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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD

DAVID M. GILL, et al. ,	)	
	)	
Plaintiffs,	)	
v.	)	No. 16 – cv – 3221
	)	
CHARLES W. SCHOLZ, et al.,	)	Hon. Sue E. Myerscough
	)	
Defendants.	)	

Plaintiffs' Combined Response and Reply Brief to Cross Motions for Summary Judgment

Plaintiffs, through counsel, Samuel J. Cahnman and Andrew Finko, file their Combined Response and Reply Brief[1], and further state as follows:

Response to Defendants' Additional Material Facts

Response ¶1. Although other state laws may be material, DAF 1 is disputed because it is incomplete. While South Carolina's requirement is 5% of the total electorate, not to exceed 10,000 signatures, Defendants failed to include that South Carolina, unlike Illinois, imposed no restriction on the duration of time a candidate could collect said signatures. Winger Dep. (Dkt. 38-6) at 36:7-9.

Response ¶2. Although other state laws may be material, DAF 2 is disputed because it is incomplete. While Georgia requires 5% of the number of registered voters as of the proceeding election year, Defendants failed to include that Georgia allowed double the amount of time as Illinois to collect said signatures by allowing six months to gather petition signatures. *Id.* at 27:17-19.

Response ¶3. Although other state laws may be material, DAF 3 is disputed

1 Although Plaintiffs acknowledge that Local Rule 7.1 restricts a reply brief to five pages, as this is a combined response and reply, Plaintiffs respectfully request that this honorable court allow 15 pages for their combined brief.

because it is incomplete. While North Carolina had a requirement of 4% of registered voters, lowered last year to 1.5%, Defendants failed to include that North Carolina, unlike Illinois, imposed no restriction on the duration of time a candidate could collect said signatures. *Id.* at 27:14-16.

Response ¶4. Although the number of signatures collected by U.S. House candidates in other states may be material, DAF 4 is disputed because the Defendants failed to state the time limit imposed for collecting said signatures, and California code has been amended. Under current California law U.S. House candidates only need a minimum of 40 signatures. Cal.Elec.Code Sec. 8062. California now employs the top two election system as opposed to separate partisan primaries. Cal.Const. Art. 2, Sec. 5.

Response ¶5. Although the number of signatures collected by U.S. House candidates in other states may be material, DAF 5 is disputed because it is incomplete. Defendants failed to state the duration of time within which signatures could be gathered; at present, Montana, unlike Illinois, imposes no restriction on the duration of time a candidate could collect said signatures. (A search of Montana's election laws revealed no limit.)

Response ¶6. Although the number of signatures collected by U.S. House candidates in other state laws may be material, DAF 6 is disputed because it is incomplete. Defendants failed to include whether there was a time limit imposed for collecting said signatures. See Response ¶4, above.

Response ¶7. Although the number of signatures collected by U.S. House candidates in other state laws may be material, DAF 7 is disputed because it is incomplete. Defendants failed to disclose that Florida had a signature collection

period of 189 days. Winger Dep. (Dkt. 38-6) at 27:6-9.

Response ¶8. Although the number of signatures collected by U.S. House candidates in other state laws may be material, DAF 8 is disputed because it is incomplete due to the failure to address time limit imposed for collecting said signatures. See Response ¶4, above.

Response ¶9. Although the number of signatures collected by U.S. House candidates in other state may be material, DAF 9 is disputed because it is incomplete for lack of signature gathering time restrictions. Defendants failed to disclose that Maryland imposes no restriction on the duration of time that a candidate may collect said signatures. (A search of Maryland's statutes revealed no limit).

Response ¶10. Although the number of signatures collected by U.S. House candidates in Illinois may be material, DAF 10 is disputed because it is incomplete. Defendants failed to disclose that in 1974, Illinois imposed no restriction on the duration of time a candidate could collect said signatures. Winger Dep. (Dkt. 38-6) at 47:5-9. No facts are alleged regarding the duration of time that Mr. Lassiter was actually circulating petition sheets.

Response ¶11. Although the number of signatures collected by U.S. House candidates in other states may be material, DAF 9 is disputed because it is incomplete. Defendants failed to disclose that in 1954, Ohio imposed no restriction on the duration of time a candidate could collect said signatures. *Id.* at 27:10-13.

Response ¶12. Although the number of signatures collected by U.S. House candidates in other states may be material, DAF 12 is disputed because it is incomplete. Defendants failed to disclose that in 1998, Florida, unlike Illinois,

allowed 189 days for a candidate to gather said signatures. *Id.* at 27:6-9.

