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

William Morgan, et al,	)	
	)	
Plaintiffs,	)	Case No.: 20-cv-2189
	)	
vs.	)	Hon. Charles R. Norgle, Sr., Presiding Judge
	)	
	)	
Jesse White, et al.,	)	Hon. M. David Weisman, Magistrate Judge
	)	
Defendants.	)	

DEFENDANT STATE BOARD OF ELECTIONS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY OR PERMANENT INJUNCTION AND DECLARATION AS A MATTER OF LAW

Defendants William J. Cadigan, Katherine S. O'Brien, Laura K. Donahue, Casandra B. Watson, Ian K. Linnabary, Charles W. Scholz, and William McGuffage (collectively "State Board of Elections" or "Board") submit the following memorandum in response to Plaintiffs' Emergency Motion for a Preliminary or Permanent Injunction and Declaration as a Matter of Law. (Dkt. 6.)

INTRODUCTION

Though not required to do so by federal law, Illinois allows citizens to propose amendments to Article IV of the Illinois Constitution by "a petition signed by a number of electors equal in number to at least eight percent of the total votes cast for candidates for Governor in the preceding gubernatorial election." Ill. Const., Art. XIV, § 3.[1] Electors are provided an 18-month period in which to gather signatures for their proposed constitutional

[1] Plaintiffs' Complaint contains allegations pertaining to a proposed Evanston local initiative. These allegations are not directed at the State Board of Elections and the Board accordingly takes no position on a grant of relief as to that petition.

amendment to appear on the general election ballot. *Id*. ("A petition… shall have been signed by the petitioning electors not more than twenty-four months preceding that general election and shall be filed with the Secretary of State at least six months before that general election."). Despite the generous timeline to collect signatures for ballot initiatives seeking to amend Article IV of the Illinois Constitution, Plaintiffs, proponents of the "Illinois Democracy Amendment," have filed suit on the eve of the May 3, 2020 filing deadline complaining of Illinois' initiative referendum procedures. Further, they expect the State, at their behest, to hastily create a new online system to enable them to gather as many as 363,813 "electronic" petition signatures for submission.

Plaintiffs are not entitled to their requested relief for a number of reasons. *First*, Plaintiffs are not entitled to the requested injunctive relief because they are unlikely to succeed on the merits of their claims: Plaintiffs have no federal right to secure a place on the ballot for their proposed amendment. The vast majority of restrictions that Plaintiffs complain of—the handwritten signature requirement, the applicable filing deadline, and number of signatures required—do not state a First Amendment claim since they pertain only to the state-created right of ballot referenda. *Second*, given Plaintiffs' broad and administratively burdensome requests for relief, the hardship to the Board far outweighs the harm to Plaintiffs should no injunction issue. *Third*, the public interest is not furthered by Plaintiffs' requested relief; rather, granting Plaintiffs' request could jeopardize citizens' right to challenge petition signatures—a process used to ensure the integrity of Illinois elections for the voters—and upend many important aspects of Illinois' election procedures.

For these reasons, the court should deny Plaintiffs' request for the entry of a preliminary injunctive relief.

BACKGROUND

Since approximately December 2019, the world has been coping with the outbreak of the respiratory disease COVID-19. (Dkt. 1, ¶¶ 22 – 23.) In response to this respiratory disease, the Centers for Disease Control issued guidelines on February 27, 2020, including the recommendation that people practice social distancing. (*Id*. at ¶ 24.) Weeks later, the Governor of Illinois proclaimed the entire state a disaster area and banned gatherings of 1,000 people or more and closed all schools, restaurants, and bars. (*Id*. at ¶ 25.) Shortly thereafter, the President of the United States declared a national emergency. (*Id*. at ¶ 27.)

Since March 20, 2020, the State of Illinois has been subject to orders that residents, with some exceptions, stay at home and maintain a distance of six feet from one another. (*Id*. at ¶ 29.) The order is to remain in effect until April 30, 2020. (*Id*. at ¶ 31.) Plaintiffs allege that circulating initiative petitions is not listed as an essential activity under the Governor's order and that they are effectively barred from gathering signatures for their proposed ballot initiative, the Illinois Democracy Amendment. (Dkt. 1, ¶¶ 3 – 9, 32.)

