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

DAVID M. GILL,	)	
	)	
Plaintiffs,	)	No. 16 CV 3221
	)	
v.	)	Judge Sue E. Myerscough
	)	
CHARLES W. SCHOLZ, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants, the members of the Illinois State Board of Elections, in their official capacities, by their attorney, Lisa Madigan, Attorney General of the State of Illinois, submit the following reply memorandum of law in support of their motion for summary judgment.

INTRODUCTION

In their motion for summary judgment, the Defendants demonstrated that Plaintiffs' claims in this case were barred by existing Seventh Circuit and Supreme Court precedent, most notably *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017). In *Tripp*, the Seventh Circuit considered the same issues—notarization, the 5% requirement, the rural nature of a legislative district, the cumulative effect of all the requirements—that Plaintiffs raise here, and rejected all these claims.

Plaintiffs' only real argument in response is that few independent candidates have met the 5% requirement. But as demonstrated in the Defendants' summary judgment brief, candidates in both Illinois and other states have met similar signature requirements. To avoid chaos, Illinois must have an established metric, a bright-line rule, that both independent candidates and election officials can rely on. The Seventh Circuit has repeatedly upheld the 5% requirement as a bright-line rule for all Illinois elections. The ballot access restrictions challenged in this case are not

severe, and are justified by the state's legitimate interests in insuring that candidates show a reasonable modicum of support before being placed on the ballot. Accordingly, the Court should grant the Defendants' motion for summary judgment and dismiss this case.

ARGUMENT

I. THE 5 PERCENT STANDARD IN THE ILINOIS ELECTION CODE IS CONSTITUTIONAL

Defendants' summary judgment motion was straightforward. Gill needed 10,754 valid petition signatures to get on the ballot as an independent running for Congress in 2016 from the 13th Congressional District. That number represented 5 percent of the number of votes cast in the district in the previous election. 10 ILCS 5/10-3. It's undisputed he fell short, collecting about 8,500 valid signatures. *See* Dkt. 42 at 10-14.

Plaintiffs' only real argument in response is that few independent candidates have met the requirement historically. Dkt. 45 at 6-7. But as Defendants pointed out in their opening brief, candidates in other states and Illinois have met roughly similar signature totals, even if in particular cases circulation periods may have been longer. Dkt. 42 at 12-13. Furthermore, we have no way of knowing how many independent candidates actually make serious attempts to get on the ballot—there may be very few. A person who tries to run and do it himself by gathering a few hundred signatures and then abandons the effort cannot be considered a serious candidate. But the larger point is that once a percentage and filing period have been settled as constitutional by higher courts, that settled law must be followed. No case holds that a percentage set by statute for electoral districts generally is subject to a shifting judicial standard based on how many people in the past have been able to meet it. And for good reason—if every district's number were subject to ad hoc judging in the trial court on what number was sufficient to show a reasonable modicum of support, the system literally could not function. Imagine what chaos

would ensue if an independent candidate in the 13th Congressional District needed a different flat number of signatures from those in the 12th District, where those signature requirements translated to dramatically different percentages. And what problems would ensue if the percentages required in central or southern Illinois districts differed from requirements for districts in Chicago or suburban Cook County. Those disparities would raise constitutional problems of their own. There would be no established metric for candidates to know what number they needed when circulating; no standard for objectors to know when to object; and no way for the State Board to administer the system by setting in advance bright-line numbers for all districts based on the turnout from the last election. Both election officials and candidates need stability and bright-line rules above all.

