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, SALLY WILLIAMS, Director of Michigan Bureau of Elections, in their official capacities,

Defendants-Appellants.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Victoria A. Roberts

EMERGENCY MOTION FOR STAY ON BEHALF OF DEFENDANTS-APPELLANTS

ACTION REQUIRED BY 3:00 p.m. ON SEPTEMBER 6, 2018

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Dated: September 4, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

STATEMENT OF ISSUE PRESENTED

1. Whether the State should be granted a stay pending appeal where they are likely to prevail on the merits, the public interest would be served by granting a stay, and the district court exceeded its authority by supplanting the will of the Legislature in imposing a remedy and granting a preliminary injunction.

INTRODUCTION

A Michigan election statute gave Christopher Graveline 180 days to gather petition signatures before he could appear on the November general election ballot as an independent candidate for Michigan's Attorney General. Instead of using those 180 days, he waited almost five months, collecting signatures for only 43 days. But in that 43-day period, he nevertheless collected nearly 50% of the statute's requirement, gathering almost 15,000 signatures. But it was not enough. Graveline then filed suit seeking to excuse his failure through a declaration that the statute was unconstitutional as applied to him

Notwithstanding Graveline's inexplicable delay, the district court granted his motion for a preliminary injunction on the premise that he had been "reasonably diligent." The district court concluded that Graveline demonstrated a substantial likelihood of success—despite his apparent ability to comply with the law. In granting relief, the district court supplanted the role of the Legislature and directed Defendant to use 5,000 signatures as the necessary threshold for appearing on the ballot, rather than the 30,000 set by the Legislature. This Court should stay this unwarranted intrusion into the State's sovereignty.

In denying Defendants' motion for a stay, the district court misconstrued Defendants' arguments and compounded its erroneous conclusion that Plaintiffs have a substantial likelihood of succeeding on the merits. Defendants likely will prevail on appeal and, without a stay, Defendants—not to mention the public—will be harmed. Accordingly, this Court should, on an expedited basis, stay the order granting a preliminary injunction pending Defendants' emergency appeal to the Sixth Circuit.

STATEMENT OF THE CASE

On June 4, 2018, Plaintiff Graveline filed to become a candidate for the office of Attorney General with no political party affiliation. (Complaint ¶1, R. 1, Page ID # 3.) As a candidate for statewide office, Graveline is required to comply with Michigan's Election Law, which includes statutory deadlines.

The next day, Graveline began attempting to collect the 30,000 signatures required under Mich. Comp. Laws §§ 168.544f and 168.590b(4). At that point, he had been eligible to begin collecting petitions for 137 days. Despite the efforts of hundreds of volunteers and

a paid petitioning service, he came up short, submitting 14,157 signatures on July 19, 2018. (Page ID # 33, 35.)

In this lawsuit, Graveline and three of his supporters mount an as-applied constitutional challenge to a combination of election requirements, including (1) the 30,000 minimum signature requirement applicable to independent candidates for Attorney General, with at least 100 registered voters in each of at least 1/2 of the congressional districts in the state, *see* Mich. Comp. Laws §§ 168.544f, 168.590b(4); (2) the filing deadline for filing the qualifying petition, which was July 19, 2018, *see* Mich. Comp. Laws § 168.590c(2) (the 110th day before the general election); and (3) the 180-day window, ending at the date of filing, during which a candidate may collect signatures, *see* Mich. Comp. Laws § 168.590b(3).

Plaintiffs filed their lawsuit on July 27, 2018, and they did not file a motion for preliminary injunction until August 3, 2018—over two weeks after Defendant Secretary of State rejected their petition. After a hearing, the district court granted Plaintiffs' motion for a preliminary injunction and ordered Defendants to place him on the November 6, 2018 general election ballot. The court invoked its equitable powers in

fashioning a remedy and deciding that Graveline should only have to submit 5,000 valid signatures, instead of the 30,000 required by Michigan law. (*Id*., pp 23-24, Pg ID 167-168.) Notably, this is not the relief that Plaintiffs requested in their motion for preliminary injunctive relief. In fact, Plaintiffs requested an injunction "directing the Defendants to place Plaintiff Christopher Graveline on the November 6, 2018 General Election ballot." (Doc. 4, Plaintiffs' Brief in Support of Motion for Preliminary Injunction, p. 18, Page ID # 91). This was confirmed by Plaintiffs at the preliminary injunction hearing when the question of lowering the signature number (as suggested by the Plaintiffs' expert to 5,000) was mentioned by defense counsel: "We [Plaintiffs] have never asked for the signature level to be altered in the absence of a complete litigation of all those precise interests and everything. We just wouldn't ask for that." Preliminary Injunction Hearing Transcript 8/22/18, p. 48 (lines 24-25); p. 49 (lines 1-2) (Exhibit 1).

