NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-9748

CHRISTOPHER J. ANGLIN,

Plaintiff,

v.

PHILLIP E. BERGER, in his official capacity as the PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and KIMBERLY W. STRACH, in her official capacity as EXECUTIVE DIRECTOR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER CAME ON TO BE HEARD before the Court during the August 13, 2018, Session of Superior Court, Wake County. All adverse parties to this action received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure. The Court considered the pleadings, arguments, briefs of the parties, supplemental affidavits, and the record established thus far, as well as submissions of counsel in attendance.

THE COURT, in the exercise of its discretion and for good cause shown, hereby makes the following:

Findings of Fact

1. In 2016 and 2017, the North Carolina General Assembly (hereinafter "the General Assembly") enacted laws making partisan all elections for judicial office in North Carolina. *See* 2016 N.C. Sess. Laws 125, §§ 21(a), 21(h) (Court of Appeals and Supreme Court); 2017 N.C. Sess. Laws 3, §§ 5, 14 (Superior and District Courts).

2. On October 17, 2017, Session Law 2017-214 (hereinafter "S.L. 2017-214") became law notwithstanding the objections of Governor Roy Cooper. S.L. 2017-214 became "effective January 1, 2018, and applie[d] to all primaries and elections held on or after that date." 2017 N.C. Sess. Law. 214, § 5.

3. S.L. 2017-214 cancelled the 2018 judicial primaries for all candidates seeking judicial office. In place of a judicial primary, S.L. 2017-214 provided that each person seeking judicial office was required to file a notice of candidacy, and that a "candidate, at the time of filing the notice of candidacy under this section, shall indicate on the notice of candidacy the political party recognized under Article 18 of Chapter 163A of the General Statutes with which that candidate is affiliated or any unaffiliated status. The certificate required by subsection (d) of this section shall verify the party designation or unaffiliated status, and the verified party designation or unaffiliated status shall be included on the ballot." 2017 N.C. Sess. Law. 214, § 4.(b).

4. S.L. 2017-214 therefore required a candidate's political party affiliation to appear on the ballot when that candidate chose to be affiliated with a political party and that party designation was verified as the party with which the candidate was registered. S.L. 2017-214 did not, however, require the candidate's party affiliation or unaffiliated status be the same as the

party with which the candidate was registered for any specific amount of time prior to the date of filing the notice of candidacy.

5. On June 7, 2018, Plaintiff changed his party registration from the Democratic Party to the Republican Party by filing the necessary documentation with the Wake County Board of Elections.

6. On June 18, 2018, at noon the filing period for judicial candidates began.

7. On June 20, 2018, Session Law 2018-13 (hereinafter "S.L. 2018-13") became law notwithstanding the objections of Governor Roy Cooper. S.L. 2018-13 provided that a disclaimer would appear at the top of the judicial offices section of the 2018 general election ballot as follows:

> "No primaries for judicial office were held in 2018. The information listed by each of the following candidates' names indicates only the candidates' party affiliation or unaffiliated status on their voter registration at the time they filed to run for office."

2018 N.C. Sess. Law. 13, § 2.(c).

8. On June 29, 2018, Plaintiff filed with the Bipartisan State Board of Elections and Ethics Enforcement (hereinafter "the Bipartisan State Board of Elections") the necessary paperwork to run for a seat on the Supreme Court of North Carolina, specifically as an associate justice. Plaintiff also paid the requisite filing fee.

9. As required by S.L. 2017-214, Plaintiff indicated on his notice of candidacy the political party—i.e., the Republican Party—with which he was affiliated. As required by S.L. 2017-214, Plaintiff included a certification from the Wake County Board of Elections that his party registration was with the Republican Party at the time of his filing his notice of candidacy.

10. On June 29, 2018, at noon the filing period for judicial candidates ended.

11. On August 4, 2018, Session Law 2018-130 (hereinafter "S.L. 2018-130") became law notwithstanding the objections of Governor Roy Cooper. S.L. 2018-130 "is effective when it becomes law and applies to the 2018 elections only." 2018 N.C. Sess. Law. 130, § 4.

12. S.L. 2018-130, in part, rewrites S.L. 2017-214, such that Section 4.(b) now reads, in pertinent part, as follows: "A candidate, at the time of filing the notice of candidacy under this section, shall indicate on the notice of candidacy the political party recognized under Article 18 of Chapter 163A of the General Statutes with which that candidate is affiliated or any unaffiliated status. If the candidate's political party affiliation or unaffiliated status is the same as on their voter registration at the time they filed to run for office and 90 days prior to that filing, the political party designation or unaffiliated status shall be included on the ballot." 2018 N.C. Sess. Law. 130, § 1.