In *Libertarian Party v. Rednour*, 108 F.3d 768 (7th Cir. 1997), the Seventh Circuit held that "plaintiff cannot argue that the 5% petitioning requirement is severe on its face." *Id*. at 775. In *Norman v. Reed*, 502 U.S. 279, 282 n.2, 295 (1992), the Court upheld a signature requirement holding that the minimum number needed to be 5 percent of the vote cast in the preceding election or 25,000, whichever was less. In that district of Cook County, in an election for Cook County Commissioner, the Court had no problem with the 25,000 number, which translated to about 2 percent of the vote cast in that district in the preceding election. In *Stone v. Bd. of Election Commissioners for the City of Chicago*, 750 F.3d 678 (7th Cir. 2014), the Seventh Circuit upheld a flat numerical requirement of 12,500 signatures in the 90-day circulation period to run for Mayor of Chicago, a number in excess of what Gill needed. And in the most recent decision, *Tripp v. Smart*, 872 F.3d 857 (7th Cir. 2017), the Court again found the 5 percent standard to be reasonable. In *Jenness v. Fortson*, 403 U.S. 441 (1971), the court upheld a requirement of 5 percent of the total number of registered voters, a much higher number than 5

percent of the people who voted in the last election. Even if the Georgia law upheld in *Jenness* had a six month circulation period, the number is still a lot higher and more demanding than the Illinois standard.

These cases do *not* hold what plaintiffs implicitly suggest: that the 5 percent standard can turn from reasonable to "severe" when the geographic area of the district is large and rural, when district lines bisect larger urban areas, or when the record shows few independent candidates have met the standard. The cases do not say that a state statute's clear numerical standard can be re-worked by a federal district court to a lower number once the number has been shown to be constitutionally not "severe" by a higher court under the test of *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Anderson v. Celebreeze*, 460 U.S. 780 (1983). A valid percentage is a valid percentage. That percentage will generate different numbers depending on the size of the district and the prior turnout in that district, but that is a given when the metric used is a percentage. It is totally invalid to say that, constitutionally, it makes a difference that the state representative district in *Tripp* only required 2,400 signatures while this congressional district required 10,754. While a larger district will have a larger numerator, it will also have a larger denominator—more voters available to sign than in the smaller district. As long as the 5 percent does not require more than 25,000 signatures or 1 percent of the statewide turnout in the last statewide election, whichever is less, the number generated by the 5 percent standard will be facially valid. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173 (1979). Illinois law reflects the holding of S*ocialist Workers Party*. 10 ILCS 5/10-3 (noting whenever the minimum signature requirement for an independent candidate shall exceed the minimum number of signatures for a statewide election, *i.e.*, 1 percent of the statewide total or 25,000, whichever is less, then the

number is capped at that figure). (Usually 25,000 signatures will be less than 1 percent of the statewide total).

The Seventh Circuit has already held that a state is not constitutionally required to use a flat number rather than a percentage, and indeed has upheld the 5 percent standard for an independent candidate running for Congress in Illinois, onfacts functionally identical to our case. In *Stevo v. Keith*, 546 F.3d 405 (7th Cir. 2008), the plaintiff needed 10,285 signatures, based on the same 5 percent standard challenged here as unconstitutional. He gathered about 7,000. Judge Mills dismissed the case, and the Seventh Circuit affirmed, upholding the 5 percent standard, and rejecting the idea that the signature requirement had to be a fixed number such as 5,000 (the number used in Illinois after a redistricting when boundary lines change). The Court noted:

> The Supreme Court has held that 5 percent is a permissible minimum signature requirement for placing third-party or independent candidates on the ballot, provided that there is not only a write-in alternative but also other means of getting one's candidacy before the electorate, such as finding sponsorship by a political organization, and provided also that the state does not impose "suffocating restrictions" on ballot access. Illinois does not.

Id. at 407 (citations omitted).