According to the Complaint, Plaintiffs must submit 363,813 intiative petition signatures to the Illinois Secretary of State by May 3, 2020. (*Id*. at ¶ 34.) Yet the Complaint is noticeably devoid of any allegations discussing Plaintiffs' progress in the petition circulation process and gathering signatures—a process which Plaintiffs were able to begin in November 2018, twenty-four months prior to the upcoming general election, and more than sixteen months prior to the Governor's "stay at home" order.

Though the offending circumstances have existed only a relatively short time during the signature collection period, Plaintiffs nevertheless claim that their rights to petition and political speech are severely burdened in light of the current public health emergency, and request that the

Court issue a temporary restraining order and/or preliminary injunction not only enjoining or modifying enforcement of Illinois' petition collection requirements for initiative referenda,[2] but also significantly modifying two ballot access provisions and requiring the State to develop and implement an entirely new program for petitions to be submitted electronically on the eve of the May 3 filing deadline. While Plaintiffs' Complaint also alleges that Illinois' petition collection requirements unduly burden and violate their rights under the Equal Protection Clause, they do not address this claim in their motion for preliminary or permanent injunction and declaration as a matter of law.

LEGAL STANDARD

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original); *see also Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998) (same); *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 389 (7th Cir. 1984). For such drastic relief to be granted, "a plaintiff must show three things: (1) without such relief, he will suffer irreparable harm before his claim is finally resolved; (2) he has no adequate remedy at law; and (3) he has some likelihood of success on the merits." *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017). If plaintiff can make this minimum showing, the court must still "weigh the harm the plaintiff will suffer without an

[2] Plaintiffs do not specify the exact "petition collection requirements" they seek to enjoin or modify, but complain only of the notarized affidavit of the petition circulator that he personally witnessed the signatures of all signers and notary attesting he witnessed the signature of the circulator, the requirement that initiative petition signatures must be handwritten on a paper petition, and that the paper initiative petitions pages must be bound and filed in one book with the appropriate officer. (Dkt. 1, at ¶ 38.) In addition, Plaintiffs seek modifications to their time to file the ballot initiative and to the number of signatures required for ballot access in their requested relief.

injunction against the harm the defendant will suffer with one." *Id*. The court must also consider whether granting a preliminary injunction is in the public interest. *Id*.

The court "must balance the competing claims of injury and must consider the effect on each party of granting or withholding the requested relief," paying "particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008).

Here, Plaintiffs' burden is even greater than usual because, rather than seeking to preserve the status quo, they seek *mandatory* interim relief directing Defendants to accept petitions to be submitted electronically via names of qualified electors collected by an online form created by the Secretary of State, extend the May 3, 2020 deadline for an Article XIV, Section 3 referendum to August 3, 2020, and reduce by 50% the number of signatures required to qualify Article XIV statewide and Article VII local government initiative referenda for the general election ballot or reduce by some percentage necessary to demonstrate substantial public support. (Dkt. 6, at 10.) Plaintiffs also seek a declaratory judgment and permanent injunction. (*Id*.) Because a mandatory injunction requires the court to command the defendant to take a particular action, it is "cautiously viewed and sparingly issued." *Knox v. Shearing*, 637 F. App'x 226, 228 (7th Cir. 2016) (quoting *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997)). Mandatory injunctions are "rarely issued," interlocutory mandatory injunctions are "even more rarely issued," and neither should be issued "except upon the clearest equitable grounds." *W.A. Mack, Inc. v. Gen. Motors Corp.*, 260 F.2d 886, 890 (7th Cir. 1958).

Plaintiffs' burden is also greater here because the interim injunction they request in their present motion would give them substantially all the relief they seek through this lawsuit. *See, e.g.*, *Boucher*, 134 F.3d at 827 n.6 ("A preliminary injunction that would give the movant

substantially all the relief he seeks is disfavored, and courts have imposed a higher burden on a movant in such cases."); *W.A. Mack, Inc.*, 260 F.2d at 890 ("A preliminary injunction does not issue which gives to a plaintiff the actual advantage which would be obtained in a final decree."). In a ballot access case, the court observed that this factor counted against the plaintiffs because "a victory at [the preliminary injunction] stage would effectively win the case for the [plaintiff] by putting its candidates on the November ballot regardless of the eventual outcome." *Tripp v. Smart*, No. 14-CV-0890, 2014 WL 4457200, at *6 (S.D. Ill. Sept. 10, 2014). "A plaintiff should not gain, via preliminary injunction, the actual advantage which would be obtained in a final decree." *Id*.

