UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCUIT

Case No. 22-1653

DAVID M. GILL, DAWN MOZINGO, DEBRA KUNKEL, LINDA R. GREEN, DON NECESSARY, and GREG PARSONS,

Plaintiff-Appellants,

- v. -

CHARLES W. SCHOLZ, IAN K. LINNABARY, WILLIAM J. CADIGAN, LAURA K. DONAHUE, WILLIAM R. HAINE, WILLIAM M. McGUFFAGE, KATHERINE S. O'BRIEN, and CASANDRA B. WATSON,

Defendant-Appellees.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS AT No. 16-cv-03221

REPLY BRIEF OF APPELLANTS

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294 (ph)
oliverhall@competitivedemocracy.org

Attorney for Plaintiff-Appellants

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Plaintiff-Appellants David Gill, Dawn Mozingo, Debra Kunkel, Linda R. Green, Don Necessary and Greg Parsons (collectively, "Gill") respectfully submit this Reply Brief in response to the Brief and Supplemental Appendix of Defendants-Appellees (Dkt. 18) ("ISBE Br.") filed by members of the Illinois State Board of Elections and the State Officers Electoral Board (collectively, "ISBE"), who are named as defendants in their official capacities.

ARGUMENT

I. This Case Is Not Moot Because It Presents a Live Controversy That Is Capable of Repetition Yet Evading Review.

ISBE's assertion that this case is moot has no merit. It is nothing more than an attempt to evade judicial review of a statutory scheme that is unconstitutional under every test the Supreme Court and this Court have applied when analyzing state ballot access requirements. But the mootness doctrine does not apply here because this case presents a live controversy that is capable of repetition yet evading review.

A. This Case Presents a Live Controversy.

Time and time again, this Court has recognized that the passage of an election does not moot a constitutional challenge to a state election law where a plaintiff candidate intends to run for office again and the law remains in effect. *See*, *e.g.*, *Acevedo v. Cook County Officers Elec. Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) ("[B]ecause Acevedo has expressed his intention to run for office in Cook County again, his challenge remains live."); *Tobin for Governor v. Illinois State Bd. of Elect.*, 268 F.3d 517, 528-29 (7th Cir. 2001) ("[C]hallenges to the validity of statutory provisions that will continue to operate past the election in question and that will burden future candidates in future elections … present a 'continuing controversy'…") (citation and footnote omitted); *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000) (challenge to restrictions on petition circulators remained live after election "because the use of non-resident, non-registered solicitors is still prohibited by Illinois with respect to future elections …") (citation omitted). This

well-settled precedent is controlling here. The evidence shows that Dr. Gill intends to run for Congress as an Independent in Illinois in future elections. (Decl. of D. Gill (ECF No. 62-19) ¶¶ 5-6). Further, 10 ILCS 5/10-3 ("the 5 percent requirement"), 10 ILCS 5/10-4 ("the 90-day period") and 10 ILCS 5/10-4 (the "notarization requirement") (collectively, the "Challenged Provisions") remain in effect. This case therefore presents a live controversy.[1]

Tellingly, ISBE does not cite a single ballot access case in support of its assertion that this case is moot. (ISBE Br. at 15-18.) Instead, ISBE purports to rely on several cases involving vote dilution claims brought under the Voting Rights Act. (*Id.* at 18.) Those cases are inapposite. As the Supreme Court explained in one such case, a vote dilution claim necessarily depends on the specific make-up of the voting population in a challenged district, because to prevail a plaintiff must demonstrate that the minority population "has the potential to elect a representative of its own choice in some single-member district," and that "the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population." *Growe v. Emison*, 507 U.S. 25, 39 (1993) (citation omitted). Vote dilution claims are therefore mooted when a challenged redistricting map is superseded because the challenged district no longer exists and a plaintiff cannot make the requisite showings. *See id*.

Here, contrary to ISBE's assertion, Gill does not assert a "challenge[] to [a] legislative district that no longer exist[s]…" (ISBE Br. at 17-18.) Rather, Gill asserts an as applied in combination challenge to Illinois's ballot access requirements for Independent candidates for

[1] That would be true even if Dr. Gill did not intend to run for office in the future, because the voter-plaintiffs have an independent and ongoing interest in the resolution of their claims. (Decl. of L. Green (ECF No. 62-20) ¶ 5 ("I also want the opportunity to vote for other independent candidates for the U.S. House in future elections."); Decl. of D. Kunkel (ECF No. 62-21) ¶ 5 (same); Decl. of D. Monzingo (ECF No. 62-22) ¶ 5 (same); Decl. of D. Necessary (Dkt. 62-23) ¶ 5 (same) Decl. of G. Parsons (ECF No. 62-24) ¶ 5 (same)); *see Gjertsen v. Bd. of Elec. Comm'rs*, 751 F.2d 199, 202 (7th Cir. 1984) (recognizing that voter-plaintiffs' claims were independently sufficient to maintain challenge to ballot access requirements after passage of election).

Congress, and those requirements remain in effect. Unlike vote dilution claims brought under the Voting Rights Act, Gill's claim does not in any way depend upon the specific make-up of the voting population in any particular district. The rationale for holding vote dilution claims moot following a redistricting therefore does not apply to Gill's claim. The Voting Rights Act cases cited by ISBE are simply irrelevant.

