UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

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

Plaintiffs,

v.

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

Defendants.

Case No. 2:18-cv-12354-VAR-DRG

Judge Victoria A. Roberts
Magistrate Judge David R. Grand

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Christopher Graveline, Willard Johnson, Michael Leibson and Kellie Deming ("Plaintiffs") respectfully submit this Reply to the Response to Plaintiffs' Motion for Summary Judgment ("Resp.") that Defendants Ruth Johnson and Sally Williams ("Defendants") filed on September 5, 2019.[1] (ECF. No. 31.)

ARGUMENT

I. Plaintiffs' Evidence Is Sufficient to Support Their Motion for Summary Judgment as to Count II and Count III.

Plaintiffs are well aware that obtaining a preliminary injunction does not mean that they "must necessarily prevail at summary judgment," (Resp. at 6), but it does mean that Defendants must provide the Court with some basis for reaching a contrary result, and Defendants fail to do so. Defendants note, irrelevantly, that they assert more "statements" in support of their motion for summary judgment than Plaintiffs assert in support of theirs, (Resp. at 4), but that is primarily because Defendants include a lengthy recitation of the Michigan Election Code, which speaks for itself, as well as numerous opinions and legal arguments that are plainly disputed. Moreover, the issue is not which party asserts *more* facts, but rather which party asserts *material* facts that are genuinely undisputed and sufficient to support judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). Plaintiffs do.

[1] Plaintiffs have previously refuted Defendants' assertions as to mootness and standing, as well as Defendants' assertion that the challenged provisions do no not burden Plaintiffs' voting rights. (*Compare* Resp. at 7-8, 16 *with* ECF No. 33 at PageID.608-20,629.) Plaintiffs incorporate that prior discussion herein by reference.

Plaintiffs have set forth the undisputed facts and evidence demonstrating that M.C.L.A. §§ 168.590c(2) (the "Filing Deadline"), 168.544f (the "Signature Requirement") and 168.590b(4) (the "Distribution Requirement"), as applied in combination, severely burden their First and Fourteenth Amendment rights. (Pl. MSJ at 9-12.) Although Defendants purport to dispute such facts and evidence, they expressly concede that the Signature Requirement "is high as an absolute number," that it is "higher than most states," and critically, that no statewide independent candidate has complied with the challenged provisions in the 30 years since they were enacted. (Resp. at 4.) It is therefore undisputed that these provisions operate as an absolute bar to such candidates' access to the ballot, which is compelling evidence that they impose severe burdens on both independent candidates and the voters who wish to support them. *See Storer v. Brown*, 415 U.S. 724, 742 (1974).

Plaintiffs' evidence that the challenged provisions are not sufficiently tailored to further a compelling or legitimate state interest is also undisputed. Defendants purport to deny that the Signature Requirement is an "arbitrary number," for example, (Resp. at 1), but fail to address the issue in their brief and thus assert no interest that can justify the fact that it is 2.5 times greater than the requirement imposed on districts with just one fewer voter. (Resp. at 11-13.) Defendants also fail to dispute Plaintiffs' expert Richard Winger's empirical data demonstrating that, with only one exception in all of American electoral history, no state that imposed a

5,000-signature requirement or greater has ever had more than eight candidates on the ballot for statewide office. Such evidence shows that the Signature Requirement is far greater than necessary to protect any compelling or legitimate state interest.

Defendants contend that their statistician Dr. Colleen Kelly "contradicts" Mr. Winger's evidence, (Resp. at 4), but Dr. Kelly merely attempts to show, by means of statistical projections, that a 5,000-signature requirement might in rare cases lead to more than eight candidates on the general election ballot. Even if that were true, it does not support the conclusion that a 30,000-signature requirement is sufficiently tailored to further a compelling or legitimate state interest. Moreover, Mr. Winger's empirical facts are better evidence than Dr. Kelly's theoretical projections.[2]

Defendants' petitioner Lee Albright's evidence actually supports Plaintiffs' case by showing that all-volunteer efforts to comply with the challenged provisions are likely to fail. (ECF. No. 28-7 at PageID.391.) This evidence corroborates Plaintiffs' claim that the challenged provisions impose an impermissible financial burden by obliging candidates to hire paid petition circulators.[3] (Pl. MSJ. at 21-24.)

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[2] Further, Dr. Kelly's report contained a significant factual error that undermines her analysis. (Defs. MSJ. at 11-12 (ECF. No. 28).)

[3] Such evidence also distinguishes this case from those Defendants cite with respect to the financial burden. (Resp. at 14-15.) Unlike *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570 (6th Cir. 2016) and *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011), the evidence here shows that the cost of complying with the challenged provisions does cause independent candidates' exclusion from the ballot, and thus constitutes a severe burden. (ECF. No. 1-3 at PageID.35 (Graveline Dec. at ¶ 13).) Further, *American Party of Texas v. White*, 415 U.S. 767 (1974) did [cont.]

Further, Mr. Albright's unfounded speculation that Plaintiff Graveline's costs "might have been lower" if he started his petition drive earlier is contradicted by Plaintiff Graveline's undisputed evidence that he paid a fixed per-signature rate. (*Compare* (ECF. No. 28-7 at PageID.392 *with* ECF No. 1-3 at PageID.35 (¶13).) Therefore, Plaintiff Graveline's costs were a function of the number of signatures required, not the time it took to obtain them.

