[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12649

D.C. Docket No. 1:20-cv-02118-MHC

DEBORAH GONZALEZ,
APRIL BOYER BROWN,
ADAM SHIRLEY,
ANDREA WELLNITZ,
LINDA LLOYD,

Plaintiffs-Appellees,

versus

GOVERNOR OF THE STATE OF GEORGIA,
SECRETARY OF STATE, STATE OF GEORGIA,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(October 27, 2020)

Before MARTIN, JILL PRYOR, and BRANCH, Circuit Judges.

BRANCH, Circuit Judge:

Following the resignation of the district attorney for the Western Judicial Circuit, the Governor of the State of Georgia solicited applications to appoint a replacement. The Secretary of State of the State of Georgia subsequently cancelled the election that was to be held for that office on November 3, 2020, on the grounds that O.C.G.A. § 45-5-3.2, a statute that addresses the Governor's power to fill vacancies in the office of district attorney, would permit the Governor's appointee to serve until the following state-wide general election.

After unsuccessfully attempting to qualify for the November election, Deborah Gonzalez sued the Governor and the Secretary of State (collectively, the "State") in the United States District Court for the Northern District of Georgia.[1] She argued that O.C.G.A. § 45-5-3.2 violates the Georgia Constitution and the Due Process Clause of the Fourteenth Amendment to the extent it allows the State to cancel the November 2020 election and sought a preliminary injunction that would require the State to hold the election.

[1] Four other registered voters joined Deborah Gonzalez in suing the State. Each had intended to vote in the November 2020 election. For simplicity, we will refer to the five plaintiffs collectively as "Gonzalez," and to Deborah Gonzalez herself, where needed, by her full name.

The district court found that Gonzalez established a substantial likelihood of success in her argument that O.C.G.A. § 45-5-3.2, as applied here, violates the Georgia Constitution and the Fourteenth Amendment, and granted a preliminary injunction.[2] The State appealed, arguing that the district court abused its discretion by granting the preliminary injunction.

Because the question of whether O.C.G.A. § 45-5-3.2 violates the Georgia Constitution was an important and unresolved question of Georgia law, we certified a question to the Supreme Court of Georgia. Having received an answer from that court, we now address the merits of the State's appeal and affirm the district court's order granting the preliminary injunction.

I.

On February 5, 2020, Ken Mauldin announced his resignation from the office of district attorney for the Western Judicial Circuit, effective February 29, 2020. Under Article VI, Section VIII, Paragraph I(a) of the Georgia Constitution,[3]

[2] The district court did not address Gonzalez's First Amendment claims or petition for writ of mandamus because it found the Fourteenth Amendment claim to be a sufficient basis on which to grant the preliminary injunction. *See Gonzalez*, 2020 WL 4873545, at *6 n.8 (citing *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1134 (11th Cir. 2005)). Because we affirm on this ground, we need not address Gonzalez's other claims. *See generally Wetherbee v. S. Co.*, 754 F.3d 901, 905 (11th Cir. 2014) (noting that this Court may affirm a district court's decision based on any ground that finds support in the record).

[3] *See* Ga. Const. art. VI, § VIII, ¶ I(a) ("There shall be a district attorney for each judicial circuit, who shall be elected circuit-wide for a term of four years. . . . District attorneys shall serve until their successors are duly elected and qualified. Vacancies shall be filled by appointment of the Governor.").

Governor Brian Kemp had the authority to appoint a replacement for Mauldin, and he began soliciting applications to do so soon thereafter. Prior to Mauldin's resignation, an election for the office of district attorney for the Western Judicial Circuit was scheduled for November 3, 2020.

On March 6, 2020, Deborah Gonzalez attempted to qualify as a candidate for that election. Secretary Brad Raffensperger did not permit her to qualify as a candidate for the election because he had determined that, under O.C.G.A. § 45-5-3.2, the election would be cancelled.[4] Under the State's reading of O.C.G.A. § 45-5-3.2, the next election for the office of district attorney for the Western Judicial Circuit would be held in November 2022.

Gonzalez sued Governor Kemp and Secretary Raffensperger under 42 U.S.C. § 1983,[5] alleging that O.C.G.A. § 45-5-3.2 violates the Georgia Constitution and the Due Process Clause of the Fourteenth Amendment,[6] as well as

---

[4] *See* O.C.G.A. § 45-5-3.2 ("In those instances where the Governor fills a vacancy in the office of district attorney pursuant to Article VI, Section VIII, Paragraph I(a) of the Constitution, the vacancy shall be filled by the Governor appointing a qualified individual to the office of district attorney who shall serve until January 1 of the year following the next state-wide general election which is more than six months after the date of the appointment of such individual, even if such period of time extends beyond the unexpired term of the prior district attorney.").