ISBE nonetheless insists that Gill's claim is moot "because this court can no longer grant meaningful relief" from the Challenged Provisions now that Illinois has redistricted and the boundaries of the district in which he formerly ran have been redrawn. (ISBE Br. at 17.) That is incorrect. While Gill's request for an injunction placing him on Illinois's 2016 general election ballot is "obviously moot," his requests "for a declaratory judgment and an injunction prohibiting enforcement of [the Challenged Provisions] remain live." *Acvedo*, 925 F.3d at 948 n.1; *see also Krislov*, 226 F.3d at 858. Here, as in *Acvedo*, *Krislov* and countless other constitutional challenges to ballot access requirements that were decided after the passage of an election, the Court can grant meaningful relief by declaring the Challenged Provisions unconstitutional and enjoining their enforcement. This case therefore presents a live controversy.

B. The Controversy Is Capable of Repetition Yet Evading Review.

Constitutional challenges to ballot access requirements such as the claim Gill asserts here present "notorious examples" of the exception to the mootness doctrine for controversies that are "capable of repetition yet evading review." *Stewart v. Taylor*, 104 F.3d 965, 969 (7th Cir. 1997) (citation omitted). That exception applies where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Acvedo*, 925 F.3d at 947 (citation omitted). "These requirements are often met in ballot access cases," *id.* (citations omitted), "because elections are routinely too short in duration [for a

constitutional challenge] to be fully litigated, and there is a reasonable expectation that the same party would be subjected to the same action again." *Stewart*, 104 F.3d at 969. Indeed, this Court has identified election law challenges as a paradigmatic example of the capable of repetition yet evading review exception to mootness. *See Majors v. Abell*, 317 F.3d 719, 722-23 (7th Cir. 2003).

This case falls squarely within that exception. Like the other ballot access cases cited herein, the time between the date on which Gill was denied ballot access (July 22, 2016) and the date of the 2016 general election (November 8, 2016) – approximately three and one-half months – was too short to litigate this matter. (Plaintiffs' Statement of Undisputed Material Facts (ECF No. 62-1) ("Pl. SUMF") ¶¶ 11-12.) There is also a reasonable expectation that Gill will be subject to the same action again – exclusion from Illinois's ballot due to the enforcement of the Challenged Provisions – because he intends to run for Congress as an Independent in future elections and those provisions remain in effect. *See Acevedo*, 925 F.3d at 948; *Tobin for Governor*, 268 F.3d at 528-29; *Krislov*, 226 F.3d at 858. The mootness doctrine therefore does not apply.

In fact, this Court has already concluded, in a prior appeal, that Gill's claim in this case is not moot because it is capable of repetition yet evading review. *See Gill v. Scholz*, 962 F.3d 360, 363 n.3 (7th Cir. 2020). According to ISBE, however, the Court should now reject that conclusion, as well as the reasoning of all the other ballot access cases cited herein, "because the boundaries of the 13th District [where Gill attempted to run in 2016] have substantially changed as a result of redistricting …" (ISBE Br. at 19.) In ISBE's view, this means that "there is no longer 'a reasonable expectation that the same complaining party will be subject to the same action again'" because no one "will ever again run for office in the version of the 13th District that existed in 2016." (*Id.* (quoting *Fed. Elec. Comm'n. v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007))). That is incorrect.

As an initial matter, the requirement that the same complaining party is likely to be subject to the same action is relaxed in election law challenges. *See Majors*, 317 F.3d at 723. Consequently, in such cases the requirement is satisfied if it is reasonably likely that *other* candidates will be burdened by a challenged statute in future elections. *See id.* (citing cases). Furthermore, the Supreme Court has repeatedly recognized that "the capable of repetition, yet evading review" exception to mootness applies in election law cases involving "as applied challenges as well as in the more typical case involving only facial attacks." *Wisc. Right to Life, Inc.*, 551 U.S. at 463 (quoting *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974)) (internal quotation marks omitted). And in *Wisconsin Right to Life* – the very case on which ISBE purports to rely – the Court squarely rejected ISBE's assertion that "to prove likely recurrence of the same controversy," a plaintiff must establish that future cases will share "all the characteristics that the district court deemed legally relevant" to the case under review. *Id.* (citation omitted). Such a requirement "asks for too much," the Court reasoned, because "[r]equiring repetition of every 'legally relevant' characteristic of an as-applied challenge – down to the last detail – would effectively overrule [*Storer*] by making this exception unavailable for virtually all as-applied challenges." *Id.* Instead, the Court concluded, the 'likely recurrence' requirement is satisfied if there is a reasonable expectation that a "materially similar" controversy will arise in the future. *Id.*; *see also Davis v. Fed. Elec. Comm'n*., 554 U.S. 724, 736 (2008).

This Court adopted the same reasoning to apply the capable of repetition yet evading review exception in a ballot access case decided less than three months ago. *See Hero v. Lake County Elec. Bd.*, No. 21-2793 (7th Cir. Aug. 2, 2022) (unpublished) ("Slip Op.").[2] Following *Wisconsin Right to Life* and *Davis*, this Court rejected the assertion that "there need[s] to be any

[2] Pursuant to Fed. R. App. P. 32.1(b), a copy of this Court's opinion in *Hero* is attached as Exhibit A.

type of precisely similar fact pattern" to satisfy the 'likely recurrence' requirement. Slip Op. at 9. *Hero* is especially relevant because the Court relied on the first appeal in this case to support its conclusion that the capable of repetition yet evading review exception applied in that case. *See* Slip Op. at 9 ("Our opinion in *Gill v. Scholz*, 962 F.3d 360 (7th Cir. 2020), parallels this case."). *Hero* thus confirms that the 'likely recurrence' requirement is satisfied here too, even if future cases will not follow a "precisely similar fact pattern" that repeats "every 'legally relevant' characteristic" of the present controversy. *Id.* (quoting *Wisc. Right to Life, Inc.*, 551 U.S. at 463).

