

LINDA H. LAMONE,

* IN THE

Petitioner,

* COURT OF APPEALS

v.

* OF MARYLAND

NANCY LEWIN, *et al.*,

* September Term, 2018

Respondents.

* Petition Docket No. ____

COA-PET-0097-2018

* * * * *

**PETITION FOR WRIT OF CERTIORARI
AND REQUEST FOR EXPEDITED REVIEW**

Linda H. Lamone, State Administrator of Elections, respectfully requests this Court to issue a pre-judgment writ of certiorari to review the order of the Circuit Court for Anne Arundel County granting a preliminary injunction and compelling the removal of a candidate from the primary election ballot, even though the statutory deadline for removal was March 9, 2018. (App. 6-7.)¹ This Court's immediate attention is desirable and in the public interest because the lower court's order, which contravenes statutorily established deadlines, will disrupt the orderly process of the primary election.

PERTINENT PROVISIONS

Md. Const. art. I, § 12

Md. Code Ann., Elec. Law §§ 5-502(a), 5-504(b), 5-601(1)(iii), 12-202

¹ The circuit court's interlocutory order granting a preliminary injunction is immediately appealable. Md. Code Ann., Cts. & Jud. Proc. § 12-303(3)(i). The intermediate appellate court has not yet docketed the case.

QUESTION PRESENTED

Did the circuit court err in entering a preliminary injunction that requires the defendant to remove the name of a candidate from the ballot for the 2018 primary election, where the statutory deadlines have passed, laches bars the relief ordered, removal at this late date will disrupt the orderly process of the election, and other, less disruptive relief is available?

STATEMENT OF THE CASE

Candidate Qualifications

To qualify for the office of state Senator, an individual must be a registered voter. Md. Const. art. I, § 12; Elec. Law § 5-203(a)(2)(ii). An individual is disqualified to be a registered voter if the individual “has been convicted of a felony and is actually serving a court-ordered sentence of imprisonment...” *Id.* § 3-102(b)(1).

Statutory Deadlines

For a candidate seeking nomination by primary election, the deadline for filing a certificate of candidacy was February 27, 2018. Elec. Law § 5-303(a)(1). The withdrawal deadline was March 1, 2018. *Id.* § 5-502(a).

As relevant here, “the name of any individual who files a certificate of candidacy and does not withdraw shall appear on the primary election ballot unless, by the 10th day after the filing deadline ..., the individual’s death or disqualification is known to the [State Board].” *Id.* § 5-504(b). Thus, a disqualified candidate “shall appear on the primary

election ballot,” *id.* § 5-504(b), unless the State Board knew of the candidate’s disqualification by March 9, 2018, *id.* § 5-302(b).

Under Election Law § 9-207(a)(1), the State Board must certify the ballot “*at least* 55 days before the election,” whereupon the ballots are posted for public display. *Id.* §§ 9-207(a)(1) (emphasis added), 9-207(c). Unless otherwise ordered by a court, after the second day of public display, the content of the ballots may not be changed and the State Board may begin to print the ballots. *Id.* §§ 9-207(c)-(e). Absentee ballots must be made available to military and overseas voters no later than 45 days before the election (this year, May 12, 2018). 52 U.S.C. § 20302(a)(8)(A).

The deadline for voter registration for the 2018 primary election is June 5, 2018. Elec. Law § 3-302(a).

Challenges to acts or omissions relating to an election must be brought within “10 days after the act or omission or the date the act or omission became known to the petitioner.” *Id.* § 12-202(b).

The State Board’s Preparations for the 2018 Primary Election

On March 12, 2018, after the deadlines for candidacy withdrawals and removals had passed, the State Board began creating ballot databases, importing ballot data, and laying out the primary-election ballots. (App. 84.) On March 23, 2018, local boards received ballot-proofing packages to review and approve. (App. 84)

Six days before plaintiffs filed suit, on April 3, 2018, the State Board certified the ballots and posted them for public viewing on its website. (App. 84.)

On April 11, 2018, the State Board began to create the 747 PDFs for the different ballot formats that will be used in the primary. Two of these ballots, which are assigned to fifty election-day precincts and seven early-voting centers, include the Senate Democratic-primary contest for Legislative District 41. (App. 84-85.) Any change to the ballots will require redoing of the PDFs of all formats of the affected ballots. (App. 85.)

