

VIRGINIA :

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

CESAR J. ALBERTO, et al.,)
)
Plaintiffs,)
v.)
)
CITY OF ROANOKE, General Registrar,)
J. ANDREW COCHRAN, et al.,)
)
Defendants.)

Civil Action No. CL20-997

ORDER

On June 4, 2020, upon proper notice to all Defendants, the parties, by counsel, appeared before this Court for a hearing upon the Plaintiffs' Verified Complaint and Motion for Preliminary Injunction, in which the Plaintiffs ask, pursuant to 42 U.S.C. § 1983 that this Court enjoin the enforcement of certain procedures for attaining access to the ballot in the November 2020 City of Roanoke City Council Member Election on the grounds that those restrictions violate the Plaintiffs' First Amendment rights as applied to the November 2020 Roanoke City Council Member Election. The Plaintiffs, along with the defendants the General Registrar for the City of Roanoke, Roanoke City Electoral Board, Virginia Department of Elections, Virginia State Board of Elections, and their respective members, by counsel, have presented to this Court a Consent Order awarding the Plaintiffs certain injunctive relief to be considered for entry by this Court. Upon due consideration of the pleadings, the Plaintiffs' oral motion modify the specific relief sought in the *ad damnum* to the Verified Complaint, the argument of the parties, application of the law, and it otherwise appearing proper to do so, this Court makes the following ruling.

In Virginia, an 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 et 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.* Under federal law, a preliminary injunction is warranted if the party seeking an injunction satisfies that four factors articulated 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. *Id.*

The Court **FINDS** that Section 19 of the Roanoke City Charter states “[a]ll elections provided for in this charter, except as otherwise provided herein, shall be conducted, and the result canvassed and certified by the regular election officials provided for by the general election laws of the state and all such elections shall be governed by the general election laws.” The petition requirements for aspiring city council member candidates are set by Virginia Code § 24.2-506, and require the candidates to submit a petition to the General Registrar containing a minimum of 125 signatures of qualified voters of the city. The petition circulators must witness each signature and sign an affidavit to that effect. *See* Virginia Code § 24.2-506. Such a petition must be filed no later than June 9, 2020 at 7:00 p.m. *See id.* § 24.2-507. In an ordinary election cycle, the foregoing requirements are a constitutionally permissible means of protecting the Commonwealth’s interest in conducting fair and orderly elections as well as its interest in ensuring that candidates for office demonstrate some modicum of support before being placed on the ballot. *See McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1222-23 (4th Cir. 1995) (observing that analogous ballot access restrictions in Virginia are constitutionally permissible for these reasons).

But this is not an ordinary election. The COVID-19 pandemic took hold in Virginia in late February 2020. On March 12, 2020, Gov. Ralph Northam declared a state of emergency pursuant

to Virginia Code § 44-146.13 et seq. Ex. Ord. No. 51 (Gov. Northam 2020). Thereafter, Executive Orders have followed restricting social and economic activity for the protection of public health. On March 17, 2020, guidance was issued prohibiting the non-essential gathering of more than ten people in any one location at any time. Press Release, *Gov. Northam Announces New Measures to Combat COVID-19 and Support Impacted Virginians* (Office of the Governor, Mar. 17, 2020). As a result of these restrictions, many non-essential businesses have been shuttered or have their operations limited. This includes many social gathering places such as restaurants, shopping centers, hotels, salons, cultural attractions, theaters, bars, etc. Additionally, the Governor issued Executive Order Number Sixty-Three effective on May 29, 2020 to require all citizens to wear facial masks and continue to engage in “social distancing,” i.e., maintaining six feet of separation from others.

Under these extraordinary circumstances, the process of gathering hand-signed petitions is uncharacteristically challenging. Opportunities to gather petition signatures are unusually limited. Would-be petition signers are predictably reluctant to break from social distancing guidance to handle a clipboard and sign a petition. Because of these disruptions, the Plaintiffs are severely limited in their ability to engage in political dialogue or debate at the elevated level in which they seek to engage in such discussion, namely the seeking of signatures of qualified registered voters in the City of Roanoke.

Under these unusual circumstances, the Court **FINDS** that the qualification criteria provided in Virginia Code §§ 24.2-506 and 24.2-507, solely as applied to the qualification requirements and deadlines for the November 2020 Roanoke City Council Member Election, constitute a “severe” burden on the Plaintiffs’ voting, associational, and expressive rights guaranteed by the First Amendment. Therefore, this Court must evaluate the constitutionality of

the ballot access restrictions for the 2020 Roanoke City Council Member Election using strict scrutiny analysis, i.e., the Court must determine whether these restrictions are “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279 (1993).