ISBE's assertion that Illinois's redistricting process mooted this case is flatly contradicted by *Wisconsin Right to Life*. To demonstrate that the capable of repetition yet evading review exception to mootness applies here – as it typically does in ballot access cases – Gill need not establish that a future candidate will run for office "in the version of the 13th District that existed in 2016," as ISBE incorrectly asserts. (ISBE Br. at 19.) Such a requirement "asks for too much." *Wisc. Right to Life, Inc.*, 551 U.S. at 463. Instead, the exception applies if it is reasonably likely that Gill, or any other candidate, will run in a district that is "materially similar" to that district. *Id.* ISBE's own evidence confirms that is the case. (ISBE Br., Supp. App. at 1-2.) Following Illinois's redistricting, District 13 itself still "stretches across" multiple "predominantly rural counties in the middle of Illinois," and it continues to cover a "large[] geographical area" that cuts across county lines and urban population centers. *Gill*, 962 F.3d at 362, 365. Other districts share similar characteristics. Because these characteristics are materially similar to those of the previous District 13, this controversy is capable of repetition yet evading review. The mootness doctrine therefore does not apply.

II. ISBE Fails to Provide Grounds for This Court to Affirm the District Court Despite the Errors Identified in Gill's Opening Brief.

Gill's opening brief ("Gill Br.") identifies three errors of law that the District Court committed which constitute grounds for reversal. First, the District Court violated this Court's precedent – including this Court's express guidance in Gill's prior appeal – by failing to conduct the fact-intensive analysis of Gill's as applied in combination claim that is required under the *Anderson-Burdick* framework.[3] Second, the District Court relied on improper evidence and imposed an improper evidentiary burden to reject Gill's argument that the Challenged Provisions are severely burdensome. Third, the District Court violated the legal standards applicable to motions for summary judgment filed under Federal Rule of Civil Procedure 56(c) by failing to address the undisputed facts on which Gill relies, and by resolving issues of fact against Gill. ISBE fails to provide this Court with grounds to affirm the District Court despite these errors.

A. The District Court's Failure to Conduct a Proper Fact-Intensive Analysis of Gill's As-Applied in Combination Claim Requires Reversal.

Under this Court's precedent, the District Court was "required to evaluate [the Challenged Provisions] together, not individually, and assess their combined effect on voters' and candidates' political association rights." *Lee v. Keith*, 463 F.3d 763, 770 (7th Cir. 2006) (emphasis added) (citing *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004)). The District Court violated that requirement. It focused most of its analysis on whether each Challenged Provision, "standing alone," is unconstitutional, (App. at 8-19), and failed to address the facts supporting Gill's as applied in combination claim – the only one he pressed on remand (App. at 5 n.6) – until the final few pages of its 24-page opinion, if at all. (App. at 20-24.) This was error.

As this Court emphasized in Gill's prior appeal, proper application of the *Anderson-Burdick* framework "requires courts to conduct fact-intensive analyses" when evaluating challenges to state election laws. *Gill*, 962 F.3d at 365. Here, that meant a "careful analysis of the

[3] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

facts" supporting Gill's claim that the Challenged Provisions are severely burdensome as applied in combination. *Id*. Because the District Court improperly focused its analysis on whether each Challenged Provision is unconstitutional standing alone, however, (App. at 8-19), it entirely omitted from that analysis the following facts demonstrating that they are severely burdensome as applied in combination:

- Gill obtained more signatures than 99.9 percent of all candidates who ran in more than 25,000 races for Congress nationwide since states began regulating ballot access in 1890, (Pl. SUMF ¶¶ 23, 29, 30);
- Only one state besides Illinois requires more than 10,000 signatures for congressional candidates to qualify for the general election ballot – Georgia – and no independent candidate has qualified in Georgia since 1964, (Pl. SUMF ¶ 25);
- Georgia allows candidates six months to gather signatures, which is twice as long as the 90-day period that Illinois imposes, (Pl. SUMF ¶ 36);
- Unlike Illinois, a majority of states do not impose a time limit on the petitioning period, (Pl. SUMF ¶ 47);
- Illinois's June filing deadline is one of the earliest in the country, (Pl. SUMF ¶ 48);
- No candidate for Congress in Illinois has overcome the 5 percent requirement since 1974, and the candidate who did so that year, H. Douglas Lassiter, was not subject to the 90-day time limit, but rather had no restriction on the number of days he was permitted to collect signatures, (Pl. SUMF ¶¶ 23-24, 35);
- H. Douglas Lassiter collected 9,698 signatures in 1974, which is less than the 10,754 signatures Gill was required to submit, (Pl. SUMF ¶ 24);
- H. Douglas Lassiter is the only candidate for the U.S. House in Illinois who has ever overcome a signature requirement of 8,593 or more, which is the number of valid signatures that Gill submitted, (Pl. SUMF ¶ 24);
- No candidate for the U.S. House in Illinois has ever overcome a signature requirement of 10,754 or more, which is the number that Gill was required to submit, (Pl. SUMF ¶ 23);
- Since 1890 there have been more than 25,000 U.S. House races nationwide. In those 25,000-plus races over a span of 126 years, only three candidates overcame a general election signature requirement of 10,754 or more, (Pl. SUMF ¶¶ 23, 29);

- Since 1890 a candidate has overcome a general election signature requirement of 8,593 or more in only 0.048 percent of the races for Congress – meaning Gill obtained more valid signatures than 99.9 percent of all congressional candidates in American history – and in only 0.021 percent of all such races has a candidate overcome a general election ballot signature requirement of 10,754 or more. (Pl. SUMF ¶ 30).

