

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

LEALAN JONES, et al.,)	
)	
Plaintiff,)	
v.)	Case No. 12-cv-9997
)	
WILLIAM McGUFFAGE, et al.,)	Honorable John Tharp
)	
Defendants.)	
)	

**DEFENDANTS' CLOSING BRIEF IN OPPOSITION TO PLAINTIFFS'
MOTIONS FOR PRELIMINARY INJUNCTION**

Defendants, by and through their counsel, Lisa Madigan, Attorney General for the State of Illinois, hereby submit their closing brief in opposition to Plaintiffs' motions for preliminary injunction.

A. Plaintiffs' Request for Equitable Relief Should Not Be Granted.

Throughout these proceedings, Plaintiffs' requested relief has been direct placement on the ballot, or alternatively, to be held to a pro-rated version of the signature requirement applied to the Republican Party (.5%). Yesterday, for the first time, Plaintiffs sought an extension of time. Amending their requested relief at this eleventh hour has severely shifted the balance of harms. Indeed, based on the evidence presented, it would be inequitable for the Court to order *any* equitable relief under the circumstances. Before delving into why equitable relief is inappropriate, a timeline best illustrates the reprehensible conduct, particularly of Plaintiffs Illinois Green Party ("ILGP") and Jones in this matter:

- **November 21, 2012:** Jesse Jackson, Jr. resigns as the 2nd Congressional District Representative.
- **November 26, 2012:** Pursuant to Illinois law, Governor Quinn announces a special election to be held on March 19, 2013. ILGP took no action.

- **December 3, 2012:** 10 ILCS 5/25-7 is amended to move the special election to April 9, 2013 to coincide with a previously scheduled election. ILGP took no action.
- **December 8, 2012:** ILGP holds a caucus and nominates Plaintiff Jones. A signature drive was discussed but not implemented, instead, it was determined that litigation would be pursued in lieu of a signature drive.
- **December 17, 2012:** The petitioning period is in its 2nd week. ILGP finally files their Complaint. Not a single signature has been collected by ILGP and Jones.
- **December 21, 2012:** The petitioning period is in its 3rd week. Plaintiffs Lewis and Newman move to intervene.
- **January 2, 2013:** The petitioning period is in its 5th week. ILGP and Jones move for a preliminary injunction, and still have not collected a single signature.
- **January 3, 2013:** A briefing schedule is set on the instant motions. All Plaintiffs acknowledge a January 30 hearing means a ruling without time for appeal before the February 4 deadline if their motions are denied. Not a single signature has been collected by ILGP and Jones.
- **January 17, 2013:** Defendants' response brief argues that Plaintiffs have not even attempted to meet their evidentiary burden. (Dckt. No. 23, p. 6).
- **January 23, 2013:** The petitioning period is in its 8th week. Plaintiffs ILGP and Jones acknowledge they have provided no evidence and request an evidentiary hearing. (Dckt. No. 30, p. 5). Plaintiff Jones submits an affidavit in which he states, "[a]n active petitioning drive is underway and my campaign and the Illinois Green Party are doing everything in their power to obtain as many valid petition signatures as possible." (Dckt. No. 30-1, ¶4). In actuality, not a single signature has been collected by ILGP and Jones.
- **January 30, 2013:** The petitioning period is in its final week. ILGP and Jones request for the first time that they receive a 2 week extension, at which time they pledge they can submit 2,000 valid signatures. Mr. Lewis, in his closing brief, requests that he be ordered onto the ballot with his current 645 signatures. They also testified to the following:
 - Mr. Jones has gathered zero signatures to date, and this week he has been organizing his petitioning drive. He is unaware of whether ILGP has gathered any signatures to date.
 - Mr. Huckelberry, chair of ILGP is not participating in the petition drive. He is unaware of whether any signatures have been gathered to date by ILGP because he has not been able to get an answer, though he has inquired.

- There were approximately 50 volunteers who participated in the 2012 ILGP petition drives. Mr. Huckelberry is unaware of how many of them have been contacted to potentially assist with Mr. Jones' petition drive. Mr. Huckelberry has been in contact with the Green Party's National Committee but has not requested assistance of any kind regarding Mr. Jones' campaign.
- Mr. Jones' website, which was under construction as of January 27, is finally up and running. He alleged it was previously functioning, but refused to say how long the website was under construction. (Def. Ex. 1).
- Plaintiff Jones has not used his campaign Facebook page, "Friends of LeAlan M. Jones," to organize a petition drive.
- Mr. Huckelberry confirmed that ILGP has access to free social media, including a Facebook page and group, the ILGP website, and Twitter, all of which he has administrative rights to, and none of which were used to attempt to organize a petition drive. The single post made by Mr. Huckelberry was to ILGP's website, recently announcing the instant lawsuit. His reasoning for failing to even attempt to promote the petition drive through social media was that any attempt at gathering signatures under the circumstances was simply a "fool's errand."
- Mr. Lewis has gathered only 645 signatures in over 8 weeks.

