Case No. 18-1992

In The

United States Court of Appeals

for the

Sixth Circuit

CHRISTOPHER GRAVELINE, WILLARD H. JOHNSON, MICHAEL LEIBSON, and KELLIE K. DEMING,

Plaintiffs-Appellees,

v.

RUTH JOHNSON, Secretary of State of Michigan, and SALLY WILLIAMS, Director of Michigan Bureau of Elections, in their official capacities,

Defendants-Appellees.

On Appeal of Preliminary Injunction Entered by the
United States District Court for the Eastern District of Michigan
Case No. 2:18-cv-12354-VAR-DRG
The Honorable Victoria A. Roberts, Presiding

APPELLEES' RESPONSE TO APPELLANTS' EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION

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DATED: September 5, 2018

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STATEMENT OF THE ISSUE PRESENTED

Whether the District Court abused its discretion in issuing a preliminary injunction where the State failed to address the central claim in this ballot access case (that the State's combination of ballot access restrictions was unconstitutional) and where the District Court acted within its judicial authority in fashioning the equitable relief afforded by the injunction.

INTRODUCTION

Plaintiff-Appellees Christopher Graveline, Willard H. Johnson, Michael Leibson and Kellie K. Deming (together, "Plaintiff Graveline") hereby submit this Response in Opposition to the Emergency Motion for Stay on Behalf of Defendants-Appellants ("Mot.") filed by Defendant-Appellants Ruth Johnson and Sally Williams (together, "the Secretary"). As set forth below, the Secretary's motion has no merit and should be denied on several grounds.

ARGUMENT

I. The Secretary's Motion Should Be Denied Because She Fails to Address, Much Less Attempt to Meet, the Legal Standard That Applies to This Court's Review of the District Court's Entry of a Preliminary Injunction.

Eight days after the District Court entered its order granting Plaintiff Graveline's motion for a preliminary injunction, and six days after filing her notice of appeal, the Secretary has filed an "emergency" motion for a stay, which avers that action by this Court is "required" by 3:00 P.M. on September 6, 2018 – less than 48 hours after the Secretary filed the motion. But, despite the relatively long time the Secretary took to prepare her motion, it contains a fundamental – and fatal – defect. Not once in her 21-page filing does the Secretary identify the legal standard that this Court must apply in reviewing the District Court's issuance of a preliminary injunction, much less does the Secretary make any attempt to meet that standard. As a consequence, her motion fails as a matter of law.

Notwithstanding the Secretary's disregard for it, the legal standard that applies on this appeal is well-settled. This Court reviews the District Court's entry of a preliminary injunction for an abuse of discretion. *See Certified Restoration Dry Cleaning v. Tenke*, 511 F. 3d 535, 540-41 (6th Cir. 2007). "Under this standard," the Court has explained:

> [W]e review the district court's legal conclusions *de novo* and its factual findings for clear error. The district court's determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed *de novo.* However, the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief is reviewed for abuse of discretion. This standard of review is highly deferential to the district court's decision. The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake as been committed.

Id. at 541 (citations and quotation marks omitted).

Accordingly, to prevail under this "highly deferential" standard, the Secretary was obliged to show that the District Court made a "clearly erroneous" finding of fact or committed a legal error. *See id.* This the Secretary plainly failed to do. In the absence of such an error, this Court will overrule the District Court's entry of a preliminary injunction "only in the rarest of cases." *Leary v. Daeschner*, 228 F. 3d

729, 736 (6th Cir. 2000) (citing *Sandison v. Michigan High School Athletic Ass'n*, 64 F. 3d 1026, 1030 (6th Cir. 1995)). This is not such a case.

As set forth below, the District Court's order granting Plaintiff Graveline a preliminary injunction is based on the faithful application of precedent to the uncontested facts and undisputed evidence in the record. Its reasoning is sound and its legal conclusions are supported by careful findings of fact. And while the Secretary may disagree with the District Court's findings and conclusions, the Secretary makes no attempt to show that they are clearly erroneous or otherwise an abuse of discretion. The Secretary's motion is therefore legally deficient and should be denied on that basis alone.

II. The Secretary's Motion Should Be Denied Because the Secretary Does Not and Cannot Show That the District Court Abused Its Discretion in Issuing the Preliminary Injunction.

