No. 20-4051

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAN GARBETT,

Plaintiff/Appellant,

v.

GARY HERBERT, et al.,

Defendants/Appellees.

On appeal from the United States District Court, District of Utah,

Honorable Robert J. Shelby, No. 2:20-cv-00245-RJS

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Michael J. Teter (16734)
Margaret B. Vu (15277)
Teter & Vu LLC
57 W. 200 South, Suite 250
Salt Lake City, Utah 84101
michael@tetervu.com
margaret@tetervu.com
(801) 810-0365

Attorneys for Appellant

Pursuant to Federal Rule of Appellate Procedure 8 and Tenth Circuit Rules 8.1 and 8.2, Appellant Jan Garbett respectfully moves this court for an emergency injunction pending interlocutory appeal. The District Court granted in part Garbett's motion for a preliminary injunction, finding that she had satisfied her burden of establishing a high likelihood of success on the merits on her claim that the State of Utah had placed an unconstitutional burden on her ability to gather petition signatures to secure a place on the Republican Party ballot for governor. However, the District Court did not afford Garbett the full relief she requested. Instead, it issued an injunction that affords Garbett no meaningful relief and that, in effect, ossifies the unconstitutional burden imposed on her by the State. Thus, Garbett's appeal, and this Motion, focuses exclusively on the appropriate scope of the preliminary injunction that has already been issued by the District Court.

This Court should issue an injunction pending appeal that prevents the Lieutenant Governor from certifying the Republican primary ballot for governor. As the District Court has found, Garbett is highly likely to succeed on the merits of her claims. Absent this Court's intervention, Garbett will face irreparable injury. Moreover, because Garbett seeks narrow relief that meets the State's proffered interests surrounding its Election Code and because the State has no interest in enforcing unconstitutional laws, no harm will befall the State by issuing the injunction. Further, the public's interest aligns with Garbett's, as it is in the public

interest to prevent the State from violating an individual's rights. In addition, allowing voters an additional choice on the ballot matches the State's interests in ensuring greater voter participation in the electoral process.

Factual and Procedural Background

Garbett seeks the Republican Party nomination for governor of Utah. Under Utah law, a Republican gubernatorial candidate can secure access to the ballot through two possible routes: selection by delegates at a party convention or submitting to the lieutenant governor 28,000 signatures of registered Republican voters. *See* Utah Code Ann. §§ 20A-9-407, 20A-9-408. Utah law provides that the signatures may be gathered from January 1 until 5 p.m. on Monday, April 13.[1]

Garbett began considering running for governor after a January 31, 2020, forum featuring the declared Republican gubernatorial candidates. Decl. of Jan Garbett in Support of Mot. For Preliminary Inj. ¶ 8 ("Garbett Decl.) (Dkt. 6-1). One of the most important considerations in Garbett's decision-making process was whether she would be able to collect signatures in time to qualify for the primary ballot. *Id.* ¶ 11.

[1] Utah explains that candidates have until "5 p.m.14 days before the day on which the qualified political party's convention for the office is held." *See* Utah Code Ann. § 20A-9-408(8)(b). The Utah Republican Party convention was Saturday, April 25, 2020. Because the fourteen-day mark falls on a weekend the deadline became the following business day. *See id.* § 20A-1-104(3)(b)(iv).

Garbett approached eight different firms about gathering signatures and ultimately received bids from two with significant experience. Garbett Decl. ¶¶ 14-16. Both firms submitted proposals to gather 35,000 signatures each—the 7,000 extra signatures to provide a buffer, as is common—*before* the April 13 deadline. *Id.* ¶¶ 17-18. Confident she could gather the signatures, Garbett decided to run for governor. *Id.* ¶ 18.

On February 17, Garbett signed a contract with one of these firms, I&RCMS, to gather 35,000 signatures. Garbett Decl. ¶ 19. Garbett also engaged the second firm, Zero Week, to collect 15,000 additional signatures exclusively in Utah County. *Id.* ¶ 20. Garbett contracted for 50,000 signatures to be certain of qualifying and to handle any unforeseen setback. *Id.* ¶ 21.

