

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEALAN JONES, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 12-cv-9997
)	
WILLIAM McGUFFAGE, et al.,)	Hon. John Tharp, Judge Presiding
)	
Defendants.)	
)	

CLOSING ARGUMENT OF PLAINTIFFS JONES, SACKS AND ILLINOIS GREEN PARTY
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

NOW COME Plaintiffs LeAlan Jones, David Sacks and the Illinois Green Party, by and through their attorney, Richard J. Whitney, and for their Closing Argument in Support of their Motion for Preliminary Injunction, state:

A. The interests at stake in this litigation.

1. The interests at stake in this litigation may be summarized as follows. For Plaintiffs Jones, Sacks and the Illinois Green Party, they are the “rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively,” protected by the First and Fourteenth Amendments.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S. Ct. 533 (1986).¹ Defendants have identified the underlying State interests they

¹ The rights of candidates are essentially identical in this context as the rights of voters and political parties or associations: “Our ballot access cases based on First Amendment grounds have rarely distinguished between the rights of candidates and the rights of voters. In *Bullock v. Carter*, 405 U.S. 134, 143, 92 S. Ct. 849, 31 L.Ed.2d 92 (1972), we said: ‘[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.’” *Cook v. Gralike*, 531 U.S. 510, 531, 121 S.Ct. 1029 (2001) (Rehnquist, J., concurring).

are asserting here as an interest in reducing “election-and-campaign-related disorder,” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364 (1997), (Def.’s Opp. Mot. Prelim. Inj., Doc. 23, at 8), “requiring demonstration of a significant modicum of support before placing a candidate on the ballot, . . . a vested interest in maintaining fairness, efficiency, stability and integrity in its electoral process, including all routes to the ballot,” and an “interest in avoiding overcrowded ballots, which avoids voter confusion and ensures that the winner is the choice of a majority,” (Def.’s Opp. at 11 and authorities cited therein), sometimes described in the motion hearing in this matter as an interest in avoiding “ballot clutter.”

2. During oral argument at the Jan. 30th motion hearing over the suggested remedy of extending the deadline, Defendants suggested that the Court should also consider the “rights of objectors,” i.e., those who file objections to candidate petitions pursuant to 10 ILCS 5/10-8. However, the case law on this subject does not indicate that there is a separate category of Constitutional rights covering “objectors.” Rather, such “rights” as objectors possess are purely statutory, and reflect the interests of competing candidates and their supporters. *See Krislov v. Rednour*, 946 F. Supp. 563, 567 (N.D. Ill. 1996). This objector provision further serves the *State’s* interests in integrity and avoiding overcrowded ballots, by providing a method of policing signature-gathering methods. *Id.* (Indeed, as expert witness Richard Winger noted, Illinois is unique insofar as the State itself does *not* police candidate petition filings *absent* the filing of an objection.) In short, the “rights” of “objectors” are not of Constitutional dimension, they are simply a particular device used to further the State’s asserted interests.

3. Finally, Defendants legitimately invoke the interests of uniformed services voters and overseas voters, as have been considered by this Court in Case No. 13-cv-00189, and reflected in the Consent Decree entered in that cause. (Def.’s’ Opp. Ex. F; Doc. 23-7.) Plaintiffs do not seek to collaterally attack the Consent Decree and accept that it will require transmittal of absentee ballots by

no later than March 8, 2013. However, as Plaintiffs argue herein, their request for a brief extension of the deadline for filing petition signatures is fully reconcilable with that deadline.

B. Defendants’ focus on the undeveloped state of the Jones campaign to date, and on the hypothetical possibility of meeting the ballot access requirement at issue, are irrelevant to Plaintiffs’ facial challenge and miss the point with respect to their as-applied challenge.

4. Plaintiffs brought their claims as both a facial and an “as applied” challenge to the statutory scheme governing the April 9, 2013 special election. (Compl., Doc. 1, ¶¶ 27-29.) Sometimes these categories overlap, and fact patterns arise where an “as applied” challenge, as a practical matter, necessitates relief that functionally converts it to a facial challenge, such that “[t]he label is not what matters.” *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2817 (2010). In the case at bar, Plaintiffs have largely prosecuted their claim as a facial challenge, since the ballot access barriers at issue are so extreme, on their face, that they violate the rights of candidates of, and voters who support, *any* “new party” or political association that might seek to surmount them. Plaintiffs just happen to be the ones who brought the challenge. Thus, while Defendants have sought to make an issue of some of the particular facts and circumstances of Plaintiffs’ level of organization and Plaintiffs, in kind, have responded with evidence of levels of support among voters in or near the Second Congressional District, and testimony regarding how the ballot access barriers themselves have *impeded* their efforts to organize, none of this should be permitted to distract the Court from the core of Plaintiffs’ claims – viz., that the statutes in question impose constitutionally impermissible barriers on non-established parties, their candidates and the voters who may wish to vote for them, that cannot possibly be justified by any of the legitimate State interests advanced by Defendants.

