IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

REVEREND ROBERT MCBRIDE *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**NO. 1:11-cv-443**
	§	
CITY OF JASPER, *a home-rule municipality, et al.*,	§	
	§	
	§	
Defendants.	§	

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

This case is assigned to the Honorable Ron Clark, United States district judge, and was referred to the undersigned United States magistrate judge pursuant to Referral Order RC-72.1. Pending is Plaintiffs' "Amended Motion for Preliminary Injunction" (Docket No. 11). The parties have consented to the undersigned's decision for resolving the preliminary injunction. See 28 U.S.C. § 636(c)(1) (2011); Fed. R. Civ. P. 73. Starting on October 7, 2011, a two-day hearing was held before the undersigned, and the parties presented evidence relevant to the pending motion. Having reviewed the pleadings and the evidence, Plaintiffs' motion for preliminary injunction is denied for the reasons stated below.

I. Background

This dispute arises from the appointment of Rodney Pearson as the chief of police in Jasper, Texas. Chief Pearson is the first African-American police chief for the city. After this appointment, a group of citizens, predominantly if not entirely made up of white citizens, initiated recall elections

for the African-American city council members who voted for Chief Pearson's appointment. The recall procedures are provided by the city's charter, which allows qualified voters of Jasper, on an at-large basis, to subject a city council member representing a single-member district to a recall election. The pending lawsuit challenges the charter's recall provisions and the alleged actions of certain city officials.

A. Jasper's Government

Jasper is a home-rule municipality with a council-manager government. The city council is comprised of five elected members and the mayor, who only votes on a matter under consideration by the city council in the event of a tie. The city council members serve two-year terms and are subject to a three-term limit. In 1991, Jasper's charter was amended to establish single-member districts. Accordingly, four of the five city council members are elected by residents of their respective districts. The remaining council member and the mayor are elected on an at-large basis.

At the time of Chief Pearson's appointment, Jasper's city council consisted of the following members: Joe Clyde Adams, an African-American council member who represented District 1; Randy Sayers, a white council member who represented District 2; Tommy Adams, an African-American council member who represented District 3; Willie Land, an African-American council member who represented District 4; and Terrya Norsworthy, an African-American council member who represented District 5, which is an at-large district. Mike Lout was the mayor of Jasper and is white.[1]

[1] All of the above individuals currently serve in the same positions, except for Councilman Adams, who was subject to a recall election and subsequently retired.

B. The City Council's Appointment of Chief Pearson

In February 2011, Jasper's then chief of police, Todd Hunter, announced that he was moving to Kilgore, Texas. Soon thereafter, Mayor Lout had a discussion with Gerald Hall, a white captain in the police department, and asked whether he was interested in serving as the interim chief of police.[2] At the next city council meeting, Mayor Lout recommended that Captain Hall should take the position on an interim basis. The city council rejected Mayor Lout's recommendation and unanimously voted for Rodney Pearson to serve as the interim chief of police. At a later meeting, Chief Pearson was elected as the permanent chief of police, making him the first African-American chief of police in Jasper's history. Councilman Sayers opposed Chief Pearson's appointment as the permanent chief of police despite voting for Chief Pearson as the interim chief of police.

C. The Recall Petitions

Jasper's charter provides that a council member "shall be subject to recall and removal from office by the *qualified voters* of the city on the grounds of incompetency, misconduct, or malfeasance in office." (Pls.' Am. Mot. Prelim. Injunction, Ex. A Charter, § 6.01, Docket No. 11) (emphasis added) The charter further states that a recall petition "shall be signed by *qualified voters* of the city equal in number to at least thirty (30) percent of the number of votes cast at the last regular municipal election of the city, but in no event less than one hundred fifty (150) such petitioners." (Id. at § 6.02) (emphasis added) The charter does not define "qualified voter."

[2] The parties dispute whether Mayor Lout promised the position to Captain Hall during this discussion.

If the required number of signatures are obtained, a recall election is held. (Id. at § 6.07.) If a majority of the votes cast at the recall election are in favor of the recall, the council member is removed from office. (Id. at § 6.09.) The charter does not explicitly state who may vote in the recall election. A council member may be subject to a recall every three months. (Id. at § 6.10.)

In July 2011, a group of Jasper citizens collected signatures pursuant to the charter to recall Councilpersons Adams, Land, and Norsworthy. Separate petitions were prepared for each council member. Each petition stated that the reason for the recall effort was the councilpersons' "incompetence, misconduct and malfeasance in office." These allegations were attributed to the councilpersons' supposed failure to perform an adequate background check of Chief Pearson and to terminate his employment after learning of alleged false statements in his employment application.[3] (See e.g., Pls.' Hr'g Ex. 3 1.)

Despite the proffered reasons in the recall petitions, some of the organizers of the recall petitions appear to have had racist motivations. For example, Lance Caraway, one of nine citizens who collected petition signatures, used racial epithets and made racist jokes in Facebook posts after Chief Pearson was appointed. (Id. at Ex. 6.) One of these posts directly referenced Councilpersons Norsworthy and Adams. (Id.) From the testimony elicited at the hearing, it appears that all of the citizens who spearheaded the recall effort and all of the signers of the petitions were white.

