno Warren acknowledges she had between January 21, 2020 and March 17, 2020, to gather signatures and that there were risks unrelated to the COVID-19 pandemic in waiting until the last two weeks to gather most of her signatures, including the risk an elector would sign her petition after signing an earlier petition (which would invalidate the signature on her petition) or a blizzard hitting Colorado and impeding travel, keeping electors indoors, and inhibiting public gatherings.

9. Based on his past experience with other campaigns, Mr. Soto nonetheless expected to gather at least one-half of the required signatures during the last two weeks before the deadline. To accomplish this goal, Mr. Soto planned to use 39-40 circulators on Ms. Ferrigno Warren's campaign beginning March 5, 2020.

10. A circulator working for Mr. Soto is compensated for each signature he or she obtains. On average, a circulator is able to gather 80 signatures per day. Accordingly, on any given day with 39 paid circulators, Mr. Soto expected to gather approximately 3,120 signatures. Over the course of the twelve days between March 5, 2020 and March 17, 2020, Mr. Soto could expect to gather over 37,000 signatures. Some of these signatures, of course, likely would be declared invalid by the Secretary during her review but given the volume of signatures expected to be collected Mr. Soto and Ms. Ferrigno Warren believed they would gather more than enough valid signatures to meet the requirement.

11. Mr. Soto provides credible and unchallenged testimony that collection efforts on

the Thursday through Saturday (March 5th through March 7th) following "Super Tuesday" (March 3rd) proceeded as planned, i.e. circulators collected an average of 80 signatures per day. Circumstances, however, began to change for the worse on Sunday (March 8th). On Sunday, Mr. Soto spoke with one of his circulators about a possible exposure to COVID-19. This and other circulators employed by Mr. Soto had worked on the campaign of Reverend T. Hughes in his bid for a House seat in the Colorado General Assembly. Unfortunately, Reverend Hughes had been diagnosed with the virus and was in the intensive care unit.

12. Mr. Soto and some of the circulators gathering signatures for Ms. Ferrigno Warren had been in direct contact with Reverend Hughes and all were concerned they may have been exposed to the virus. On Sunday (March 8th), Mr. Soto told his circulators about his possible exposure. Many of the circulators began expressing safety concerns for themselves and their families, especially circulators who were at a higher risk of complications from exposure (i.e. older circulators and those with underlying health conditions) or who had family members at a higher risk. As a result, about one-half of the circulators working for Mr. Soto "said no more" and stopped working. Mr. Soto ultimately lost 24 or 25 out of 39 circulators.

13. Per the credible testimony of Mr. Soto, on Sunday (March 8th) his best circulators were only able to gather 20-25 signatures apiece because potential electors were not opening their doors, especially since the circulators were wearing face masks. In addition, Mr. Soto credibly describes how on the following Saturday (March 14th) one of his very best circulators was working the City Market parking lot in Pueblo and gathered only 12 signatures in four hours. This particular circulator routinely collected about 125 signatures per day.

14. Exhibit 1 reveals that on the following Friday (March 13th) at 10:57 a.m., Jeffrey Mustin, the Petitions Lead for the Elections Division for the Secretary of State, emailed Ms.

Ferrigno Warren regarding pending legislation, i.e. HB 20-1359, that if passed in its current form would "push back the statutory deadline for major party candidate petitions 14 days." According to the credible testimony of Ms. Ferrigno Warren, the email and the possibility of an extension allowed her and her team to "pause and exhale" and to think about how to move forward.

15. On Saturday (March 14th), however, Ms. Ferrigno Warren learned there would be no "remedy" in the legislation that would give her additional time beyond the current deadline to collect signatures. Ms. Ferrigno Warren thus decided to continue her circulation efforts but described "bad dynamics" that weekend given the Governor's declared state of emergency the previous Wednesday (March 10th) and the public's concern with getting food, toilet paper, etc.

16. On Saturday (March 14th) Ms. Ferrigno Warren decided to "pull the plug" and suspend her circulation efforts out of concern for the health of her staff, her volunteers, the circulators, and the community. Ms. Ferrigno Warren also was concerned about her own health and the health of her son since both have asthma.

17. On March 17, 2020, Ms. Ferrigno Warren timely filed her petition with the Secretary. The Secretary reviewed the petition in accordance with § 1-4-908(1), C.R.S.