These facts are critical to a proper analysis of the Challenged Provisions' combined effect because they are directly relevant to the "inevitable question for judgment": whether "a reasonably diligent independent candidate could be expected to satisfy [the Challenged Provisions], or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Lee*, 463 F.3d at 769 (quoting *Storer*, 415 U.S. at 724). The foregoing facts demonstrate that the answer is No. They establish that no Independent candidate for Congress has been able to overcome the Challenged Provisions since 1974, when the 90-day period did not apply – a span of more than 45 years. It was therefore incumbent on the District Court to address these facts before making any finding with respect to the burden that the Challenged Provisions impose.

Instead, when the District Court finally addressed Gill's as applied in combination claim, it expressly predicated its analysis on its prior finding that the Challenged Provisions are not severely burdensome as applied separately – a finding it made without even acknowledging the above-cited facts. (App. at 20 ("As discussed above, the Court does not find that the five percent requirement … is severely burdensome.").) In so doing the District Court ran afoul of *Lee* and *Gill*. It was required to assess the Challenged Provisions' "combined effect," *Lee*, 463 F.3d at 770, based on a "careful analysis" of the relevant facts, *Gill*, 962 F.3d at 365 – not to start from a presumption that the Challenged Provisions are not severely burdensome, which disregards the relevant facts.

ISBE does not seriously dispute that the District Court erred in failing to conduct a proper, fact-intensive analysis of Gill's as applied in combination claim. Instead, ISBE takes issue with

Gill's contention that the District Court "devoted three scant paragraphs" of discussion to that claim before reaffirming its prior conclusion that the 5 percent requirement is not severely burdensome. (ISBE Br. at 29.) According to ISBE, the District Court's discussion actually ranged "over five full pages." (*Id.*) On this point, however, the District Court's opinion speaks for itself and confirms that Gill's characterization is accurate. (App. at 19-20.)

In any event, ISBE's quibble is beside the point. The District Court erred not because it devoted insufficient verbiage to Gill's as applied in combination claim, but because it adopted an improper methodology to analyze that claim. The District Court expressly stated that it would proceed by "examining the challenged provisions individually before analyzing them in combination." (App. at 5 n.6.) That is a direct violation of this Court's instruction that the provisions must be analyzed "together, not individually," in order to "assess their combined effect." *Lee*, 463 F.3d at 770 (citing *Nader*, 385 F.3d at 735). Moreover, by analyzing the Challenged Provisions separately, the District Court minimized or completely disregarded the evidence demonstrating that their "combined effect" is severely burdensome. *See id*. And while ISBE insists that the District Court did address that evidence, (ISBE Br. at 29), the District Court's opinion once again speaks for itself, and confirms that almost all of the above-cited facts are never even acknowledged, much less addressed at any length.

According to ISBE, the District Court remedied its error because "eventually … the court did, in fact, analyze the challenged provisions' combined effect." (ISBE Br. at 29.) But the District Court did not even address Gill's "main argument" that the Challenged Provisions are severely burdensome because they "have completely excluded independent congressional candidates from Illinois's ballot since 1974" until the last three pages of its 24-page opinion. (App. at 22.) By that time, the District Court had already concluded that the Challenged Provisions are not severely burdensome. (*Id.* ("Finally, the Court does not find that the notarization requirement pushes the

cumulative burden over the edge.").) That is precisely the kind of "cursory or perfunctory" analysis that the *Anderson-Burdick* framework forbids. *Gill*, 962 F.3d at 365.

Finally, the District Court's error in adopting an improper analytic method to assess the Challenged Provisions' combined effect is no mere formality. As this Court has recognized, "much of the action takes place at the first stage of *Anderson*'s balancing inquiry," because it determines the level of scrutiny that applies. *Stone v. Bd. of Election Comm'rs for City of Chicago*, 750 F.3d 678, 681 (7th Cir. 2014). Thus, the District Court's error was the difference between a properly heightened review under *Anderson-Burdick* and the deferential review the District Court applied. It was dispositive. That error is grounds for reversal.

B. The District Court's Reliance on Improper Evidence Requires Reversal.

The District Court also should be reversed because it incorrectly concluded that the appearance on Illinois's ballot of candidates who did not have to comply with the Challenged Provisions was evidence that the Challenge Provisions are not severely burdensome. (App. 22-23.) As Gill has explained, the appearance of such candidates says nothing about the burden the Challenged Provisions impose. It only means that the candidates were not subject to that burden.

ISBE attempts to redeem the District Court's error by asserting that Gill "misunderstand[s] the import of those candidates." (ISBE Br. at 30.) ISBE speculates that these candidates "might have avoided an objection by greatly exceeding the signature threshold," and thus asserts that there is "a hole in plaintiff's data." ISBE is incorrect. The evidence on which the District Court relied was the testimony of Richard Winger. (App. at 23.) Although Winger testified that "quite a few" candidates have appeared on Illinois's ballot by avoiding an objection, he further testified that he "knew they only collected a handful of signatures just by talking to them." (Winger Dep. (ECF No. 62-7) 29:22–30:20.) Winger further made clear that while some candidates had submitted

"thousands" of signatures, none of them to his knowledge greatly exceeded the signature requirement, as ISBE speculates. (*Id.* at 31:23–35:21.)