13. S.L. 2018-130 does not change the requirement that a candidate indicate a party affiliation or unaffiliated status on his or her notice of candidacy, does not extend the deadline for filing a notice of candidacy, and does not otherwise allow already-filed notices of candidacy to be amended—only withdrawn.

14. Importantly to Plaintiff's claims, S.L. 2018-130 changes the legal consequences flowing from Plaintiff's already-completed actions in filing a notice of candidacy. The application of S.L. 2018-130 to a candidate like Plaintiff, who changed his or her party registration less than ninety days before filing a notice of candidacy, now precludes the candidate's party affiliation or unaffiliated status from being included on the 2018 general election ballot. The application of S.L. 2018-130 to Plaintiff will result in no party affiliation or unaffiliated status being listed with Plaintiff's name on the partisan ballot, while still providing a party affiliation or unaffiliated status of Plaintiff's opponents.

15. S.L. 2018-130 also changed the text of the disclaimer provided by S.L. 2018-13. The disclaimer now reads as follows:

> "No primaries for judicial office were held in 2018. The party information by each of the following candidates' names is shown only if the candidates' party affiliation or unaffiliated status is the same as on their voter registration at the time they filed to run for office and 90 days prior to that filing."

2018 N.C. Sess. Law. 130, § 3.

16. On August 6, 2018, Plaintiff filed a verified complaint seeking a temporary restraining order and preliminary injunction.

17. On August 6, 2018, the Court entered a temporary restraining order pursuant to Rule 65(b) of the North Carolina Rules of Civil Procedure.

18. Any candidate appearing on a ballot without partisan affiliation would be highly unlikely to win an election if the ballot also included candidates for the same race who are shown as affiliated with a political party. *See* Affidavit of Gary O. Bartlett.

19. Plaintiff alleges in his verified complaint that S.L. 2018-130, as applied to Plaintiff, violates the rights Plaintiff enjoys under Article I, Sections 1, 10, 14, 19, and 32 of the North Carolina Constitution. Plaintiff seeks to enjoin Defendants from enforcing against Plaintiff the party affiliation and ballot disclaimer provisions of S.L. 2018-130 and from authorizing any change to Plaintiff's verified designation as a Republican candidate for judicial office.

Based upon the foregoing findings of fact, the Court makes the following:

Conclusions of Law

1. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the

hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-760 (1983) (emphasis in original); see also N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene,* 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

2. While the Court recognizes S.L. 2018-130 is entitled to a presumption of constitutionality, Plaintiff has shown a likelihood that he will prevail on the merits of his case, particularly as it relates to his claims based on a violation of his due process and associational rights under Article I, Sections 19 and 14 of the North Carolina Constitution, respectively.

3. Plaintiff has shown that his political party designation was properly verified by the required certificate at the time Plaintiff filed his notice of candidacy. Pursuant to S.L. 2017-214, Plaintiff's verified party designation was thereby required to be included on the 2018 general election ballot. 2017 N.C. Sess. Law. 214, § 4.(b). Additionally, the filing period for judicial candidates has closed. Plaintiff has shown that he satisfied North Carolina's requirements to run for judicial office and thereby obtained the right to appear on the 2018

general election ballot as provided by the law as it existed at that time. As such, Plaintiff has shown that he had a vested right to appear on the 2018 general election ballot with his chosen political party designation because it was "so far perfected as to permit no statutory interference." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980).

4. S.L. 2018-130 is retroactive in its application to Plaintiff because the Session Law's "operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Gardner*, 300 N.C. at 718, 268 S.E.2d at 471. Retroactive changes in election laws can be patently unfair to the candidates who followed pre-existing election rules and procedures. See *Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995). Plaintiff has shown that S.L. 2018-130 retroactively eliminates Plaintiff's vested right and forces Plaintiff to choose between either being listed on the ballot with no party affiliation or withdrawing from the race—neither of which allows Plaintiff the opportunity to enjoy his vested right. Importantly, S.L. 2018-130 provides Plaintiff no opportunity to comply with the new requirements to otherwise preserve his vested right. As such, Plaintiff has shown that S.L. 2018-130, as applied to Plaintiff, violates fundamental principles of fairness, thereby violating Plaintiff's right to due process provided by the North Carolina Constitution.

5. S.L. 2017-214 as originally written conferred on Plaintiff the right to have his party affiliation listed on the ballot, and while candidates for political office typically have no right to have a partisan affiliation listed on a ballot, if a law gives some candidates for a specific race a party identifier, but not other candidates for the same race, that law imposes "a burden on the associational rights of the candidates left unidentified." *Marcellus v. Va. State Bd. Of Elections*, 849 F.3d 169, 177 (4th Cir. 2016). As such, Plaintiff has shown that S.L. 2018-130, as

applied to Plaintiff, burdens Plaintiff's right of association provided by the North Carolina Constitution.