Defendants sought a stay of the preliminary injunction pending appeal, but on August 30, 2018, the district court denied that motion based on its understanding that its jurisdiction was limited due to the

pending appeal. It also held, in the alternative, that Defendants failed to demonstrate irreparable harm, utilized new arguments in support of their motion, and failed to show a likelihood of success on the merits.

ARGUMENT

I. Pending appeal, this Court should stay the district court's preliminary injunction that was entered August 30, 2018.

The standard for a stay pending appeal of the grant of a preliminary injunction is as follows:

> [W]e consider "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." All four factors are not prerequisites but are interconnected considerations that must be balanced together.

Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 244 (6th Cir. 2006) (citations omitted). It bears repeating that a preliminary injunction is an extraordinary remedy, *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009), which is to be granted only if the movant carries its burden of proving that the circumstances clearly demand it. *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002).

A. Defendants are likely to succeed on the merits of their appeal.

In granting Plaintiffs' motion for a preliminary injunction, the district court rejected Defendants' arguments that any burden caused by these statutes (1) was not severe and (2) was supported by the State's interests in having independent candidates demonstrate a modicum of support to appear on a statewide ballot, and to mitigate voter confusion by tempering the number of candidates that could appear on the ballot for a statewide office. (*Id.*) In fact, Plaintiffs did not make a "substantial" showing that the statutes, in combination, were unconstitutionally applied to Plaintiffs under the circumstances of this case.

1. Legal background

The "right to vote in any manner ... [is not] absolute," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted); the Constitution recognizes the states' clear prerogative to prescribe time, place, and manner restrictions for holding elections. U.S. Const. art. I, § 4, cl. 1. Indeed, there "must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433

(quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Federal law thus generally defers to the states' authority to regulate the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (Stevens, J., op.) (recognizing that neutral, nondiscriminatory regulation will not be lightly struck down, despite partisan motivations in some lawmakers, so as to avoid frustrating the intent of the people's elected representatives).

When a constitutional challenge to an election regulation requires courts to resolve a dispute concerning these competing interests, courts apply the *Anderson-Burdick* analysis from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, *supra*, which requires the following considerations:

> [T]he court must first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate. Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. Finally, it must determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Green Party of Tenn. v. Hargett (Hargett II), 791 F.3d 684, 693 (6th Cir. 2015)(internal quotation marks and citations omitted). "Though the

touchstone of *Anderson-Burdick* is its flexibility in weighing competing interests, the 'rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.' " *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (quoting *Burdick*, 504 U.S. at 434).

If a state imposes "severe restrictions" on a plaintiff's constitutional right to vote, its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and "'the State's important regulatory interests are generally sufficient to justify the restrictions.'" *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (citing *Green Party of Tenn. v. Hargett (Hargett I)*, 767 F.3d 533, 546 (6th Cir. 2014), and quoting *Burdick*, 504 U.S. at 434). Regulations falling somewhere in between—"i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the state's asserted interest and chosen

means of pursuing it.' " *Ohio Democratic Party*, 834 F.3d at 627 (quoting *Hargett I*, 767 F.3d at 546).

2. The statutory scheme imposed a minimal burden on Graveline.

The combined effect of Michigan's statutory scheme does not impose more than a minimal burden on independent candidates. The district court held that Defendants failed to address the combined effect of the statutes, but Plaintiffs did not carry their burden to explain how the statutes' alleged burdens amplified one another. In reality, none of the statutes—individually or in combination—creates more than a minimal burden when considering Graveline's motivations for entering the race and his demonstrated ability to follow the law. For clarity, the statutes will be discussed individually before their combined effects are analyzed.

a. Mich. Comp. Laws § 168.590b(4).

There is nothing severely burdensome in requiring a statewide independent candidate like Graveline to obtain at least 100 signatures from registered electors in at least half (7 of the 14) congressional districts in Michigan. *See* Mich. Comp. Laws § 168.590b(4). Graveline concedes that he met the requirement by obtaining at least 100

signatures from 12 of the 14 districts. (Compl., ¶ 25, Pg ID 12). Moreover, *the district court ordered that Graveline comply with this requirement in order to be placed on the ballot*. (Doc. 12, Opinion & Order, p 25, Pg ID 169). The district court therefore believed, and Defendants agree, that Graveline and the other Plaintiffs were not at all burdened by the application of this statute. It's a classic case of "no harm, no foul."

b. Mich. Comp. Laws §§ 168.590c(2), 168.544f.

