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

DEBORAH GONZALEZ, APRIL BOYER BROWN, ADAM SHIRLEY, ANDREA WELLNITZ, and LINDA LLOYD,	**CIVIL ACTION FILE**
Plaintiffs,	**NO. 1:20-CV-2118-MHC**
v.	
HON. BRIAN KEMP, Governor of the State of Georgia, and BRAD RAFFENSPERGER, Secretary of State, State of Georgia,	
Defendants.	

ORDER

This case comes before the Court on Defendants' Emergency Motion to Stay Pending Appeal of Preliminary Injunction ("Mot. to Stay") [Doc. 25].

I. BACKGROUND

On July 2, 2020, this Court granted Plaintiffs' Motion for Preliminary Injunction [Doc. 5], and preliminarily enjoined Defendants from following the portion of O.C.G.A. § 45-5-3.2 that would prevent an election for District Attorney for the Western Judicial Circuit on November 3, 2020. July 2, 2020, Order

[Doc. 22] at 20-22. The Court ordered that Defendant Secretary of State Brad Raffensperger ("Secretary Raffensperger") take all steps necessary to conduct the election for the office of District Attorney for the Western Judicial Circuit for the term beginning January 1, 2021, on the same date as the 2020 general election. Id. The Court also indicated that nothing in its Order prevented Defendant Governor Brian Kemp ("Governor Kemp") from filling the existing vacancy in the office of District Attorney for the Western Judicial Circuit in accordance with Article VI, Section VIII, Paragraph I(a) of the Georgia Constitution; provided that if the Governor chooses to fill the vacancy by appointment, he must do so before the close of a qualifying period[1] for the special election for such position on November 3, 2020, if the appointee intends to run for the term of office beginning on January 1, 2021. Id. On July 14, 2020, Defendants filed a Notice of Appeal [Doc. 26] and the instant Motion to Stay.

[1] The parties were directed to confer in an effort to present a proposed consent order which sets forth the procedure for conducting the special election for the District Attorney of the Western Judicial Circuit, including setting the dates for a special qualifying period for candidates for that office. July 2, 2020, Order at 21-22.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 62(d) governs the granting of a stay of an injunction pending appeal and provides in relevant part:

> While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

FED. R. CIV. P. 62(d). "A stay is not a matter of right, even if irreparable injury might otherwise result." Nken v. Holder, 556 U.S. 418, 434 (2009) (citing Virginian Ry. Co. v. United States, 272 U.S. 658, 672 (1926)). "It is instead 'an exercise of judicial discretion,' and '[t]he propriety of its issu[ance] is dependent upon the circumstances of the particular case.'" Id. (internal citations omitted).

In reviewing a motion to stay an injunction pending appeal, a court must consider "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether [the] issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies." Democratic Exec. Com. of Fla. v. Lee, 915 F.3d 1312, 1317 (11th Cir. 2019) (citing Nken, 556 U.S. at 434). The movant bears a "heavy burden" and "must establish each of these four elements in order to prevail." Larios v. Cox, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (citing Siegel v. Lepore, 234 F.3d 1163,

1176 (11th Cir. 2000) (en banc)); see also Nken, 556 U.S. at 433–34 ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."). The first two factors "are the most critical." Nken, 556 U.S. at 434; Lee, 915 F.3d at 1317. "It is not enough that the chance of success on the merits be better than negligible . . . . By the same token, simply showing some possibility of irreparable injury . . . fails to satisfy the second factor." Nken, 556 U.S. at 434–35 (citations and internal quotation marks omitted). In addition, the latter two factors (i.e., harm to the opposing party and weighing the public interest) merge when the government is the opposing party, such as in the case *sub judice*. Id. at 435.

III. DISCUSSION

A. Whether Defendants Are Likely to Succeed on the Merits

In arguing that they believe they are likely to succeed on the merits of their appeal, Defendants make the identical arguments they made in their opposition to a preliminary injunction which the Court continues to find unpersuasive. Defendants unsuccessfully attempt to merge the state constitutional provision providing for the filing of vacancies for judges serving on the state appellate courts (GA. CONST. art. VI, § VII, ¶ IV) with the distinct constitutional provision providing for the filling of vacancies for the office of district attorney (GA. CONST. art VI, § VIII, ¶ 1(a)).