5. Even some of the evidentiary particulars brought to the Court’s attention – the dearth of petitioning opportunities and productive venues in the Second Congressional District, especially during Winter, the effects of harsh weather and high crime rates on petitioning, the

inability to petition in most shopping malls and centers, Intervening Plaintiff Lewis’s insightful evidence regarding barriers to petitioning at public universities and colleges in the District – are all “universal” in that they would impact *any* aspiring non-established party or independent candidate who sought to surmount the barriers imposed by the law at issue. About the only evidence that truly goes to an “as applied” challenge is Plaintiff Jones’ testimony that some of his erstwhile supporters who might otherwise have petitioned for him were instead attracted to the campaigns of the 17 Democratic and 5 Republican challengers who filed. (The Court can take judicial notice of the ISBE’s official website verifying this, at:

<http://www.elections.il.gov/ElectionInformation/CandList.aspx?SearchType=office&ListType=RESULTS+OF+SEARCH+BY+OFFICE&ElectionID=38&ElectionType=SP&ElectionDate=2%2f26%2f2013&QueryType=CANDIDATE&OfficeIDSearchType=Matches&OfficeID=6453&StatusSearchType=Matches&Status=&OrderBy=ORDER+BY+OfficeBallotGroup%2c+OfficeSequence%2c+PartySequence%2cFileDateTime%2cvwCandidates.Sequence%2cLotteryLastName%2cLotteryFirstName> .)

6. No doubt this phenomenon reflects the fact that the ballot access requirements for Democratic and Republican candidates were vastly lower, thus making the prospect of working for a Democratic or Republican candidate that much more appealing in comparison to the prospect of working for a candidate whose petitioning efforts would be futile, absent a positive outcome in this lawsuit. Incidentally, the “ballot clutter” that will obviously confront Democratic primary voters makes a mockery of the Defendants’ asserted interest, in defending the statutes, of “avoiding overcrowded ballots . . . voter confusion and ensur[ing] that the winner is the choice of a majority.” (Def.’s Opp. at 11.) Apparently such concerns in Illinois are reserved for the general election ballot and are mysteriously absent with respect to the primary ballot. While Plaintiffs have focused on the First Amendment violations at issue, this adds a new dimension to the claim that the statutory scheme also runs afoul of the Equal Protection Clause.

7. Defendants’ efforts to expose the admittedly undeveloped level of organization of the

Jones campaign, and limited resources and organizational limitations of Plaintiff ILGP, are simply not relevant to the question presented by the facial challenge – and, to the degree that they have any relevance at all to an “as applied” challenge, the evidence cuts both ways.

Defendants make the elementary error of confusing the level of *organization* exhibited by Jones and the ILGP with the State’s interests in “requiring demonstration of a significant modicum of support before placing a candidate on the ballot.” Simply because neither the Jones campaign nor the ILGP have *yet* managed to recruit large numbers of persons willing to commit time and energy to a broader, longer-term cause, so as to build a stronger and more enduring party organization and/or cadre of activists, this has *nothing to do* with whether significant numbers of registered *voters* in the District want to vote for a Green Party candidate, or for Jones – or at least want the opportunity to do so.

8. Similarly, Defendants’ harping on the fact that the Jones campaign, *per se*, hasn’t yet collected petition signatures but is still trying to organize (while ignoring the fact that ILGP members *have* collected signatures for Jones but with no reporting mechanism yet established) suffers from the same flaws: It is not relevant to the facial challenge at all; it is simply another reflection of the organizational difficulties faced by non-established parties and their candidates; it completely *fails to take account of the discouraging and demoralizing impact of the very statute at issue on efforts to organize a petition drive and recruit volunteers*, by imposing an insurmountable barrier to such parties and their candidates, and it has nothing whatever to do with *voter* support for such parties and their candidates.