[3] The parties avoided litigating the merits of these allegations, which are the subject of unrelated lawsuits.

The petitions for Councilpersons Adams and Land were signed by white citizens who did not reside in the councilpersons' districts. Councilman Sayers signed all three recall petitions.[4] Mayor Lout did not sign the recall petitions, and he denies that he personally promoted the petitions.

Blank recall petitions were distributed by Debbie Foster at the KJAS radio station. Mayor Lout is the owner and station manager of KJAS. Debbie Foster is his girlfriend and an employee of KJAS. The radio station broadcasted announcements describing the locations where the petitions could be signed. Mayor Lout testified that he has not been personally involved in any broadcasts relating to official city business since he decided to run for mayor.

After the signatures were collected, the petitions were presented to City Secretary Karen Pumphrey, who sent the petitions to the voter registrar at the county clerk's office. The clerk's office cross-referenced the county's records and the petitions to determine whether each signer was a registered voter. The clerk's office tallied 549 signatures for Councilman Adams, 534 signatures for Councilman Land, and 560 signatures for Councilwoman Norsworthy. (Pls.' Hr'g Exs. 3-5.) Additionally, because Jasper's charter did not clearly indicate whether a petitioner who resided in one district could count towards the signatures needed to recall a council member in another district, the clerk's office attempted to mark next to each signer's name the district in which he resided. The

[4] There is inconsistent testimony regarding the location where Councilman Sayers signed the recall petitions. At the hearing on the preliminary injunction, Councilman Sayers testified that he signed the petitions at Pamela Hamilton's husband's place of business, but Pamela Hamilton testified that Councilman Sayers signed the petitions at his own house. Furthermore, despite signing the recall petitions, Councilman Sayers filed a disclaimer claiming to have no interest in the mandamus proceeding before the Ninth Court of Appeals, which the undersigned discusses later in this order. (See Pls.' Hr'g Ex. 12.)

clerk's office was unable to identify the districts for some of the signers.[5] Once this process was finished, the petitions were returned to City Secretary Pumphrey.

Neither the city nor the county verified the authenticity of the signatures. At the hearing on the pending motion, evidence was presented that several signatures appeared in almost identical handwriting, raising the inference that the same person signed on behalf of multiple individuals. A handwriting expert who reviewed half of the petitions testified that two people were responsible for fifteen signatures and that as many as 225 signatures warranted further investigation.

On July 27, 2011, the recall petitions were presented to the city council. No action was taken by the city council at that meeting. On July 28, 2011, the councilpersons requested a "special call meeting" for August 1, 2011, to discuss whether the petitions should be investigated. (Pls.' Hr'g Ex. 13.) Mayor Lout struck that request pursuant to his authority to set the agenda under the city's rules of procedure and the advice of the city attorney. The city attorney told Mayor Lout that he could leave the item on the agenda but that the city would not have authority or jurisdiction to consider the request in an executive session.[6]

At the next regularly scheduled meeting on August 8, 2011, Councilman Sayers made a motion to accept the petitions and go forward with the recall elections. (Def. City of Jasper's Hr'g Ex. A-3.) The motion failed for lack of a second. (Id.) The challenged councilpersons then

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[5] At the hearing on the pending motion, evidence was presented of inconsistencies in the voter registrar's verifications. The clerk's office incorrectly determined the districts in which several petitioners resided.

[6] The parties dispute whether the councilpersons actually requested an executive session.

attempted to discuss the recall petitions, but they were ruled out of order by Mayor Lout, who then adjourned the meeting.

D. Petition for Writ of Mandamus to the Ninth Court of Appeals

On August 22, 2011, Craig Stewart, a white citizen of Jasper and an organizer of the recall petitions, filed a petition for writ of mandamus in the Ninth Court of Appeals in Beaumont, Texas. Mayor Lout and the city council filed an answer in which they argued that the city charter violated Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, because it allowed the recall election to take place on an at-large basis. (Def. City of Jasper's Hr'g Ex. C.) The respondents asserted that the recall elections for Councilmen Adams and Land should be limited to the qualified voters in their respective single-member districts. (Pls.' Hr'g Ex. 14.) Additionally, the respondents argued that the charter was invalid or void because it did not require the city secretary to verify that the signers of the recall petitions were qualified voters. (Id.) Mayor Lout and Councilman Sayers filed disclaimers stating that they had "no interest in pursuing this case or in its outcome." (Id. at Exs. 12, 14.)

On August 29, 2011, the Ninth Court of Appeals issued its memorandum opinion, granting the requested mandamus relief and ordering the city council to hold recall elections for Councilpersons Adams, Land, and Norsworthy. (Def. City of Jasper's Hr'g Ex. D 1, available at No. 09-11-00467-CV, 2011 WL 3847449.) The court reconciled §§ 3.01, 6.02, and 6.09 of the city charter and determined that a recall petition can be signed by a qualified (registered) voter of any district in the city, but only the qualified voters in a single-member district may actually vote in a

recall election for their single-member-district representative. (Id. at 2.) Additionally, the court found that the city secretary certified the total number of qualified voters who signed the petitions and determined that the number satisfied the requirements in the charter. (Id. at 2-3.) For these reasons, the court ordered the city to comply with its ministerial duty to hold the recall elections at the next uniform election date, November 8, 2011. (Id.)