Response ¶13. Although the number of signatures collected by U.S. House candidates in other state laws may be material, DAF 13 is disputed because it is incomplete. Defendants failed to disclose that in a 2010 North Carolina, unlike Illinois, imposed no restriction on the duration of time a candidate could collect said signatures. *Id*. at 27:10-13.

Response ¶14. It is conceded to be material and undisputed.

Response ¶15. It is conceded, but immaterial. Further, it erroneously references a map for the 13th Congressional District.

Response ¶16. It is conceded, but immaterial. Further, it erroneously references a map for the 13th Congressional District.

Response ¶17. It is conceded, but immaterial. Further, it erroneously references a map for the 18th Congressional District.

Response ¶18. It is conceded, but immaterial.

Argument

A. There is no litmus-test for constitutional restrictions on ballot access.

Defendants argue that all issues have been resolved through the Seventh Circuit's decision in *Tripp v. Scholz,* 872 F.3d 857 (7th Cir. 2017). Defendants' reliance upon *Tripp* as being dispositive of any or all challenges to Article 10's signature requirement of at least 5% but not more than 8% of votes cast at last election, gathered within 90 days, is erroneous and misplaced.

The appropriate standard of review undertaken by a district court is a fact-based inquiry to determine if a reasonably diligent candidate could be expected to meet the requirements and gain a place on the ballot. The Seventh Circuit in *Tripp*

recognized the requisite factual analysis under the standard explained in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). See also, Plaintiffs' motion for summary judgment (Dkt. 39) at pages 6-8.

This court was aware of the *Tripp* decision when it entered its preliminary injunction order, and addressed that decision as follows (Dkt. 15 at pgs. 17-18):

> The Court recognizes that United States District Judge Michael J. Reagan in the Southern District of Illinois granted summary judgment in favor of the defendants on a similar challenge to the 5% signature requirement, notarization requirement, and 90-day signature collection period. See *Tripp v. Smart*, No. 14-cv-0890, 2016 WL 4379876 (S.D. Ill. Aug. 17, 2016) (Tripp II). In that case, however, the plaintiff Illinois state representative candidates only had to obtain approximately 2,400 signatures under the 5% requirement, and the defendants presented evidence that other independent and minor party candidates faced with the same restrictions were able to secure a place on the ballot. *Id*. at *6. In contrast here, the evidence is that independent and minor party candidates have not been able to meet the requirements and such candidates get on the ballot only if no objections to the nominating petitions are made or if it is a redistricting year when only 5,000 signature are required.

The material facts have not changed since this court considered Plaintiffs' motion for preliminary injunction, and no contrary facts have been offered by Defendants either through factual affidavits or expert testimony. The Seventh Circuit's decision in *Tripp* did not change the facts that were considered by Hon. Michael J. Reagan, as affirmed by the Seventh Circuit.

The Seventh Circuit's decision in *Tripp* is further distinguishable on the facts, notably that in that case those plaintiffs were seeking election to state representative as new political party candidates, and were expected to submit approximately 2,400 signatures under the 5% requirements. Unlike the arguments before this court, the defendants in *Tripp* were able to present evidence that other independent and minor party candidates facing the same restrictions were able to

obtain a place upon the ballot. However, it is not clear from *Tripp* whether such candidates actually submitted the requisite signatures, or were placed upon the ballot with insufficient signatures simply because no challenge was filed.

It is significant to note that until the March 2018 primary, the Defendants would place any candidate's name upon the ballot if there was no challenge, regardless of the number of signatures submitted. See PSF par. 9, and Dkt. #5-1 (Larry Lawrence "Joe" Cohen certified to the ballot with zero voter signatures submitted.) Starting with the March 2018 primary, the Defendants feel confident that a showing of 10% of the required signatures is sufficient to deter frivolous candidates, and confirm that the nomination papers are in substantial conformity with the Election Code. See PSF par. 39. This new process does not involve a validation of signatures, merely a count of submitted signatures.

Unlike *Tripp*, the evidence presented before this court is unequivocal. Other than H. Douglas Lassiter, no independent (or minor party) U.S. House candidate has been able to meet the Illinois signature requirement, and such candidates were placed on the ballot only if no objection was filed to the nomination papers, or in redistricting years, when "only" 5,000 valid signatures are required. Lassiter collected only 9,698 signatures, which is less than the 10,754 Gill needed, and the 90-day window to collect signatures had not yet been enacted. Therefore, no independent (or minor party) U.S. House candidates who needed 10,754 or more signatures has ever been able to get on the ballot when challenged in Illinois.