Even if the Secretary had attempted to carry her burden in this appeal, by showing that the District Court had abused its discretion, she would be unable to do so. There are no errors of law in the District Court's order, nor did the District Court make any findings that were erroneous – much less findings that were clearly erroneous, as they must be to constitute an abuse of discretion. *See Certified Restoration Dry Cleaning*, 511 F.3d at 540-41. Significantly, despite attacking the District Court's order on a number of grounds, the Secretary herself does not appear to dispute this fundamental point. In particular, the Secretary fails to identify any legal error that could serve as grounds for disturbing the District Court's injunction, and the

Secretary fails to identify any finding of fact that she believes to be clearly erroneous. Instead, the Secretary essentially objects to the fact that the District Court ruled in Plaintiff Graveline's favor. But that is not a valid basis for this Court to stay the issuance of the District Court's properly entered preliminary injunction.

As a threshold matter, it is undisputed that the District Court properly analyzed the challenged statutory provisions under the analytic framework established by the Supreme Court for constitutional review of ballot access laws. *See* Slip Op. at 8-9 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)). The District Court correctly characterized that framework and methodically applied it in the carefully reasoned discussion that followed. *See* Slip Op. at 9-22, RE 12, Page ID ## 153-166. This explains the Secretary's failure to identify any errors of law or fact in the District Court's order: there are none.

As a result, the Secretary's motion largely rests on unsupported assertions that contradict the District Court's findings and conclusions. The Secretary asserts, for example, that "none of the [challenged] statutes – individually or in combination – creates more than a minimal burden" on Plaintiff Graveline. Mot. at 10, RE 6-1, Page ID # 16. With respect to the distribution requirement, the Secretary asserts that "there is nothing severely burdensome" about it, and the Secretary makes the same assertion regarding Michigan's 30,000-signature requirement, despite her admission that it is one of the most restrictive in the nation. Mot. at 10-11, 13, RE 6-1, Page ID # 16-17, Page ID # 19. The Secretary also asserts that the burden imposed by the filing

deadline "was minimal; at best, it was somewhere between the minimal and severe burdens contemplated in the *Anderson-Burdick* analysis." Mot. at 13, *Id*.

The problem with these assertions is that they fail to engage with the District Court's reasoning, and consequently they provide no basis for concluding that the District Court abused its discretion. For example, the District Court made specific factual findings regarding "the substantial financial and human resources needed to satisfy the distribution requirement". Slip Op. at 10, RE 12, Page ID # 154. By contrast, the Secretary simply disregards those findings, and insists, falsely, that the District Court "believed" that Plaintiff Graveline was "not at all burdened by application of this statute." Mot. at 11, RE 6-1, Page ID # 17.

Likewise, in an attempt to defend Michigan's 30,000-signature requirement and its filing deadline, the Secretary asserts that Plaintiff Graveline could have complied with these requirements, and faults the District Court for "summarily" concluding that he was "reasonably diligent" in his efforts to do so. Mot. at 15-16 (citing Page ID # 157). Again, however, the Secretary ignores the District Court's specific findings with respect to this issue, as well as the uncontested facts and expert testimony on which they were based. Slip Op. at 4-5, 10-11, RE12, Page ID ## 154-155 . As the District Court itself observed, it is the Secretary – and not the District Court – that failed to address the evidence in the record. Slip Op. at 10 (relying on the expert testimony of Richard Winger, and noting that the Secretary failed to dispute his opinion or challenge his conclusions).

One of the most important pieces of evidence in this case is that no independent candidate for statewide office has complied with Michigan's ballot access requirements in the 30 years since they were enacted in 1988. Slip Op. at 13, RE 12, Page ID # 157. The District Court properly relied on this evidence as tending to support a finding that Michigan's requirements "operate to freeze the political status quo" and effectively bar independent candidates from accessing the ballot. Slip Op. at 13-14, RE 12, Page ID ## 156-157 (citing *Jenness v. Fortson*, 403 U.S. 431 (1971), *Storer v. Brown*, 415 U.S. 724 (1974)). According to the Secretary, however, this evidence "means nothing" without additional evidence that candidates have tried to comply but failed. Mot. at 16, RE 6-1, Page ID # 22. The Secretary is incorrect. As the Supreme Court made clear in *Storer*, the absence of successful candidates is itself evidence that a ballot access statute is unconstitutionally burdensome. *Storer*, 415 U.S. at 742.[1] That is so if only because there is no official record – and thus no evidence – when candidates try but fail to comply with a ballot access law. In this case, for instance, the Secretary refused to accept Plaintiff Graveline's petitions on the ground that they were incomplete. Slip Op. at 5, RE 12, Page ID # 149. Therefore, despite the

[1] In this appeal, as in the proceedings below, the Secretary incorrectly states that the Court in *Storer* upheld California's signature requirement for independent candidates. It did not. The majority remanded the case for further findings regarding the constitutionality of the requirement, over the objection of the dissent, which concluded that the evidence in the record was already sufficient to hold the statute unconstitutional. *See Storer*, 415 U.S. at 746, 762-764.