Similarly, there is nothing severely burdensome in requiring an independent candidate like Graveline to file 30,000 petitions by July 19, 2018, the 110th day before the November general election, as required by § 590c(2). By law, Plaintiffs had 180 days (six months) in which to circulate Graveline's qualifying petition before the 110th day filing deadline elapsed on July 19, 2018. Mich. Comp. Laws § 168.590b(3). For his own personal reasons, Graveline let almost five months of this six-month window elapse, and he only started circulating petitions on or about June 5, 2018. (Graveline Dec., Doc. 1-3, PageID # 33, ¶ 9). Even so, in 43 days Graveline collected 14,157 signatures, 7,899 of which were collected by his unpaid volunteers. *Id.*, Page ID # 35, ¶¶ 11, 13,

15. If Plaintiffs' volunteers had circulated for 180 days at that rate, they would have collected just over 33,000 signatures, satisfying the 30,000 signature requirement. Adding in the approximately 6,200 signatures collected by the paid circulators, the cost of which was primarily covered by contributions, *id*., Page ID # 35, ¶¶ 11, 13-15, Graveline would have collected close to 40,000 signatures, comfortably over the 30,000-signature requirement.

Considering the 6-month circulation period permitted by § 590b(3) in combination with the 110th day filing deadline imposed by § 590c(2), and Plaintiffs' relative success in collecting signatures, the filing deadline did not impose a severe burden as applied to Plaintiffs. Graveline's "burden" was self-imposed due to his own delay in circulating petitions. By his own admission, Graveline's employment as a federal employee is what delayed his ability to gather signatures when he "began to seriously consider" running for Attorney General in early May, as "the Hatch Act precluded [him] from becoming a candidate for what is considered a partisan office including raising or spending any money to advance the campaign." (Graveline Dec., Doc. 1-

3, Page ID ## 31-33, ¶¶ 6, 8-9). [1] Any burden created by the filing deadline was minimal; at best, it was somewhere between the minimal and severe burdens contemplated in the *Anderson-Burdick* analysis.

Defendants do not dispute that many other states apparently have lesser signature requirements for independent candidates seeking to run for a statewide office. But it is also true, as noted by Plaintiffs' expert, that there are at least five states with higher signature requirements than Michigan: Alabama, Arizona, Georgia, North Carolina, and Texas. (Winger Dec., Doc. 1-2, Page ID # 22, ¶ 8).[2] And as fully set forth in Defendants' response to the motion for preliminary injunction, numerous federal courts have upheld similar signature requirements for minor party candidates, which candidates are similarly situated in many respects to independent or NPA candidates. (Doc. 8, Defs' Resp. to PI, Page ID ## 111-117). *See also Storer v.*

[1] See *McEntee v. Merit Systems Protection Bd.*, 404 F.3d 1320, 1327 (Fed. Cir. 2005)("the interplay of the [Hatch Act] statute, regulations, and case law established a broad prohibition against covered employees playing an active role in political campaigns, which included a ban on becoming a partisan candidate for public office.").

[2] Defendants simply did not have time to obtain an expert in the ten days they had to respond to Plaintiffs' motion for preliminary injunction to rebut statements contained in Mr. Winger's declaration.

Brown, 415 U.S. 724, 740 (1974) (upholding California's petition requirements for independent candidates); *De La Fuente v. State*, 278 F. Supp. 3d 1145 (C.D. Ca. 2017) (upholding California's petition requirements for independent presidential candidates). And the Sixth Circuit has recognized that states have "an important interest in ensuring that candidates demonstrate a 'significant modicum of support,' before gaining access to the ballot, primarily in order to avoid voter confusion, ballot overcrowding, and frivolous candidacies." *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 577 (6th Cir. 2016) (citation omitted).

c. The statutes had no "combined effect" resulting in unconstitutional treatment of independent candidates.

Setting aside the geographical-distribution requirement, which Graveline easily satisfied, the two statutes at issue describe (1) the 30,000-signature requirement and (2) the July 19, 2018 deadline. The allegedly unconstitutional "combined effect" of these statutes arises when a candidate makes the decision to enter the race, only to find that the signature deadline is just around the corner.

In Graveline's own words, that sort of unconstitutionally rude awakening did not befall him. Graveline explained that his motivation for entering the race had nothing to do with the major-party candidates. In their motion for the preliminary injunction, Plaintiffs explain that Graveline's "conviction" that "Michigan's chief law enforcement officer should be a non-partisan actor" is "what motivated Plaintiff Graveline to resign his position as a federal prosecutor in order to run for Attorney General." (Pls. Mot. for PI at 9, Page ID # 82.) Unless one assumes that the two major parties might have nominated a "non-partisan actor" for Attorney General, Graveline's admission precludes any argument that he waited to circulate his petitions because he wanted to know whether he was dissatisfied with the other candidates.

Accordingly, the fatal defect in Plaintiffs' as-applied challenges is that, as discussed above, Plaintiffs likely would have met the threshold 30,000 signature requirement permitting them to file Graveline's qualifying petition if they had circulated petitions for the full 180 days permitted by law. Rather than meaningfully address the issue and acknowledge Graveline's admission that his reasoning for entering the race was not affected by the identity of the major-party candidates, the

court summarily concluded Graveline was "reasonably diligent." (Page ID # 157.)