While Plaintiffs have done virtually nothing, the Illinois State Board of Elections has a strict timeline (in addition to expending significant effort on the instant expedited litigation) and several third party rights and interests to balance:

- **February 5-11, 2013:** Period for objections to petitions to be filed.
- **February 15, 2013:** The Board begins its review process of objections, including any adjudication which will need to ensure.
- **March 8, 2013:** Ballots must be sent out to military voters. (Dckt. 23-7, ¶14).

A preliminary injunction is an extraordinary remedy, only to be awarded upon a clear showing that the plaintiff is entitled to such relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 375, 172 L.Ed.2d 249 (2008). A mandatory preliminary injunction, which requires a defendant to take an affirmative action, is even more extraordinary. Such an injunction is "cautiously viewed and sparingly issued," such that nothing but "the clearest equitable

grounds” justify the remedy. *Graham v. Medical Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir.1997) (citations omitted); *see also O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1012–18 (10th Cir. 2004) (McConnell, J., concurring), *aff’d*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (explaining the disfavored status of preliminary relief that disrupts the status quo); *Perry v. Judd*, 840 F.Supp.2d 945, 950 (E.D. Virginia 2012). Plaintiffs have sought an extraordinary remedy – that the Illinois Election Code be enjoined to permit them ballot access. Yet, Plaintiffs do not come to the Court with the equities weighing in their favor. It is Plaintiffs’ burden to make a “clear” showing that they are entitled to any relief, especially a deadline extension. Plaintiffs fall woefully short of meeting that burden.

i. The balance of harms weighs against ordering an extension of time.

Plaintiffs’ newly suggested relief is to extend the signature gathering deadline, but this would be manifestly unfair to the election authorities and third parties. Defendants are already on a very tight deadline. When petitions are submitted, there is a period for objections to be filed and hearings to be held. Objectors and candidates have due process rights and this process takes time no matter how expedited. The validity of signatures is often contested on a line by line basis. Administrative law hearings are held and at times, there are state court challenges. Additionally, as explained in Court, Defendants have a court imposed deadline of March 8 to send out military ballots. (Dckt. 23-7, ¶14). Plaintiffs’ requested 2 week extension would mean Defendants would have **18 days** to permit objections to be filed, review objections, conduct administrative hearings, certify the ballot, print the ballots and transmit the ballots by March 8. This is an impossible expectation.

The Court must consider the balance of harms. See *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 593-94 (7th Cir. 1985). Extending the filing deadline (whether solely for Plaintiffs or for all candidates) has a great potential to harm the election

process, impose unfair burdens on election officials, create confusion for other candidates, disrupt the Consent Decree, and possibly delay the mailing of ballots to military voters. Plaintiffs' cavalier suggestion of "give us two more weeks," simply ignores the cascade effect that such a delay would have on Defendants and third parties. The ballot needs to be finalized, that is why the deadlines exist in the first place.

ii. Plaintiffs Have Not Made a Serious Attempt to Meet the Signature Requirement.

For an entire month of the 62 day petition period, Plaintiffs ILGP and Jones did nothing. They didn't petition, and they didn't move for an injunction. With only days left in the circulation period, the evidence showed that they have collected *zero signatures*. The Green Party candidacy is not a serious one - rather than committing any effort to meeting the requirement, they wish to litigate their way onto the ballot. Not a single petition sheet was placed into evidence. Plaintiffs have no entitlement to a modification of existing law. Courts do not issue advisory opinions, and do not decide constitutional questions when they can be avoided. The intervenor, Plaintiff Lewis, had approximately 645 signatures, a woefully lacking number. The factual predicate needed to justify a preliminary injunction is lacking.

Had plaintiffs made a showing of having gathered several thousand signatures (however short of 15,682 that might be), and demonstrated a substantial "modicum of support," that would at least give them a colorable claim of ballot access. Only at that juncture could a constitutional claim possibly be appropriately faced, and the Court would be in a position to make the careful exercise of discretion called for. That is not what the record here shows. The evidence is that Plaintiffs sued instead of collecting signatures, and when their efforts were challenged by Defendants, Plaintiff Jones submitted an affidavit to this Court which was misleading at best, but

more accurately false. Such a claim is insufficient as a matter of law. Plaintiffs must come to a court of equity with clean hands and without undue delay, not a baseless sense of entitlement.