District Court's finding that he was "reasonably diligent", there would be no evidence of his efforts to support a future challenge to Michigan's requirements.

In sum, as the District Court correctly observed, the Secretary largely failed to address the basis for Plaintiff Graveline's claims in this case, or the evidence on which they rely. Similarly, for purposes of the instant motion, the Secretary continues to rely on unsupported assertions, rather than attempting to demonstrate that the District Court committed an abuse of discretion. The Secretary's motion therefore should be denied.

III. The Secretary's Motion Should Be Denied Because the District Court Properly Exercised Its Discretion in Fashioning a Remedy to Protect the First Amendment Rights Implicated By Michigan's Total Exclusion of Statewide Independent Candidates From the Ballot.

The Secretary's contention that the District Court "supplanted the role of the Legislature" by fashioning a remedy that Plaintiff Graveline himself did not request (Mot. at 2, 5, RE 6-1, Page ID # 8, Page ID # 11) is wrong as a matter of law and as a matter of fact.

To the extent that the Secretary contends that the District Court lacked legal authority to grant Plaintiff Graveline a preliminary injunction, her position is contradicted by decades of precedent demonstrating that federal courts have broad discretion to fashion an appropriate remedy where they conclude that ballot access statutes impose unconstitutional burdens. Typically, that remedy is to place the candidate challenging the statute on the ballot, provided that the Court has some basis

for finding that the candidate has a modicum of community support. That is precisely what the District Court did here, and it was well within its discretion to do so.

Federal courts have routinely granted such relief at least since 1976, when the United States Supreme Court and several lower federal courts ordered officials in multiple states to place independent presidential candidate Eugene McCarthy on their general election ballots. These states had failed to provide any means for independent candidates to appear on the ballot. As the Fifth Circuit concluded, the proper remedy for this constitutional defect was to order McCarthy's inclusion on the ballot. *See McCarthy v. Askew*, 540 F.2d 1254, 1255 (5th Cir. 1976) (*per curiam*) (affirming order placing McCarthy on Florida's ballot). To explain its rationale, the Fifth Circuit relied on the fact that Justice Powell, sitting in chambers, had recently granted McCarthy the same relief in Texas. *See id.* (quoting *McCarthy v. Briscoe*, 429 U.S. 1317, 97 S. Ct. 10 (1976)). Finding "no material difference" between the two cases, the Fifth Circuit quoted at length from Justice Powell's order in *Briscoe*:

> The Texas Legislature provided no means by which an independent presidential candidate might demonstrate substantial voter support. Given this legislative default, the courts were free to determine on the existing record whether it would be appropriate to order Senator McCarthy's name added to the general election ballot as a remedy for what the District Court properly characterized as an "incomprehensible policy" violative of constitutional rights. This is a course that has been followed before both in this Court, see *Williams v. Rhodes,* 89 S.Ct. 1, 21 L.Ed.2d 69. (Opinion of Stewart, J., in-Chambers, 1968), and, more recently, in three District Court decisions involving Senator McCarthy, *McCarthy v. Noel*, 420

> F.Supp. 799 (D.C. R.I. 1976); *McCarthy v. Tribbitt*, 421 F.Supp. 1193 (D.C. Del. 1976); *McCarthy v. Askew*, 420 F.Supp. 775 (D.C. Fla. 1976).
>
> In determining whether to order a candidate's name added to the ballot as a remedy for a State's denial of access, a court should be sensitive to the State's legitimate interest in preventing "laundry list" ballots that "discourage voter participation and confuse and frustrate those who do participate." *Lubin v. Panish*, 415 U.S. 709, 715 (1974). But where a state forecloses independent candidacy in presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support. See *McCarthy v. Askew*, *supra,* Memorandum Opinion, at 779. It is not seriously contested that Senator McCarthy is a nationally known figure; that he served two terms in the United States Senate and five in the United States House of Representatives; that he was an active candidate for the Democratic nomination for President in 1968, winning a substantial percentage of the votes cast in the primary elections; and that he has succeeded this year in qualifying for position on the general election ballot in many States. The defendants have made no showing that support for Senator McCarthy is less substantial in Texas than elsewhere. For the reasons stated, I have ordered that the application be granted and that the Secretary of State place the name of Eugene J. McCarthy on the November 1976 general election ballot in Texas as an independent candidate for the office of President of the United States.