The Coronavirus Crisis Hits Utah and the Campaign

Just as the signature-gathering companies began staffing and collecting signatures, the Coronavirus crisis made its way to Utah. Garbett Decl. ¶¶ 22-29. The two most efficient and common ways to collect signatures are by approaching voters at large public gatherings or at their homes. *Id.* ¶ 28. When seeking signatures at homes, canvassers use voter data to specifically target registered Republicans and then knock on their doors to ask for signatures. *Id.* However, the pandemic eventually made this outreach impossible.

Utah identified its first case of COVID-19 on March 9, the same day that Governor Herbert declared a state of emergency because of virus spread. This set in motion a cascading chain of events that further restricted daily life—and understandably so given the serious risks involved. As the government began issuing these warnings and orders, Garbett began to see her rejection rate—the rate at which people refuse to sign a petition after answering their door or being approached by a canvasser—grow from 20 percent to 50 percent. Garbett Decl. ¶ 38. In addition, ordinarily, Garbett could be expected to gather up to 30 percent of the necessary signatures by sending organizers to public events or to places where large groups congregated (such as universities) but this became impossible. *Id.* ¶ 39. On March 16, Zero Week informed the Garbett campaign that it was instructing its employees to stay at home and suspended signature-gathering on a day-by-day basis. *Id.* ¶ 30. Garbett was forced to let the company go. *Id.* ¶ 31.

Inefficient as signature-gathering may have been during these challenges, the Garbett campaign did grow its infrastructure and ability to collect signatures. Around the time the Governor issued his statewide stay-at-home directive on March 27, the campaign had collected about 19,000 signatures and was set to reach 40,000 by the April 13 deadline, given that it was averaging over 1,600 signatures a day at that point. Decl. ¶¶ 40-42. However, in light of the safety risk, state orders

and directives, and local orders, Garbett ended her canvassing efforts through direct public outreach on March 28. *Id.* ¶¶ 37, 42.

Coronavirus-Related Changes to Utah's Election

While Garbett was struggling to obtain signatures, various Utah officials were making changes to election procedure to address the Coronavirus crisis. The Utah Republican Party, as mandated by its constitution, was slated to hold its required precinct caucuses on March 24 to select delegates to its convention. On March 12, the party announced that it would not hold its precinct caucuses, that its state convention would move to a virtual online convention, and that it would use 2018 state delegates instead of choosing new people for the 2020 convention. *See Statement from Chairman Derek Brown*, Utah Republican Party, available at https://utgop.org/caucus/.

On March 27, Governor Herbert effectively ended door-to-door and public canvassing by issuing his Stay Safe, Stay Home Directive. Garbett Decl. ¶ 34. That same day, Salt Lake City issued its stay-at-home order. *Id.* ¶ 36. Salt Lake County issued its order a few days later and other counties followed suit. *Id.* Those orders do not create exemptions for signature collections. Garbett saw no choice but to end canvassing on March 28.

While the campaign stopped contacting people in public, it did attempt to collect signatures through remote solicitation via mail, email, and text message.

Garbett Decl. ¶¶ 51, 53. All of these methods proved ineffective and exceedingly costly; for comparison, the campaign's average cost per canvassed signature was just under $25 per signature but the per signature average for mail was $163, email was $355, and text message $5,500. *Id.* ¶¶ 51-54.

As of April 13, Garbett had collected 20,874 signatures. Garbett Decl. ¶ 56. Her campaign took these signatures to the Lieutenant Governor's office that day, but the office refused to accept them. *Id.* But for the unprecedented limitations imposed by the government in response to a pandemic, Garbett would have met the signature threshold by the deadline.