18. The Secretary issued a Statement of Insufficiency on April 15, 2020. The Statement shows Ms. Ferrigno Warren gathered a total of 5,383 valid signatures from across the state. This represents 51.2% of the total number of valid signatures required by § 1-4-801(2)(c)(II), C.R.S.

19. The Statement further shows there were 35 "signature mismatches" on the petition that Ms. Ferrigno Warren may cure by affidavits filed before 5:00 p.m. on April 20, 2020.

20. Ms. Ferrigno Warren submitted 2,995 invalid signatures. Per § 1-4-909(1.5),

C.R.S., Ms. Ferrigno Warren "may petition the district court within five days for a review of the [insufficiency] determination pursuant to section 1-1-113." Such a review may reveal that some of the invalid signatures are, in fact, valid signatures. However, even if all invalid signatures were somehow declared to be valid (thus bringing the total number of valid signatures to 8,378), Ms. Ferrigno Warren would still need to collect an additional 2,122 valid signatures to meet the threshold set forth in § 1-4-801(2)(c)(II), C.R.S.

21. The Statement provides a breakdown of valid signatures from each congressional district: 1) 1,036 in the 1st congressional district; 2) 1,502 in the 2nd congressional district; 3) 315 in the 3rd congressional district; 4) 313 from the 4th congressional district; 5) 490 from the 5th congressional district; 6) 1,139 from the 6th congressional district; and 7) 588 from the 7th congressional district.

22. Ms. Ferrigno Warren collected the required number of valid signatures in one of seven congressional districts (i.e. the 2nd congressional district). In the 1st congressional district Ms. Ferrigno Warren collected 69% of the required number of valid signatures; in the 3rd congressional district 21%; in the 4th congressional district 20.8%; in the 5th congressional district 32.6%; in the 6th congressional district 75.9%; and in the 7th congressional district 39.2%.

23. The Statement further reveals that Ms. Ferrigno Warren submitted less than 1,500 signatures (whether valid or invalid) in six of the seven congressional districts.

24. The Secretary's deadline to deliver the June 30, 2020 primary election ballot order and content to the county clerks is May 7, 2020. The county clerks' deadline to transmit ballots to military and oversees voters is May 16, 2020.

APPLICABLE LAW

Pursuant to section 1-1-102 of the Colorado Revised Statutes, the "Uniform Election Code of 1992" applies to primary elections. Section 1-1-103(1) of this Code states, "This code shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections." In addition, section 1-1-103(3) states, "Substantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies." The Colorado Secretary of State is charged with the duty to "supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections" and to "enforce the provisions of [the election] code." *See* § 1-1-107, C.R.S. When a dispute regarding the application and enforcement of the Election Code arises section 1-1-113 is implicated. This statute provides in part:

> (1) When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.
>
> . . .
>
> (4) Except as otherwise provided in this part 1, the procedure specified in this section shall be the exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election.

Pursuant to section 1-4-103, "All candidates for nominations to be made at any primary election shall be placed on the primary election ballot either by certificate of designation by assembly or by petition." Section 1-4-502(1) provides in part, "[N]ominations for United States senator . . . may be made by primary election under section 1-4-101 or by assembly or convention under section 1-4-702 by major political parties, by petition for nomination as provided in section 1-4-802, or by a minor political party as provided in section 1-4-1304." Section 1-4-603 states, "Candidates for major political party nominations for the offices specified in section 1-4-502(1) that are to be made by primary election may be placed on the primary election ballot by petition, as provided in part 8 of this article." Section 1-4-801 provides in pertinent part that "Candidates for political party nominations to be made by primary election may be placed on the primary election ballot by petition. . . . (2) The signature requirement for the petition are as follows . . . (c)(II) Every petition in the case of a candidate for the office of governor or the office of United States senator must be signed by at least one thousand five hundred eligible electors in each congressional district. . . ." The Court notes the General Assembly recently revised portions of this statute in response to the COVID-19 pandemic. House Bill 20-1359 was signed by Governor Polis on March 16, 2020, and provides in part: [3]

> **1-4-801. Designation of party candidates by petition – repeal.**
> (5)(a) Party petitions shall not be circulated nor any signatures be obtained prior to the third Tuesday in January. EXCEPT AS PROVIDED IN SUBSECTION (5)(b)(I) OF THIS SECTION, petitions must be filed no later than the third Tuesday in March.
>
> (b)(I) NOTWITHSTANDING SUBSECTION (5)(a) OF THIS SECTION, IN 2020, IF THE DESIGNATED ELECTION OFFICIAL WITH WHOM A PETITION IS TO BE FILED IS UNABLE TO ACCEPT THE FILING BECAUSE OF CLOSURES OR RESTRICTIONS DUE TO PUBLIC HEALTH CONCERNS, THE DESIGNATED ELECTION

[3] As noted at the bottom of the first page of the bill itself, capital letters indicate new material added to existing law.