The evidence on which ISBE purports to rely thus demonstrates that there is a "hole" in ISBE's data, not Gill's. There is no evidence in the record to support ISBE's speculation that candidates have appeared on Illinois's ballot by greatly exceeding the 5 percent requirement. The District Court's reliance on Winger's testimony to conclude that the Challenged Provisions "in no way freeze the status quo" was therefore error. The District Court should be reversed on that basis too.

Conclusion

For the foregoing reasons, and those stated in Gill's Brief of Appellants, this Court should reverse the District Court and remand with instructions to enter summary judgment in Gill's favor.

Dated: October 28, 2022

Respectfully submitted,

s/Oliver B. Hall
Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Appellants complies with the type-volume limit of Fed. R. App. P. 32(a(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the brief contains 3,954 words.

I certify that the foregoing Brief of Appellant complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief is prepared in Times New Roman 12 Point Font.

/s/ Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2022, I caused the foregoing Brief of Appellants to be served electronically, via the Court's CM/ECF system, which will effect service on all counsel of record.

s/Oliver B. Hall
Oliver B. Hall

Counsel for Appellants

EXHIBIT A

In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2793

JOSEPH HERO,

Plaintiff-Appellant,

v.

LAKE COUNTY ELECTION BOARD,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 19-cv-00319 — **Damon R. Leichty**, *Judge*.

ARGUED APRIL 13, 2022 — DECIDED AUGUST 2, 2022

Before ROVNER, WOOD, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Joseph Hero has been a registered Republican for forty years. He supported Republican candidates, voted in Republican primaries for decades, and even ran for office as a Republican with occasional success. But local politics can be messy. Hero's town council decided to exercise its eminent-domain authority to seize property of low-income residents. Hero opposed the measure and backed independent candidates to replace two incumbent Republican

councilmembers. Upon learning of his actions, the Indiana Republican Party banned him from the Republican party for ten years. Undeterred, Hero tried to appear as a Republican candidate in the 2019 election. He met all the criteria established by Indiana law, but the party objected to his status, and the Lake County Election Board ("the Election Board") sided with the party, striking his name from the ballot.

Hero sued the Election Board, seeking declaratory relief that his rights were violated in the past election and an injunction prohibiting the Election Board from similar conduct in future elections. The district court dismissed for lack of jurisdiction. We affirm, albeit on a different basis.

I. Background

Hero, a resident of St. John, Indiana, has been a member of the Republican Party for more than forty years. He voted as a Republican in every primary election since the mid-1980s, including in the 2020 primary election; held numerous positions within the Republican Party, such as Lake County Republican Chairman; supported Republican candidates for every office; and usually voted for Republican candidates in the general election.

In 2015, St. John got swept up in a polarizing debate over eminent domain. The St. John Town Council, comprised exclusively of five Republican members, voted to seize private residences for a commercial development. Some residents were unhappy because this decision would have primarily affected lower-income homeowners who had been living in the area all their lives. They formed a local political action committee to elect two independent candidates for town council running against the incumbent, pro-development candidates.

Hero lent his support to the effort, offering legal advice, posting yard signs, and making his opinions publicly known. According to Hero, the issue was not partisan (one of the independent candidates was also a Republican), and this election was the only instance in which he openly campaigned for the defeat of a Republican candidate.

The state Republican Party, however, caught wind of Hero's efforts to oust Republican incumbents. The year after the contentious events, Hero ran to retain his position as St. John Precinct Committeeman and delegate to the Republican State Convention. The Republican Party officials determined that because he supported the independent candidates in the town-council election, he could not serve in these capacities. Shortly after, Hero received a letter from the state chairman of the Republican Party, informing him that for the next ten years he was "not a Republican in good standing" and thus barring him from seeking elected office in Indiana as a Republican during that time. Undeterred by the letter, in 2019, Hero declared his candidacy for an at-large seat on the St. John Town Council.

Under Indiana law, there are three ways to appear on an election ballot. First, a candidate of a major political party can file a "declaration of candidacy" for a party if either he voted in the last primary election, or the county chairman certifies that the candidate is a member of the political party. Ind. Code § 3-8-2-7(a)(4) (2021). Second, a candidate can run as an independent by obtaining two percent of the total vote cast in the last election. *Id.* § 3-8-6-3(a). Third, a candidate can appear as a write-in option. *Id.* § 3-8-2-2.5(a).

Despite meeting the requirements to appear on the Republican primary ballot in 2019, the chairman of the Lake County

Republican Party and a member of the Lake County Council challenged Hero's candidacy. The Lake County Election Board held a hearing on February 26, 2019. Hero explained that he met the requirements under Indiana law to be a Republican in the upcoming primary election. He presented an opinion from an attorney for the Indiana Election Division and a print-out of every Republican primary he had voted in since the mid-1980s. The challengers conceded that Hero met the qualifications for affiliation under Indiana Code § 3-8-2-7(a)(4) but maintained that Hero could not run based on "an actual order from the party chairman in Indiana." The Election Board unanimously ruled against Hero and removed his name from the Republican primary ballot.

Hero filed a complaint against the Election Board in federal court, arguing that "[t]he determination that the plaintiff may not run for election as a member of the Republican Party, and the resulting removal of the plaintiff from the Republican primary ballot, violates the First and Fourteenth Amendments of the United States Constitution." *See* 42 U.S.C. § 1983. He requested declaratory relief that the Election Board "violated the rights of the plaintiff" and an injunction "prohibiting the [Election Board] from prohibiting the plaintiff from seeking election as a member of the Republican primary provided that he meets all requirements of Indiana Code § 3-8-2-7," though not damages. He submits that he would like to run as a Republican candidate "for the St. John Town Council or another local office at the earliest opportunity" and the Election Board's position effectively denied him the chance to run for the duration of the ten-year ban.