Procedural History

Garbett initiated her action for declaratory and injunctive relief on April 13, 2020, the same date that the Lieutenant Governor's Office rejected her signatures. (Dkt. 2.) The following day, she filed a Motion for Preliminary Injunction. (Dkt. 6.) On April 16, 2020, the parties filed a stipulated motion to expedite the briefing and hearing schedule, and requested that the District Court issue a decision before Wednesday, April 29, 2020—the day state law requires the Lieutenant Governor to certify the names to appear on the primary ballots. (Dkt. 15.) The District Court granted the stipulated motion and on April 27, 2020, held a hearing on the Motion for Preliminary Injunction. Following the hearing, the District Court ruled and advised the parties that a written order would follow. (Dkt. 28.) In its Order, the

District Court held that Garbett was likely to succeed on the merits of her First Amendment claim and further held that the other relevant factors warranted issuing an injunction. (Dkt. 31.) The District Court's Order extended relevant deadlines for certifying and mailing the ballot and reduced the signature threshold that Garbett needed to meet to qualify for the ballot from 28,000 to 19,040. The District Court did not grant Garbett any additional time to collect signatures.

On April 28, 2020, Garbett filed a motion requesting that the District Court allow supplemental briefing on the issue of the scope of the preliminary injunction, as Defendants had not challenged the scope of Garbett's requested relief in their opposition papers and, therefore, the parties had not briefed the matter. (Dkt. 26.) The District Court granted the motion in part, and allowed Garbett to file an expedited motion to reconsider. (Dkt. 27.) Garbett filed her Motion for Reconsideration and Modification of Preliminary Injunction on April 29, 2020. (Dkt. 29.) On April 30, 2020, the District Court denied Garbett's motion. The District Court provided the notice of its denial in a docket entry "to facilitate the potential appeal by either or both parties." (Dkt. 31.) A written order explaining the denial is to follow but has yet to be entered.

On May 1, 2020, Garbett filed a notice of interlocutory appeal. (Dkt. 36.)

Argument

Rule 8 of the Federal Rules of Appellate Procedure and Tenth Circuit Rule 8.1 allow this Court to issue an injunction pending appeal when a party demonstrates the likelihood of success on appeal, the threat of irreparable harm if the injunction is not granted, the absence of harm to the opposing parties if the injunction is granted, and any risk of harm to the public interest. Fed. R. App. P. 8; Tenth Circuit R. 8.1.

There is "substantial overlap" between this standard and that which the District Court applied in issuing the preliminary injunction. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Indeed, if anything, the standard for a preliminary injunction on appeal is slightly easier than that required for a preliminary injunction. A party "will be deemed to have satisfied the likelihood of success on appeal element if they show questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996).

A. Statement of Jurisdiction

In her Complaint, Garbett challenged the State's actions as unconstitutional under the First and Fourteenth Amendments of the United States Constitution (Dkt. 2.) She moved for a preliminary injunction pursuant to 28 U.S.C. §§ 2201 and

2202 and Federal Rule of Civil Procedure 65(a). The District Court had federal question jurisdiction in this case pursuant to 28 U.S.C. §§ 1331 and 1343. This Court possesses jurisdiction to review "interlocutory orders of the district courts of the United States" "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to … modify injunctions." 28 U.S.C. § 1292(a)(1).

B. Garbett Has Demonstrated Substantial Questions on the Merits, Making the Issue Deserving of More Deliberate Investigation

Garbett's Motion comes to the Court in an unusual posture. Garbett agrees with the vast majority of the District Court's Order granting her a preliminary injunction. Indeed, Garbett appeals only one provision—but, admittedly, that provision is enormously consequential and will determine whether she will appear on the Republican primary ballot for governor. For that reason, Garbett has filed a notice of interlocutory appeal as quickly as practicable to prevent the Lieutenant Governor from certifying the Republican primary ballot for governor.