On April 18, 2018, the State Board imported final ballot-style data into its MDVOTERS database. After that, local boards of election verified that styles are aligned with the correct precincts and splits. Any change to the ballots during or after this process would require reimporting of the ballot styles and re-verifying of all ballot styles to precinct associations. (App. 85.)

On April 23, 2018, the State Board sent PDFs of test decks and ballots to the printer, and printing began. It takes approximately two days to lay out the ballot styles and create the metal printing plates for each ballot style. When ballot styles change, new ballot style PDFs must be sent to the printer and the pre-print production process must be redone. (App. 86, 90.)

After printing begins, changes to ballots is costly and disruptive. (App. 86.) The State Board has ordered sufficient paper to print 4,000,000 ballots, and expects to print between 3,000,000 and 3,500,000 ballots. (App. 92.) After ballots have been printed, a change to the ballots in a large jurisdiction such as Baltimore City would likely require the State Board to reprint the ballots for the entire jurisdiction. (App. 92.) This would require ordering ballot paper, which, due to the particular specifications required for such paper, would require a four-week lead time. (App. 92-93.)

On April 25, 2018, the State Board finalized the ballot-style process in the MDVOTERS database by assigning voters who have requested an absentee ballot to the current election. The absentee voters cannot be unassigned without intervention from the MDVOTERS development team, and it would take five days to complete that process. (App. 86, 90.)

Also as of April 25, in addition to the commencement of printing and the assigning of absentee voters to the current election through the MDVOTERS database described above, the State Board has done the following:

- (1) Distributed final databases, specimen ballot PDFs and eleven-inch ballot PDFs to the local board of elections;
- (2) Distributed final poll book exports to the poll book team;
- (3) Distributed ballot PDFs, XML files and reports to the post-election-audit vendor;
- (4) Generated PDFs of sample ballots, and sent them to the voter-services developer, and made sample ballots available to voters through the State Board's voter services website;
- (5) Imported ballot data for the ballot delivery system and ballot duplication software and generated test ballot PDFs.
- (6) Generated preliminary news-feed data and sent it to the Baltimore Sun for their initial testing;
- (7) Created test election result files and sent them to EMS development team to start election result testing.

(App. 90-91.)

On April 26, 2018, the State Board will begin testing its web-delivery system, a two-week process, which must be complete before the May 12, 2018 deadline for making absentee ballots available to military and overseas voters. The testing process cannot begin until absentee ballots are assigned to voters. (App. 86.) A five-day delay occasioned by

the need to reassign absentee voters to the current election because of a change to the ballots (App. 86), will risk non-compliance with the May 12, 2018 federal deadline.

Factual Background

Until March 29, 2018, Mr. Oaks was a Senator representing Legislative District 41. (App. 49.) Mr. Oaks filed a certificate of candidacy to seek the Democratic nomination for re-election, and for election to the Democratic State Central Committee. (App. 46.) Mr. Oaks did not withdraw either candidacy by the statutory deadline of March 1, 2018, *see* Elec. Law § 5-502(a), and was not known by the State Board to be disqualified by March 9, 2018, *see id.* § 5-504(b).

On March 29, 2018, Mr. Oaks pleaded guilty to wire fraud in violation of federal law, and resigned from the Senate. (App. 49.) Mr. Oaks's sentencing is not scheduled until after the primary. (App. 47.)

Despite his guilty plea, Mr. Oaks remained eligible to be a candidate in the 2018 primary because he was a registered voter and not “currently serving a court-ordered sentence of imprisonment for the conviction.” Elec. Law § 3-102; *see id.* § 5-203(a)(2)(ii). On April 9, 2018, the day plaintiffs filed this action, Mr. Oaks executed an affidavit “consent[ing] to have [his] name removed from the ballot for the primary election on June 26, 2018.” (App. 49.) On April 11, 2018, that affidavit became known to the parties to this lawsuit. (App. 49.) Twelve days later, at plaintiffs' request, Mr. Oaks cancelled his voter registration. (App. 102-107.)

Procedural Background

On April 9, 2018, plaintiffs filed this action in the Circuit Court for Anne Arundel County. One week later, they moved for preliminary injunctive relief.² The same day, the circuit court denied plaintiffs' request for a temporary restraining order and scheduled a preliminary injunction hearing for April 20, 2018. (App. 108.) At that hearing, the State Board presented evidence that removing Mr. Oaks from the ballot at this late date would be difficult and disruptive to the orderly process of the election. (App. 19-31, 83-87.) At the conclusion of the hearing, the circuit court denied preliminary injunctive relief. (App. 8.)