> OFFICIAL MAY EXTEND THE DEADLINE TO FILE THE PETITION OR DESIGNATE AN ALTERNATE LOCATION FOR FILING THE PETITION OR BOTH; EXCEPT THAT A SIGNATURE GATHERED AFTER THE THIRD TUESDAY IN MARCH IS INVALID AND SHALL NOT BE COUNTED.
>
> (II) THIS SUBSECTION (5)(b) IS REPEALED, EFFECTIVE DECEMBER 31, 2020.

The Court notes the following provisions also are relevant to this dispute and remain unchanged by House Bill 20-1359. First, section 1-4-902(1) states, "The signatures to a petition [for candidacy] need not all be appended to one paper, but no petition is legal that does not contain the requisite number of names of eligible electors whose names do not appear on any other petition previously filed for the same office under this section." Second, section 1-4-907 provides, "The petition, when executed and acknowledged as prescribed in this part 9, shall be filed . . . [w]ith the secretary of state if it is for an office that is voted on by the electors of the entire state . . . ." Third, section 1-4-908 describes the review and notification process the Secretary must execute once she receives the petition. Finally, section 1-4-909 states:

> (1) A petition or certificate of designation or nomination that has been verified and appears to be sufficient under this code shall be deemed valid unless a petition for a review of the validity of the petition pursuant to section 1-1-113 is filed with the district court within five days after the election official's statement of sufficiency is issued, or, in the case of a certificate of designation, within five days after the certificate of designation is filed with the designated election official.
>
> (1.5) If the election official determines that a petition is insufficient, the candidate named in the petition may petition the district court within five days for a review of the determination pursuant to section 1-1-113.
>
> (2) This section does not apply to any nomination made at a primary election.

With these statutes in mind, the Court highlights two particular cases it considered in resolving this dispute. First, both parties cite to *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994).

In *Loonan*, the appellees (which included Peggy Loonan) brought an action to challenge the sufficiency of initiative petitions circulated by the appellants (William Woodley and Patricia Miller, hereinafter collectively "Woodley") that would require parental notification of an unemancipated minor's decision to have an abortion. The sole contention of Loonan was that Woodley collected an insufficient number of valid signatures to include the initiative on the November 1994 ballot because the affidavits submitted by Woodley's circulators did not include the statement that the circulator "has read and understands the laws governing the circulation of petitions" as required by statute. Notwithstanding the failure to include this language on the affidavits, the Secretary of State found the signatures collected by circulators using deficient affidavits were still valid and issued a statement of sufficiency in Woodley's favor. The district court, however, vacated the Secretary's determination. On appeal to the Colorado Supreme Court, Woodley asserted that compliance with election regulations must be judged using a "substantial compliance" standard rather than according to the strict compliance standard used by the district court. *Id.*, at 1383. The Supreme Court agreed with Woodley concerning the appropriate standard (i.e. substantial compliance not strict compliance is required), but nonetheless affirmed the ruling of the district court to the detriment of Woodley.

In doing so, the Supreme Court stated, "[T]he right to vote and right of initiative have in common the guarantee of participation in the political process. . . . In light of the nature and seriousness of these rights, we have held that constitutional and statutory provisions governing the initiative process should be liberally construed so that the constitutional right reserved to the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." *Loonan*, 882 P.2d at 1383-84 (internal

quotations omitted). The Supreme Court further said, "In the voting rights context we have held that the rule of 'substantial compliance' provides the appropriate level of statutory compliance to 'facilitate and secure, rather than subvert or impede, the right to vote." *Loonan*, 882 P.2d at 1384, citing *Meyer v. Lamm*, 846 P.2d, 862, 875 (Colo. 1993). The Supreme Court ultimately held that "[g]iven the similar nature of the right to vote and the right of initiative and referendum, and the common statutory goal of inhibiting fraud and mistake in the process of exercising these rights . . . substantial compliance is the appropriate standard to apply in the context of the right to initiative and referendum." *Id.*