9. Obviously, the vote totals received by the 2010 Green Party candidate in what was a substantially similar Second Congressional District and Jones’ U.S. Senate vote totals the same year, (Pl.’s Hearing Exs. 1, 2), demonstrate a substantial showing of support among Illinois voters in the same portion of Illinois. Richard Winger’s testimony further places this in proper

perspective, as he noted that LeAlan Jones' percentage for his 2010 U.S. Senate runs (short term and regular) were the highest for any minor party or independent candidate for U.S. Senate in Illinois since 1936; that the Illinois Green Party has more voter support in Illinois than any party besides the Democrats and Republicans, with both its U.S. House nominees winning over 5 percent of the vote, and its showing for Governor in 2010 being the third highest showing by a third party for that office in Illinois since 1930.

10. Jones, ILGP and Intervening Plaintiff Lewis obviously have bases of *voter* support but what Defendants fail to appreciate is that the ability to recruit, build and maintain an organization that can maintain itself between election cycles, and thereby help launch the next petition drive, is an entirely different proposition. The reality for non-established parties (and independent candidates) is that the campaigns become vehicles for building infrastructure more than the other way around – which creates a Catch-22 for such organizations, in that it takes more time to get a campaign underway, in order to build, or at least build up, the requisite infrastructure. Thus, it requires more lead time for building a campaign *before* it can even *begin* a petition drive, than is needed for established parties or established party candidates, who typically begin with a larger pre-existing infrastructure, greater financial reserves and/or fundraising ability (and in any event have far less petition signatures to collect). The testimony of witnesses Jones and Huckelberry plainly illustrate this. It was also starkly illustrated by the experience of Intervening Plaintiff Lewis, a man who received over 40,000 votes in the identical 2nd Congressional District in the 2012 General Election (See:

<http://www.elections.state.il.us/ElectionInformation/VoteTotalsList.aspx?ElectionType=GE&ElectionID=33&SearchType=OfficeSearch&OfficeID=6103&QueryType=Office&>), yet, when faced with beginning his campaign and a new petition drive only about a month later, found that

he essentially had to start from scratch.

11. The significance of this evidence, then, is not that it shows lack of support among voters in the 2nd Congressional District for Jones, Green Party candidates or Lewis. The significance of the evidence is that it illustrates the vastly *disparate and disproportionately heavy impact* of a short petitioning period, *combined with* very short lead time in which to even begin to organize a campaign, on non-established party and independent candidates vis-à-vis established party candidates.

12. As to the testimony of Defendants' expert witness Harold Hubschman, that can be dispensed with very quickly. All Hubschman established is that, with enough money to pay professional petitioners, and/or large numbers of volunteers, it is *humanly possible* to gather large numbers of signatures, at least in Massachusetts and Connecticut, in a short period of time, comparable to the bar set by the State of Illinois in the instant case. While Hubschman adroitly evaded giving direct answers about how much money would be required of his firm to gather the approximately 20,000 signatures needed to survive a petition challenge in 62 days via a paid petition drive, he at least admitted that his firm has charged as much as \$4 a signature and indicated that \$70,000 would be in the ballpark. Needless to say, the Constitutional protections afforded to voters and candidates of non-established parties is neither reserved to those who happen to have \$70,000 in their coffers nor those who can establish that they have hundreds of volunteers, or even some combination of volunteers and money, nor to those who might happen to persuade a person with Hubschman's resources to donate his services. Nor does any of the case law support the proposition that, "if it falls within the realm of human possibility, it is Constitutional." Hubschman's testimony may support the conclusion that a two-tier or two-class system exists in the world of ballot access petitioning but it is simply irrelevant to the issues at

hand.

C. The constitutionality of a five percent threshold requirement under one set of circumstances does not signify that a five percent threshold requirement passes constitutional muster under all circumstances – and certainly not in the circumstances present in the case at bar.

13. Defendants understandably return frequently to the cases upholding ballot access requirements based on five percent of the registered voters, or five percent of the numbers voting in the immediately prior election, waving the five-percent threshold as a kind of talisman that ensures a finding of constitutionality under *all* circumstances. In their Reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, (Doc. 30), at 2-4, 7-10, Plaintiffs already responded to this argument in detail. Suffice it to say here that none of the authorities cited by Defendants create a "per se" rule – and, considered in their totality, the adverse circumstances that the statutory scheme imposes on "new party" and independent candidates *in this case* plainly cannot possibly survive constitutional scrutiny. What makes this statutory scheme unconstitutional is not simply the five percent requirement but the five percent requirement, in a Congressional District, *combined with*:

- a. the truncated, 62-day time period;
- b. the fact that the 5 percent requirement, when applied to this Congressional District, results in a numerical threshold substantially higher than has ever been achieved by any non-established or independent candidate for U.S. House to appear on the ballot in the history of the United States, per Richard Winger's testimony;
- c. the discouraging impact that knowledge of an impossibly high signature-gathering requirement has on efforts to recruit volunteers to petition, or even to lead and organize a petition drive;
- d. the lack of start-up time to organize a petition drive prior to undertaking

petitioning, and the disparate impact this has on non-established parties and their candidates;

e. the other facts and circumstances specific to this statute and Congressional District that adversely affect petitioning, viz., the weather conditions that both limit outdoor petitioning opportunities and impair petitioning itself, the impact of high crime in much of the District, the demonstrable prohibitions or restrictions on campus petitioning, the general inability to petition in private shopping malls or centers, making it factually similar to *Libertarian Party of Oklahoma v. Oklahoma State Election Bd.*, 593 F. Supp. 118 (W.D. Okla. 1984), and

f. the other facts and circumstances specific to Illinois law, such as its bar against voters signing petitions of more than one candidate, bar against petitioners circulating petitions for more than one candidate, requirement that all petition sheets be notarized and other rigid requirements of the form of petition, all of which make petitioning and proper submission of petitions a complex undertaking. 10 ILCS 5/10-3, 10-4.

D. The remedies that Plaintiffs seek are not extraordinary under the circumstances, unworkable or contrary to the other interests that must be balanced in this matter.

14. In recognition of the extraordinary circumstances just outlined, resulting from the oppressive and brazenly unconstitutional impact that the statutes at issue in this cause have had on the rights of Plaintiffs, Plaintiffs have requested, in the alternative, that the Court simply place Plaintiff Jones on the ballot, or, alternatively, impose a ballot access requirement comparable to that imposed on Republican Party candidates, or, if some other formula is used to balance the rights of Plaintiffs against the legitimate State interests at stake, that it at least take account of *all* the factors enumerated above in paragraph 13, *supra* – and not simply a proportion of the 5 percent rule prorated over the truncated petitioning period. In that connection, Plaintiffs orally suggested and requested consideration of a brief extension of time to meet the filing deadline, taking into consideration especially factors 13. b. and c.

15. A two-week extension of time would result in a deadline of February 18th. The five-day period required for filing objections, 10 ILCS 5/10-8 would then expire on February 25th. The Illinois State Board of Elections would then have 13 days in which to hear and rule on objections prior to having to certify, print and ship ballots to overseas voters, pursuant to the Consent Decree in Case No. 13-cv-00189. While this would be a tall order, it should not be unmanageable considering that the Board's attention would be focused on one election, in one District, with, at most, two additional candidates whose petitions *might* be challenged.

16. In addition, most of the time and labor consumed in hearing and ruling on objections to such petition filings is due to the Board's practice of engaging in an intensive process referred to as a "binder check," that entails a line-by-line comparison of challenged signatures on the petitions with records on file with local election authorities. *See generally Nader v. Keith*, Not Reported in F.Supp.2d, 2004 WL 1880011 *1-2 (N.D. Ill. 2004). Yet there is nothing in the Election Code or any regulations of the Board that requires a "binder check" as *the* mechanism for determining whether filed petitions contain the required number of valid signatures. Indeed, with respect to ballot initiatives under Article 28 of the Code, 10 ILCS 5/28-1 et seq., the Board uses an entirely different, and more expeditious method to check validity of signatures, via a "random sampling method." 10 ILCS 5/28-11. Under the extraordinary circumstances of the special election, there is no reason why the Board could not employ the same method to determine whether an objector's objections to a petition filing should be upheld or denied.

17. All told, it is clear that the statutory scheme at issue in this cause is unconstitutional on its face, and, for the reasons already advanced in their initial Motion for Preliminary Injunction, supporting Memorandum and other supporting papers, the other requirements for a preliminary injunction have been satisfied.

WHEREFORE, Plaintiffs LeAlan Jones, David Sacks and Illinois Green Party respectfully pray that this Court GRANT their Motion for Preliminary Injunction and either grant the relief requested therein, grant the relief orally requested at hearing, or grant such other relief as the Court deems fit in considering all the facts and circumstances as presented.

RESPECTFULLY SUBMITTED,

LEALAN JONES, DAVID SACKS and ILLINOIS
GREEN PARTY, PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2013, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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I further certify that on January 31, 2012, I served the following parties by electronic mail at the following electronic addresses:

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Respectfully submitted,

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