As this Court previously found, the portion of O.C.G.A. § 45-5-3.2 that alters the period of service for a person appointed to fill a vacancy in the office of district attorney when the appointment occurs less than six months before the next general election clearly conflicts with the provision of the Georgia Constitution that provides for all district attorney appointees to run in the next general election occurring after their appointment.

> Under the plain language of [GA. CONST. art. VI, § VIII, ¶ I(a)], individuals who presently or subsequently serve as incumbent district attorneys "shall be elected . . . at the general election held immediately preceding the expirations of their respective terms." When there is a vacancy in the office of district attorney, the Governor appoints an individual to fill that vacancy, who becomes the incumbent district attorney. The Georgia Constitution thus requires the appointed district attorney to run for re-election at the general election prior to the expiration of the existing term of office.
>
> Prior to 2018, that is also what the applicable statute provided. See O.C.G.A. § 45-5-3, Ga. Laws 1996, p. 166, § 2 (amended 2018). . . .
>
> In 2018, the General Assembly enacted the new Code Section 45-5-3.2 to provide that the person appointed by the Governor to fill a vacancy in the office of district attorney shall serve "until January 1 of the year following the next general state-wide election which is more than six months after the appointment[.]" O.C.G.A. § 45-5-3.2, Ga. Laws 2018, Act 291, § 1. Based upon this statute, if the Governor fills a vacancy by appointment less than six months before the next general election, the subsequent incumbent does not run "at the general election held immediately preceding the expiration" of the four-year term, but at the general election held two years later. This is contrary to the express language contained in Article VI, Section VIII, Paragraph I(a) of the Georgia Constitution.

July 2, 2020, Order at 10-12 (footnote omitted). Because the failure to hold an election for the Western Judicial Circuit District Attorney position for the term beginning January 1, 2021, violates the Georgia Constitution, the supreme law of the State of Georgia, it also violates the due process clause of the Fourteenth Amendment. Duncan v. Poythress, 657 F.2d 691, 708 (5th Cir. 1981)[2]; see also Sherman v. Atlanta Indep. Sch. Sys., 293 Ga. 268, 275 (2013).

In arguing that they are likely to succeed on appeal, Defendants once again rely on Perdue v. Palmour, 278 Ga. 217 (2004), and Barrow v. Raffensperger, No. S20A1029, 2020 WL 2485188 (Ga. May 14, 2020), to demonstrate the Georgia Supreme Court's "willingness to find that terms of service of appointees need not be tied to serving out the term of the appointee's precedessor." Mot. to Stay at 4. In light of such willingness, Defendants argue, the unconstitutionality of O.C.G.A. § 45-5-3.2 is not "clear," as this Court determined, and the question should have been certified to the Supreme Court of Georgia. Id. at 5.

The Georgia Supreme Court in Barrow construed a different provision in the Georgia Constitution, which applies to vacancies created by the resignation of

[2] In Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981.

judges, not to the period of service of appointed district attorneys. Compare GA. CONST. art. VI, § VII, ¶ IV, with GA. CONST. art. VI § VIII, ¶ I(a). Moreover, Palmour is equally unpersuasive because, as this Court concluded, nothing in Palmour applies to the provisions affecting the period of service of judicial appointees to the office of district attorney. July 2, 2020, Order at 15. Defendants offer no justification for their continued reliance on cases that do not discuss the filling of vacancies in the office of district attorney. Because the conflict between Article VI, Section VIII, Paragraph I(a) of the Georgia Constitution an O.C.G.A. § 45-5-3.2 is clear, there is no requirement that the question be certified to the Supreme Court of Georgia. See Autauga Quality Cotton Ass'n v. Crosby, 893 F.3d 1276, 1286 n.8 (11th Cir 2018) (citation omitted) (declining to certify questions to the Alabama Supreme Court because no "substantial doubt exists about the answer"); Jordan v. Novastar Mortg. Inc., No. 1-08-CV-3587-CAP, 2009 WL 10681131, at *2 (N.D. Ga. Nov. 18, 2009) ("[T]he court concludes there is sufficient case law to support its decision and declines to vacate and certify the question to the Georgia Supreme Court.").