Id. Citing *Briscoe*, other courts – including the federal district court in Michigan – soon ordered McCarthy's inclusion on additional state ballots, in time for the 1976 general election. *See*, *e.g.*, *McCarthy v. Exon*, 424 F.Supp. 1143 (D. Neb.) *summ. aff'd.*, 429 U.S. 972 (1976); *McCarthy v. Austin*, 423 F.Supp. 990 (W.D. Mich. 1976);

see also MacBride v. Exon, 558 F.2d 443 (8th Cir. 1977); *MacBride v. Askew*, 541 F.2d 465 (5th Cir. 1976).

The issue arose again in 1980. Even though Michigan's statutory scheme had been declared unconstitutional in *McCarthy v. Austin*, *supra*, the Legislature failed to enact remedial legislation. As a result, Gus Hall and Angela Davis, running as independent candidates in Michigan for president and vice-president, respectively, were forced to resort to the federal court to obtain ballot access – relief which the district court granted them. *See Hall v. Austin*, 495 F. Supp. 782 (E.D. Mich. 1980).

In 1984, the Michigan Legislature had still failed to remedy its constitutionally defective statutory scheme. A candidate for the State Board of Education thus challenged the lack of provision for an independent to gain ballot access. Once again, the district court declared Michigan's ballot access scheme unconstitutional and ordered the Secretary of State to place the candidate on the ballot, and the Sixth Circuit affirmed. *See Goldman-Frankie v. Austin*, 727 F.2d 603, 607-08 (6th Cir. 1984). "Although Goldman-Frankie's demonstration of the requisite community support is not compelling," the Sixth Circuit concluded, "the Court finds it sufficient to warrant the relief granted by the district court." *Id.* The only evidence the Sixth Circuit cited in support of this finding is that the candidate had run for the same statewide office ten years before on the Communist Party ticket, receiving 5,936 votes, and two years prior to that, she ran for the Wayne State University Board of Governors, again as a Communist, and received 14,903 votes. *See id*. at 607 n.4.

Acknowledging that courts should take care not to burden ballots with an excessive number of candidates, the Sixth Circuit nonetheless reasoned that "it would be understandable if the courts looked with increasing disfavor on the State's arguments regarding requisite support for a candidate when the State possesses the power to establish a uniform method of assuring such support and continuously refuses to do so." *Id.*

More recently, a federal district court relied on the *McCarthy* line of cases as authority for ordering Ohio's Secretary of State to place the candidates of both the Libertarian Party of Ohio and the Socialist Party of Ohio on the 2008 general election ballot. *See Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008). The Court relied on Justice Powell's above-quoted order in *Briscoe*, as applied by the Sixth Circuit in *Goldman-Frankie*. *See id.* at 1015. Thus, it concluded:

> The Constitution gives the Ohio legislature significant discretion to establish election procedures. After the state statute was held to fall outside "the boundaries established by the Constitution," the legislature failed to act. ... The Court will not prescribe Constitutional election procedures for the state, but in the absence of constitutional, ballot access standards, when the "available evidence" establishes that the party has "the requisite community support," this Court is required to order that the candidates be placed on the ballot. *McCarthy v. Briscoe*, 429 U.S. at 1323, 97 S.Ct. 10. As set out above, the Court finds that the Libertarian Party has the requisite community support to be placed on the ballot in the state of Ohio.

Id. (emphasis added).

Still more recently, a federal district court in Georgia struck down that state's 1 percent signature requirement for minor party or independent presidential candidates, and permanently enjoined the Secretary of State from enforcing it. *See Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340 (N.D. Ga. 2016). But the Court also found it proper to grant injunctive relief, as necessary to enable the minor party plaintiffs to place their candidates on Georgia's 2016 general election ballot:

> Because this is a presidential election year, the Court feels compelled to assure that a procedure is in place to protect the very rights that this Order seeks to secure: specifically, the rights of Georgia voters to fully participate in presidential elections by having a meaningful opportunity to vote for candidates other than those nominated by the two major political parties. The rights of the voters are significant and accordingly a remedy must be imposed immediately.