1. Garbett is Likely to Succeed on the Merits of Issuing an Injunction

As the District Court held, Garbett is highly likely to succeed on her claims that the State violated rights guaranteed her by the First and Fourteenth Amendments by imposing severe burdens on her access to the ballot. (Dkt. 31.) Because Garbett does not challenge any part of the District Court's legal conclusions on this issue—and for the sake of brevity—she adopts the reasoning of

the District Court. Specifically, the District Court correctly determined that the State's COVID-19 orders coupled with the signature-gathering requirement imposed an unconstitutionally severe burden on her First Amendment rights and that the State had not narrowly tailored its orders.

2. *Garbett is Likely to Succeed in Demonstrating that the District Court's Injunction Did Not Provide Sufficient Relief*

While the District Court sought to arrive at a fair outcome, it itself imposes an unconstitutional burden on Garbett's First Amendment rights. If the State of Utah implemented a ballot access scheme that did not reveal the required signature-gathering threshold for a candidate until after the candidate submitted her signatures and the time for collecting signatures had closed, this Court would likely hold that system violated the Constitution. It cannot, then, be adequate, appropriate, or equitable for the District Court to order such a framework to remedy state action that violated Garbett's constitutional rights. Indeed, the relief is even more severe than the burden the State imposed because it is retroactive, inflexible, and takes all control out of Garbett's hands to make decisions for herself and her campaign that might affect the outcome. In these ways, the District Court's Order falls out of step—and significantly so—with the injunctions issued by every other court that has considered similar matters during the COVID-19 crisis.

A preliminary injunction must be "broad enough to be effective." *PepsiCo, Inc. v. Redmond,* 54 F.3d 1262, 1272 (7th Cir. 1995). And once a constitutional

violation is demonstrated, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 1, 15 (1971). The District Court has found that Garbett is entitled to a preliminary injunction. (Dkt. 31.). This means, in the context of a disfavored injunction such as that which is at issue, that Garbett has made "a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Fish v. Kobach*, 840 F.3d 710, 724 (10th Cir. 2016) (internal quotation marks and brackets omitted). In this instance, the injury involves the Defendants violating Garbett's constitutional rights guaranteed under the First and Fourteenth Amendments—rights that "rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

a. *The 19,040-signature Threshold Imposes its Own Severe Burden on Garbett*

A signature-gathering framework requires the candidate know the target in advance, which allows the candidate to account for invalid signatures and the need to submit a greater number of signatures than required. It is undisputed that Garbett's signature-gathering operation took all of that into account and aimed to collect 40,000 to 50,000 signatures. *See* Garbett Decl. ¶ 21; Blaszak Decl. ¶ 23 (Dkt. 17). It is also undisputed that in her last week of signature-gathering, which included days when gatherers did not seek signatures but instead spent time hand

addressing letters to voters, she gathered 8,100 signatures. *See* Blaszak Decl. ¶ 22 & Ex. 5. Even assuming no increased momentum, Garbett was on track to collect an additional 20,000 signatures from March 29-April 12, which would have resulted in roughly 40,000 total signatures. *Id.* ¶ 23.

Furthermore, at some point in early April, Garbett would have been able to submit 28,000 signatures to have the Lieutenant Governor's Office verify them. From there, she would know how many more signatures she needed to gather, just as each of her counterparts did. *See* Lee Decl. ¶¶ 22-26 (Dkt. 21-1).

An order that retroactively creates a new threshold fails to account for these relevant aspects of signature-gathering. To reach 19,040 signatures with a validity rate of 70%, Garbett would have aimed to collect 27,200. The difference between the 20,874 signatures Garbett collected and the 27,200 she would need to reach 19,040 assuming a 70% validity rate only amounts to three to four days of canvassing (and perhaps fewer days based on the growing momentum). The campaign could have made different decisions to account for that new threshold in the last few days. Instead of having all of its canvassers write letters, it could have collected signatures. Instead of stopping canvassing operations out of concerns for public health even in counties where no stay-at-place orders were issued, it could have collected signatures. Moreover, the campaign could have turned in the

signatures it had collected to learn the validity rate and the number of remaining signatures she needed to collect.

