No. 20-1961

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Libertarian Party of Illinois, et al.,

Plaintiffs-Appellees,

v. William Cadigan, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division
Case No. 20-cv-2112

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION TO STAY AND MOTION TO EXPEDITE

Introduction

This action was filed under the First and Fourteenth Amendments and 42 U.S.C. § 1983 against Appellants and the Governor of Illinois (who has not joined the appeal) on April 2, 2020. Plaintiffs-Appellees sought emergency injunctive relief from the effects of the COVID-19 crisis, the Governor's emergency stay-at-home/shelter orders, and Illinois's strict enforcement of its ballot access laws in order to exercise their First Amendment rights and once again obtain ballot access in the State. Without relief, the candidates and political parties joined together in this case as Plaintiffs-Appellees would not be able to participate in the November 2020 general election.

The District Court expedited the matter and immediately scheduled a round of telephonic conferences beginning on April 14, 2020, *see* Minute Entry, R.11, with all the parties in an effort to resolve the dispute. Following several telephonic conferences, the parties each submitted a proposed resolution to the Court, and the Court then adopted on April 23, 2020, with Plaintiffs'-Appellees' concurrence, the proposal submitted by the Defendants-Appellants. *See* Injunction, R.27. The Court

described its reasoning and this agreed-to resolution in its Opinion and Order released that same day, April 23, 2020:

> The combined effect of the restrictions on public gatherings imposed by Illinois' stay-at-home order and the usual in-person signature requirements in the Illinois Election Code is a nearly insurmountable hurdle for new party and independent candidates attempting to have their names placed on the general election ballot. See Ill. Exec. Order No. 2020-10 (Mar. 20, 2020); 10 ILCS 5/10-4. The problem is exacerbated by the circumstance by the fact that the "window" for gathering such signatures opened at nearly the same time that Governor Pritzker first imposed restrictions. The court need not devote significant additional attention to the constitutional questions presented because, after a round of briefing and several hearings and in response to the court's direction at oral argument, the parties have proposed an order that grants appropriate relief in these unprecedented circumstances. Notably, from the outset of these proceedings, even Defendants have acknowledged that the ballot access restrictions must be relaxed, in some shape or form, to account for the havoc that COVID-19 has wreaked. (See Defs.' Resp. to Emergency Mot. at 2 (recognizing "the need for some accommodations" under the circumstances).) The court is satisfied that the parties' agreed order will ameliorate Plaintiffs' difficulty meeting the statutory signature requirement due to the COVID-19 restrictions—thereby addressing the constitutional questions raised by Plaintiffs' motion (see Pls.' Emergency Mot. [2] at 11–12)—while accommodating the State's legitimate interest in ensuring that only parties with a measurable modicum of public support will gain access to the 2020 general election ballot.

Opinion and Order, R.26, at PAGEID # 395-96 (emphasis added).

The Court thus in its Order not only observed that "the parties have proposed an order that grants appropriate relief in these unprecedented

circumstances," *id.* (emphasis added), it further noted that "from the outset of these proceedings, even Defendants have acknowledged that the ballot access restrictions must be relaxed, in some shape or form, to account for the havoc that COVID-19 has wreaked." *Id.* The Court emphasized that it was "satisfied that the parties' agreed order will ameliorate Plaintiffs' difficulty meeting the statutory signature requirement due to the COVID-19 restrictions …." *Id.* (emphasis added).

The agreed-to order did several things. First, it enjoined Illinois's nomination petition signature requirement for independent and minor-party candidates to gain access to the November 2020 general election ballot, Injunction, R.27, at PAGEID # 399, enjoined Illinois's requirement that original, "wet," in-person collected signatures be submitted, *id.* at 400, and enjoined Illinois's deadline for filing nomination petitions. *Id.* It also, with the agreement of Defendants, extended the deadline to August 7, 2020, *id.*, and ordered that "[c]andidates nominated by Plaintiff Libertarian Party of Illinois ("LPIL") and Plaintiff Illinois Green Party ("ILGP") shall qualify for placement on Illinois' November 3, 2020 general election ballot for each office for which the respective party placed a candidate on Illinois' general election ballot in either 2018 or 2016." *Id.*

These candidates accordingly did not need to submit signatures. For all other candidates, as agreed by the parties, the order reduced the signature requirement to 10% of the statutory requirement. *Id*. at 401.