While, as noted above Section 19 of the Roanoke City Charter and Virginia Code §§ 24.2-506 and 24.2-507 are ordinarily a constitutionally permissible means of vindicating compelling state interests, the Court **FINDS** that the ballot access criteria for the qualification requirements and deadlines for the November 2020 Roanoke City Council Member Election are not the least restrictive means of vindicating these interests in light of the unprecedented social and economic disruption resulting from the COVID-19 pandemic. Solely as applied to the November 2020 Roanoke City Council Member Election, the challenged ballot access restrictions do not satisfy strict scrutiny. Therefore, the Court **FINDS** that the Plaintiffs are likely to succeed on the merits as to certain defendants.

Next, the Court **FINDS** that the Plaintiffs will suffer irreparable harm in the absence of an injunction. “The Supreme Court has explained that ‘loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury.’” *Newsome v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). The severe burdening of the Plaintiffs’ First Amendment freedoms is no exception.

Finally, the Court **FINDS** that the public interest and balance of equities favor the granting of injunctive relief. “[U]pholding constitutional rights surely serves the public interest.” *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2003). Further, there are no countervailing equitable considerations that overwhelm the clear public interest in upholding the Plaintiffs’ constitutional rights. As further articulated below, the state and local election officials have

articulated, and the Plaintiffs have accepted, parameters for injunctive relief that will not unduly interfere with the City of Richmond's preparations for the forthcoming election.

In *McLaughlin*, the Fourth Circuit noted that it is "beyond judicial competence to identify, as an objective and abstract matter, the precise numbers and percentages that would constitute the least restrictive means to advance the state's avowed and compelling interests." *McLaughlin*, 65 F.3d at 1222. This Court is no better equipped to identify the precise thresholds appropriate to balance the competing interests at stake in this case. At the same time, this Court is mindful of the numerous courts across the country to have engaged in some form of ad hoc balancing to alleviate the First Amendment burdens arising due to the COVID-19 pandemic.¹ Under the circumstances, some dispensation from the normal ballot access requirements is warranted, notwithstanding the difficulty in ascertaining the appropriate thresholds.

Here the Plaintiffs are seeking to reduce the signature requirement from at least 125 total signatures of qualified registered voters to at least 50 signatures of qualified registered voters. The Court **FINDS** that this proposed reduction is supported by the evidence. No Defendant has proposed an alternative threshold.

¹ *E.g.*, *McLean v. Showalter*, Case No. CL20-1959 (Va. Cir Ct. May 18, 2020) (City of Richmond) (reducing the signature requirement from 500 to 125 signatures and extending the deadline to file petitions from June 9 to June 23); *Faulkner v. Va. Dep't of Elections*, CL20-1456 (Va. Cir. Ct. Mar. 25, 2020) (City of Richmond) (Marchant, J.) (reducing the signature requirement sixty-five percent in light of COVID-19 restrictions); *Esshaki v. Whitmer*, No. 2:20-cv-10831, 2020 U.S. Dist. LEXIS 68254 (E.D. Mich. Apr. 20, 2020) (reducing the number of required signatures by 50 percent and extending the deadline to May 8, 2020 in a COVID-19 challenge to ballot access requirements for the United States Senate); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 U.S. Dist. LEXIS 71563 (N.D. Ill. Apr. 23, 2020) (reducing signature requirements for elections for statewide office to 10 percent of the statutory minimum due to COVID-19 restrictions); *Garbett v. Herbert*, No. 2:20-cv-245, 2020 U.S. Dist. LEXIS 75853 (Apr. 29, 2020) (reducing the signature requirement to attain ballot access for Utah Governor from 28,000 to 19,040 due to COVID-19 restrictions).

The Plaintiffs also seek an extension on the June 9, 2020 filing deadline. The General Registrar has stated that he can accommodate an extension to June 23, 2020, but no later, without unduly interfering with the balance of his duties in preparation for the forthcoming election. The Plaintiffs do not object to an extension within these parameters.