On September 1, 2011, the city council ordered the recall elections scheduled for November 8, 2011. (Id. at Ex. A-4.) At the hearing on the preliminary injunction, the city represented that the recall elections would comply with the opinion of the Ninth Court of Appeals – that the recall elections for Councilmen Adams and Land would be limited to the qualified voters residing in their respective single-member districts. The city also discussed the procedure it would utilize to guarantee this result.

At the hearing on the preliminary injunction, there was also testimony that the city council was presented with a recall petition for Mayor Lout. The city indicated that it is applying the same recall procedures to Mayor Lout as to Councilpersons Adams, Land, and Norsworthy. The details of Mayor Lout's recall are not before the court.

E. The Present Lawsuit

On September 13, 2011, Councilman Adams, Councilman Land, Councilwoman Norsworthy, and individual citizens of Jasper (collectively Plaintiffs) brought the instant lawsuit against the City of Jasper, Mayor Lout[7], and City Secretary Pumphrey[8] (collectively Defendants). On September 30,

[7] Mayor Lout is sued in his official and individual capacity.

[8] City Secretary Pumphrey is sued only in her official capacity.

2011, Plaintiffs filed the pending motion, seeking to enjoin the recall elections scheduled for November 8, 2011. Defendants City of Jasper and City Secretary Pumphrey filed their "Response" (Docket No. 27) on October 6, 2011.[9]

The undersigned has ascertained the following allegations from the parties' pleadings and the evidentiary hearing. Plaintiffs allege that Jasper's charter violates the Equal Protection Clause of the Fourteenth Amendment and seek a preliminary injunction through 42 U.S.C. § 1983. Specifically, Plaintiffs allege that their "right to equal protection under the one-person-one-vote principle will be violated" by the recall provisions of the charter. (Pl.'s Am. Mot. Prelim. Injunction 11, Docket No. 11.) Defendants construe Plaintiffs' equal protection claim as one against Defendants for racial discrimination. (See Defs.' Resp. 18, Docket No. 27.) Defendants do not address the charter's alleged violation of the one-person-one-vote principle. (See id.) The undersigned will address both equal protection claims in this order.

Plaintiffs further allege that they are entitled to injunctive relief pursuant to § 2 of the Voting Rights Acts because the charter's recall provisions "result in the abridgement or dilution of the right to vote or to participate in the political process on account of the voters' race or color . . . ." (Pl.'s Am. Mot. Prelim. Injunction 12, Docket No. 11.) Plaintiffs aver that these provisions have "a discriminatory effect on the ability of black voters in Jasper to participate in the political process and elect representatives of their choice to public office." (Id. at 13.)

Finally, Plaintiffs argue that the court should enjoin the recall elections under traditional

[9] On that same date, Mayor Lout filed his "Motion to Dismiss" (Docket No. 25) in which he asserts a qualified immunity affirmative defense. The undersigned need not address Mayor Lout's motion at this time.

principles of equity. (Id. at 14.) Plaintiffs assert that the organizers of the recall petitions violated various provisions of the Texas Penal Code and that Defendants "have attempted the deliberate disenfranchisement of minority voters." (Id.) Plaintiffs also assert that there are "red flags" suggesting a substantial number of forged signatures appear on the recall petitions, and therefore, the recall elections should be enjoined until the signatures are verified. (See id.)

II. Jurisdiction

This court has federal question jurisdiction over this matter. See 28 U.S.C. § 1343; 42 U.S.C. §§ 1973, 1983, 1988. Venue is proper because the events giving rise to the above claims occurred within the confines of this district. See 28 U.S.C. § 1391.

III. Legal Standard

Under Rule 65(a)(1) of the Federal Rules of Civil Procedure, a court may issue a preliminary injunction upon notice to the adverse party. Fed. R. Civ. P. 65(a)(1). "Injunctive relief is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 997 (5th Cir. 1985). The movant has the burden to establish:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011) (quoting Byrum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009)) (quotation marks omitted in original).

"[T]he importance and nature of the [likelihood of ultimate success] requirement can vary significantly, depending upon the magnitude of the injury which would be suffered by the movant in the absence of interlocutory relief and the relative balance of the threatened hardship faced by each of the parties." Texas v. Seatrain Int'l S.A., 518 F.2d 175, 180 (5th Cir. 1975). However, "[t]here is [no] need to weigh the relative hardships which a preliminary injunction or the lack of one might cause the parties unless the movant can show some likelihood of ultimate success." Id. "The denial of a preliminary injunction will be upheld where the movant has failed sufficiently to establish *any one* of the four criteria." Black Fire Fighters Ass'n v. City of Dallas, 905 F.2d 63, 65 (5th Cir. 1990) (emphasis in original).

To prevail on the element of likelihood of success on the merits, the movant "is not required to prove its entitlement to summary judgment." Byrum, 566 F.3d at 446. The substantive law establishes the standards to determine the likelihood of success on the merits. Janvey, 647 F.3d at 596 (citing Roho, Inc. v. Marquis, 902 F.2d 356, 358 (5th Cir. 1990)). The movant "must present a prima facie case but need not show that he is certain to win." Id. (quoting 11A Wright, Miller & Kane, Federal Practice and Procedure § 2948.3 (2d ed. 1995)).