In addition, the Court's Order varies significantly from how other courts addressing similar matters have remedied the severe burden imposed by ballot access laws during the pandemic:

- In *Esshaki v. Whitmer*, No. 2:20-CV-10831-TGB, 2020 WL 1910154, at *10 (E.D. Mich. Apr. 20, 2020), the court (1) lowered the minimum number of signatures required for candidates to be included on the primary ballot by 50%; (2) extended the deadline to gather signatures; and (3) ordered the State to implement a method that would permit signatures to be gathered through the use of electronic mail.
- In *Goldstein v. Sec'y of Commonwealth*, No. SJC-12931, 2020 WL 1903931, at *10 (Mass. Apr. 17, 2020), the court (1) reduced the signature requirements by 50% for all offices; (2) extended deadlines for candidates running for state district and county offices to submit nomination papers; and (3) ordered the state to allow the submission and filing of nomination papers with electronic signatures.
- In *Libertarian Party of Illinois v. Pritzker*, No. 20-CV-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020), the court enforced the parties' agreed order which (1) permitted ballot access for previously-qualifying new

party and independent candidates; (2) reduced the statutory signature requirements for other new party and independent candidates to 10%; and (3) allowed candidates to submit physical or electronic copies of petitions.

- In *Omari Faulkner for Virginia, et al. v. Virginia Dep't of Elections*, et al., Case No. CL-20-1456, at 4 (March 25, 2020; Richmond City Cir. Ct. (Marchant)) (attached as Addendum 1 to Motion for Reconsideration and Modification (dkt. 29)), the court ordered the State 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" total. This number represented 35% of the normal threshold. The court noted that while it is "not qualified to articulate the number of signatures that should be required in order for an individual to appear on the ballot," the plaintiff articulated those numbers and the State did not object. *Id*.
- In *Ferrigno Warren v. Griswold*, Case No. 20-CV-31077, at 25, 28 (April 21, 2020; Denver Dist. Ct.) (attached as Addendum 2 to Motion for Reconsideration and Modification (dkt. 29), the court ordered the State place the plaintiff on the 2020 Democratic primary ballot as a candidate for United States Senate. She had collected just over 50% of the total number of valid signatures required under statute. The court rejected a per-day average formula that the State proposed, stating that signature-gathering is not linear

and instead noting that the process followed a "hockey stick model" so that it was more appropriate to review individual candidates and recognize the ramp up and increased intensity at the end. *Id*. at 26.

Each of these cases dealt with states that had far lower signature-gathering thresholds to begin with and, in *Ferrigno Warren*, also had an alternative route to the ballot through caucus and convention. *Id*. at 1. Further, these court orders were broader because they applied to more than one candidate.

Finally, the Order represents a severe burden by the fact that no candidate could meet its established threshold. The inability of a candidate to achieve ballot access through a route is strong evidence that it imposes a severe burden. *See, e.g.*, *Stone v. Board of Election Com'rs for City of Chicago*, 750 F.3d 678, 683 (7th Cir. 2014); *Lee v. Keith,* 463 F.3d 763, 771 (7th Cir. 2006). It requires a validity rate of 91%, which Defendants stated is far above the highest validity rate ever seen. To have succeeded, it requires Garbett to have collected approximately 27,200 signatures from February 25, 2020 to March 27, 2020. It took the other three relevant campaigns much longer to collect their first 28,000 signatures—during a time when COVID-19 was not an issue. *See* Lee Decl. ¶¶ 22-26.

The Order does not remedy the State's imposed unconstitutional burden. It replaces it with another.

b. This Court Should Enjoin the Lieutenant Governor from Certifying the Republican Primary Ballot for Governor so that the Court Can Consider Alternative Remedies that Protect Garbett's Rights and Redress Her Harms

In her Motion for Reconsideration and Modification (dkt. 29), Garbett presented alternative approaches for the District Court to consider in affording Garbett her relief. This Court should enter an injunction that prevents the Lieutenant Governor from certifying the Republican primary ballot for governor until this Court has an opportunity to weigh those alternatives. This is especially true because the parties did not brief the scope of the injunction and Garbett has demonstrated that the District Court's Order raises "serious, substantial, difficult" questions so "as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon*, 79 F.3d at 1020.

