E-FILED
Friday, 26 March, 2021 04:36:49 PM
Clerk, U.S. District Court, ILCD

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

DAVID M. GILL, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Case No.: 3:16-cv-03221
v.	)	
	)	Judge Colin S. Bruce
CHARLES W. SCHOLZ, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs David M. Gill, Dawn Mozingo, Debra Kunkel, Linda R. Green, Don Necessary and Greg Parsons (collectively, "Plaintiffs") respectfully submit this Reply in support of Plaintiffs' Motion for Summary Judgment (Dkt. 62) and in response to Defendants' Combined Reply in Support of Their Renewed Motion for Summary Judgment and Response to Plaintiffs' Cross-Motion for Summary Judgment (Dkt. 67), which Defendant members of the Illinois State Board of Elections ("ISBE") filed on March 5, 2021 ("Reply" or "ISBE Rep.").

REPLY TO ADDITIONAL MATERIAL FACTS

Response to Paragraphs 1 and 2: The statements in these paragraphs are immaterial and undisputed. Gill was largely motivated to run as an independent candidate for U.S. House in Illinois' District 18 in the 2020 general election because the Democratic Party had not nominated a candidate to run for that office. (Decl. of D. Gill, ¶ 3 (attached as Exhibit A).) The Democrats ultimately did nominate a candidate for that office, which significantly diminished Gill's interest in running. (*Id.* at ¶ 4.) Gill therefore did not run as an independent candidate for U.S. House in the 2020 general election, but he remains interested in doing so, and he intends to do so in future elections in Illinois. (*Id.* at ¶ 5.)

ARGUMENT

I. ISBE Fails to Provide the Court With Grounds to Deny Plaintiffs' Motion.

A. Plaintiffs' Claims Are Not Moot.

ISBE devotes considerable effort to establishing that because this Court lacks a "time machine" it cannot grant Plaintiffs' request for injunctive relief in the form of an order placing Gill on Illinois' 2016 general election ballot. (ISBE Rep. at 11-13.) This discussion is not relevant. It is settled law that the passage of the 2016 election cycle does not moot Plaintiffs' claims – including their claims for injunctive relief. *See Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006); *Majors v. Abell*, 317 F. 3d 719, 722-23 (7th Cir. 2003); *Krislov v. Rednour*, 226 F. 3d 851, 858 (7th Cir. 2000). Further, this Court retains full authority to grant injunctive relief as it deems proper, separate and apart from an order placing Gill on the 2016 general election ballot. *See Frank v. Walker*, 819 F.3d 384, 388 (7th Cir. 2016) ("the district court 'should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.'") (quoting Fed. R. Civ. P. 54(c)). Therefore, Plaintiffs' request for injunctive relief is not moot.

B. ISBE Presents No Defense Against Plaintiffs' As Applied in Combination Claim.

ISBE has never presented any defense to Plaintiffs' central claim that the challenged provisions are unconstitutional as applied in combination, and its Reply fails to remedy that fatal defect. (Pl. Opp. to Def. MSJ. ("Pl. Opp.") (Dkt. 61) at 11-13); Pl. MSJ. ("Pl. MSJ") (Dkt. 62) at 11-18.) ISBE once again focuses almost entirely on its improper attempt to defend each provision separately. (ISBE Rep. at 13-20.) And when ISBE finally addresses Plaintiffs' as applied in combination claim, briefly, at the end of its Reply, the sum total of its purported defense is that *Lee* and *Libertarian Party of Il. v. Pritzker* are inapposite here. (ISBE Rep. at 22-24). But even if that were true – and it is not – it would be insufficient to defeat the claim.

The essential facts demonstrating that the challenged provisions are severely burdensome as applied in combination are not in dispute. Specifically: (1) the 5 percent requirement is the most restrictive in the nation (no state requirement is higher and only two, Georgia's and South Carolina's, are roughly equal); (2) the 5 percent requirement is far more restrictive than Illinois' other signature requirements (*i.e.*, those that apply to candidates for U.S. Senate and in elections following a redistricting; and (3) the challenged provisions operate as an absolute bar to independent candidates (as do the provisions in Georgia and South Carolina), including Gill, who was more diligent than virtually every U.S. House candidate in history. The facts demonstrating that the challenged provisions are not narrowly tailored to serve Illinois' legitimate regulatory interests, because less burdensome alternatives are available, are also undisputed. These facts are set forth at length in Plainitffs' motion, (Pl. MSJ at 4-7), and they prove that the challenged provisions are unconstitutional under the standards established by Supreme Court precedent. *See Storer v. Brown*, 415 U.S. 724, 742 (1974) (regulations unconstitutional if "past experience" demonstrates that "reasonably diligent" candidates cannot comply); *Jenness v. Fortson*, 403 U.S. 431, 438 (1971) (regulations unconstitutional if they "operate to freeze the political status quo").