VI. Analysis

The undersigned has ascertained the following allegations from the parties' pleadings and the evidentiary hearing on the pending motion: (1) the city's charter violates the Equal Protection Clause of the Fourteenth Amendment under the one-person-one-vote principle; (2) Defendants violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against the African-American council members on the basis of race; (3) the charter violates § 2 of the Voting Rights Act; (4) there are "red flags" suggesting a substantial number of forged signatures appear on

the recall petitions; and (5) the organizers of the recall petitions violated various provisions of the Texas Penal Code.

A. Likelihood of Success on the Merits

1. One Person, One Vote

"[T]o establish liability through a [§] 1983 action[,] [t]here must be (1) a deprivation of a right secured by federal law (2) that occurred under color of state law, and (3) was caused by the state actor." Victoria W. v. Larpenter, 369 F.3d 475, 482 (5th Cir. 2004). Plaintiffs argue that they are entitled to enjoin the recall elections pursuant to 42 U.S.C. § 1983 because Jasper's charter violates the Equal Protection Clause of the Fourteenth Amendment.

The one-person-one-vote principle of the Equal Protection Clause of the Fourteenth Amendment "guarantees the opportunity for equal participation by all voters in local government elections." Fairley v. Hattiesburg, Miss., 584 F.3d 660, 674 (5th Cir. 2009) (citing Avery v. Midland Cnty., 390 U.S. 474 (1968)); see also Bd. of Estimate v. Morris, 489 U.S. 688, 693 (1989) ("Both state and local elections are subject to the general rule of population equality between electoral districts."). "Full and effective participation . . . requires . . . that each citizen have an equally effective voice in the election . . . of his [representatives]." Reynolds v. Sims, 377 U.S. 533, 565 (1964). This goal is "the basic aim of legislative apportionment . . ., and it was for that reason that the [*Reynolds*] decision insisted on substantial equality of populations among districts." Gaffney v. Cummings, 412 U.S. 735, 748 (1973). A court should consider whether "the vote of any citizen is approximately equal in weight to that of any other citizen." Reynolds, 377 U.S. at 579.

Plaintiffs allege that Jasper's charter violates the one-person-one-vote principle because the charter's recall provisions allow the citizens of Jasper, on an at-large basis, to subject a city council

member representing a single-member district to a recall election. Plaintiffs argue that these provisions deny residents of the single-member districts full and effective participation in the political process. The undersigned acknowledges that "the personal right to vote is a value in itself," but the undersigned is not convinced that this equal protection principle is applicable to the present case. See Morris, 489 U.S. at 698. The present case is distinguishable from the cases interpreting and applying the one-person-one-vote principle because this case is not an apportionment case. See id.; Fairley, 584 F.3d at 674-75.

Additionally, Plaintiffs have not proffered any evidence showing that Jasper's charter enables voters of any district to elect an unconstitutional proportion of council members. See Morris, 489 U.S. at 698; Fairley, 584 F.3d at 674-75. A violation of the one-person-one-vote principle could possibly arise if the recall elections for Councilmen Adams and Land were not limited to their respective districts, but the Ninth Court of Appeals ordered the city to limit those elections to the residents of the single-member districts, and the city has represented that it will comply with that order. Thus, the individual residents of each single-member district have a vote that is equal in weight to the residents of the other districts – only the residents of a single-member district *may vote to elect* their single-member-district council member and only those residents *may vote in a recall election* for that council member. Finally, Plaintiffs have not persuaded the undersigned to extend the one-person-one-vote principle to the ability to recall an elected representative. For these reasons, Plaintiffs have not established a substantial likelihood of success on this equal protection claim.

2. Racial Discrimination

"The Equal Protection Clause commands that no state shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." Cornerstone Christian Schs. v. Univ. Interscholastic League, 563

F.3d 127, 139 (5th Cir. 2009) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)) (internal quotations omitted). "To state a claim of racial discrimination under the Equal Protection Clause and [§] 1983, the plaintiff must allege and prove that he received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from discriminatory intent." Priester v. Lowndes Cnty., 354 F.3d 414, 424 (5th Cir. 2004) (quoting Taylor v. Johnson, 257 F.3d 470, 473 (5th Cir. 2001)).

Plaintiffs' "Amended Motion for Preliminary Injunction" does not expressly indicate that Plaintiffs request injunctive relief under a theory of racial discrimination. Nonetheless, Defendants City of Jasper and City Secretary Pumphrey construe the motion to allege that Defendants violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against the African-American council members on the basis of race.

Having reviewed the pleadings and the evidence, the undersigned finds that Plaintiffs have failed to satisfy their burden to establish a substantial likelihood of success on a claim for racial discrimination, if such a claim is alleged. See Cornerstone Christian Schs., 563 F.3d at 139; Priester, 354 F.3d at 424. There is no evidence suggesting that the *City of Jasper* treated the African-American city council members differently than the white city council member. Instead, the evidence indicates that the city is applying the same recall procedures to Mayor Lout, who is subject to recall in May 2012, as to the challenged African-American city council members, who are subject to recall on November 8, 2011. Moreover, there is no evidence suggesting that the City of Jasper treated its white citizens differently than its black citizens with respect to its charter. The charter provides the same right to *every* citizen, regardless of race or district, to subject a council member to a recall election. (See Pls.' Am. Mot. Prelim. Injunction, Ex. A Charter, §§ 6.01, 6.02, Docket No. 11.)