An additional fact that is different in the *Tripp* decision is the minimum number of valid signatures required. In *Tripp*, that number was at least 2,400 valid signatures (i.e., after a records examination), while Plaintiff, Gill, faced a signature

requirement that was 5 times higher, of at least 10,754 valid signatures after a records examination. The effective burden is much greater upon Plaintiff, Gill, because Illinois has 18 U.S. House districts, but 118 state house districts. In 2018, for independent candidates, the average U.S. House district required 14,560 valid signatures, but the average state house district required 2,221 valid signatures. Both offices are governed under the same 90 days petition gathering restriction. See Exhibit 13, attached, with 2018 signature requirements from Candidate's Guide from State Board of Elections.

As this court keenly observed in its preliminary injunction order (Dkt. 15 at pg. 12):

> Courts must consider the restrictions on candidacy together. *Nader v. Keith,* 385 F.3d 729, 735 (7th Cir. 2004). This makes it difficult for courts to rely on precedent because laws vary greatly from state to state and the circumstances of each case—including the evidence presented—are different. *Id.*; *Green Party of Ga.* v. Ga., 551 F. App'x 982 (11th Cir. 2014) (unpublished) (past decisions "'do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson*'") (quoting *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985))."

Defendants' argument that "this case can be decided with a citation to the Seventh Circuit's decision in *Tripp*" would be contrary to the Supreme Court's holding in *Anderson*, et al.

Tripp is also distinguishable from the instant case because the plaintiffs in *Tripp* were not reasonably diligent candidates, whereas Gill clearly was. The *Tripp* candidates did not start collecting signatures at the beginning of the 90-day circulation period. *Tripp*, 2016 WL 4379876 at 2. Both *Tripp* candidates filed less than the minimum number of signatures needed. Tripp needed 2,399, but filed 1,700, and Shepherd needed 2,407, but filed 1,800. *Tripp*, 872 F.3d at 861. The Court

of Appeals noted that spread over 90 days each of the *Tripp* candidates needed to collect a mere 21 signatures per day. *Id.* at 870.

Instantly, Gill started collecting signatures at the beginning of the 90-day circulation period. PSF, par. 40. Gill filed 11,350 signatures, which was more than minimum required number of 10,754. *Id.* at pars. 6 & 8. Spread out over 90 days, Gill needed 119.5 signatures a day, or almost six times the 21 per day the *Tripp* candidates needed.

Defendants also argued that the *Tripp* Court of Appeals decision concluded that signature requirements further the legitimate state interest that candidates make a preliminary showing of some modicum of support. (Defendants' Br. at pg. 11) The modicum of support is a factual determination, that would be the necessary signatures to deter frivolous candidates. This court has already found that the 8,593 valid signatures Gill obtained showed the requisite "modicum of support." (Dkt. #15 at pg. 26)

B. <u>Evidence of the real impact the restrictions have had on the process supports a finding of severe burden.</u>

Contrary to Defendants' argument, the ultimate question on severity is not what the percentage figure is in the statute, but whether a reasonably diligent candidate could be expected to meet the requirements and gain a place on the ballot. As stated in *Tripp*:

> [S]heer percentages only go so far. *See Hall v. Simcox*, 766 F.2d 1171, 1174 (7th Cir. 1985) ("Granted numbers aren't everything.") "What is ultimately important is not the absolute or relative number of signatures required, but whether a 'reasonably diligent candidate could be expected to meet the requirements and gain a place on the ballot.'" *Stone* 750 F.3d at 682 (quoting *Bowe v. Bd. Of Election Comm'rs of City of Chi.*, 614 F.2d 1147, 1152 (7th Cir. 1980)).

Tripp, 872 F. 3d at 866. See also Opinion & Order in *Graveline v. Johnson*, 18-cv-12354 (E.D. Mich. 8/27/18) *affm'd* 2018 WL 4057396 (September 6, 2018), attached as Plaintiffs' Exhibit 14.

"When a state promulgates a regulation which imposes a 'severe' burden on individuals' rights, that regulation will only be upheld if it is 'narrowly drawn to advance a state interest of compelling importance.'" *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005) (quoting *Burdick*, 504 U.S. at 434); see also *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."). "If regulations enacted do not seriously burden a plaintiff's rights, a state's important regulatory interests will typically be enough to justify "reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788.

The Illinois Election Code as applied to independent candidates, imposes a severe restriction upon ballot access, and the Election Code provisions governing independent candidacies should be "narrowly drawn to advance a compelling state interest." The Illinois Election Code is neither narrowly drawn, nor does it advance a compelling state interest. The Election Code provisions that govern independent candidates are neither reasonable or nondiscriminatory, as history confirms.