After the circuit's denial of preliminary injunction, plaintiffs requested that Mr. Oaks cancel his voter registration. (App. 102-104.) Mr. Oaks agreed and submitted his request to the Baltimore City Board of Elections on April 23, 2018. (App. 106.)

The same day, plaintiffs filed a second amended complaint and motion for reconsideration of the order denying a preliminary injunction. The State Administrator opposed the motion because, in addition to the lack of statutory authority for that relief, and the disruption to the orderly process of the election, Mr. Oaks will not necessarily be ineligible as a matter of law to be a candidate on June 26, 2018. There is no statutory impediment to Mr. Oaks's reregistering to vote before the June 5, 2018 closing of registration. The State Administrator requested a hearing on plaintiffs' motion, but the

² On April 12, 2018, plaintiffs unsuccessfully sought relief from the State Board at a public meeting of the State Board.

circuit court granted the motion without a hearing and entered a preliminary injunction without a hearing.

Without acknowledging the defense of laches, the court entered the injunction because Mr. Oaks “is now disqualified for election,” and there is still “adequate time to reform the ballots in Baltimore City.” (App. 6.) The court faulted the State Board for continuing with the orderly process of the election, even though the court had both denied preliminary injunctive relief, and denied plaintiffs’ request for stay pending appeal. (App. 8.) Because the matter “remained in active litigation,” the court found that proceeding with long-scheduled ballot-testing and printing “cannot be deemed to have further prejudiced” the State Board. (App. 6.) After discounting the proven massive disruption and cost to the election process, the court found that the risk of voter confusion outweighed that inconvenience, and that providing notice to voters was an inadequate remedy. (App. 6.)

The same day, after filing an answer, the State Administrator filed notices of appeal to the Court of Special Appeals and this Court. (App. 109-110.)

REASONS FOR GRANTING REVIEW

This Court should grant review and vacate the injunction because plaintiffs are unlikely to succeed on their claim, which contravenes statutory mandates, and is barred by laches. Plaintiffs have failed to prove that they satisfy each of the other preliminary injunction factors because their purported injury is both non-cognizable and speculative, and the balance of convenience and the public interest weigh heavily against them because removing a candidate from the ballot at this late stage will disrupt the orderly process of

the election. “The failure to prove the existence of even one of the four factors will preclude the grant of preliminary relief.” *Schade v. Maryland State Bd. of Elections*, 401 Md. 1, 367 (2007).

I. THE PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS.

The plaintiffs cannot establish a “real probability of prevailing on the merits,” *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 455-56 (1995), because the relief they seek is barred by laches and violates mandatory statutory deadlines. *See Lamone v. Schlakman*, 451 Md. 468, 485 (2017) (laches barred action because plaintiffs’ delay was unreasonable and prejudicial to defendants and the election process).

A. The Relief Sought Is Barred by Laches.

The doctrine of laches applies when “unreasonable delay in the assertion of one’s rights” causes “prejudice to the opposing party.” *Liddy v. Lamone*, 398 Md. 233, 244 (2007). Laches can bar an election-law claim even when the “delay in seeking judicial relief [is] measured in days,” *Baker v. O’Malley*, 217 Md. App. 288, 296 (2014), and where the action would be timely under Election Law § 12-202(b); *see Schlakman*, at 482 (where equitable relief is sought, the proper focus is on “laches,” rather than Election Law § 12-202 (citation omitted)). Both prongs of the laches doctrine are met here—unreasonable delay and prejudice to the defendant.

First, although plaintiffs filed their action within ten days of Mr. Oaks’s guilty plea, they waited another week before seeking preliminary injunctive relief. Because the statutory deadline for removing a candidate had long since passed, and the State Board had

already certified the ballot and posted it for public viewing, plaintiffs unreasonably delayed in seeking preliminary relief. Moreover, even though they knew that Mr. Oaks would become ineligible only if he cancelled his voter registration, plaintiffs waited until after the preliminary-injunction hearing (and the day before printing began) to request that he cancel his registration. (App. 102-104.) After he did so, plaintiffs amended their complaint on April 23 to allege that Mr. Oaks is disqualified. (App. 45-58.) But nothing prevented them from making that request of Mr. Oaks before they filed this action on April 9.

Second, plaintiffs' delay prejudiced the State and local boards of elections, which are already well into the process of preparing for the June 2018 primary election.