Finally, there is insufficient evidence to establish a prima facie case of racial discrimination against Mayor Lout. There is no direct evidence showing that Mayor Lout promoted the recall petitions or did so on the basis of race. Although his radio station and girlfriend were involved in the recall process, Mayor Lout denies personal involvement. Moreover, unlike Councilman Sayers, Mayor Lout did not sign the recall petitions.

Additionally, there is no direct evidence showing that Mayor Lout, on the basis of race, prevented the city council from investigating the recall petitions or otherwise taking official action with respect to the petitions. Rather, the evidence suggests that Mayor Lout struck the councilpersons' July 28, 2011 agenda request because he believed that the city did not have jurisdiction or authority to consider the request as it was presented. Furthermore, the parties dispute whether the city council could have taken any official action once the recall petitions were presented because the challenged councilpersons constituted a majority and had arguable personal interests in preventing the recall elections, which would require recusal.

In the equal protection context, the focus is on state action. At this time, Plaintiffs have not proffered sufficient evidence of state action to establish a substantial likelihood of success on their claim for racial discrimination. However, the undersigned does find that some of the recall petitioners acted with racial animus towards Councilpersons Land, Adams, and Norsworthy. For example, Lance Caraway, one of the white Jasper citizens who gathered signatures on the recall petitions, used racial epithets in Facebook posts after Chief Pearson was appointed. He also posted a most distasteful picture featuring Chief Pearson, two of the African-American council members, the President of the United States, and the First Lady. Not to be outdone, at the evidentiary hearing, Mr. Caraway failed to appear pursuant to an executed subpoena. The undersigned then issued a

warrant for his arrest, and Mr. Caraway was arrested by the United States Marshal. Regardless of the reprehensible nature of Mr. Caraway's and other individuals' actions, this conduct does not constitute state action that violates the Constitution or federal law. Accordingly, Plaintiffs' claim for racial discrimination does not support the issuance of a preliminary injunction.

3. Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act, as amended, provides that: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied *by any State or political subdivision* in a manner which results in a *denial or abridgement* of the right . . . to vote on account of race or color . . . ." 42 U.S.C. § 1973(a) (2011) (emphasis added). Plaintiffs must demonstrate that, based on the totality of the circumstances, they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Sensley v. Albritton, 385 F.3d 591, 594-95 (5th Cir. 2004) (quoting 42 U.S.C. § 1973(b)).

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47 (1986). "[W]here minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of the minority voters." Id. Accordingly, § 2 "prohibits all forms of voting discrimination, not just vote dilution." Id. at 45 n.10. Minority voters "must prove that the [standard, practice, or procedure] operates to minimize or cancel out their ability to elect their preferred candidates." See id. at 47. A discriminatory voting practice "must be undertaken with an intent to discriminate or must produce discriminatory results." United States v. Brown, 561 F.3d 420, 432 (5th Cir. 2009).

The Supreme Court has stated that courts should interpret the Voting Rights Act "in a manner that provides the broadest possible scope." Chisom v. Roemer, 501 U.S. 391, 403 (1991) (internal quotations omitted). Nonetheless, "[f]or [§] 2 to apply, the challenged situation must constitute a qualification, prerequisite, standard, practice or procedure within the meaning of [§] 2." Brown, 494 F.Supp.2d 440, 480 (S.D.Miss. 2007), *affirmed* 561 F.3d 420 (5th Cir. 2009). A challenged procedure may fall under § 2 when there is evidence of racial motivation or intent to discriminate. See Welch v. McKenzie, 765 F.2d 1311, 1316 (5th Cir. 1985); Brown, 494 F.Supp.2d at 486; Dillard v. Town of North Johns, 717 F.Supp. 1471, 1476 (M.D.Ala. 1989). Likewise, a challenged practice may fall within the meaning of § 2 when the practice results in the disenfranchisement of minority voters. See Goodloe v. Madison Cnty Bd. of Election Com'rs, 610 F.Supp. 240, 242 (S.D.Miss. 1985).

Courts have been reluctant to apply the Voting Rights Act to the petition process.[10] The undersigned is unaware of any court that has addressed whether a charter violates § 2 of the Voting Rights act by allowing citizens, on an at large basis, to subject the elected representative of a single-member district to a recall election, and Plaintiffs have failed to cite such a case. The Fifth Circuit has only suggested that "allegations of improper conduct in the application of the recall process [would have to be liberally] construed to implicate rights arising under [§] 2." Smith v. Winter, 717 F.2d 191, 197 (5th Cir. 1983).