Following entry of the preliminary injunction and agreed order, Defendants did nothing. They did not appeal. How could they, after all, since they submitted the parties' order and agreed to its terms? Indeed, the State Board of Elections trumpeted its agreement: "A spokesperson for the State Board of Elections said its directors 'think the order serves the best interests of all parties involved.'" Rebecca Anzel, CAPITOL NEWS ILLINOIS, *Third-party candidates' ballot access rules officially loosened in Illinois*, Apr. 24, 2020.[1] The Governor also supported the order: "'In light of the fact that the period for these candidates to gather signatures is occurring during the COVID-19 pandemic, the governor supports the court's order allowing candidates additional means to obtain actual signatures for their ballot petitions, such as through email, and additional time in which to submit those petitions,' the spokesperson said in an email." *Id*.

[1] https://thesouthern.com/news/local/govt-and-politics/third-party-candidates-ballot-access-rules-officially-loosened-in-illinois/article_77f56144-077b-54eb-b102-f2543c3a1cdd.html.

Plaintiffs-Appellees, meanwhile, busied themselves with collecting signatures for those candidates who still needed them and providing to Defendants the lists of those Green and Libertarian candidates who would be running in the races where the two parties were ballot-qualified under the terms of the order. These candidates, meanwhile, had stopped petitioning in reliance upon the agreed-to relief.

On May 8, 2020, two weeks after the agreed-to order was put in place, Defendants-Appellants moved the District Court for reconsideration. *See* Motion for Reconsideration, R. 31. They sought not only to increase the signature requirement they had agreed to, but also to undo their prior agreement that "wet" signatures need not be provided and to return to the original deadline. Notwithstanding that Defendants-Appellants had agreed to these terms, and notwithstanding that they waited two weeks before seeking reconsideration, the District Court on May 15, 2020 granted Defendants-Appellants' motion in part and moved the deadline nearly three weeks earlier, from August 7, 2020 to July 20, 2020. *See* Notification of Docket Entry, R.36.

Following this modification, those candidates who joined and who were not automatically placed on the ballot redoubled their efforts to

collect the needed signatures under the continuing trying circumstances presented by COVID-19. The Green and Libertarian candidates who were automatically on the ballot did not collect signatures because they did not need to. Defendants-Appellants, meanwhile, did nothing for more than three weeks.

Finally, on June 6, 2020, without first asking the District Court to stay its preliminary injunction pending appeal under Federal Rule of Civil Procedure 62, Defendants-Appellants noticed their appeal in this case. *See* Notice of Appeal, R.38. Defendants-Appellants then waited another three days -- after this Court set a briefing schedule beginning on July 20, 2020, *see* Notice of Case Opening, Doc. No. 1-2 -- before they on June 9, 2020 moved this Court to expedite the appeal, see Motion to Expedite, Doc. No. 6, and moved this Court to stay the preliminary injunction. *See* Motion to Stay, Doc. No. 7-1.

In sum, Defendants waited over two weeks to seek reconsideration from the very relief they proposed and agreed to. Still, the District Court entertained the motion and granted part of the relief, moving the deadline from August 7, 2020 to July 20, 2020. They then waited another three weeks before filing this appeal. They then waited until after this

Court fixed the briefing schedule to seek to expedite briefing. They also waited until after this Court had set the briefing schedule to seek a stay pending appeal, relief they notably failed to seek in the District Court. According to Defendants-Appellants, all of their delay, failure and omission is justified by the fact that several major-party candidates allegedly were able to collect substantially fewer signatures than Plaintiffs-Appellees are statutorily required to submit and submit them on June 1, 2020. Whether this is true or not has not been established, of course, since the Defendants-Appellants failed to submit the relevant evidence to the District Court, and even if it were true it would have no bearing on Plaintiffs-Appellees' entitlement to relief.

Still, Defendants-Appellants expect this Court to take their allegations on faith, expedite briefing to be completed in one week, stay a preliminary injunction the parties have been relying upon for nearly two full months, restore the June 20, 2020 deadline in the interim, remove several Green and Libertarian candidates who are already on the November 2020 ballot, and effectively end any chance the remaining independent and minor-party candidates who relied on the preliminary injunction have of qualifying for the November 2020 ballot. All of this in

less than a week, even though Defendants-Appellants waited six weeks from the initial entering of the preliminary injunction, and over three weeks from the District Court's modification, to take their "emergency" appeal. Defendants' motions should be **DENIED**.

Argument

I. Defendants-Appellants' Motion Should Be Denied Because They Failed to Comply with Federal Rule of Appellate Procedure 8.

Federal Rule of Appellate Procedure 8(a)(1) provides:

> A party must ordinarily move first in the district court for the following relief:
>
> (A) a stay of the judgment or order of a district court pending appeal;
> (B) approval of a bond or other security provided to obtain a stay of judgment; or
> (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

To avoid the requirement that a motion to stay first be filed in the District Court, a party "must" show that "moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2). Circuit Rule 8 reinforces these requirements, stating that "[c]ounsel's obligation under Fed. R. App. P. 8(a) to provide this court with the reasons the district judge gave for

denying relief includes an obligation to supply any statement of reasons by a magistrate judge or bankruptcy judge."