Plaintiffs are incorrect that precedent is not useful or can be disregarded in election cases. It is true that when looking at election burdens, state laws have to be looked at individually and cumulatively to determine the burdens they impose. Cases from other states which have different legal requirements may not lend themselves to easy comparisons. However, while there is no "litmus test" (Dkt. 45 at 4), that does not mean that controlling precedent can be disregarded. Just as the Seventh Circuit cites earlier Seventh Circuit cases and earlier Supreme Court cases when concluding that the 5 percent standard is constitutional, a district court must also follow those same cases. Previous authority is not thrown out so that each case challenging the 5 percent standard becomes a case of first impression depending on the terrain or population density of the

district. In *Tripp*, for example, the Court noted that new political parties were able to access the ballot. New parties are not all that functionally different from independent candidates seeking access to the ballot. A new political party may be a small group of persons seeking to get a slate of candidates, or an individual, on the ballot. An independent candidate, choosing to run without party affiliation, is likely to have a group of supporters helping him as well. The independent candidate may have even more support than the new party. Gill himself gathered almost 5,000 signatures during the circulation period. Pl. Stmt. of Facts (Dkt. 38) ¶ 41. With a small group of dedicated supporters, the signature total he needed to meet was achievable. Gill faced no unique circumstances here that would take him outside the normal legal standards established in other cases.

Plaintiffs cite a case from the Sixth Circuit, *Graveline v. Johnson*, -- F. Supp. 3d --, 2018 WL 4057396, *stay denied* 2018 WL 4240050 (6th Cir. 2018) in support of his claims. Dkt. 45 at 10-11. In *Graveline*, the court enjoined a Michigan law requiring independent candidates in Michigan running for statewide office (Attorney General) to collect 30,000 signatures, including at least 100 from at least half of Michigan's 14 congressional districts. 2018 WL 4057396 at *2. *Graveline* is not binding on this Court, of course. If there is a conflict between *Graveline* and the Seventh Circuit, this Court obviously knows which decision is controlling and which is not. But *Graveline* has points of distinction which should be noted, and it supports Defendants' position in significant respects. In *Graveline*, the candidate collected 14,157 signatures in 42 days (*id.*), which strongly suggests the feasibility of collecting 10,754 valid signatures in 90 days. The Michigan law also had a geographic distribution requirement not present in Illinois law, which imposes an extra burden for the candidate. *Id.* at *2. Finally, the filing deadline for independent candidates in Michigan was 50 days before major parties were required to nominate their

candidates. *Id*. at *4. Based on prior Sixth Circuit precedent, the Court held that "this early deadline has the same effect of requiring an independent candidate 'to recruit supporters at a time when the major party candidates are not known and when the populace is not politically energized.'" *Id*. at *4, *quoting Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006). The Court found that this early filing deadline disadvantaged independent candidates relative to major party candidates. *Id*. Here, in contrast, the signature collection period began on March 27, 2016, twelve days *after* the major party candidates were decided in the March 15, 2016 primary election[1], and concluded on June 27, 2016, 102 days after the primary. Dkt. 38 ¶ 7. Thus, the early filing deadline that concerned the *Graveline* court is not a factor here. And in any event, *Graveline*, from a different circuit and a different state, cannot be reconciled with the controlling Seventh Circuit precedent.

II. PLAINTIFFS' REMAINING CLAIMS SHOULD BE REJECTED.

Plaintiffs' Response and Reply Brief (Dkt. 45), does not address Plaintiffs' remaining claims regarding the notarization requirement for petitions and their more global claim that all of the Election Code's requirement, including the 90-day circulation period, taken together, constitute a deprivation of their First Amendment rights. As we have previously argued, the Seventh Circuit in *Tripp v. Smart* disposed of these identical claims. *See* Dkt. 42 at 14-16.

CONCLUSION

Under the test of B*urdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and as applied by the Seventh Circuit, the ballot access restrictions challenged in this case are not severe, and are justified by the state's legitimate interests in insuring that candidates show a reasonable modicum of support before being placed on the

[1] *See, e.g.*, 2016 Election Schedule and Registration Deadlines, available online at https://www.elections.il.gov/downloads/electioninformation/pdf/2016electionschedule.pdf.

ballot. The notarization requirement is also justified by the State's interest in preventing circulator fraud and is not a severe burden. *Tripp,* 872 F.3d at 870. Taken together, these restrictions are constitutional. *Id.* at 871-72.

Defendants request that their motion for summary judgment be granted.

Respectfully submitted,

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