Even if Graveline was waiting to see who was nominated, the five major party candidates for Attorney General–Nessel, Miles, and Noakes as Democrats, and Leonard and Schuitmaker as Republicans – had declared their candidacies in the Fall of 2017 by publicly forming candidate committees. (Doc. 8, Defs' Resp. to PI, Page ID # 107 & n.1.) A "reasonably diligent" potential candidate would have been aware of this.

All of these facts tend to show that Graveline could have met the signature requirement had he not unduly delayed becoming a candidate. As a result, Plaintiffs never demonstrated a "substantial"' likelihood of success on the merits of their as applied challenge to Michigan's election statutes.

3. Other problems with the district court's reasoning illuminate why Defendants will likely succeed on appeal.

To determine the magnitude of the burden imposed by a state's election laws, courts consider the associational rights at issue, including: (1) "evidence of the real impact the restriction has on the

process"; (2) "whether alternative means are available to exercise those rights"; and (3) "the effect of the regulations on the voters, the parties and the candidates." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006).

The district court purported to apply this test to determine the magnitude of Plaintiffs' alleged burden, and it concluded that the combined effect of Michigan's statutory scheme "severely burdens Plaintiffs' fundamental rights." (Page ID # 156.) Throughout the district court's analysis, however, it utilized a single piece of evidence—Michigan's 30-year drought of independent candidacies appearing on a ballot—to conclude Plaintiffs carried their burden. (Page ID ## 157-161.)

Plaintiffs' use of half of a statistic, without more, does not satisfy their burden. The historical fact is a numerator in need of a denominator; it means nothing without some accompanying evidence creating an inference that people were *trying* to launch independent candidacies, yet failed. Individuals may be deterred from seeking statewide office for myriad reasons, but the district court held that "the Michigan statutory scheme has *prevented* independent candidates …

from accessing the ballot." (Page ID # 159 (emphasis added)). The data does not say this. The case law relied upon by the district court was inapposite, as it involved "a historical record of parties … being *unable* to meet the state's ballot-access requirements." (Page ID # 157, quoting *Libertarian Party of Ohio*, 462 F.3d at 589-90 (emphasis added)). This type of incomplete statistical evidence should not have been considered—and it certainly should not have been used as the keystone of the district court's analysis, *see Libertarian Party of Ohio*, 462 F.3d at 589 (stating that historical evidence is "not conclusive in and of itself"). To the extent complete information is unavailable, that goes to Plaintiffs' burden, not Defendants' wrongdoing.

Relatedly, the district court's decision to require a 5,000 minimum signature requirement—particularly when this relief was not requested by Plaintiffs—when the statute at issue has not been declared unconstitutional was error. This Court has commented on the role of the courts in fashioning relief in election cases:

> [O]ur task (especially with respect to minimally burdensome laws) is neither to craft the "best" approach, nor "to impose our own idea of democracy upon the [Michigan] state legislature." *Libertarian Party [of Ohio]*, 462 F.3d at 587; *see also Crawford*, 553 U.S. at 196, 128 S. Ct. 1610 … Rather, we simply call balls and strikes and apply a generous strike

> zone when the state articulates legitimate and reasonable justifications for minimally burdensome, non-discriminatory election regulations.

Ohio Democratic Party v. Husted, 834 F.3d at 633-34.

Here, the district court departed from these principles. Michigan's election process shall be allowed to proceed unhindered by the federal courts. *Id*. at 622. ("Proper deference to state legislative authority requires that Ohio's election process be allowed to proceed unhindered by the federal courts.").

B. Defendants will be irreparably harmed absent a stay.

The Supreme Court has recognized that "anytime a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, *3 (2012) (C.J. Roberts in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977). The election laws challenged here were duly enacted by the Michigan Legislature. Moreover, the people have an interest in the fair and orderly holding of elections. These factors thus weigh in favor of staying the injunction. *See Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000) (noting that "[a] state's interest in proceeding with

an election increases as time passes, decisions are made, and money is spent.").

Finally, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other." *Michigan Coal of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Given that Plaintiffs are unlikely to succeed on the merits on appeal, *see supra*, Defendants have a lower burden concerning their irreparable harm.

CONCLUSION AND RELIEF REQUESTED

Defendants request the Court stay or dissolve the district court's August 30, 2018 preliminary injunction for the reasons set forth above. The State asks that this Court provide a response by 3:00 p.m. on September 6, 2018 so that the general election ballot for the November 6, 2018 election can be certified before the statutory deadline. (Aff. of Sally Williams, R. 14-2, ¶ 4, Page ID # 208.)

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 5,200 words. This document contains 3,696 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on September 4, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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