By the time plaintiffs filed suit, the State Board had already certified and posted the ballots for viewing. Five days before plaintiffs moved for preliminary injunctive relief, the State Board began the process of creating the PDFs of the 747 primary election ballots for each of the different ballot formats that will be used in the primary election. On the day that plaintiffs filed their motion, the State Board was only one week away from sending the ballots to the printer. Two days after that, the State Board imported the final ballot-style data into its MDVOTERS database, so that local boards could verify that styles are aligned with the correct precincts and splits. Any changes to the ballots will require reimporting of the ballot styles and re-verifying of all ballot-styles-to-precinct associations. On April 23, three days after the circuit court denied preliminary-injunctive relief, the State Board began printing ballots and plaintiffs filed a second amended complaint and moved for reconsideration of the circuit court's order. On April 25, the State Board assigned absentee voters to the current election through the MDVOTERS database, a process that

cannot be reversed and corrected without intervention from the MDVOTERS development team, which would cause at least a five-day delay.

The plaintiffs' delay also prejudiced the State Administrator's ability to defend a lawsuit on the merits while conducting an election, and the court's ability to fashion an appropriate remedy. The plaintiffs' claim is barred by laches.

B. The Complaint Is Unlikely to Succeed on the Merits.

Even if their claim were timely, plaintiffs have failed to identify an "act or omission" that violates the Election Law Article or "other law applicable to the elections process." Elec. Law § 12-202(a)(1).

1. Mr. Oaks Had Neither Withdrawn nor Been Disqualified by the Statutory Deadlines.

Section 5-601 of the Election Law Article provides, in relevant part, that "[t]he name of a candidate *shall* remain on the ballot and be submitted to the voters at a primary election," if the candidate:

(i) has not withdrawn the candidacy in accordance with Subtitle 5 of this title; [or]

(ii) has not died or become disqualified, and that fact is known to the applicable board by the deadline prescribed in § 5-504(b) of this title . . .

Elec. Law § 5-601(1)(i)-(ii).

First, Mr. Oaks did not withdraw under the terms of Title 5, subtitle 5. Section 5-501 provides that a candidate may withdraw "by filing a certificate of withdrawal as provided in this subtitle." *Id.* § 5-501. To effectuate withdrawal, a candidate must file "on the form prescribed by the State Board within 2 days after the filing date established under § 5-303 of this Title," i.e., March 2, 2018. *Id.* § 5-502.

Nor was disqualification of Mr. Oaks known to the State Board by the deadline in § 5-504(b), which was March 9, 2018, nearly three weeks before his March 29 guilty plea, 31 days before plaintiffs filed suit, 38 days before plaintiffs moved for preliminary injunctive relief, and 45 days before Mr. Oaks cancelled his voter registration at plaintiffs' request.

Permitting a candidate to evade statutory deadlines by the device of cancelling his voter registration contravenes the clear legislative intent that a candidate "shall" remain on the ballot unless by the "10th day after the filing deadline specified under [Election Law] § 5-303," the individual's disqualification becomes known to the applicable board of elections. Elec. Law § 5-504(b). If candidates could accomplish withdrawals by self-disqualifying themselves by cancelling their voter registrations, it would wreak havoc on the ballot-preparation process and the administration of the election more generally. It would render the statutory deadline for candidacy withdrawals meaningless. *See Patterson Park Pub. Charter Sch., Inc. v. Baltimore Teachers Union*, 399 Md. 174, 200 (2007) (rejecting interpretation that "would lead to the absurd result that all of Title 9's provisions could be waived, rendering the entire Title nugatory").

2. The Candidacy Withdrawal and Removal Deadlines Are Constitutional.

There is no injury to plaintiffs' voting rights if Mr. Oaks's name remains on the ballot. That is because the "mere inclusion of a rival [candidate] does 'not impede the voters from supporting the candidate of their choice' and thus does not cause the legally cognizable harm necessary for standing." *Hollander v. McCain*, 566 F. Supp. 2d 63, 69

(D.N.H. 2008) (quoting *Gottlieb v. Federal Election Comm’n*, 143 F.3d 618, 622 (D.C. Cir. 1998)); *see also Berg v. Obama*, 586 F. 3d 234, 239-40 (3d Cir. 2009) (“As a practical matter, Berg was not directly injured because he could always support a candidate he believed was eligible.”); *Becker v. Federal Election Comm’n*, 230 F.3d 381, 390 (1st Cir. 2000) (voters lack cognizable injury where “[t]he only derivative harm ...[they] can possibly assert is that their preferred candidate now has less chance of being elected”). Here, plaintiffs remain able to vote for their desired candidates, and compete on equal terms with other candidates for the Democratic State Central Committee.