6. The burden imposed by S.L. 2018-130, as applied to Plaintiff, is severe. S.L. 2018-130 eliminates Plaintiff's vested right to have his party affiliation listed on the ballot while allowing the other candidates in the same, specific race to have their party affiliation listed on the ballot. Moreover, S.L. 2018-130's new requirement imposed on Plaintiff does not allow Plaintiff any amount of time, reasonable or otherwise, to comply. The burden on Plaintiff's rights is also severe because it affects Plaintiff's rights "at the most crucial stage in the election process—the instant before the vote is cast." *Cook v. Gralike*, 531 U.S. 510, 525 (2001).

7. When due process and associational rights are "severely burdened" by an election law, "the challenged statutes must be strictly scrutinized to determine whether they were 'narrowly tailored and advance a compelling state interest.'" *Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 47, 707 S.E.2d 199, 203 (2011). The State carries this burden of proof. *Id.* While the General Assembly's stated interest in preventing voter confusion is in general a legitimate, compelling State interest, it is unlikely that the State can show that S.L. 2018-130 advances a compelling interest. Furthermore, the State cannot likely show that S.L. 2018-130 is narrowly tailored to advance its proffered compelling interest because the Session Law was not "the least restrictive means of advancing the State's compelling interest." *State v. Bishop*, 368 N.C. 869, 878, 787 S.E.2d 814, 820 (2016). Indeed, the State already resolved concerns regarding voter confusion through the enactment of S.L. 2017-214 and S.L. 2018-13. As a result, Plaintiff is likely to show that, as applied to Plaintiff, the severe burden S.L. 2018-130 imposes on Plaintiff's rights will not survive strict scrutiny.

8. Moreover, even if S.L. 2018-130 does not severely burden Plaintiff's rights, Plaintiff will likely be able to show the State's interests are not "sufficiently weighty to justify the limitation imposed on [Plaintiff's] rights." *Libertarian Party*, 365 N.C. at 51, 707 S.E.2d at 206. Plaintiff is therefore likely to prevail even if strict scrutiny does not apply.

9. In addition to Plaintiff's showing that there is a likelihood he will prevail on the merits of his case, Plaintiff will suffer an immediate and irreparable loss of his rights if the preliminary injunction is not issued. Additionally, it is the opinion of the Court that issuance of a preliminary injunction is necessary for the protection of Plaintiff's rights during the course of the present litigation. S.L. 2018-130 includes a deadline of August 8, 2018, for candidates to withdraw from the race, which has been temporarily enjoined by the Court. The Bipartisan State Board of Elections, through counsel, has represented that ballots for the 2018 general election must be printed immediately. Once ballots are printed, Plaintiff's constitutional injury will be irreparable. Given the severity of Plaintiff's constitutional injury and absence of legitimate countervailing interests, the public interest in fair elections clearly favors issuance of a preliminary injunction and a weighing of the equities leads the Court to conclude that the potential harm to Plaintiff if the injunction is not issued outweighs the potential harm to Defendants if injunctive relief is granted.

10. Therefore, the Court, in its discretion and after a careful balancing of the equities, concludes it is proper that a preliminary injunction shall issue, enjoining the application of S.L. 2018-130 to Plaintiff's candidacy for Associate Justice of the Supreme Court of North Carolina.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff's motion for a preliminary injunction is hereby GRANTED.
2. Defendants are hereby ENJOINED during the pendency of this litigation from:
    a. Enforcing against Plaintiff the provisions of S.L. 2018-130 or otherwise issuing or causing any county Board of Elections to issue any official state publication to the voting public which states that Plaintiff is anything other than a Republican candidate for Associate Justice of the Supreme Court of North Carolina;
    b. Authorizing any change to Plaintiff's verified designation as a Republican candidate for Associate Justice of the Supreme Court of North Carolina on the official ballot for the November 6, 2018, General Election; and,
    c. Authorizing official ballot language for the November 6, 2018, General Election or authorizing the printing of ballots by county Boards of Elections that state the 90-day pre-registration requirement pertains to Plaintiff's candidacy for Associate Justice of the Supreme Court of North Carolina.
3. The Court hereby STAYS the effect of the August 8, 2018, deadline for withdrawal from 2018 general election for judicial office until disposition of Plaintiff's claim on the merits. This Court maintains jurisdiction to ensure Plaintiff the opportunity to withdraw Plaintiff's name from the ballot if subsequent review by this Court or appellate action overturns any injunctive relief entered by this Court.

4. This Court has considered the necessity of a bond under Rule 65 of the North Carolina Rules of Civil Procedure and finds that a nominal bond will suffice. Plaintiff is therefore ORDERED to pay a bond of $1.00 (One Dollar) to the Wake County Clerk of Court.

SO ORDERED, this 13th day of August, 2018.

Rebecca W. Holt

Rebecca W. Holt
Superior Court Judge Presiding