Rather than addressing the foregoing facts, ISBE asserts one solitary basis for the denial of Plaintiffs' as applied in combination claim: the decision in *Lee*, according to ISBE, "is readily distinguishable." (ISBE Rep. at 22.) To be sure, there are differences between this case and *Lee*, but as Plaintiffs have explained, *Lee's* rationale is directly on point and applies here with even greater force. (Pl. MSJ at 14.) Here, as in *Lee*, the undisputed facts demonstrate that the 5 percent requirement (as applied in combination with the other challenged provisions) is severe by every relevant metric. (*Id.*; Pl. Opp. at 21); *see Lee*, 463 F.3d at 768-70. ISBE therefore must show that it is "narrowly drawn to advance a state interest of compelling importance." *Lee*, 463 F.3d at 768 (citation omitted). This ISBE fails to do.

As before, ISBE makes no attempt to show that the challenged provisions are narrowly drawn, nor to rebut Plaintiffs' argument that they are not. (Pl. MSJ at 6-7, 14-18.) ISBE merely asserts that *Libertarian Party of Il.* should be confined to its facts. (ISBE Rep. at 23-24.) But Plaintiffs cite that case only to confirm that Illinois' 2020 general election ballot was not overcrowded despite the relief it granted. In any event, the case says nothing about whether the challenged provisions are narrowly drawn, and ISBE does not otherwise address the issue. ISBE therefore fails to show that the challenged provisions can withstand scrutiny. The Court should declare them unconstitutional as applied in combination.

C. ISBE's Attempt to Defend the Challenged Provisions Separately Fails.

ISBE asserts that Plaintiffs fail to demonstrate that the notarization requirement "standing alone" imposed a severe burden on their rights, (ISBE Rep. at 13), but as ISBE concedes, Plaintiffs demonstrate that it substantially increases the severity of the burden the challenged provisions impose as applied in combination. It is undisputed, for example, that Gill was required to obtain between 717 and 1,000 separate notarizations, as opposed to the 120 or 121 notarizations the plaintiffs needed in *Tripp v. Scholz*, 872 F.3d 857, 869 (7th Cir. 2017). Thus, the burden that the notarization requirement imposed here is between 5.9 and 8.3 times greater than the burden it imposed in *Tripp*. Contrary to ISBE's assertion, therefore, Plaintiffs do not rely on "conclusory assertions" but specific evidence to demonstrate that the notarization requirement significantly contributes to the severe burden that the challenged provisions impose on Plaintiffs' rights.

ISBE's attempt to defend the 5 percent requirement repeats the same erroneous points contained in its motion. ISBE asserts, for instance, that the 13th Congressional District "is not unusually rural or spread out," (ISBE Resp. at 15), but the undisputed facts prove that it is. (Pl. SUMF ¶ 18.) ISBE also suggests that Gill should not be deemed "reasonably diligent" based on his "own personal efforts alone," but Plaintiffs do not rely on that evidence alone (though it does

demonstrate Gill's extraordinary personal diligence). (Pl. SUMF ¶¶ 40-41.) Rather, Plaintiffs rely on the undisputed facts demonstrating that Gill recruited 18 volunteers, and together they were more diligent than 99.9 percent of all U.S. House candidates in history. (Pl. SUMF ¶¶ 23,29,30,40-42.) Contrary to ISBE's assertion, (ISBE Resp. at 15), the fact that Gill still fell short is powerful evidence that the challenged provisions are unconstitutionally burdensome, because if Gill could not comply, then practically no other candidate in history would have either. *See Storer*, 415 U.S. at 742. Again, the standard is not whether a candidate with unlimited time, resources and help could comply, but whether a "reasonably diligent" candidate could. *See id.*