“[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation and internal quotations omitted). The State Board’s overarching interest in maintaining an early withdrawal deadline for candidates is the orderly administration of the election—specifically, “the need for election ballots to be timely and accurately prepared.” *De La Fuente v. Kemp*, No. 1:16-CV-2937-MHC, 2016 WL 9023598, at *6 (N.D. Ga. Aug. 30, 2016), *aff’d in part, dismissed in part*, 679 F. App’x 932 (11th Cir. 2017); *see also Wood v. Meadows*, 207 F.3d 708, 715 (4th Cir. 2000) (“Administrative convenience readily falls under the rubric of a state’s ‘regulatory interests,’ the importance of which the Supreme Court has repeatedly recognized.”). The ballot preparation process is complicated and time-consuming, as evidenced by the sequence of steps that the State Board must undertake between the candidate-filing

deadline and the date by which absentee ballots must be provided to military and overseas voters. (App. 83-93.)

In light of the negligible injury to voters, the State's important regulatory interests are sufficient for the candidate-withdrawal deadline to survive constitutional scrutiny. Preparations for the primary election are well underway, and permitting withdrawal at this late stage would introduce delay in the calendar, risk violation of the federal absentee-ballot deadline, and risk confusion and error. While "[a]ny filing deadline imposes some burden on constitutional rights," *Wood v. Meadows*, 207 F.3d 708, 714 (4th Cir. 2000), the interests that support the deadlines here are more than sufficient to overcome constitutional scrutiny.

II. THE PLAINTIFFS FAILED TO MEET THE OTHER REQUIREMENTS FOR ISSUANCE OF AN INJUNCTION.

"[I]rreparable harm must be neither remote nor speculative, but actual and imminent." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F. 2d 802, 812 (4th Cir. 1991) (cited in *Schade*, 401 Md. at 39). The continued presence of Mr. Oaks on the primary ballot causes plaintiffs no cognizable harm, whether as voters or candidates, because it does not impede plaintiffs from voting or associating with their chosen candidate, and any claim based on how voters would otherwise vote in Mr. Oaks's absence is speculative.

The plaintiffs' failure to establish "actual and imminent" irreparable harm in the absence of relief stands in stark contrast to the concrete harm that the State Board will face if the Court upholds the injunction. *See Schade*, 401 Md. at 36 ("the 'balance of

convenience’ [is] determined by whether greater injury would be done to the defendant by granting the injunction than would result by its refusal”).

The State Board has imported final ballot-style data into its MDVOTERS database. Any changes from this point forward “would require the ballot styles to be reimported and require affected [local boards of elections] to re-verify all ballot style to precinct associations.” (App. 85.) Moreover, these changes would need to have taken place prior to the commencement of printing on April 23, 2018. (App. 86.) Because they were not, changes imposed after printing has begun “would be costly and disruptive,” and would require redoing the two-day pre-print production process and reprinting affected ballots, as well as discarding all previously-printed (and now erroneous) ballots. *Id.* With a large jurisdiction like Baltimore City, it is possible that additional, specialized ballot paper would need to be ordered, which requires *four weeks* of lead time. (App. 92-93.) These delays would also impact the process of assigning absentee ballots to voters and testing the State Board’s web-delivery system, which began on April 25, 2018 and which, together can take over two weeks to complete. (App. 86-87.) Reassigning absentee ballots due to a change in the ballot content would take approximately five days. (App. 86.) Given the May 12, 2018 deadline for the delivery of absentee ballots to military and overseas voters, the risk that an eleventh-hour ballot change could impose significant hardship on the State Board—including affecting its ability to meet the federal May 12 deadline—is substantial. Other election preparations are also underway, and will be disrupted by a preliminary injunction. (App. 30, 86-87, 90-91.) It is not in the public interest to disrupt the State Board’s orderly schedule for achieving these tasks.

CONCLUSION

The petition for a writ of certiorari should be granted and all proceedings in the circuit court stayed pending further order of this Court.

Respectfully submitted,

/s/ Julia Doyle Bernhardt

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This document contains 3882 words, excluding the parts exempted from the word count by Rule 8-503.
2. This document complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Julia Doyle Bernhardt

Julia Doyle Bernhardt

CERTIFICATE OF SERVICE

I certify that on this 26th day of April 2018, a copy of the foregoing was filed and served electronically on the MDEC system and sent by electronic mail to:

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