The Supreme Court in *Loonan* recognized several factors to determine whether a party has substantially complied with statutory requirements: 1) the extent of non-compliance; 2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the non-compliance; and 3) whether there was a good faith effort to comply or whether non-compliance is based on a conscious decision to mislead the electorate. *Id.*; *see also Fabec v. Beck*, 922 P.2d 330 (Colo. 1996). When applying these factors to the facts of its case, the Supreme Court found the second factor was dispositive "because the 1993 statutory amendment [requiring a statement on the affidavit from a circulator that he or she has read and understands the laws governing the circulation of petitions] is so clear, direct and specific, and because the appellants made no attempt to comply with it." It is worth noting that Woodley used circulator affidavits based upon an accepted form used in previous petition campaigns (which apparently were acceptable in all other respects besides not containing the new language required by the 1993 amendment) and there were no other deficiencies cited by the Supreme Court that rendered the petition or signatures invalid. Rather, the Supreme Court focused on the omitted language as proof that the appellants "disregarded or were unaware of the 1993 amendments" and, thus, may

have been unaware "of their important role in implementing all of the statutory safeguards and in assuring the validity of the signatures they collect." *Loonan*, 882 P.2d at 1385. In short, the "substantial compliance" standard did not insulate Woodley from his failure to comply with "the very particular requirements as to form, procedure, and disclosures that must be followed by the proponents of a petition." *Id.* With this in mind, this Court observes from the result in *Loonan* that while Ms. Ferrigno Warren suggests the "substantial compliance" standard is a more forgiving standard that favors the candidate in an election dispute, application of the standard by the Colorado Supreme Court indicates the standard is still a rigorous one that can just as easily be used as a sword to strike down a petition as opposed to a shield to protect it.

The Colorado Supreme Court's more recent decision in *Kuhn v. Williams*, 418 P.3d 478 (Colo. 2018) further demonstrates this point. In *Kuhn*, incumbent Representative Doug Lamborn sought access to the 2018 primary election ballot in the Fifth Congressional District as a Republican candidate for United States House of Representatives. Mr. Lamborn chose to proceed by petition. To be on the ballot, Mr. Lamborn was required to collect 1,000 valid signatures from registered Republicans in the district. The campaign for Mr. Lamborn hired an organization to circulate petitions and collect signatures which were later submitted to the Secretary of State for review and verification. The Secretary ultimately determined the campaign submitted 1,269 valid signatures and issued a "Statement of Sufficiency." This determination was challenged in the district court by several registered voters of the Fifth Congressional District pursuant to sections 1-1-113(1) and 1-4-909(1), C.R.S. (2017). The protestors argued that several of the circulators were not Colorado residents as required by section 1-4-905(1) of the Election Code and, therefore, the signatures collected by them should have been declared invalid by the Secretary. The district court held an evidentiary hearing and

the argument focused on two particular circulators. The district court concluded one circulator was not a Colorado resident and *in*validated the 58 signatures he collected. No party appealed that ruling. The district court concluded the second circulator was a Colorado resident and validated the 269 signatures he collected. As such, with these 269 valid signatures, the district court found Mr. Lamborn had collected enough signatures to satisfy the statutory threshold and upheld the Secretary's finding of sufficiency. The protestors appealed this ruling to the Colorado Supreme Court and the Court reversed.

In a *per curiam* opinion with no dissent, the Supreme Court concluded that because the second circulator was not a Colorado resident and, thus, did not meet the statutory requirements to be a circulator, all signatures collected by this circulator should have been declared invalid by the Secretary. By declaring these 269 signatures invalid, Mr. Lamborn was left with only 942 valid signatures – 58 signatures short of the threshold. The Supreme Court held that because Mr. Lamborn collected fewer than 1,000 valid signatures the Secretary could not certify him to the primary ballot. In reaching this result, the Court acknowledged the outcome in *Loonan* – "upholding order vacating the Secretary's determination of sufficiency and enjoining the Secretary from certifying proposed initiative to the ballot due to circulator's failure to comply with statutory requirements" – and stated in a footnote that "residency is not a mere technical requirement that is subject to substantial compliance." *Kuhn*, 418 P.3d at 489, n.4, citing *Loonan*, 882 P.2d at 1382. At the end of its opinion, the Supreme Court pointedly stated, "We recognize the gravity of this conclusion, but Colorado law does not permit us to conclude otherwise," *Kuhn*, 418 P.3d at 489, suggesting again to this Court that the "substantial compliance" standard set forth in *Loonan* may not be as forgiving as Ms. Ferrigno Warren asserts it to be, and signifying that the signature threshold itself is not a simple technical