Specifically, the District Court rejected extending Garbett's deadlines to collect signatures because it was concerned about delaying an election by tying it to unknown events. However, it now appears that restrictions are being relaxed and the Court could therefore issue such an injunction extending all deadlines by eight weeks.

In addition, the District Court rejecting placing Garbett on the ballot directly as too broad a remedy. However, in Colorado, courts have taken this exact

approach when the candidate has demonstrated a modicum of support. *See Ferrigno Warren*, Case No. 20-CV-31077, at 25, 28.

Alternatively, this Court should hear argument on Garbett's proposed remedy to place her where she would have been but for the unconstitutional burdens: submitting enough signatures to account for a 70% validity rate. On April 28, 2020, Garbett submitted 20,874 signatures pursuant to the Order. The Court should consider ordering that Garbett must have 14,612 valid signatures to be placed on the ballot. In addition to more accurately accounting for the harm, this approach has other benefits.

First, while outcome determinative, the outcome is not preordained.

Second, several other approaches coalesce around a similar number of signatures. The State allows candidates seeking the nomination of registered political parties to collect and submit signatures totaling 2% of registered party voters. The difference between registered political parties and qualified political parties is that qualified political parties have the convention route as a means of accessing the ballot. However, in 2020, that traditional caucus system was dramatically altered. Treating Garbett as if she were a candidate for a registered political party makes sense in the context of 2020 and the changes to the caucus

and convention system.[2] Based on data from the Lieutenant Governor's Office, that would place Garbett's threshold at approximately 13,660.[3]

At the April 27 hearing on Garbett's Motion for Preliminary Injunction, discussion centered in significant part on how the District Court should account for the fact that Garbett did not file her notice of intent to collect signatures until February 24, 2020—six weeks after her male counterparts in the race. Defendants argued that the fault for Garbett's not collecting 28,000 signatures lay with her because of that "late" start. However, as the statutory framework demonstrates, Garbett did not start the process "late." State law provides that an individual could only file their declaration of candidacy and their notice of which route to the ballot they were pursuing from March 13-19, 2020. Not only does this rebut the argument that seeks to place the fault at Garbett's feet—an untenable argument given the finding of an unconstitutionally severe burden—but it also supplies a more reasonable date to calculate the signature threshold. From the date a candidate could file a declaration of candidacy and formally select their route to the ballot to

[2] Defendants argued against applying the registered political party standard to Garbett because, they noted, SB54 was a delicate, balanced compromise. That is precisely the point. The compromise was careful and balanced and assumed that the parties would be able to follow their normal, by-laws-required approach regarding caucuses and conventions. That changed this year, so the careful balance is disrupted.

[3] *See* Office of the Lieutenant Governor, *Voters By Party and Status*, May 28, 2019, available at https://elections.utah.gov/party-and-status. Alternatively, based on Mr. Lee's declaration, the number would be 14,254. *See* Lee Decl. ¶ 21.

the date for submitting signatures, a candidate had thirty-one days. Defendants argued that the proper date for calculating the burden's start is March 26. Accepting that as true, despite Garbett's assertions and Court's finding that the burden began earlier than that, the State unconstitutionally burdened Garbett for seventeen of her thirty-one days as a potential candidate gathering signatures, or 55% of her days. Under this approach, her signature threshold should be reduced to approximately 12,600.