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[10] See Padilla v. Lever, 463 F.3d 1046, 1050-53 (9th Cir. 2006) (holding that recall petitions did not violate the bilingual or multilingual requirements of the Voting Rights Act because the proponents of the recall filled out the form recall petitions); Montero v. Meyer, 861 F.2d 603, 607-09 (10th Cir. 1988) (holding that § 4 is inapplicable to the petition process); Delgado v. Smith, 861 F.2d 1489, 1492-93 (11th Cir. 1988) (holding that § 4 is inapplicable to the petition process); but see Operation King's Dream v. Connerly, No. 06-12773, 2006 WL 2514115, at *12-14, 15-17 (E.D. Mich. Aug. 29, 2006) (applying § 2 to initiative petitions but holding that there was no violation because minority and non-minority voters participated in the petition process on the same terms).

In *Smith v. Winter*, the Fifth Circuit identified two potential ways that a recall process allegedly violating § 2 could support removal under 28 U.S.C. § 1443. Id. at 193-94, 197-99. First, the court considered whether a recall process could implicate prospective voting rights "to the extent that the removal process itself constitutes a voting practice or procedure that has the potential to culminate in a special removal election." Id. at 197. The party seeking removal would have to allege that: (1) a recall procedure constitutes a voting practice or procedure; (2) irregularities have transpired; and (3) there has been a denial or abridgement of the right to vote on account of race. Id. Second, the court considered whether the recall process could implicate retrospective voting rights that have already been exercised. Id. The court then considered the scope of the "right to vote" within the meaning of the Voting Rights Act and concluded that it "stops short of any absolute right to resist recall from office." Id. at 197-98. The court further stated that "[t]he[] right[] to vote [is] consummated and made effective in the election." Id. at 199.

In the present case, Plaintiffs allege that Jasper's charter violates § 2 because it allows for citizens, on an at-large basis, to subject the elected representative of a single-member district to a recall election. Plaintiffs argue that the charter may be used as an instrument of intimidation and oppression because its recall provisions may be invoked every three months. (See Pls.' Am. Mot. Prelim. Injunction, Ex. A Charter, § 6.10, Docket No. 11.) Plaintiffs suggest that this concern is apropos because of the history of racial tension in Jasper.

Plaintiffs' suggestion that the charter may be used as an instrument of oppression is inconsistent with the city's *recent* history. The residents of Jasper are approximately one-half African-American and one-half white, but African-Americans currently hold four of the five council member seats. Likewise, Councilwoman Norsworthy was elected on an at-large basis, and

Councilman Adams represents District 4, which predominantly consists of white residents. Finally, Jasper's charter was amended in 1991, but the recall procedures have not been invoked until the pending controversy. These facts suggest that the recall elections were brought on by the actions of a vocal segment of the population, but do not suggest that the charter's recall provisions have been used as a tool to systematically oppress minority representation.

The court construes Plaintiffs' argument under § 2 of the Voting Rights Act as a claim for the abridgement of the right to vote rather than a claim for dilution.[11] Plaintiffs have not established a substantial likelihood of success on the merits of this claim for the following reasons: (1) Plaintiffs have not shown that the Voting Rights Act applies to the recall process itself; (2) the most analogous case in the Fifth Circuit suggests that Plaintiffs cannot prevail; and (3) if § 2 does apply, Plaintiffs have not established a prima facie case of unequal access to the charter's recall procedures.

First, the undersigned is not convinced that the Voting Rights Act applies in the manner suggested by Plaintiffs. Three different circuit courts of appeals have held that the Voting Rights Act does not apply to voter initiated petitions. See Padilla, 463 F.3d at 1050-53; Montero, 861 F.2d at 607-09; Delgado, 861 F.2d 1489, 1492-93. Moreover, as stated above, the undersigned is unaware of *any* case holding that a charter violates § 2 of the Voting Rights Act by allowing citizens, on an at-large basis, to subject an elected representative of a single-member district to a recall election.

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[11] To analyze a § 2 dilution claim, a court applies a two-part framework: first, a party must satisfy the three threshold requirements announced in *Gingles*; and, second, a party must offer evidence of the totality of the circumstances regarding the political landscape. NAACP v. Fordice, 252 F.3d 361, 365 (5th Cir. 2004). The threshold *Gingles* test requires a plaintiff to show, by a preponderance of the evidence, that: (1) the affected minority group is sufficiently large and geographically compact to constitute a voting age majority in a district; (2) the minority group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority group's preferred candidate. Id. (citing Gingles, 478 U.S. 50-51). Plaintiffs have presented no evidence with respect to these factors, except for conclusory testimony during the hearing on the preliminary injunction that the voting age majority in Jasper is white. Accordingly, if Plaintiffs allege a claim for dilution under § 2, they have failed to establish a substantial likelihood of success on the merits.

The lack of favorable case law debilitates Plaintiffs' efforts to establish their burden of showing a substantial likelihood of success on the merits. Because this issue is unresolved, especially in the Fifth Circuit, Plaintiffs' claim must fail at this stage of the litigation.

Second, the most analogous case in the Fifth Circuit is *Smith*. Assuming that it is possible to extend *Smith* beyond the context of removal under 28 U.S.C. § 1443, the case suggests that Plaintiffs have not established a substantial likelihood of success on the merits. If the undersigned were to extrapolate the Fifth Circuit's language to the present context, a claim for the abridgment of prospective voting rights would fail because the Ninth Court of Appeals ordered the City of Jasper to limit the recall elections for Councilmen Adams and Land to their respective single-member districts. See Smith, 717 F.2d at 197. A claim for the abridgement of retrospective voting rights would also fail because *Smith* suggests that the right to vote under the Voting Rights Act does not apply to recall procedures. See id.