In due consideration of these findings and the law, the Court **GRANTS** the Plaintiffs' request for a preliminary injunction. It is therefore **ORDERED, ADJUDGED, and DECREED** as follows:

1. The Court **DECLARES** that, solely as applied to qualification requirements and deadlines for the November 2020 Roanoke City Council Member Election, the Plaintiffs have demonstrated a substantial likelihood of establishing that the petition signature requirements for attaining ballot access in the November 2020 Roanoke City Council Member Election as stated in Virginia Code § 24.2-506, the requirement that the petition circulators swear they personally observed each person signing the petition, and the filing deadline of June 9, 2020 at 7:00 p.m. provided under Virginia Code § 24.2-507, constitute an impermissible burden on the Plaintiffs' voting, associational, and expressive rights guaranteed by the First Amendment. The Court further **FINDS** that the General Registrar, Local Electoral Board, Virginia Department of Elections, and Virginia State Board of Elections are legally blameless for these longstanding restrictions that were rendered unconstitutionally burdensome solely as the result of a wholly unforeseen and unprecedented pandemic.

2. The Court **ENJOINS** enforcement of the petition signature thresholds required to attain access to the ballot for the November 2020 Roanoke City Council Member Election as stated in Virginia Code § 24.2-506. Instead, the Court **ORDERS** that any candidate, including the Plaintiffs, who seeks to qualify for the ballot in the November 2020 Roanoke City Council Member

Election must submit a petition containing at least 50 signatures of qualified registered voters. The existing procedures for the validation of petition signatures by the General Registrar are not altered or otherwise affected by this Order.

3. The Court further **ENJOINS** enforcement of the filing deadline provided under Virginia Code § 24.2-507 solely as applied to qualification for the November 2020 Roanoke City Council Member Election. Instead, the Court **ORDERS** that any candidate, including the Plaintiffs, who seeks to qualify for the ballot in the November 2020 Roanoke City Council Member Election must submit the required petition no later than June 23, 2020 at 7:00 p.m.

4. The foregoing relief is granted solely with respect to candidates who wish to qualify to appear on the ballot for City Council Members in the forthcoming November 2020 Roanoke City Council Member Election. The Court **FINDS** that this relief is necessitated by the unique challenges created by the COVID-19 pandemic. The Court expresses no opinion on the constitutionality of Virginia Code §§ 24.2-506 and 24.2-507 generally. Further, this Order shall not apply to qualification requirements and deadlines for any future elections other than the November 2020 Roanoke City Council Member Election. This Order shall not apply to any office other than Roanoke City Council Members. This Order shall not apply to the election for the office of Mayor.

5. The Plaintiffs and Plaintiffs' counsel waive all claims for costs and attorney's fees under 42 U.S.C. § 1988. Accordingly, it is **ORDERED** that all parties shall bear their own costs, including attorney's fees.

6. Finally, the Court **WAIVES** the requirement that the Plaintiffs post an injunction bond.

7. The Court will **RETAIN** jurisdiction over this matter for purposes of enforcement or, in the event any party files a motion for modification prior to June 24, 2020, a modification of this Order as appropriate. The deadline for the defendants to file responsive pleadings pursuant to Rule 3:9 is extended indefinitely unless and until this Court orders otherwise.

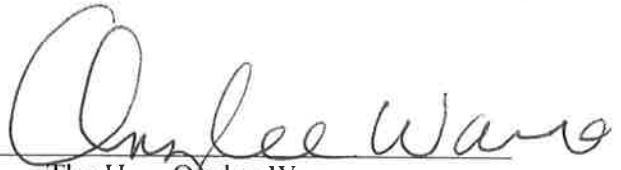
8. Unless there are intervening motions for modifications and proceedings associated therewith, this Order will expire by its own terms at midnight on June 24, 2020 and shall operate as a dismissal with prejudice at that time.

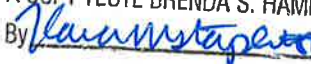
IT IS SO ORDERED.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties' endorsement of this Order which are not otherwise set forth below.

Let the Clerk send a certified copy of this Order to the parties.

Entered this 4th day of June, 2020.


The Hon. Onzlee Ware

A COPY TESTE BRENDA S. HAMILTON, CLERK
By  Deputy Clerk



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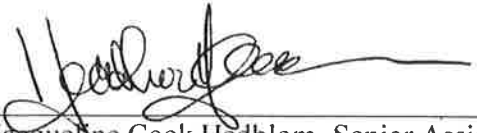
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CIRCUIT COURT

Received Order From

OW ☒ JCC ☐
DBC ☐ CND ☐

On JUN - 4 2020

By Karam Stapleton
Deputy Clerk
City of Roanoke

Regarding the decree or order to which
this stamp is affixed. I certify that on

June 4, 2020

I delivered a certified copy to:

T. Spencer (2)

Karam Stapleton
Deputy Clerk Circuit Court, City of Roanoke