Simply put, “[t]here is no constitutional right to procrastinate.” *Dobson v. Dunlap*, 576 F.Supp.2d 181, 183 (D. Maine 2008). Courts routinely bar election law challenges where the plaintiffs have slept on their rights to the detriment of the defendants and seek relief which will disrupt the electoral process. See *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (upholding denial of preliminary injunction where former Green Party candidate Ralph Nader “created a situation in which any remedial order would throw a state’s preparations for the election into turmoil”); *Navarro v. Neal*, 12-cv-7535, 2012 WL 4933262, *3-4 (N.D. Ill. Oct. 15, 2012); *North Carolina Constitution Party, et al., v. Bartlett, et al.*, No. 12-cv-00192-GCM, 2012 WL 1644483 (W.D.N.C. May 10, 2012) (denying preliminary injunction as barred by laches where plaintiffs submitted signatures in amounts severely short of the required number); *Perry*, 840 F.Supp.2d at 953-955 (denying preliminary injunction raising challenges to election provisions where “plaintiffs [] slept on their rights to the detriment of the defendants”). See also *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (noting that laches, “in the context of elections, [] means that any claim against a state electoral procedure must be expressed expeditiously”). Plaintiff ILGP and Jones’ calculated conduct in misleading this Court into thinking that an active petition drive was ongoing also precludes them from equitable relief. Ordering either Plaintiff on the ballot when they have failed to demonstrate any modicum of support or viability as a candidate would create a fundamental injury to Defendants for all the reasons and legitimate state interests discussed in Defendants’ original response brief. The evidence is clear – Plaintiffs are not entitled to equitable relief.

B. Plaintiffs Have Failed to Establish A Likelihood of Success on the Merits.

Pursuant to the constitutional avoidance doctrine, this Court need not look past the fact that Plaintiffs' motions are equitably barred. Nonetheless, Defendants primarily rely on their response brief in this matter in addressing why Plaintiffs fail to establish a likelihood of success and why the requirement, as applied in this election, is valid as a matter of law and ample binding precedent. (Defendants' Opposition to Plaintiffs' Motions for Preliminary Injunction is incorporated herein by reference, Dckt. No. 23). Defendants need only address two issues.

First, Mr. Hubschman's testimony at the evidentiary hearing made clear that the requirement is entirely feasible. (Dckt. No. 33-1). Mr. Winger proclaims that it has never been done, but admits that a state by state comparison would be "apples to oranges" because some states would not even permit a new party candidate to qualify on a district by district basis, but rather would require statewide qualification first – of which he approximates 2/3 of states have such a requirement. He also admits that his affidavit is supported only by review of the requirements in place and the names that then appeared on the ballot. In other words, he doesn't actually know how many signatures were turned in by *any* candidate. Lastly, although Mr. Winger expressed a preference for a raw number rather than a percentage as the appropriate benchmark, that is simply not the law.

Second, Plaintiffs, in an about face, now claim in their reply that *Rednour* is not on point because it did not squarely address the 5% signature requirement. As the undersigned explained yesterday, this is patently false. The questions posed in *Rednour* could not have been clearer,

The Party asserts that the Illinois Election Code accomplishes this goal through two 'intimately-related' ballot access regulations: one that requires 'new' political parties to meet a 5% petitioning requirement in order to gain access to the general election ballot, and the other that prohibits so-called minor-established parties' from nominating congressional candidates via primary elections. *Libertarian Party of*

Illinois v. Rednour, et al., 108 F.3d 768, 773 (7th Cir. 1997), *cert. denied*, 522 U.S. 858 (1997)

In relying on *Jenness* and *Norman*, the court refused to apply strict scrutiny and subsequently upheld the 5% requirement. *Id.* at 774-775 (“In light of *Jenness*, *Norman* and several other cases, [plaintiff] cannot argue that the 5% petitioning requirement is severe on its face”). Thus, *Rednour* clearly upheld Illinois’ 5% signature requirement. Plaintiffs’ recent attempt to circumvent this fact is meritless.

IV. CONCLUSION

Plaintiffs’ request for unfettered ballot access disguised as constitutional claims is painfully transparent after yesterday’s presentation of evidence (or lack thereof). At the end of the day, Plaintiffs’ claims “to be [] a serious candidate and a serious party with a serious injury become less credible by having slept on their rights.” *Fulani*, 917 F.2d at 1031. For the foregoing reasons and all those reasons in Defendants original response brief, Plaintiffs have failed to meet their burden both that they are entitled to any extraordinary relief as a matter of law, and that if they were, they would be likely to succeed on the merits. Plaintiffs’ motions are without merit and should be denied in entirety.

LISA MADIGAN
Illinois Attorney General

Respectfully submitted,

/s/ Laura M. Rawski
Laura M. Rawski
Thomas Ioppolo
Assistant Attorney General
General Law Bureau
100 West Randolph Street, 13th Floor
Chicago, IL 60601
(312) 814-5694
lrawski@atg.state.il.us

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the aforementioned document was filed on January 31, 2013 through the Court's CM/ECF system. Attorneys of record may obtain a copy of the paper through the Court's CM/ECF system. Additionally, the following parties were served by electronic mail at the following electronic addresses, on January 31, 2013:

Marcus Lewis
Marlew7@aol.com

Arthur Newman
ftgmarketing@gmail.com

/s/ Laura M. Rawski