Finally, Defendants take exception to the Court failing to consider whether O.C.G.A. § 45-5-3.2 "could be saved through severance or the imposition of a limiting construction." Mot. to Stay at 5-6. In fact, the Court imposed such a

narrow construction by limiting the injunction so as not to affect the Governor's constitutional right to appoint an individual to fill the existing vacancy in the office of District Attorney for the Western Judicial Circuit, a right that is preserved in the portion of O.C.G.A. § 45-5-3.2 that is not subject to the preliminary injunction.

Consequently, Defendants have not met their burden to show that they are likely to succeed on the merits of their appeal.

B. Whether Defendants Will be Irreparably Injured Absent a Stay

Defendants urge the Court to find that enjoining them from effectuating a statute enacted by the legislature will cause irreparable harm. Mot. to Stay at 6. More specifically, Defendants express concern that the conduct of the special election for District Attorney for the Western Judicial Circuit will call into question the validity of the victor's actions should the injunction later be overturned. Id. at 7.

Defendants provide no support for their contention that a public official chosen at an election held in accordance with an order by a court of competent jurisdiction somehow would have his or her authority questioned in the event of an appellate decision which declines to adopt the rationale for the conduct of that election. "[T]he asserted irreparable injury must be neither remote nor speculative, but actual and imminent." Siegel, 234 F.3d at 1176. Indeed, "simply showing

some possibility of irreparable injury . . . fails to satisfy the second factor." Nken, 556 U.S. at 434-35 (citation and quotation marks omitted). Indeed, as discussed in this Court's prior Order, it is Plaintiffs, not Defendants, who would suffer irreparable harm by the failure to conduct an election for District Attorney for the Western Judicial Circuit during the 2020 general election. See Jones v. Governor of Fla., 950 F.3d 795, 828 (11th Cir 2020) ("Indeed, several of our sister circuits have similarly concluded that missing the opportunity to vote in an election is an irreparable harm for the purposes of a preliminary injunction.").

C. Balance of Harms to Plaintiffs and Public Interest

In none of their prior briefs did Defendants claim a substantial burden if this Court ordered a special election for District Attorney for the Western Judicial District. In fact, at the hearing on the motion for preliminary injunction, Defendants only urged the Court to schedule any such special election at the same time as the November 3, 2020, general election and to provide a schedule that takes into account both state and federal deadlines for the mailing of absentee ballots to Georgia voters. Now, for the first time, Defendants assert in a conclusory manner that "the State's burden in complying with the Court's order is significant." Mot. to Stay at 8.

There is no "significant burden" on either Defendant. Governor Kemp's ability to appoint a replacement to fill the vacancy remains. With respect to Secretary Raffensperger's obligations, the Court accepted his counsel's suggestion and ordered the parties to agree on a schedule that permits the State to fulfill both state and federal deadlines for the mailing of absentee ballots and scheduled the special election for District Attorney for the Western Judicial Circuit at the same time as the November 3, 2020, statewide general election. It should also be noted that the Western Judicial Circuit is composed of just two Georgia counties: Athens-Clarke and Oconee. The extra "expense" of adding this election to the general election ballot in these two counties can only be expressed as minimal. And having the Secretary of State's office accept applications for those interested in qualifying for such office for a limited time period can hardly be said to be "significant."

Defendants also assert that implementation of the Court's preliminary injunction somehow could "confuse the public" about the validity of Governor Kemp's appointment to the position of District Attorney of the Western Judicial Circuit. Mot. to Stay at 8. How the public would be so confused is curious, since the appointee would be identified as the incumbent on the ballot and would no doubt emphasize that fact in any campaign for re-election. It is also noted that this

vacancy was created by the resignation of the prior officeholder in February 2020, and Governor Kemp to date has yet to make any appointment to fill this vacancy.

By contrast, without injunctive relief, Plaintiffs will lose the opportunity to vote or run in the November 2020 election and risk being disenfranchised. The public interest is best served by holding the election for the District Attorney for the Western Judicial Circuit on November 3, 2020, in compliance with the Georgia Constitution. See July 2, 2020, Order at 20 (citing Wright v. Sumter Cty. Bd. of Elections and Registration, 361 F. Supp. 3d 1296, 1303 (M.D. Ga. 2018)).

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendants' Emergency Motion to Stay Pending Appeal of Preliminary Injunction [Doc. 25] is **DENIED**.

IT IS SO ORDERED this 16th day of July 2020.

MARK H. COHEN
United States District Judge