requirement, is inflexible by law, and a "substantial compliance" analysis cannot save a petition with a deficient number of valid signatures. With that said, this Court notes the United States District Court in *Goodall v. Williams*, 324 F.Supp.3d 1184 (D. Colo. 2018) later issued a preliminary injunction ordering the Secretary of State (Wayne Williams at that time) to certify Mr. Lamborn to the ballot because the residency requirement for circulators likely violated the First Amendment. The United States District Court eventually entered a permanent injunction enjoining the Secretary from enforcing those provisions of section 1-4-905(1) that require petition circulators to be registered voters and residents of Colorado. *See Goodall v. Griswold*, 369 F.Supp.3d 1144 (D. Colo. 2019).

CONCLUSIONS OF LAW

A. Jurisdiction

The Court first addresses the jurisdictional challenge raised by the Secretary in her Hearing Brief. As noted above, the Secretary asserts the Court does not have jurisdiction to resolve this dispute under section 1-1-113, C.R.S., because in the face of an obvious deficiency in the number of petition signatures collected by Ms. Ferrigno Warren the Secretary's determination of insufficiency is required by the Election Code and, therefore, does not amount to a breach or neglect of her duties or other wrongful act under the Code. In essence, the Secretary maintains that because she properly applied a technical compliance standard in reviewing the petition her "Determination of Insufficiency" is unreviewable under the Election Code. The Court disagrees. In doing so, the Court again looks to the decision of *Kuhn v. Williams*, 418 P.3d 478 (Colo. 2018) for guidance. In *Kuhn*, the Colorado Supreme Court addressed a somewhat similar "technical compliance" jurisdictional issue in deciding whether the protestors could challenge the embattled circulator's residency in a section 1-1-113 proceeding. In framing the issue, the Supreme Court first stated, "Here, the protestors do not

dispute that the Secretary followed the appropriate verification procedures to do a facial verification of [the circulator's] information. Instead, they look to the courts for vindication. So, we must address whether judicial review of the Secretary's decision is allowed under section 1-1-113." *Id.*, at 485. The Supreme Court further stated, "Here, the Secretary properly relied on the circulator affidavit and information in the voter registration database to conclude that the Lamborn Campaign's petition appeared sufficient. Thus, the question becomes whether the Secretary has another relevant duty he might be 'about to' breach or neglect, or some other relevant wrongful act in which he might be 'about to' engage." *Id.*

In resolving this question, the Supreme Court first recognized that "Section 1-4-908(3) states that upon determining the petition is sufficient, the Secretary 'shall certify the candidate to the ballot.' [This statute] thus imposes a separate duty on the Secretary to place a candidate's name on the ballot." *Id.* The Supreme Court then considered the language of section 1-4-909(1) that allows for filing a protest of designations and nominations within five days after the Secretary's statement of sufficiency is issued. In light of these two statutes, the Supreme Court said, "[T]he Election Code expressly contemplates that, within a narrow, five-day window after the election official issues a statement of sufficiency, a challenge to the 'validity of the petition' may be brought through a proceeding under section 1-1-113, before the election official certifies a candidate to the ballot. Should the court determine that the petition is not in compliance with the Election Code, the election official would certainly 'commit a breach or neglect of duty or other wrongful action,' § 1-1-113(1), to nonetheless certify that candidate to the ballot under section 1-4-908(3)." *Id.*

From this Court's perspective, the opposite side of this jurisdictional coin is implicated in the present case. Section 1-4-909(1.5) provides, "If the election official determines that a

petition is insufficient, the candidate named in the petition may petition the district court within five days for a review of the determination pursuant to section 1-1-113." Ms. Ferrigno Warren alleges her petition is *not* insufficient and substantially complies with the Election Code despite containing a deficient number of signatures. While the merits of this argument are subject to further analysis by the Court, were the Court to agree with Ms. Ferrigno Warren that her petition is sufficient, the Secretary would commit a breach or neglect of her duty by not certifying the candidate to the ballot. As such, the Court finds Ms. Ferrigno Warren is not precluded by the Election Code from bringing the issue before the Court. This conclusion is consistent with the broad language of section 1-1-113 that provides, in part, "When *any* controversy arises between any official charged with any duty or function under this code and any candidate . . . *alleging* that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act . . . upon a finding of good cause, the *district court* shall issue an order requiring substantial compliance with the provisions of this code." (Emphasis added). As emphasized above, Ms. Ferrigno Warren has alleged the Secretary is in violation of the Election Code. Therefore, based on this allegation, the Court has jurisdiction to hear and resolve the dispute.