Finally, this approach balances the equities and interests appropriately. Garbett has demonstrated that Defendants likely violated her constitutional rights by placing severe burdens on her ability to qualify for the ballot. Given that finding, the State's only interest is in fashioning a remedy that redresses that violation, that ensures a candidate has a modicum of support, and that meets the State's administrative needs. As discussed above, Garbett's proposed remedy most accurately redresses the harm because she had created and significantly invested in a signature-gathering operation that would allow her to submit far more than the requisite signatures. To the extent that Defendants believe Garbett should be penalized for starting signature-gathering later than other candidates, that penalty already exists in the form of a more expensive signature-gathering operation and by the fact that Garbett had to account for a larger invalidity rate because the pool of available voters from which to draw was reduced by their having signed other

candidates' petitions. Further, Garbett's proposed remedy allows the State to be satisfied that she has demonstrated a modicum of support. And Garbett's proposed remedy places no additional burden on the State's administering its election laws than the State has created for itself through statute or that the Court has imposed already.

Each of these alternatives more credibly addresses the burdens placed on Garbett by the State's actions and balances the equities more fairly than the injunctive relief provided by the District Court. This Court should consider these options, which requires enjoining the ballot's certification.

C. As the District Court Found, Garbett will Suffer Irreparable Harm Without Injunctive Relief

The District Court correctly concluded that absent a preliminary injunction, Garbett would suffer irreparable harm. That is now true on appeal, as well, as Defendants notified the District Court that its review of signatures submitted to it by Garbett reached the point that the Lieutenant Governor's Office concluded that Garbett did not qualify for the ballot under the District Court's Order. Without injunctive relief, the Republican primary ballots will be printed and mailed without Garbett's name appearing as a candidate for governor.

D. The Injunction is Equitable and in the Public Interest

As discussed above, absent an injunction, Garbett's First Amendment rights will be irreparably harmed. On the other hand, Governor Herbert and Lieutenant

Governor Cox face no harm if the court grants the injunction to allow the Court to consider alternative remedies. Ultimately, Defendants are being asked to do nothing more than to place Garbett's name on the Republican primary election ballot. Because of the ease with which that can be accomplished, the balance of equities tips decidedly in Garbett's favor. Further, if the Court instead orders a different basis for determining whether Garbett should be placed on the ballot, it will do so taking into account the State's asserted interests of ensuring a candidate demonstrates a modicum of support. Moreover, the Defendants are sued in their official capacity, as representatives to the people. The equities favor voters having more electoral choices and opportunities—especially in a pandemic—than fewer.

Defendants and the State of Utah have no legitimate interest in enforcing an unconstitutional elections framework. *See, e.g.*, *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("[T]he Government does not have an interest in the enforcement of an unconstitutional law."). And, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1131-32 (10th Cir. 2012); *see also Pacific Frontier*, 414 F.3d at 1237 ("[v]indicating First Amendment freedoms is clearly in the public interest"). This is even more true in the ballot access context, where granting an injunction to a party or candidate seeking a place on a ballot "serves to provide another option to voters." *United Utah Party*, 268 F. Supp. 3d at 1260. The public

has a vital interest in a broad selection of candidates as well as the conduct of a free, fair, and constitutional election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (recognizing the public has a "strong interest in exercising the fundamental political right to vote" (citations omitted)).

Conversely, "[t]he public has no interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1273 (11th Cir. 2006) (citing cases).

Thus, the requested injunction would therefore serve the public interest.

CONCLUSION

For the reasons set out above, the Court should grant Garbett's requested injunction pending appeal. Garbett requests the Court issue its decision by May 6, 2020—the District Court's imposed deadline by which the Lieutenant Governor's Office must certify the names of the Republican candidates for governor that will appear on the primary ballot. This deadline affects subsequent State and Federal deadlines regarding the printing and delivery of ballots.

DATED: May 1, 2020

Respectfully submitted,

/s/ *Michael J. Teter*
Michael J. Teter
Margaret B. Vu
TETER & VU LLC

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 5,188words. I relied on I relied on my word processor to obtain the count and it is Microsoft Word 365.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

DATED: May 1, 2020

/s/ *Michael J. Teter*
Michael J. Teter
TETER & VU LLC
57 W. 200 South, Suite 250
Salt Lake City, UT 84101
(801) 810-0365
michael@tetervu.com

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) Any required privacy redactions have been made;

(2) If required to file additional hard copies, that the ECF submission is an exact copy of those documents; and

(3) the digital submissions have been scanned for viruses with AV Defender version 6.2.19.899 (updated August 9, 2018) and according to the program are free of viruses.