Here, Defendants-Appellants failed to seek a stay in the District Court, even though they had weeks to do so. They are therefore in direct violation of Rule 8(a)(1) and Circuit Rule 8. Defendants-Appellants' attempt to invoke Rule 8(a)(2) despite their failure to comply with Rule 8(a)(1) is unavailing because there was nothing "impracticable" about first seeking a stay in the District Court. The District Court, after all, had already modified its injunction at Defendants-Appellants' request. Chief Judge Pallmeyer was plainly prepared to grant them relief if presented with the appropriate facts. Defendants-Appellants simply have no excuse for violating Rule 8(a)(1).

Defendants-Appellants attempt to justify their belated appeal and motions here by arguing that new evidence demonstrates that petitioning is no longer unlawful or practically impossible in Illinois. Even if that were true, it would have no bearing on Plaintiffs-Appellees' entitlement to relief for the violation of their rights during the months when petitioning undeniably was unlawful and practically impossible. Furthermore, putting aside that Defendants-Appellants' unverified "new

evidence" involves major-party candidates with major-party resources and far lower signature requirements – *i.e.*, candidates who are not similarly situated to Plaintiffs-Appellees – this is the very sort of new evidence that must be presented to the District Court in the first instance. Such evidence may have led the District Court to modify its injunction once again, to grant a stay, or to deny Defendant-Appellants further relief. In any event, this Court would have a properly developed record on which to decide the instant appeal. Because Defendant-Appellants attempted to circumvent Rule 8(a)(1), however, they failed to develop a proper record. Their motion to stay should be denied on that ground alone.

The factors to be considered by both the District Court and this Court in deciding whether to grant a stay are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the parties interested in the proceeding; and (4) where the public interest lies. *Bradford–Scott Data Corp., v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir.1997); *Glick v. Koenig*, 766 F.2d 265, 269 (7th

Cir.1985). As the Supreme Court noted in *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987), "the factors regulating the issuance of a stay are generally the same" for both Courts.

Courts agree that under Rule 8 of the Federal Rules of Appellate Procedure a stay applicant must either "move first in the district court" for a stay or "show that moving first in the district court would be impracticable[.]" *SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (finding that the applicant had failed to explain its failure to do so). A party's failure to demonstrate the impracticability of moving first in the District Court precludes the party from seeking a stay in the Court of Appeals. *See, e.g., Hirschfeld v. Bd. of Elections,* 984 F.2d 35, 38 (2nd Cir.1993) (denying motion to stay judgment because there was "no explanation why the instant motion for a stay pending appeal was made in the first instance to [the appellate court.]").

"Temporal emergency" alone is not sufficient to justify a party's failure to move first in the District Court. *See*, *e.g.*, *Chemical Weapons Group v. Department of Army*, 101 F.3d 1360, 1361 (10th Cir. 2006). Nor is uncovering new evidence. Indeed, when new evidence is arguably discovered Courts have made clear that the new evidence must be first

presented to the District Court. In *Chemical Weapons Group*, for example, the Court stated that the need to move first in the District Court "is particularly so when the relief sought pending appeal is premised primarily on new evidence which the district court has not yet had a chance to consider. We will not assume that the district court would not properly consider the new evidence if a motion for stay or other appropriate motion were presented to it in the first instance." *Id*. at 1362 (citation omitted).

Even "[b]eyond the inapplicability of the futility theory," the Tenth Circuit added, "the fundamentally different roles of appellate and trial courts mandate consideration of the new evidence by the district court under Fed.R.Civ.P. 62(c) before Rule 8 proceedings in this court." *Id*. "The district court is the proper forum for presentation, testing and confrontation of the new evidence. Only upon completion of the district court's fact finding role, should this court consider any relief pending appeal." *Id*. (citing *In re Montes,* 677 F.2d 415, 416 (5th Cir.1982); *Ruiz v. Estelle,* 650 F.2d 555, 567 (5th Cir.1981)).

Here, Defendants-Appellants' sole explanation for their failure to move first in the District Court is their week-old discovery of new

evidence. Yet that is precisely the reason applicants must present their stay request first to the District Court. It is the "proper forum for presentation, testing and confrontation of the new evidence." *Chemical Weapons Group*, 101 F.3d at 1361. Accordingly, as in *Chemical Weapons Group*, Defendants-Appellants' motion to stay should be denied here.