Defendant Sally Williams' affidavit also supports Plaintiffs' case by confirming that the only asserted justification for the Filing Deadline is the administrative burden associated with enforcing the Signature Requirement. (ECF No. 28-2 at PageID.358-60 (¶¶ 17-19, 22).) By Defendants' own logic (and evidence), therefore, a lower signature requirement would make a later deadline feasible. Contrary to Defendants' assertion, however, enforcing an unconstitutionally burdensome Signature Requirement is not a "valid interest" that justifies imposing an unconstitutionally early Filing Deadline. (Resp. at 5.)

Defendants insist that the factual findings and legal conclusions on which this Court relied when it granted Plaintiffs' motion for a preliminary injunction are "not

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[cont.] not even address the claim that the state's ballot access procedure imposed an impermissible financial burden, but rather involved an equal protection challenge to a statute that authorized public funding for major parties' primary elections but not for minor parties' petition drives. *See id*. at 791-92. Because the evidence in this case demonstrates that candidates must spend substantial funds to comply with the challenged provisions, the cost of compliance is tantamount to the mandatory fees and costs that federal courts have invalidated. (Pl. MSJ at 21-22 (citing cases).)

binding" now, (Resp. at 6), but Plaintiffs have never suggested they are. Rather, Plaintiffs contend that the undisputed facts and evidence demonstrate that those preliminary findings and conclusions were correct. Plaintiffs are therefore entitled to summary judgment as to Count II and Count III.[4]

II. Plaintiffs Have Established That the Challenged Provisions Impose Severe Burdens and Are Not Sufficiently Tailored to Further a Compelling or Legitimate State Interest.

Defendants continue to disregard Plaintiffs' claim that the challenged provisions are unconstitutional as applied in combination. According to Defendants, Plaintiffs challenge the Signature Requirement on the ground that it is "high" and "intended to discourage independent candidates." (Resp. at 11.) Not so. Plaintiffs challenge that provision – as applied in combination with the others – on the ground that it operates as an absolute bar against the participation of independent candidates for statewide office, thereby violating Plaintiffs' speech, voting and associational rights, and because it imposes an impermissible financial burden that falls unequally on non-wealthy candidates and voters.

Defendants' persistent effort to show that the Signature Requirement, in isolation, is "not unreasonable" is therefore unavailing. (Resp. at 11.) Indeed, this

[4] Defendants' assertion that Plaintiffs did not submit additional evidence in support of their motion is incorrect. (*Compare* Resp. at 7 *with* Pl. MSJ at 2 (listing evidence).) Further, in ruling on the instant motion for summary judgment, the Court properly considers the entire record. *See* Fed. R. Civ. P. 56(c), 65(a)(2).

Court has previously observed that Defendants "fail to address the combined burdens and collective impact argument made by Plaintiffs." (ECF. No. 12 at PageID.146.) Defendants repeat that error here.

Furthermore, Plaintiffs have never argued that the challenged provisions are "intended to discourage" independent candidates for statewide office, but rather that they in fact bar such candidates from the general election ballot. This "past experience" supports the conclusion that the challenged provisions impose a severe burden, *see Storer*, 415 U.S. at 742, and Defendants cannot address it. Defendants insist that such evidence is irrelevant without additional evidence of candidates' failed attempts to comply, but that is not what *Storer* requires. *See id.* Moreover, the evidence that Defendants demand does not exist only because Defendants do not maintain it. *See Graveline v. Johnson*, No. 18-1992, 10 (6th Cir. Sept. 6, 2018).

Defendants' attempt to defend the Filing Deadline, in isolation, is similarly unavailing. Defendants assert that "the filing deadline could not be any later" if Defendants are "to accomplish everything that must be done" to ensure compliance with the Signature Requirement, (Resp. at 11), but even if true, this merely reinforces the conclusion that the challenged provisions are not only unconstitutional as applied to Plaintiffs, but unworkable for Defendants. Further, Plaintiffs need not present evidence to establish a deadline that "would have been constitutionally sufficient," (Resp. at 11), but only to show that the challenged provisions, as applied in

combination, impose severe burdens and are not sufficiently tailored to further a compelling or legitimate state interest. Plaintiffs have done so.[5]

III. The Court Has Authority to Enter a Permanent Injunction.

Plaintiffs incorporate their prior discussion demonstrating that the Court has authority to enter the requested injunctive relief. (Pl. MSJ at 18-19, 28-30.)

CONCLUSION

For the foregoing reasons, and those stated in Plaintiffs' Motion for Summary Judgment, the Court should grant Plaintiffs' motion and enter an order awarding Plaintiffs summary judgment as to Count II and Count III, as well as the requested permanent injunction, and denying Defendants' motion.

DATED: September 19, 2019

Respectfully submitted,

/s/ William P. Tedards, Jr.

OLIVER B. HALL
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org
(DC 976463) (MI)

WILLIAM P. TEDARDS, JR.*
*Counsel of Record
1101 30th Street, NW, Suite 500
Washington, DC 20007
202-797-9135
BT@tedards.net
(DC 143636) (MI)

Attorneys for Plaintiffs

[5] Defendants attempt to distinguish *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), on the ground that the Filing Deadline "was only 20 days before the August 7 primary." (Resp. at 9.) Candidates for attorney general are not nominated by primary election, however, but by convention, and the Filing Deadline is 50 days before the September 7 convention deadline. *See* M.C.L.A. § 168.591. *Libertarian Party* is therefore applicable here. *See Graveline*, No. 18-1992 at 9.

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, thereby serving all counsel of record.

/s/Oliver B. Hall
Oliver B. Hall