Finally, assuming *arguendo* that § 2 does apply to the challenged recall procedures, the jurisprudence suggests that Plaintiffs have not established a substantial likelihood of success on the merits. In *Operation King's Dream v. Connerly*, a Michigan district court held that § 2 applied to a petition process with the goal of placing an anti-affirmative action proposal on the general election ballot. Operation King's Dream, 2006 WL 2514115, at *15-17. The court further held that even though the plaintiffs established that many of the signatures on the petitions were procured by fraud, the § 2 claim failed because the plaintiffs did not establish *inequality of access* to the petition process. Id. at 17. The court found that "[m]inority and non-minority voters participated in the initiative process on the same terms." Id. Like *Operation King's Dream*, Plaintiffs have not established unequal access to the City of Jasper's recall procedures. See id. Rather, the charter's

recall procedures are available to all Jasper citizens. (See Pls.' Am. Mot. Prelim. Injunction, Ex. A Charter, §§ 6.01, 6.02, Docket No. 11.) Accordingly, Plaintiffs' claim under § 2 of the Voting Rights Act does not support issuance of a preliminary injunction.

4. Suggestions of Forged Signatures on the Recall Petitions and Alleged Violations of the Texas Penal Code

Plaintiffs argue that the court should enjoin the recall elections pursuant to its inherent equitable authority because there are "red flags" suggesting that a substantial number of forged signatures appear on the recall petitions and because the recall petitioners allegedly violated various provisions of the Texas Penal Code. Plaintiffs have not alleged a cause of action under federal law entitling them to injunctive relief with respect to these issues. Indeed, "the Voting Rights Act is not a general anti-fraud statute." Operation King's Dream, 2006 WL 2514115, at *17. Because Plaintiffs have not alleged a cognizable cause of action, they are unable to establish a substantial likelihood of success on the merits. The undersigned will consider Plaintiffs' arguments regarding the authenticity of the signatures on the recall petitions when the remaining preliminary injunction factors are addressed.

B. Substantial Threat of Irreparable Injury

The movant must establish a substantial threat of irreparable injury to obtain a preliminary injunction. Janvey, 647 F.3d at 595. The irreparable injury must be likely in the absence of an injunction. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); see also Chacon v. Granata, 515 F.2d 922, 925 (5th Cir. 1975), cert. denied, 423 U.S. 930 (1975) (holding that the anticipated injury must be "imminent"). "Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant. Thus, a preliminary injunction will not be issued

simply to prevent the possibility of some future injury." 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil § 2948.1 (2d ed. 2011).

"In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages." Janvey, 647 F.3d at 595 (citing Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 339 (5th Cir. Unit B 1981)). "Removal from office is not the type of injury which can be compensated monetarily." Hunt v. City of Longview, 932 F.Supp. 828, 838 (E.D. Tex. 1995). Voters may suffer irreparable injury when there are violations of state and federal election laws. See Casarez v. Val Verde Cnty., 957 F.Supp. 847, 865 (W.D. Tex. 1997).

Here, Plaintiffs argue that they are currently suffering irreparable harm because Councilpersons Adams, Land, and Norsworthy should not be subject to recall elections and because the Jasper citizens should not have their elected representatives subject to such elections. Plaintiffs also argue that both groups will suffer further irreparable injury if the councilpersons are actually recalled. These arguments are premised on the alleged violations of the Equal Protection Clause and the Voting Rights Act and on the purported forged signatures on the recall petitions.

Plaintiffs have satisfied their burden of persuasion on this element. Councilpersons Adams, Land, and Norsworthy are currently expending time and resources to campaign for the recall elections.[12] The threat of removal from office, by itself, is sufficient to establish irreparable injury. See Hunt, 932 F.Supp. at 838. Likewise, Jasper's citizens are dealing with the political turmoil involved with the recall elections, and therefore, are suffering irreparable harm.

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[12] The undersigned further notes that Plaintiffs have no other adequate remedy at law. The Ninth Court of Appeals issued a writ of mandamus directing the council member Plaintiffs to hold a recall election for their own seats. Consequently, the City of Jasper, acting through its council, presumably was precluded from appealing that decision because the council member Plaintiffs constitute a majority of the council. Furthermore, if the council member Plaintiffs were required to recuse themselves from such a discussion, there would be no quorum.

Plaintiffs may suffer further irreparable injury in the event that the councilpersons are actually recalled. If it is determined at the end of this litigation that the charter does in fact violate the Constitution or federal law (or that the recall petitions contain an insufficient number of signatures due to forgery), then the recall elections should never have occurred in the first place. See Casarez, 957 F.Supp. at 865. Finally, Councilman Adams is term limited, so if he is recalled, he will not have an opportunity to regain his seat. Accordingly, Plaintiffs have established a substantial threat of irreparable injury.

C. The Balance of Hardships and the Public Interest

The party seeking the preliminary injunction has the burden to show that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted and that the grant of an injunction will not disserve the public interest.[13] Janvey, 647 F.3d at 595. Plaintiff has not met the burden of persuasion on either factor.