II. Defendants-Appellants' Motion Should Be Denied Because They Are Barred By Laches.

Defendants' unjustified delay bars them from challenging the very order they proposed and agreed to under the equitable doctrine of laches. "The doctrine of laches 'derive[s] from the maxim that those who sleep on their rights, lose them.'" *Navarro v. Neal*, 716 F.3d 425, 429 (7th Cir. 2013) (citation omitted). "For the doctrine to apply," the two requirements are "(1) lack of diligence," and "prejudice to" the other parties. *Id.* Courts have routinely applied this doctrine in election settings because of the deadlines involved and because of the reliance interests at stake. *See*, *e.g.*, *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060-61 (7th Cir. 2016) ("Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice. The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept. We previously have suggested that

claims must be brought 'expeditiously'") (citations omitted); *Knox v. Milwaukee County Board of Elections*, 581 F. Supp. 399 (E.D. Wis. 1984) (applying doctrine); *McNeil v. Springfield Park District*, 656 F. Supp. 1200 (C.D. Ill. 1987) (same); *Rose v. Board of Elections*, 2015 WL 1509812 (N.D. Ill. 2015) (same).

Plaintiffs-Appellants have relied on the District Court's preliminary injunction since it was entered on April 23, 2020 – nearly two full months. In particular, the Libertarian and Green Party candidates who were placed on the ballot because of those Parties' past ballot lines have foregone petitioning to qualify for Illinois' 2020 general election ballot. They properly relied on the District Court's preliminary injunction making clear they did not need to petition. And Plaintiffs-Appellees had good reason to rely on that order: not only did Defendants-Appellants draft the order and agree to its terms, but also, they issued a public notice memorializing the changes it made to Illinois law, and they issued an updated public notice after the District Court granted their motion for reconsideration in part. *See* State Board of Elections, *Court Order Changes New Party, Independent Candidate Filing Process* (April 23, 2020); State Board of Elections, *Court Order Changes New Party,*

Independent Candidate Filing Process Update (May 15, 2020) *available at* https://www.elections.il.gov/AboutTheBoard/PressReleases.aspx (accessed June 15, 2020). Furthermore, Defendants-Appellants publicly praised that order, stating that it "serves the best interests of all parties involved." *See* Anzel, *supra* (emphasis added). Defendants-Appellants now reverse themselves and seek, through a belated stay application, to preclude Plaintiffs-Appellees from participating in Illinois' 2020 general election. As Defendants-Appellants well know, if this Court grants the relief they belatedly seek, it will be impossible for Plaintiffs-Appellees to collect the needed number of signatures by June 20, 2020 – a date only five days from the present.

Further, for the past seven weeks, Plaintiffs-Appellees' remaining candidates have worked diligently to fashion petitions that comply with the District Court's order and gather signatures remotely. During all that time, Defendants-Appellants sat on their rights and did nothing to suggest that they opposed the procedure the District Court adopted in its order (at Defendants-Appellants' suggestion). Yet Defendants-Appellants would now have this Court effectively invalidate all of the signatures that Plaintiffs-Appellees obtained by means of that procedure.

The prejudice suffered by Plaintiffs-Appellees because of Defendants-Appellants' delay is manifest. Further, Defendants-Appellants' nearly two months-long delay is all by itself inexplicable, especially when one considers that the order they now challenge was of their own making. *See*, *e.g.*, *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (applying laches where candidate waited two weeks after he knew he would not be listed on ballot to file suit). Defendants-Appellants waited too long. Even if they had a legitimate argument -- which they plainly do not possess -- it should be rejected based on their unreasonable and inexplicable delay and the prejudice it has caused Plaintiffs-Appellees.

III. The Supreme Court Has Counseled Against the Very Last-Minute Election Changes that Defendants-Appellants Seek Here.

Defendants-Appellants seek a s last-minute order changing the election rules they agreed to and that have now been in place for seven weeks. As the Supreme Court has explained, "last-minute '[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.'" *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (*per curiam*); *see*

also Republican National Committee v. Democratic National Committee, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.") (citations omitted).

Plaintiffs did not wait until the last second like Defendants here to seek relief. They filed their action on April 2, 2020, over seven months before the November 2020 general election and almost three months before the filing deadline. They did not seek last-minute changes on the eve of the election. The District Court's preliminary injunction provided all who signed the agreed order (including Defendants-Appellants) plenty of time to proceed. Although they initially embraced the order as "serv[ing] the best interests of all parties involved," *see* Anzel, *supra*, Defendants-Appellants now belatedly in a last-minute attempt on the eve of the filing deadline to rewrite the rules and force Plaintiffs to gather hundreds and thousands of signatures in five days' time! The request is inexplicable at this late date. It makes no sense, especially in light of Defendants-Appellants' prior agreement and support for the compromise. It can only be understood as a last-ditch effort to deny many thousands of Illinois voters the right "to cast their votes effectively" – a right that

"rank[s] among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). It should be rejected out of hand.