Finally, although Ms. Ferrigno Warren filed her Petition for Declaratory Relief before the Secretary issued her Statement of Insufficiency, the Court sees no reason to require Ms. Ferrigno Warren to file a second lawsuit raising the same or similar issues in order to somehow trigger a review under section 1-1-909(1.5) and section 1-1-113. Ms. Ferrigno Warren's filing on March 17, 2020 properly anticipated the Secretary's insufficiency determination and in no uncertain terms informed the Court and the Secretary that a review of that forthcoming determination was being requested. Accordingly, the Court finds the Petition for Declaratory relief is a timely filing

that requires district court review of the insufficiency determination in accordance with section 1-1-909(1.5) and section 1-1-113.

B. One-Week Extension

The Court next considers Ms. Ferrigno Warren's request to suspend the petition process and extend the filing deadline for one week after Governor Polis lifts the state of emergency. The Court rejects this request. In doing so, the Court first notes Ms. Ferrigno Warren's statement in her Reply that "she is still willing to accept an Order granting an additional seven days in order to complete petition signature gathering, however, she recognizes that there is little likelihood of the [Governor's State of Emergency and Stay at Home] Order(s) being lifted prior to the statutory ballot deadline." (Reply, page 12). The Court agrees with this assessment. More importantly, however, the Court notes that House Bill 20-1359 specifically precludes this type of relief. Per the bill, section 1-4-801(5)(b)(I), C.R.S. (2020), now provides in pertinent part that "a signature gathered after the third Tuesday in March is invalid and shall not be counted." The Colorado General Assembly could not have been more clear in this regard.

C. Substantial Compliance

The crux of this dispute is whether the Court should order the Secretary to place Ms. Ferrigno Warren on the 2020 Democratic primary ballot as a candidate for United States Senate even though she failed to collect the required number of valid signatures to petition onto the ballot. The Court has struggled with this question. As an initial matter, section 1-4-902(1), C.R.S., says "no petition is legal that does not contain the requisite number of names of eligible electors whose names do not appear on any other petition previously filed for the same office under this section." This language is clear and unequivocal and perhaps should end the Court's inquiry right here. The Secretary herself, however, does not make this argument but instead

asserts that "a reviewing court with jurisdiction under Section 113 is authorized to apply a less rigorous 'substantial compliance' standard under which it may liberally construe the Election Code in favor of ballot access." (Hearing Brief, page 7). In short, the Secretary appears to accept that the signature threshold in section 1-4-801(2)(c)(II) is not an inflexible requirement, that section 1-4-902(1) is not fatal to Ms. Ferrigno Warren's petition, and that further inquiry by the Court is warranted.

The Court, therefore, continues its analysis by considering Colorado Supreme Court precedent in this area. In going down this road, the Court is not sure whether the Supreme Court's decision in *Kuhn v. Williams*, 418 P.3d 478 (Colo. 2018), is a speedbump or a brick wall to further inquiry. The decision could be read by this Court to find that the signature threshold is inflexible by law and cannot withstand a "substantial compliance" analysis. In other words, no further inquiry is needed. Again, however, the Secretary does not make this argument but instead asks the Court to utilize a proposed mathematical formula that would require candidates like Ms. Ferrigno Warren "to still demonstrate significant public support before accessing the primary ballot, while still relaxing the statutorily required level of support due to COVID-19." (Hearing Brief, page 13). The Court observes that the Secretary cites *Kuhn* in her Hearing Brief for the proposition that a district court in a section 1-1-113 proceeding lacks jurisdiction to consider the constitutionality of state laws but does not rely on the opinion to argue Ms. Ferrigno Warren should be excluded from the primary ballot because she provided a deficient number of signatures.