There are two outcome-oriented groups in this matter. The first group consists of the City of Jasper and the citizens who are in favor of the recall elections. The City of Jasper has been ordered to comply with its ministerial duty to hold the recall elections pursuant to its charter, and it has an interest in fulfilling that duty. As far as the city is concerned, the recall petitioners merely complied with the recall procedures in the charter, as interpreted by the Ninth Court of Appeals. There was no duty to investigate the authenticity of the signatures on the recall petitions because that

[13] This statement conflates the third and fourth elements of the preliminary injunction standard. See Janvey, 647 F.3d at 595. The undersigned addresses both elements in this section of the order because the undersigned's analysis applies to both.

duty was not imposed by the charter.[14] Also in this group, are the citizens who are in favor of the recall elections. There were 1,079 voters who participated in the most recent general election in Jasper, and more than 500 qualified voters purportedly signed the recall petitions. (Def. City of Jasper's Hr'g Ex. B.) These citizens have an interest in making Councilpersons Adams, Land, and Norsworthy subject to recall for their alleged "incompetence, misconduct and malfeasance in office." While these citizens have different motivations than the City of Jasper, they have the same ultimate goal of holding the recall elections.

The second group consists of the challenged council members and the citizens who are opposed to the recall elections, i.e., Plaintiffs. This group has an interest in protecting itself from a charter that purportedly violates constitutional and federal law. This group has a similar interest in protecting itself from recall elections premised on recall petitions containing forged signatures.

If the preliminary injunction is denied, the challenged council members will have to go forward with the recall election and may be removed from office before the legality of the charter's recall provisions and the authenticity of the signatures on the recall petitions are assessed. However, if the preliminary injunction is granted, the City of Jasper will have to decide whether to ignore the Ninth Court of Appeals's writ of mandamus or this court's order enjoining the recall elections. In either scenario, approximately half of the number of voters who participated in the last general election in Jasper will be upset with the result. (See Def. City of Jasper's Hr'g Ex. B.)

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[14] Under Texas law, in a home-rule municipality, there is no duty to examine the sufficiency of a recall petition, unless expressly provided by the charter. In re Suson, 120 S.W.3d 477, 478-80 (Tex. App.–Corpus Christi 2003, orig. proceeding); see also Blanchard v. Fulbright, 633 S.W.2d 617, 621-23 (Tex. App.–Houston [14th Dist.] 1982, writ dism'd) ("No authority to determine the sufficiency of recall petitions should be inferred to exist in the city council, in the absence of an express provision in the City Charter.").

Furthermore, the recall petitions themselves are neutral with respect to the public interest element. The Ninth Court of Appeals considered the recall petitions and determined that the petitions satisfied the charter's qualified-voter requirement, and thus, obligated the city to hold the recall elections. (Id, at Ex. D 2-3.) The court did not assess the authenticity of the signatures on the petitions because Jasper's charter does not impose such a duty on the city. (See id.) In the present case, Plaintiffs' expert reviewed half of the recall petitions and concluded that as many as 225 signatures warranted further investigation. The undersigned acknowledges that there are apparent forgeries on the recall petitions but finds that the majority of the signatures appear legitimate. Assuming that Plaintiffs are correct – that there is a substantial number of forged signatures – the recall petitions would still be a neutral consideration because the Ninth Court of Appeals held that the petitions satisfied the requirements of Jasper's charter. Accordingly, Plaintiffs have not satisfied their burden of persuasion with respect to the balance of hardship and public interest elements. See Janvey, 647 F.3d at 595.

V. Conclusion

This dispute requires an intense examination of the City of Jasper's charter – a poorly written and conceived instrument that allows voters of one district to force a recall election of a neighboring district's representative. Common sense suggests that the ability to recall a single-member-district's representative should be restricted to only those voters with the authority to vote in the recall election itself. However, the City of Jasper's charter, as written and interpreted by Texas's Ninth Court of Appeals, provides that a small percentage of the city's qualified voters can force a recall election – every three months – of an elected council member for whom they can never actually vote to recall

in the voting booth. Undoubtedly, this result cheapens the finality of a general election outcome and will deter conscientious citizens from serving as elected representatives in the future.

Nonetheless, a federal court cannot intervene and stop a local election merely because it was permitted by an arcane portion of a city charter. A preliminary injunction is a drastic remedy that should not be routinely granted. For a preliminary injunction to issue, a plaintiff must not only allege that a charter or government action violates constitutional or federal law, but must also establish a substantial likelihood of ultimate success in the underlying lawsuit.

Here, Plaintiffs have not cited, nor can the court find, any decision in which other plaintiffs have prevailed on arguments remotely similar to those asserted in the present case. Without such a precedent, the undersigned cannot find that Plaintiffs have shown a substantial likelihood of success on the merits. Furthermore, Plaintiffs have failed to meet their burden of persuasion on two of the other three required elements to obtain a preliminary injunction. While Plaintiffs may ultimately prevail on the merits, they have not satisfied their burden with respect to the pending motion. Accordingly, Plaintiffs' "Amended Motion for Preliminary Injunction" (Docket No. 11) is **DENIED**.

SIGNED this 20th day of October, 2011.

Zack Hawthorn
United States Magistrate Judge