Both parties moved for summary judgment, and the district court dismissed the appeal for lack of standing. The 2019

election "has been held and decided," and there were no "continuing, present adverse effects" of the past illegal conduct.

II. Discussion

On appeal, Hero argues he has standing to sue and should prevail on the merits of his claim. We review the district court's grant of summary judgment de novo, construing all facts and drawing all reasonable inferences in favor of the nonmoving party's favor. *Lewis v. Ind. Wesleyan Univ.*, 36 F.4th 755, 759 (7th Cir. 2022).

A. Article III Jurisdiction

We first address our jurisdiction. The Election Board claims that Hero lacks Article III standing and, in the alternative, his claims for relief are moot. In his complaint, Hero sought a declaratory judgment for a past alleged wrong—his ballot-access denial from the Republican primary in 2019—and an injunction for a future wrong—the potential deprivation of his alleged right to appear on the ballot for the 2023 Republican primary. Although a plaintiff must have standing for each requested relief, *see California v. Texas*, 141 S. Ct. 2104, 2115 (2021), we focus on the declaratory judgment because Hero has satisfied the requirements under Article III.[1]

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[1] Hero's claim for an injunction is more problematic. A plaintiff seeking "prospective relief against a harm not yet suffered … must establish that he 'is immediately in danger of sustaining some direct injury as the result of the challenged official conduct[,] and [that] the injury or threat of injury [is] both real and immediate, not conjectural or hypothetical.'" *Bell v. Keating*, 697 F.3d 445, 451 (7th Cir. 2012) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *see also Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 393–94 (7th Cir. 2019). A plaintiff, like Hero, alleging some

1. Standing

Article III grants federal courts jurisdiction over "cases" and "controversies." U.S. Const. art. III § 2. "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). Standing has three elements: a plaintiff must have suffered (1) a concrete and particularized injury that is actual or imminent, (2) traceable to the defendant's conduct, and (3) can be redressed by judicial relief. *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 937 (7th Cir. 2022); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). The Election Board does not contest that Hero has satisfied most of the standing requirements—he suffered a concrete and particularized injury, caused by the Election Board, that could be remedied by his requested relief. The Election Board maintains, however, that neither of Hero's requested remedies satisfy the "actual or imminent" requirement of injury-in-fact. We disagree.

The claim for declaratory judgment easily meets the "actual" injury requirement of standing. Hero requested relief for a past wrong—mainly, the Election Board's decision to strike his name from the Republican Party's primary ballot for the 2019 election. A routine past harm, such as denial of access to a ballot, presents a textbook example an "actual" injury suffered. *See, e.g.*, *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 947 (7th Cir. 2019).

"criminal or unconstitutional behavior" based on official conduct that has yet to transpire faces a steep climb. *Bell*, 697 F.3d at 451.

2. Mootness

While Hero has standing to seek a declaratory judgment, we still must consider mootness. An actual controversy must exist at every phase of litigation. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016). If later events resolve the dispute, then the case is moot. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71–72 (2013). Both parties acknowledge that the request for declaratory relief fits within this definition because the 2019 election has come and gone. Hero argues though that his case is not moot because it falls within the "capable of repetition, yet evading review" exception, which permits courts to hear cases after resolution because the injuries occur too quickly for judicial review during the normal process. "The exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

Hero's claim for a declaratory judgment falls within the "capable of repetition, yet evading review" exception. "Challenges to election laws [or election-board decisions] are one of the quintessential categories of cases which usually fit" within the evading-review "prong because litigation has only a few months before the remedy sought is rendered impossible by the occurrence of the relevant election." *Graveline v. Benson*, 992 F.3d 524, 533 (6th Cir. 2021) (quoting *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005)); *see also Gaspee Project v. Mederos*, 13 F.4th 79, 84 (1st Cir. 2021); *Acevedo*, 925 F.3d at 947. Elections often happen too quickly for meaningful judicial review to occur before a dispute is resolved, as many cases take years

to reach a final disposition. Absent this exception, few challenges would be heard outside of an emergency basis. The facts here offer an illustrative example. Hero declared his candidacy in early 2019, and the Election Board heard his challenge in late February 2019. Hero filed his complaint shortly thereafter, in August 2019, and a final resolution will come, at the earliest, three years later. A three-year timeline is certainly not sufficient to litigate this difficult case before it becomes moot.[2]

Hero also will reasonably run again "at the earliest opportunity." He declared his intention to do so and has a long history of running for office. The ten-year ban is still in effect, and neither the Indiana Republican Party nor the Election Board have shown any intention to change course.

Recent Supreme Court decisions advise that routine election-law cases, such as this one, typically remain justiciable after the election has passed. In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, for example, the Court unanimously held that a challenge to the Federal Election Commission's blackout period for ads prior to an election was not moot. 551 U.S. at 462. Despite a two-year challenge window, the case would still avoid judicial review because groups

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[2] The Election Board averred for the first time at oral argument that Indiana state law, by providing some process to challenge the law, satisfied the "evading review" prong of the mootness exception. Assuming with skepticism that a state-court procedure might adequately provide the necessary review contemplated by federal law, a proposition that no other circuit court has recognized, the Election Board has failed to provide any details to support its argument. When pressed, it could not even say conclusively whether a decision would be rendered by a state court in time for an election.

might not know what ads to air until the public concern arises. *Id.* at 462–63. Nor does there need to be any type of precisely similar fact pattern. *Id.* at 463. "Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges." *Id.* One year later, the Court reaffirmed this holding in *Davis v. Federal Election Commission*. 554 U.S. 724 (2018). A group sought to run an ad within thirty days of the Wisconsin primary, and the Court again held that it was not moot because the case "closely resemble[d]" *Wisconsin Right to Life*. *Id.* at 735.