In light of the position taken by the Secretary, the Court continues its analysis but with some reservation. The plain language of section 1-4-902(1), C.R.S., and the Supreme Court precedent considered above, give the Court pause whether further inquiry is permissible. The

Court, however, is mindful that it is reading and interpreting the Election Code and Colorado Supreme Court precedent in a nearly empty courthouse while a global pandemic is unfolding outside its windows. By almost any measure, ordinary life for the citizens of this state has been altered by the arrival of COVID-19 to our community. How and when life returns to normal are still open questions as the Court writes this order. This case shows the political process is not immune from the virus. Candidates, voters, and government officials have encountered a primary election season unlike any other in our history. It is within these circumstances, and in light of the arguments presented by Ms. Ferrigno Warren and the Secretary, that the Court concludes strict adherence to the signature requirement for primary petitions must yield to this unprecedented public health emergency. To interpret and apply the Election Code with a business-as-usual mindset seems injudicious at a time when our community and its citizens have been asked to adapt in profound ways to this new and (hopefully) temporary reality.

Fortunately, the Election Code by its own terms contemplates some level of flexibility in its application. First, section 1-1-103(1) of the Code states, "This code shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections." In addition, section 1-1-103(3) states, "Substantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies." With that said, the Court recognizes that even though the Election Code may not require its provisions to be applied in a rigid manner during an election dispute, the flexibility the Code affords is not unrestrained as evidenced by the Colorado Supreme Court decisions of *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994) and *Fabec v. Beck*, 922 P.2d 330 (Colo. 1996). The Supreme Court in *Loonan* requires a district court to consider the following factors to determine

whether a party has substantially complied with the Code's statutory requirements: 1) the extent of non-compliance; 2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the non-compliance; and 3) whether there was a good faith effort to comply or whether non-compliance is based on a conscious decision to mislead the electorate. *Loonan*, 882 P.2d at 1384; *Fabec*, 922 P.2d at 341. The Court addresses each of these factors in turn.

First, concerning the extent of non-compliance in this matter, Ms. Ferrigno Warren collected a total of 5,383 valid signatures from across the state. This represents 51.2% of the total number of valid signatures required by section 1-4-801(2)(c)(II). Ms. Ferrigno Warren collected the required number of valid signatures in one of seven congressional districts (i.e. the 2nd congressional district). In the 1st congressional district Ms. Ferrigno Warren collected 69% of the required number of valid signatures; in the 3rd congressional district 21%; in the 4th congressional district 20.8%; in the 5th congressional district 32.6%; in the 6th congressional district 75.9%; and in the 7th congressional district 39.2%. The Court is mindful that Ms. Ferrigno Warren had a well planned strategy to use paid circulators during the final twelve days of the collection window to gather signatures in the 3rd, 4th, 5th, and 7th districts. She planned to use a large group of volunteers to gather signatures in the other three districts. To this end, Ms. Ferrigno Warren and Mr. Soto entered into a $40,000.00 contract for Mr. Soto's firm to acquire 10,000 valid signatures. Unsurprisingly, the numbers lag in the four districts that stood to benefit the most from the circulation efforts cut short by the pandemic.

Second, concerning whether the purpose of the signature requirement was substantially achieved despite the non-compliance, the Court is mindful that Ms. Ferrigno Warren had to collect petition signatures in the shadow of a global pandemic and looming public health

emergency. While a persuasive argument could be made that in more tranquil times collecting just over half the required number of valid signatures is not enough to show a candidate vying to appear on a primary ballot has a "significant modicum of support," *Utah Republican Party v. Cox*, 892 P.3d 1066, 1089 (10th Cir. 201), the Court would be remiss to ignore the on-the-ground and in-the-street realities of signature collection during this pandemic. Per the credible testimony of Ms. Ferrigno Warren, signature collection is a "very personal activity" and potential electors were "more cautious" about interacting with circulators beginning about one week before Governor Polis declared a state of emergency. In the best of times, engaging strangers in public, holding their attention, and acquiring their signatures on a petition is challenging. In a climate of social distancing to mitigate the spread of a communicable disease, it is even more so. During a declared state of emergency, it becomes almost futile.