DATED: May 1, 2020

/s/ *Michael J. Teter*
Michael J. Teter
TETER & VU LLC
57 W. 200 South, Suite 250
Salt Lake City, UT 84101
(801) 810-0365
michael@tetervu.com

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record. In addition, I provided electronic copies via electronic mail to all counsel of record.

/s/ *Michael J. Teter*
Michael J. Teter
TETER & VU LLC
57 W. 200 South, Suite 250
Salt Lake City, UT 84101
(801) 810-0365
michael@tetervu.com

No. 20-4051

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAN GARBETT,

Plaintiff/Appellant,

v.

GARY HERBERT, et al.,

Defendants/Appellees.

On appeal from the United States District Court, District of Utah,

Honorable Robert J. Shelby, No. 2:20-cv-00245-RJS

CERTIFICATE STATING BASIS FOR EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Michael J. Teter (16734)
Margaret B. Vu (15277)
Teter & Vu LLC
57 W. 200 South, Suite 250
Salt Lake City, Utah 84101
michael@tetervu.com
margaret@tetervu.com
(801) 810-0365

Attorneys for Appellant

Pursuant to Federal Rule of Appellate Procedure 8 and Tenth Circuit Rules 8.2, counsel for Jan Garbett certifies:

1. Garbett's Emergency Motion for an Injunction Pending Interlocutory Appeal could not have been filed before May 1, 2020. The District Court issued its Order denying Garbett's Motion for Reconsideration and Modification of Preliminary Injunction on April 30, 2020.
2. Garbett sought a preliminary injunction in the District Court on April 14, 2020, one day after the Lieutenant Governor's Office rejected her signature submissions. The District Court issued its order granting in part Garbett's motion for preliminary injunction on April 27, 2020 at 5:45 p.m. MDT and provided its written order on April 29, 2020. The preliminary injunction became effective that day. On April 28, 2020, Garbett filed a Motion to Allow Supplemental Briefing on Scope of Preliminary Injunction, which the District Court granted in part—allowing Garbett to file a motion for reconsideration. On April 29, 2020, Garbett filed her Motion for Reconsideration and Modification of Preliminary Injunction. The District Court denied that motion on April 30, 2020.
3. On April 30, 2020, counsel contacted the Tenth Circuit clerk's office to alert the Court about the potential for Garbett's filing an emergency

motion for an injunction. Counsel contacted the clerk's office again on May 1, 2020 to inform the Court of Garbett's intent to file an emergency motion for an injunction.

4. This appeal was docketed shortly thereafter on May 1, 2020, and the preliminary record was transmitted from the District of Utah.

5. Garbett has now filed this motion on May 1, 2020, which was as soon as reasonably possible.

6. Counsel has also alerted counsel of record about this motion.

7. Counsel of record for Appellees are:

   David N. Wolf
   Assistant Utah Attorney General
   (801) 366-0100
   dnwolf@agutah.gov

   Lance Sorenson
   Assistant Utah Attorney General
   (801) 366-0100
   lancesorenson@agutah.gov

8. Counsel of record for Appellants are:

   Michael J. Teter
   Teter & Vu LLC
   (801) 810-0365
   michael@tetervu.com

   Margaret B. Vu
   Teter & Vu LLC
   (801) 810-0365
   margaret@tetervu.com

May 1, 2020

Respectfully submitted,

/s/ *Michael J. Teter*
Michael J. Teter
Margaret B. Vu
TETER & VU LLC

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record. In addition, I provided electronic copies via electronic mail to all counsel of record.

/s/ *Michael J. Teter*
Michael J. Teter
TETER & VU LLC
57 W. 200 South, Suite 250
Salt Lake City, UT 84101
(801) 810-0365
michael@tetervu.com