Our opinion in *Gill v. Scholz*, 962 F.3d 360 (7th Cir. 2020), parallels this case. There, David Gill wanted to run as an independent candidate for an Illinois election, but he came up 2,000 votes shy of the number necessary to appear on the general ballot. *Id.* at 361. He and several registered voters sued the election board for a violation of the First and Fourteenth Amendments. *Id.* at 362. The district court granted summary judgment to the board, and Gill appealed. *Id.* Despite finding the appeal of the stay was moot, we determined that his case fit within the "capable of repetition, yet evading review" exception because "Gill was unable to litigate his claim before the November 2016 election was held, and he has expressed his intent to run for office in 2020." *Id.* at 363 n.3. Here too, Hero could not litigate his claim before the election on appeal, and he has declared his intent to run again. *See also Acevedo*, 925 F.3d at 947–48 ("[T]he timeline for collecting signatures to appear on a primary ballot is too short to fully litigate a challenge to the signature requirement. In light of this, and because Acevedo has expressed his intention to run for office in Cook County again, his challenge remains live.").

Other circuits have reached the same conclusion in similar election-law disputes. *See, e.g.*, *Gaspee Project*, 13 F.4th at 84; *Nat. Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 692 (2d Cir. 2013); *Stop Reckless Econ. Stability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 231 (4th Cir. 2016); *Cath. Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 422 (5th Cir. 2014); *Graveline v. Benson*, 992 F.3d 524, 533 (6th Cir. 2021); *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003).

The Election Board relies upon *Tobin for Governor v. Illinois State Board of Elections*, 268 F.3d 517 (7th Cir. 2001). In *Tobin*, the plaintiffs were Illinois residents who wished to place candidates from the Libertarian Party on the general election ballot. *Id.* at 519. A group also formed a political committee, named Tobin for Governor, to support James L. Tobin for governor of Illinois. *Id.* The party gathered signatures for its nomination petition, but the Illinois State Board of Elections struck out so many that the petition fell below the necessary threshold. *Id.* The Libertarian candidates who did not appear on the ballot first filed suit in Illinois state court; the state trial court determined that the Libertarian Party needed to be named, and the candidates did not serve the objectors or the party with the necessary petition for judicial review under Illinois law. *Id.* The circuit court dismissed the action, the state intermediate appellate court affirmed, and the Illinois Supreme Court denied the appeal. *Id.* The plaintiffs then sued the board in federal court. *Id.* We concluded that the party's case did not fall within the "capable of repetition, yet evading review" exception because "a controversy of this sort does not necessarily evade review." *Id.* at 529. The plaintiffs made several "procedural missteps that prevented judicial review of the Board's decision." *Id*. Additionally, there was no "reasonable

expectation that Tobin for Governor [would] find itself in this same situation in the future." *Id.*

Ultimately, *Tobin* is distinguishable for three reasons. First, Hero never pursued a state remedy and thus never committed the various "procedural missteps" made by the Libertarian candidates. Second, Hero has shown a "reasonable expectation" to run for office again; he has declared his intention and provided ample support to corroborate his plan. Finally, Hero advances a different type of claim than the one in *Tobin*. He alleges the state denied him complete ballot access, which differs in kind from a failure to collect a certain number of ballot signatures. A signature-collection issue lends itself to state resolution because of the difficulties in verifying the individual signatures and the complex procedural vehicles to adjudicate disputes, whereas a ballot-access claim often involves agreed-upon facts and isolated legal issues.

B. Federal Question

The Election Board raises a challenge, for the first time on appeal, to our statutory jurisdiction. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation …."). Section 1331 gives district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The well-pleaded rule requires that a federal question be "apparent on the face" of the complaint. *Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 707 F.3d 883, 890 (7th Cir. 2013) (citing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). A federal statute that creates a "cause of action" raises a "federal question." *Sarauer v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 10*, 966 F.3d

661, 673 (7th Cir. 2020). Hero's well-pleaded complaint raises a "federal question" by alleging a deprivation of his First and Fourteenth Amendment rights. *See* 42 U.S.C. § 1983. Section 1983 provides a cause of action, which suffices to grant federal-question jurisdiction in this case.

C. Election Law

We turn now to the merits.[3] The First and Fourteenth Amendments safeguard the rights of citizens and political parties to participate in the electoral system. *See Norman v. Reed*, 502 U.S. 279, 288 (1992). "We have stated that the *Anderson/Burdick* 'test applies to *all* First and Fourteenth Amendment challenges to state election laws.'" *Tully v. Okeson*, 977 F.3d 608, 615 (7th Cir. 2020) (quoting *Acevedo*, 925 F.3d at 948). The *Anderson-Burdick* framework derives from two Supreme Court cases, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). In *Anderson*, the Court struck down as unlawful Ohio's early filing deadline, which required independent candidates to file a statement of candidacy in March ahead of the November election. 460 U.S. at 786–87. The law placed too great a restriction on the associational rights of independent voters. *Id.* at 790–92. In *Burdick*, however, the Court upheld a Hawaii law that prohibited

[3] Although the district court did not consider the merits, "we may affirm on any ground supported in the record so long as it was adequately addressed below and the plaintiffs had an opportunity to contest the issue." *O'Brien v. Caterpillar Inc.*, 900 F.3d 923, 928 (7th Cir. 2018). Hero sued the state Election Board for violating his First and Fourteenth Amendments rights. Both parties accept these amendments govern. We do not necessarily share this confidence but given the clear resolution of this dispute and the possibility of waiver, we assume that Hero states a plausible claim for relief.

write-in voting under a more flexible standard. 504 U.S. at 432–33. The law imposed a low burden, and Hawaii had an interest in avoiding unrestrained factionalism. *Id.* at 433–40.