C. <u>Ballot access has historically been denied to independent candidates, and a reasonably diligent independent candidate is unable access the ballot.</u>

Independent candidates are in quite a different position, as compared to established party candidates, and new political party candidates. New political party candidates have a political party structure behind them, and as shown in *Tripp*, far more circulators eager to assist in such a campaign. In addition, new

political parties that achieve at least 5% of the vote at the ballot are "promoted" to "established party" status for the next election, and benefit from a far lower signature requirement (0.5% with no upper limit restriction, as compared to at least 5% but not more than 8%). Once established, such candidates also have two election cycles (primary and general) to participate in debates, attend forums, and promote their candidacies

Independent candidates face the same hurdles each and every election. Independent candidates cannot get "promoted" even if such a candidate prevailed at the election – the next election, such a candidate would still be required to submit valid signatures of at least 5% but not more than 8% of the number of voters from the last election. Realistically, as Richard Winger explained, such a candidate would have to submit at least one-and-one-half times the number of signatures, or double (but that is not possible under the 8% cap), to ensure the requisite number of valid signatures after a records examination. (Winger Dep., Dkt. 38-6, pg. 50)

Independent candidates are not affiliated with a political organization, which is both a benefit and a drawback. Without a political organization, it is more difficult to enlist circulators and volunteers to assist with the petition gathering. However, independent candidates also do not have the restrictions of a political organization either. As noted by the district court in Michigan:

> Courts further note that "[u]naffiliated candidates enhance the political process by challenging the *status quo* and providing a voice for voters who feel unrepresented by the prevailing political parties." *Delaney*, 370 F. Supp. 2d at 377 (citing *Anderson*, 460 U.S. at 794). Moreover, "independent candidates in particular play an important role in the voter's exercise of his or her rights." *Green Party of Georgia,* 171 F. Supp. 3d at 1352. In light of this, and because independent candidates are more responsive to emerging issues and less likely to wield long term or widespread governmental control, "independent

> candidacies must be accorded even more protection than third party candidacies." *Cromer v. South Carolina,* 917 F.2d 819, 823 (4th Cir. 1990).

Graveline v. Johnson, 18-cv-12354 (E.D. Mich. 8/27/18) at pg. 16, *affm'd* 2018 WL 4057396 (September 6, 2018), attached as Plaintiffs' Exhibit 14.

In the Michigan *Graveline* case no independent candidate for statewide office had secured a place on the ballot since the challenged law was enacted 30 years earlier. *Id.* 2018 WL 4057396, at 10. Similarly, Illinois has not had independent candidates reach the ballot, and this is not because Illinois' voters fall into one of two major political party camps. On the contrary, the trend has been away from political party affiliation.

Illinois does not have a process for a voter affiliating with either the Democratic or Republican party, other than the selection of either party's ballot at a primary election. There is no other provision in the Election Code by which a voter can affiliate with either established political party. In the years since 1960 the voter turnout for primary elections has been declining (see PSF, par. 27 and Exhibit 15, latest primary election summary for State Board of Elections[2].)

The situation presented in Illinois is analogous to the observations of the Supreme Court in *Anderson:*

> By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, [Illinois' ballot access regulations] threaten to reduce diversity and competition in the marketplace of ideas.

Anderson, 460 U.S. at 794.

Plaintiffs rely on two affidavits of Richard Winger, and his testimony through

2 https://www.elections.il.gov/Downloads/ElectionInformation/PDF/reg-prct.pdf

his deposition. Mr. Winger has been accepted as an expert witness concerning ballot access for minor parties and independent candidates in ten states. See Winger C.V., attached to Dkt. 38-4. See also *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1348 (N.D. Ga. 2016), aff'd, 674 Fed. Appx. 974 (11th Cir. 2017) ("Courts have considered Mr. Winger's expert testimony in many other cases and this Court finds that he is a reliable witness. Moreover, the Court primarily has relied on Mr. Winger as a gatherer of data, and there is no suggestion here that the data are inaccurate.").

Defendants do not challenge the opinions of Winger, nor do they contradict his conclusions with competing expert testimony or evidence.

The real-world issues, such as signatures not being counted as valid, for one or another reason, impose additional hurdles of a much greater magnitude for independent candidate. The single requirement of at least 5% of the voters from the last election, is a real-world requirement of at least 7.5% to 10%[3] of the number of votes cast at the last election (but technically not even possible due to the maximum 8% restriction). This requirement must be considered against the 90 day circulation restriction, and notarization requirement, each of which impose a burden of a greater magnitude on independent candidates, than others.