[5] Gonzalez's complaint contained three counts. The first count alleged infringement of Gonzalez's right to vote and right to candidacy in violation of the First and Fourteenth Amendments, under 42 U.S.C. § 1983. The second count alleged infringement of Gonzalez's right to speech and association in violation of the First Amendment, under 42 U.S.C. § 1983. The final count was a petition for writ mandamus.

[6] The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1, cl. 3.

her First Amendment rights to free speech and free association.[7] She also sought a writ of mandamus that would direct Secretary Raffensperger to conduct the election, as well as preliminary and permanent injunctive relief that would prevent the State from enforcing O.C.G.A. § 45-5-3.2 and require Secretary Raffensperger to hold the election.

The district court found that Gonzalez was "substantially likely to succeed on the merits of [her] claim that" O.C.G.A.§ 45-5-3.2, as applied here, violates the Georgia Constitution and the Due Process Clause of the Fourteenth Amendment. *Gonzalez v. Kemp*, --- F. Supp. 3d ---, No. 20-cv-2118, 2020 WL 4873545, at *6 (N.D. Ga. July 2, 2020). Accordingly, it enjoined the State from enforcing "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" and ordered Secretary Raffensperger to "take all steps necessary to conduct the election." *Id*. at *7–8.

The State appealed to this Court, and, on August 11, 2020, we certified the following question to the Supreme Court of Georgia[8]:

> Does O.C.G.A. § 45-5-3.2 conflict with Georgia Constitution Article VI, Section VIII, Paragraph I (a) (or any other provision) of the Georgia Constitution?

---

[7] *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[8] *See* O.C.G.A. § 15-2-9 (describing the certification procedure); Ga. Sup. Ct. R. 46 (same).

Gonzalez v. Governor of Ga., 969 F.3d 1211, 1212 (11th Cir. 2020) (mem.). The Supreme Court of Georgia accepted the certified question and answered:

> "[Y]es" to the extent that OCGA § 45-5-3.2 authorizes a district attorney appointed by the Governor to serve beyond the remainder of the unexpired four-year term of the prior district attorney without an election as required by Article VI, Section VIII, Paragraph I (a) of the Georgia Constitution of 1983.

Kemp v. Gonzalez, --- S.E.2d ---, No. S21Q0068, 2020 WL 5949847, at *1 (Ga. Oct. 8, 2020).[9] With the benefit of the Supreme Court of Georgia's answer to the certified question, we now address the merits of the State's appeal.[10]

II.

We review the grant of a preliminary injunction for abuse of discretion, reviewing any underlying legal conclusions *de novo* and any findings of fact for clear error.[11] *Swain v. Junior*, 961 F.3d 1276, 1285 n.3 (11th Cir. 2020). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." *United States v. Estrada*, 969 F.3d 1245, 1261 (11th Cir. 2020) (citation omitted).

---

[9] We thank the Supreme Court of Georgia for accepting and answering the certified question.

[10] *See* 28 U.S.C. § 1292(a)(1) (providing jurisdiction over appeals from district court orders granting preliminary injunctions).

[11] The State does not challenge the district court's findings of fact for purposes of this appeal.

Our review under this standard is "very narrow" and "deferential." *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005) (citations omitted).

III.

A district court may grant a preliminary injunction only if the moving party establishes that: (1) it has a substantial likelihood of success on the merits;[12] (2) it will suffer an irreparable injury unless the injunction is granted; (3) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Swain*, 961 F.3d at 1284–85; *accord Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). The third and fourth factors "'merge' when, as here, the [g]overnment is the opposing party." *Swain*, 961 F.3d at 1293 (internal quotation marks and citation omitted); *cf. Nken v. Holder*, 556 U.S. 418, 435 (2009). After considering each factor, we conclude that the district court did not abuse its discretion by granting the preliminary injunction.[13]

---

[12] "A substantial likelihood of success on the merits requires a showing of only *likely* or probable, rather than *certain,* success." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005) (emphasis in original). This factor is "generally the most important" of the four factors. *Id*.

[13] "The district court has substantial discretion in weighing the four relevant factors to determine whether preliminary injunctive relief is warranted." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1254 n.4 (11th Cir. 2005).

A. Likelihood of Success on the Merits

The district court found that Gonzalez established a substantial likelihood of success on the merits of her claim that O.C.G.A. § 45-5-3.2 violates the Georgia Constitution and the Due Process Clause of the Fourteenth Amendment. *See Gonzalez*, 2020 WL 4873545, at *6. The State argues that the district court erred by finding that O.C.G.A. § 45-5-3.2 violates the Georgia Constitution. The parties do not dispute that if O.C.G.A. § 45-5-3.2 violates the Georgia Constitution, as applied here, then it also rises to the level of a violation of the Due Process Clause of the Fourteenth Amendment. *See Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. 1981) ("It is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment. . . . [S]uch action violates the due process guarantees of the [F]ourteenth [A]mendment.").