The resulting test requires courts to engage in a two-part inquiry:

> First, we determine whether the law imposes severe or reasonable and nondiscriminatory restrictions on candidates' and voters' constitutional rights so that we can ensure application of the appropriate level of scrutiny. Second, we must determine whether the state interest offered in support of the law is sufficiently weighty under the appropriate level of scrutiny.

Navarro v. Neal, 716 F.3d 425, 430 (7th Cir. 2013) (internal citation omitted). Severe restrictions on voter rights trigger strict scrutiny, whereas courts generally defer to the state's interest for less restrictive ones, those that impose "reasonable, nondiscriminatory restrictions." *Id*. (quoting *Burdick*, 504 U.S. at 434).

The Election Board did not violate Hero's First and Fourteenth Amendment rights. The decision to strike Hero's name from the ballot imposed only a minor restriction on his ballot access. Indiana law provides alternative means to access the general-election ballot. Although Hero cannot run in the Republican primary—undoubtedly his first choice—he can either run as an independent by obtaining two percent of the total vote cast in the last election or as a write-in candidate. Ind. Code §§ 3-8-2-2.5(a), 3-8-6-3(a). As an independent, he can tout his Republican virtues, tell voters he supports Republicans, put up yard signs to that effect, and run on a platform

identical to any political party. The only limitation is that he cannot appear on the Republican Party's primary ballot.

The restriction here is also reasonable and nondiscriminatory. The state has an interest in protecting a party's right to determine its own membership and limit its candidates to those party members. *Cf. Ray v. Blair*, 343 U.S. 214 (1952) (party loyalty oath); *Kucinich v. Tex. Democratic Party*, 563 F.3d 161 (5th Cir. 2009) (party loyalty oath); *Da La Fuente v. Cortes*, 751 F. App'x 269 (3d Cir. 2018) (sore-loser law); *S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752 (4th Cir. 2010) (sore-loser law). Implicit in the First Amendment is the freedom "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. Political parties enjoy these associational rights like any other organization. And "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000); *see also Maslow v. Bd. of Election in N.Y.C.*, 658 F.3d 291, 296 (2d Cir. 2011) ("The Supreme Court has emphasized—with increasing firmness—that the First Amendment guarantees a political party great leeway in governing its own affairs.").

Hero seeks to use the First Amendment as a sword, demanding "a certain degree of influence in[] the party." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008).

But his bold assertion finds little support in precedent. Including people unaffiliated with the party—or those with whom the party does not wish to affiliate—"may seriously distort [the party's] collective decisions—thus impairing the party's essential functions." *Democratic Party of U.S. v. Wisc. ex rel. La Follette*, 450 U.S. 107, 122 (1981). "[P]olitical parties may accordingly protect themselves 'from intrusion by those with adverse political principles,'" *id.* (quoting *Ray*, 343 U.S. at 221–22), so too can a state protect the First Amendment rights of a political party, as the Election Board did here by allowing the Republican Party to determine its own membership and restrict its standard bearers to members in good standing.

Our conclusion aligns with two Eleventh Circuit opinions regarding a party's effort to exclude a candidate, David Duke, from its primary ballot. *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996); *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992).[4] The cases involve essentially identical facts. Georgia law established a committee to select the candidates for the presidential primary ballot. *Cleland*, 954 F.2d at 1527. Duke met the criteria, yet the Republican committee members successfully removed his name from the ballot. As a result, Duke and two

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[4] *See also De La Fuente v. Simon*, 940 N.W.2d 477, 496 (Minn. 2020) ("[T]he statute poses no bar to De La Fuente's right to be a presidential candidate on the general election ballot, as a party's nominee or a write-in candidate. … In contrast to this de minimis burden, the associational rights of political parties to choose a candidate are well-established."); *Langone v. Sec'y of Com.*, 446 N.E.2d 43, 50 (Mass. 1983) ("To the extent, however, that the plaintiffs wish to associate and express their ideas as Democrats, those ideas may be represented by the several candidates who obtained the requisite convention support. Every voter cannot be assured that a candidate to his liking will be on the ballot.").

supporters sued the Secretary of State and Committee (not the Georgia Republican Party). *Id.* at 1527–28. Twice, the Eleventh Circuit sided with the state. In the first case, the court agreed that the committee's action infringed upon Duke and his supporters' right to associate and vote. *Id.* at 1533. But Georgia "has an interest in maintaining the autonomy of political parties," which means the Republican Party "enjoys a constitutionally protected right of freedom of association." *Id.* at 1531–32. Applying the "reasonable restriction" standard, the decision to exclude Duke easily passed muster. Four years later, the Eleventh Circuit again denied Duke his requested relief, this time under strict scrutiny because the "state has a compelling interest in protecting political parties' right to define their membership." *Massey*, 87 F.3d at 1234. Both times, the interests of the party prevailed over that of a single candidate attempting to dictate an organization's speech. While Hero is by no means advocating similar beliefs as Duke, he also cannot define the Republican Party's message.

III. Conclusion

For these reasons, we affirm the judgment of the district court.