ISBE next repeats its assertion that other candidates have "met roughly similar signature totals," (ISBE Resp. at 15-16), but Plaintiffs have already refuted this point. (Pl. Opp. at 17.) In a span of 64 years encompassing thousands of races nationwide, ISBE is able to identify just 10 such candidates, and all of them had more time than Gill. (Pl. Opp. at 17.) This evidence thus supports Gill, not ISBE, by demonstrating that candidates rarely come anywhere close to complying with a requirement as restrictive as the 5 percent requirement. And while ISBE insists that "we have no way of knowing" how many candidates tried, that is not required under *Storer's* "past experience" test. *See Storer*, 415 U.S. at 742. The question is only whether candidates have in fact complied: "it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Id.* Here, no independent candidate has overcome the 5 percent requirement since 1974, when the 90-day period did not apply. (Pl. SUMF ¶¶ 23-24,35.)

ISBE imagines the "chaos" that would ensue if Illinois' 5 percent requirement were subject to "a shifting judicial standard," (ISBE Resp. at 16), but Plaintiffs do not ask the Court to impose one. Rather, Plaintiffs seek a declaration that the challenged provisions are unconstitutional based on the facts and evidence in this case. That judicial approach is not only consistent with but mandated by Supreme Court precedent. *See Gill v. Scholz*, 962 F.3d 360, 364-66 (7th Cir. 2020).

In the next two pages of its response, ISBE makes passing reference to no fewer than 12 cases, (ISBE Resp. at 17-19), and asserts thereafter that "Plaintiffs are incorrect that precedent is not useful or can be disregarded in election cases." (ISBE Resp. at 19.) But Plaintiffs make no such claim. On the contrary, Plaintiffs expressly rely on precedent to demonstrate that the challenged provisions are unconstitutional as applied here. Plaintiffs maintain, however, that ISBE's rote citation to a litany of cases, without addressing their specific facts, is precisely the sort of "litmus test" argumentation that the Court of Appeals and Supreme Court consistently reject, including in this very case. *See Gill*, 962 F.3d at 365-66. The Court should reject it here too.[1]

As a final point, ISBE asserts that Plaintiffs fail to press their Equal Protection claim. (ISBE Rep. at 20.) Not so. Courts properly analyze Equal Protection claims in election law cases under the *Anderson-Burdick* framework. *See Rogers v. Corbett*, 468 F.3d 188, 193-94 (3rd Cir. 2006) (citing cases); *see also Harlan v. Scholz*, 866 F.3d 754, 759-60 (7th Cir. 2017). Here, Plaintiffs argue that the burden imposed by the challenged provisions is not only severe but unequal, in that Illinois' requirement for U.S. Senate candidates translates to only 0.694 percent of the voters in the previous election, which makes the 5 percent requirement more than seven times more severe. (Pl. SUMF ¶¶ 20-21.) The crux of the claim is not, as ISBE asserts, that the requirement for U.S. House candidates should be "substantially less" than the requirement for U.S. Senate candidates, (ISBE Rep. at 20), but that Illinois violates Equal Protection by making it seven times greater.

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[1] ISBE incorrectly asserts that the facts in this case are "functionally identical" to those in *Stevo v. Keith*, 546 F.3d 405 (7th Cir. 2008), but unlike here, the plaintiff in that case did not even assert a First Amendment claim on appeal. *See id.* at 406. Furthermore, in *Stevo*, the Court found that the challenged provisions did not impose "suffocating restrictions" on ballot access, *id.* at 407, whereas here, the undisputed facts show that no independent candidate has overcome the challenged provisions in more than 45 years. (Pl. SUMF ¶¶ 23-24,35.) ISBE also incorrectly asserts that the Court in *Lee* "worked from the assumption that a 5% signature requirement is presumptively constitutional," (ISBE Rep. at 17), whereas in fact, the Court adopted no such presumption – to do so would violate Supreme Court precedent, *see Gill*, 962 F.3d at 364-65 – but rather engaged in the requisite fact-specific analysis, addressing the severity of Illinois' requirements as compared to other state requirements, and placing particular emphasis on evidence of candidates' "past experience" in attempting to comply with them. *See Lee*, 463 F.3d at 768-69.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, I filed the foregoing document using the Court's CM/ECF filing system, which will effect service upon all counsel of record.

s/Oliver B. Hall
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