The federal courts are bound by the decisions of the Supreme Court of Georgia on questions of Georgia law. *See Great Am. All. Ins. Co. v. Anderson*, 847 F.3d 1327, 1333 (11th Cir. 2017); *Silliman v. Cassell (In re Cassell)*, 688 F.3d 1291, 1292 (11th Cir. 2012); *Flava Works, Inc. v. City of Miami*, 609 F.3d 1233, 1237 (11th Cir. 2010); *cf.* 28 U.S.C. § 1652. This principle applies to questions involving the interpretation of the Georgia Constitution and Georgia election law. *See Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (giving controlling weight to the

Alabama Supreme Court's decision that an Alabama election law violated the Alabama Constitution). Because we are bound by the Supreme Court of Georgia's decision that O.C.G.A. § 45-5-3.2, as challenged here, violates the Georgia Constitution, *see Kemp*, 2020 WL 5949847, at *6, we conclude that the district court did not abuse its discretion by finding that Gonzalez established a substantial likelihood of success on her claim that O.C.G.A. § 45-5-3.2 violates the Georgia Constitution and the Fourteenth Amendment, *see Gonzalez*, 2020 WL 4873545, at *6.

B. Irreparable Injury

Nor did the district court abuse its discretion by concluding that Gonzalez would suffer an irreparable injury unless an injunction was granted. *See Gonzalez*, 2020 WL 4873545, at *6. We have held—and the State does not dispute—that "missing the opportunity to vote in an election is an irreparable harm for the purposes of a preliminary injunction." *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020). Instead, the State argues that the district court erred because O.C.G.A. § 45-5-3.2 "does not deprive anyone of the right to vote."

We reject the State's argument based on the Supreme Court of Georgia's answer to the certified question. *See Kemp*, 2020 WL 5949847, at *1, *6 (concluding that O.C.G.A. § 45-5-3.2 violates the Georgia Constitution to the extent that it "authorizes a district attorney appointed by the Governor to serve

beyond the remainder of the unexpired four-year term of the prior district attorney without an election"). Because the State's enforcement of O.C.G.A. § 45-5-3.2 would deprive Gonzalez of her right to vote in the November 2020 district attorney election, we conclude that the district court did not abuse its discretion by finding that Gonzalez would suffer an irreparable injury unless the injunction was granted.

C. Balance of Harms and Public Interest

Finally, the State argues that the district court "erred by failing to give due weight to the real harm caused by enjoining enforcement of a state statute." Before granting the preliminary injunction, the district court weighed the relative harms to the parties and concluded that the State "failed to show how the injury to [Gonzalez] by not conducting an election of the district attorney position is offset by any harm or burden to" the State. *Gonzalez*, 2020 WL 4873545, at *7. The district court also found that "the requested injunctive relief . . . would not be adverse to the public interest." *Id.*

On appeal, the State identifies two interests that it has in the enforcement of O.C.G.A. § 45-5-3.2: (1) ensuring the enforcement of valid laws, and (2) avoiding chaos and uncertainty in the State's election procedures. Given the Supreme Court of Georgia's answer to the certified question, we conclude that the preliminary injunction does not interfere with the first interest—the enforcement of *valid* laws—because O.C.G.A. § 45-5-3.2, as applied here, is invalid. *See Kemp*, 2020

WL 5949847, at *1. As to the second interest, the State has not shown that the district court clearly erred by finding that the preliminary injunction would not cause chaos and uncertainty in the State's election procedures. *See Gonzalez*, 2020 WL 4873545, at *7 (finding "no harm to the Governor if his appointee must run for office in 2020 to maintain his or her seat" and noting that the Secretary "[took] the position that as long as the relief comes in advance" of certain statutory and administrative deadlines, "the burden on the Secretary will be minimal").[14]

On the other side of the ledger, Gonzalez identifies a significant interest in favor of the preliminary injunction—her right to vote. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (concluding that "[n]o right is more precious in a free country" than the right to vote). Accordingly, we conclude that the district court did not abuse its discretion by finding that the balance of the harms and the public interest favored granting the injunction.

* * *

Because the district court did not abuse its discretion by finding that Gonzalez established all four factors governing the grant of a preliminary

[14] We can also be assured that we have the "correct answer" about the validity of O.C.G.A. § 45-5-3.2, and that there will not be future chaos and uncertainty about its application here, because the Supreme Court of Georgia is the "one true and final arbiter of [Georgia] state law." *See Miss. Valley Title Ins. Co. v. Thompson*, 754 F.3d 1330, 1334 (11th Cir. 2014) (quoting *Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996)).

injunction, we conclude that it did not abuse its discretion by granting the preliminary injunction.

IV.

For these reasons, we affirm the district court's order granting the preliminary injunction.[15]

AFFIRMED.

[15] We deny all pending motions as moot.