Id. (citing *Hall v. Holder*, 117 F.3d 1222, 1231 n.18 (11th Cir. 1997) ("The right to vote is … a right of paramount constitutional significance, the violation of which permits federal court intercession"). Finding it "well within this Court's equitable powers to fashion a remedy in this case," the Court concluded that the best way to do so was "by a reduction in the number of signatures required" of minor party presidential candidates to 7,500. *Id.* at 75 (citation omitted). The Court arrived at this figure based on expert evidence demonstrating that no state that has required as few as 5,000 signatures for statewide office has ever had more than eight candidates on the ballot. *See id.* at 77 (citing Affidavit of Richard Winger). The Court further ordered that its judicially-established "interim requirement will expire when the Georgia

General Assembly enacts a permanent provision." *See id.* at 75. The Eleventh Circuit affirmed the District Court's "well-reasoned opinion" and adopted it in whole. *See Green Party of Ga. v. Kemp*, No. 16-11689 (11th Cir. 2017) (unpublished).

In the most recent case to address the issue, a federal court in Pennsylvania held that state's ballot access laws unconstitutional, and concluded that the appropriate remedy was to reduce the applicable signature requirement from 2 percent of the last vote for governor to 5,000. *See Constitution Party of Pennsylvania et al. v. Cortes,* 116 F.Supp.3d 486 (E.D. Pa. 2015); *affirmed by* No. 15-3046 (3d Cir. June 2, 2016). Notably, it did so based on undisputed evidence in the record demonstrating that a 5,000 signature requirement was sufficient to protect the state's legitimate regulatory interests, just as the District Court did in *Green Party of Ga. v. Kemp*, *supra*. The District Court properly followed the same procedure here.

This long line of precedent amply demonstrates that the District Court was well within its discretion to place Plaintiff Graveline on the ballot provided that he presented evidence demonstrating that he has a modicum of support among the Michigan electorate. *See McCarthy v. Briscoe, 429 U.S. at 1323* (directing lower courts to rely not only on "available evidence," but also on "matters subject to judicial notice to determine whether there is reason to assume the requisite community support"). As in the above-cited cases, the District Court found that Plaintiff Graveline could show the requisite modicum of support by submitting nomination petitions with 5,000 valid signatures. This finding was supported by expert testimony, which the

Secretary does not dispute. Far from "supplanting" the role of the Legislature, therefore, the District Court properly exercised its discretion to fashion a remedy for the unconstitutional burdens imposed by Michigan's ballot access requirements for statewide independent candidates.[2]

Finally, the Secretary's suggestion that the District Court granted relief that Plaintiff Graveline did not request is incorrect. As an initial matter, the Prayer for Relief in Plaintiff Graveline's Complaint requests that the District Court "award such other and further relief as the Court deems proper." Comp. at 17 (RE 1, Page ID # 117). On its face, therefore, Plaintiff Graveline's pleading refutes the Secretary's contention. In addition, the Secretary has selectively quoted only a portion of the hearing in the proceedings below, thus omitting the portion that directly contradicts the position she adopts in this appeal. Mot. at 5. Specifically, counsel for Plaintiff Graveline made clear during the hearing that the relief sought was that "Mr. Graveline himself should be placed on the ballot, and … if the Court determines that it's appropriate, the Court could also exercise its equitable power to establish a signature requirement in the absence of valid legislation from the Legislature." Preliminary Injunction Hearing Transcript 8/22/18, p. 53 (lines 7-12) (Secretary's Exhibit 1) (RE

[2] Notably, other states in the Sixth Circuit impose similar or less restrictive requirements on independent candidates for statewide office. *See* Ky. Elec. Code § 118.315(2) (Kentucky statute requiring 5,000 signatures); O.R.C. § 3513.257(A)(Ohio statute requiring 5,000 signatures); Tenn. Elec. Code § 2-5-101(b)(1) (Tennessee statute requiring 25 signatures).

6-2, PageID # 54). Therefore, the Secretary's assertion to the contrary is demonstrably false.

CONCLUSION

Defendants-Appellants' Motion for Emergency Stay should be denied.

DATED: September 5, 2018

Respectfully submitted,

/s/ William P. Tedards, Jr.

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CERTIFICATE OF COMPLIANCE

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I hereby certify that on September 5, 2018, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, thereby serving all counsel of record.

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS WITH PAGE ID # RANGE