Nonetheless, despite the changing social dynamics associated with the pandemic and foregoing three days of circulation (which included a Sunday), Ms. Ferrigno Warren still managed to gather more than 50% of the required total number of valid signatures. This achievement suggests Ms. Ferrigno Warren has a "significant modicum" of support for her candidacy. In the Court's judgment, a 50% threshold is a reasonable line to draw in this particular case as it strikes a balance between still requiring Ms. Ferrigno Warren to demonstrate significant public support *and* acknowledging that through no fault of her own Ms. Ferrigno Warren was forced to operate within an environment much more onerous to contacting (let alone persuading) potential electors to express that support. The Court recognizes this 50% standard has its shortcomings when applied to a campaign that has collected a lot more than 1,500 valid signatures in only one or a handful of congressional districts while collecting a minimal amount of signatures in the remaining districts. In such a situation, a candidate could claim to have

substantially complied with the petition requirements by gathering at least 5,250 valid signatures while garnering little or no support in some districts. In short, a candidate could inflate the numbers by loading up on signatures in his or her home district while ignoring the other districts. Such is not the case in the present matter. Ms. Ferrigno Warren met the district minimum in only the Second Congressional District, and she exceeded that minimum by just two votes. She collected slightly more than 1,000 signatures in each of two other districts. In the remaining districts – the districts she planned to use paid circulators in the final twelve days of the collection window – she collected a comparable number of valid signatures in each district (i.e. 315, 313, 490, and 588). These results demonstrate that as a candidate for statewide elective office, Ms. Ferrigno Warren made an honest effort to collect signatures in every congressional district, obtained legitimate support for her candidacy in each district, and when combined demonstrates a "significant modicum" of support across our electorate.

The Court declines to utilize the mathematical formula proposed by the Secretary. The Court notes the proposed formula is well thought out and easily applied in this case and others. The Court also understands why the Secretary would want all district courts in our state to utilize the same formula. However, the formula does not account for the reality that signature collection often starts slow and builds in intensity as the deadline nears. This is the "hockey stick" model that Mr. Soto describes using in previous elections with success. The "per-day average" analysis proposed by the Secretary is the converse of this model and in the Court's judgment unfairly penalizes Ms. Ferrigno Warren for having to wait to hire most of her paid circulators until after "Super Tuesday" and for settling on a signature collection strategy that could not anticipate the havoc COVID-19 would wreak in our community. To the extent Ms. Ferrigno Warren should have anticipated and planned for a potential disruption to her collection

efforts during the final two weeks of the collection window (e.g. the March blizzard), the Court notes such a "typical" disruption usually impacts our community for no more than a day or two and then life returns to normal. By contrast, the arrival of COVID-19 to our state has disrupted our community much more deeply and for much longer than anyone could have predicted. Bottom line, the Court is not convinced the proposed "one size fits all" mathematical formula is the proper method to judge whether this candidate under these circumstances has substantially complied with the provisions of the Election Code.

Finally, concerning whether there was a good faith effort to comply or whether non-compliance was based on a conscious decision to mislead the electorate, the Court is convinced Ms. Ferrigno Warren made a good faith effort to comply with the signature requirements. Ms. Ferrigno Warren and her campaign team developed a sound strategy for collecting the required number of signatures. In mid-December 2019, Ms. Ferrigno Warren consulted with Mr. Soto about hiring his firm to gather signatures and they entered into a $40,000.00 contract for Mr. Soto's firm to do so. Although most paid circulators in the state were working for other campaigns and unavailable to Ms. Ferrigno Warren until after "Super Tuesday," she did not wait until the final two weeks to begin her collection efforts. Rather, Ms. Ferrigno Warren and approximately 100 volunteers began collecting signatures on the first day of the collection window (i.e. on January 21, 2020). This shows Ms. Ferrigno Warren was eager to get into the community and start collecting signatures, and the Court has heard nothing in this proceeding to suggest this enthusiasm or effort waned during the collection window. To the contrary, Ms. Ferrigno Warren provided credible testimony she took a two-month leave of absence from her job during this time and worked 40-50 hours per week just on her campaign, all with the obvious purpose of meeting the signature requirement and getting on the ballot.

CONCLUSION

After considering the three factors set forth in *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994) and *Fabec v. Beck*, 922 P.2d 330 (Colo. 1996), the Court finds all three factors weigh in favor of granting the relief requested by Ms. Ferrigno Warren. The Court thus concludes that Ms. Ferrigno Warren has substantially complied with the Election Code's signature threshold, distribution, and validity requirements. Accordingly, the Court orders the Secretary of State to place Ms. Ferrigno Warren on the 2020 Democratic primary ballot as a candidate for United States Senate.

IT IS SO ORDERED on this Tuesday, April 21, 2020.

BY THE COURT:

Christopher J. Baumann,
District Court Judge