In the previous 128 years, since 1890 only three independent candidates have overcome a signature requirement of 10,754 or more for U.S. House. Two of those candidates were gathering signatures with no restrictions upon the duration of

3 Due to potentially invalid signatures, a candidate would need at least 50 percent more raw signatures than the legal requirement. Even so, when candidates turned in one-third or two-thirds more than the requirement, it was not enough. To be really safe, a candidate would need to submit double the number of signatures that's required. Winger Dep., Dkt. 38-6, pg. 50.

time they collected signatures, and one had a duration of 189 days, or more than double the duration of time that Illinois allowed Plaintiff, Gill, to gather signatures. Arguably, if Plaintiff, Gill, had twice as long, he would have gathered twice the 8,893 signatures that were found valid after the records examination, or about 17,786, which would have been well in excess of the 10,754 signatures mandated under Illinois law.

Similarly, Defendants rely upon *Jenness* (at pg. 10), but the time for circulating the petition in that case was 180 days, or double the 90 days that Illinois allowed Gill to circulate his petition. *Jenness*, 403 U.S. at 433.

In Illinois, no independent candidate for the U.S. House has ever overcome a general election signature requirement of 10,754 or more. PSF par. 23.

Although Defendants argued that the legislative debate regarding imposition of a 90 day time in Illinois was not relevant, it is offered to show both that Illinois did not have a proper purpose for enacting such a restriction and that such restriction imposed additional hurdles upon ballot access, according to state legislators who spoke up.

The restriction on the duration of time allowed to gather signatures is a definite hurdle on ballot access, and is a distinguishing factor for the Defendants' list of signatures collected at the bottom of pg. 12 of their combined response and motion. Seven of Defendants' examples show signatures less than 10,754. Even so, the data shows the draconian effects of Illinois' ballot access laws, when one considers that there are 435 Congressional Districts in the U.S. and there have been approximately 63 elections since 1890. This means that out of approximately 27,405 U.S. House elections since 1890, only about 10 independent candidates could

obtain 9,100 or more signatures. All or almost all those candidates had either no restriction on the duration they could collect signatures, or had a duration that was double Illinois'. Clearly, despite his reasonable diligence, the odds were unconstitutionally stacked against Plaintiff, Gill's, efforts to gain a place on the ballot as an independent candidate.

D. <u>Defendants have failed to meet their burden of proof.</u>

Defendants have not set forth any facts to identify what, if any, important interest Illinois has, that somehow justifies maintaining a minimum of 5% to maximum of 8% signature requirement. In past years, the Defendants did not review nomination papers for the total signatures submitted, and would certify any candidate's name to the ballot, so long as no objection was filed. Even after an objection was filed, but withdrawn, Defendants still certified a candidate (Cohen, *supra*) to the ballot with no signatures being filed. Only since March 2018 has the State Board of Elections started to count signatures (without reviewing validity of signatures), to determine if at least 10% of the number of signatures were submitted by a candidate. This new policy is not expressly stated in the Election Code.

However, the State Board's newly adopted "apparent conformity" check has some merit in vetting nomination papers, and will certainly deter frivolous candidates. There are no other "hurdles" that would need to be thrown up, to deter frivolous candidates. This approach is also consistent with Richard Winger's opinion that a signature requirement of 1,000 would serve that same purpose. PSF par. 53, Winger Dep. Dkt. 38-6, at pg. 53:8-12.

Even so, in elections following redistricting years, when independent candidates face a 5,000 valid signature requirement (real world equivalent of 7,500

to 10,000 submitted signatures), there are ***no*** unmet "compelling state interests." Imposing upon independent candidates an arbitrary 5% valid signature requirement, gathered within 90 days, is neither warranted, nor is it a "reasonable nondiscriminatory restriction" as history confirms.

It is difficult to lend credence to Defendants' argument that somehow, the minimum of 5% but no more than 8% signature requirement is either (a) narrowly written or (b) serves an important governmental purposes. The historical facts speak to the contrary.

Defendants have failed in their burden of proof on their motion for summary judgment, and offered no facts or expert testimony to contradict Plaintiff's motion for summary judgment.

WHEREFORE, Plaintiffs, pray that their motion for summary judgment be granted, and that the Defendants' motion for summary judgment be denied.

Respectfully submitted,
By: s/ Andrew Finko
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	)	
Defendants.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that on October 1, 2018, that he electronically filed the foregoing Unopposed Motion for Extension of Time with the Clerk of the Court of the Central District using the CM/ECF system, which will send notification of such filing to all parties and counsel of record who are ECF filers.

s/ Andrew Finko