IV. The District Court's Order Is Well-Reasoned and Consistent With the Relief That Federal Courts Have Uniformly Granted From Petitioning Requirements as Applied in the Context of the COVID-19 Pandemic.

Courts across the country have recognized that people cannot engage in in-person petitioning in a safe way during the COVID-19 crisis. They have therefore routinely and uniformly granted candidates and political parties the same relief from petitioning requirements that the District Court granted here – *i.e.*, by reducing signature requirements, extending filing deadlines, and authorizing electronic petitioning procedures. *See Esshaki v. Whitmer*, No. 2:20-CV-10831-TGB, 2020 WL 1979126 (E.D. Mich. Apr. 20, 2020) (enjoining enforcement of Michigan's petitioning requirements as applied during COVID-19 pandemic), *aff'd in part Esshaki v. Whitmer*, 2020 WL 2185553. __ Fed. Appx. __ (6th Cir., May 5, 2020) (affirming on merits but remanding for further proceedings on remedy); *Goldstein v. Sec'y of Commonwealth*, No. SJC-12931, 2020 WL 1903931, at *6 (Mass. Apr. 17, 2020); *Omari Faulkner for Virginia v. Va. Dep't. of Elections*, CL 20-1456 (Va. Cir. Ct. Mar. 25, 2020); *Warren v. Colorado Secretary of State Jena Griswold*, Denver County (Colo.) Dist.

Ct. No. 20CV31077 (Apr. 21, 2020); *Dennis v. Secretary of the Commonwealth*, Mass. Case No. SJ-2020-278. More litigation continues to be filed each day in an effort to obtain similar relief. *See*, *e.g*,, *Libertarian Party of New Hampshire v. Sununu*, No. 1:20-cv-688 (D.N.H., June 8, 2020); *Alaska Libertarian Party v. Fenumiai*, No. 3:20-cv-127 (D. Ak., June 3, 2020); *Libertarian Party of Pennsylvania v. Wolf*, No. 2:20-cv-2299 (E.D. Pa., May 14, 2020); *Maryland Green Party v. Hogan*, 1:20-cv-1253 (D. Md., May 19, 2020).

Many States, moreover, have granted relief voluntarily. *See* Fla. Emergency R. 1SER20-2 (Apr. 2, 2020); N.J. Exec. Order Nos. 105, 120 (Mar. 19, 2020, Apr. 8, 2020); Utah Exec. Order No. 2020-8 (Mar. 26, 2020); Connecticut Ex. Order No. 7LL, May 11, 2020 (described in *Gottlieb v. Lamont*, 3:20-cv-0623, Doc. No. 33, at 12 (D. Conn., June 8, 2020)); Vermont HB 681, *An Act Relating to Government Operations in Response to the COVID-19 Outbreak* (2020); Jim Camden, *Candidates who are broke will get a break when filing to get names on the ballot*, Spokesman Review, May 6, 2020 (describing Governor Inslee's statement

in Washington that "[g]athering signatures during the COVID-19 pandemic 'runs contrary to recommended public health practice'").[2]

The District Court's order is consistent with these authorities. It properly recognizes the extraordinary circumstances from which this case arises – a global pandemic that has given rise to a nationwide public health crisis – and it grants reasonable relief under those circumstances. The relief granted applies for the 2020 election cycle only, and it strikes a fair balance between protecting the State's legitimate regulatory interests and vindicating Plaintiffs-Appellees' First and Fourteenth Amendment rights. The order should remain in effect, so that the parties subject to it can have the finality they need to participate successfully in Illinois' 2020 general election.

[2] https://www.spokesman.com/stories/2020/may/06/candidates-who-are-broke-will-get-a-break-when-fil/.

Conclusion

Defendants-Appellants' belated motion to stay and expedite the appeal should be **DENIED**.

Respectfully submitted,

/s/ Oliver B. Hall

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CERTIFICATE OF TYPE-SIZE AND WORD COUNT

Plaintiffs-Appellees certify that they have prepared this document in 14-point Century font and that excluding the Caption, Signature Blocks and Certificates, the document includes 3,936 words.

/s/ Oliver B. Hall

CERTIFICATE OF SERVICE

I certify that on June 15, 2020, this Response was filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding.

/s/ Oliver B. Hall