ARGUMENT

I. Plaintiffs Are Unlikely to Succeed on Their First Amendment Claim.

Nowhere does the federal constitution guarantee private citizens "a right to propose referenda or initiatives for any ballot, federal or state." *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018). As the Supreme Court has held, "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). Procedures to gain ballot access for initatives—a wholly state-created right—are subject only to rational basis review so long as the challenged regulations do not "distinguish by viewpoint or content." *Jones*, 892 F.3d at 938. In the absence of any federal protection for citizens to practice direct democracy, "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative, as they have with respect to election processes generally." *Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191 (1999).

However, where the State chooses to allow a means for direct democracy through ballot initiative, it cannot place "undue hindrances to political conversations and the exchange of ideas" on those advocating ballot initiatives. *Id.* at 192. But it is only where ballot access provisions become "invalid interactive speech restrictions" that the First Amendment is transgressed by a state's measures to ensure the integrity of its ballot. *Id.*; *see also Semple v. Griswold*, 934 F.3d 1134, 1142 (10th Cir. 2019) (recognizing distinction between laws regulating or restricting communicative conduct versus laws that govern the process by which legislation is enacted). Where the state does not restrict the means of *communication* regarding a ballot proposal, the state "may constitutionally place nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993). But even some burdens on First Amendment rights are acceptable in this context: a state can enforce measures that do not severely burden First Amendment rights to protect its "substantial interests in regulating the ballot-initiative process." *Meyer v. Grant*, 486 U.S. 414, 428 (1988); *see also Buckley*, 525 U.S. at 204–05.

Although the State's in-person signature and notarization requirements do not pose an undue hindrance to Plaintiffs' First Amendment right to engage in political conversations and the exchange of ideas even in this circumstance, the Board is willing to agree to enjoin these requirements in light of the ongoing public health emergency, so long as copies of handwritten signatures, along with the signer's printed name and home address, are submitted with Plaintiffs' petition should one ultimately be filed.[3] *See Tripp v. Scholz*, 872 F.3d 857, 869 (7th Cir. 2017)

[3] Specifically, the Board is willing to agree to the entry of an order enjoining the requirements in § 5/28-3 that the bottom of each sheet of a petition contains a circulator's statement "certifying that the signatures on that sheet of the petition were signed in his or her presence and are genuine," and that the circulator's

(upholding Illinois' per page notarization requirement in context of candidates' ballot access). But, despite its willingness to agree to enjoin these provisions of 10 ILCS 5/28-3, the Board opposes Plaintiffs' requested relief to the extent Plaintiffs seek to collect electronic signatures or extend the filing deadline set by the Illinois Constitution for their ballot initiative, as both would create insurmountable obstacles to the State's mandate to certify any constitutional amendments for the November ballot on August 21, 2020.[4] *See* Ill. Cost. Art. XIV, § 3 (requiring that petition "shall be filed with the Secretary of State at least six months before that general election"; 10 ILCS 5/28-5 (requiring certification of proposed constitutional amendment 74 days before the general election). The Board also opposes Plaintiffs' request to reduce the number of signatures needed to qualify for the general election ballot, especially in light of Plaintiffs' own dilatory action.

A. Since Ballot Access for Referenda Is a State-Created Right, Illinois' Handwritten Signature Requirement, Number of Signatures Required, and Filing Deadline Are Reasonable Regulations that Survive Rational Basis Review.

Unlike the witnessing requirement, which necessitates in-person communication and thus arguably restricts methods of communication in the midst of a public health crisis, Illinois' requirements as to handwritten signatures, the number of signatures required for ballot access, and the filing deadline for submission of an initiative are indisputably "a step removed from the communicative aspect of petitioning." *See Kendall v. Balcerzak*, 650 F.3d 515, 525 (4th Cir.

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statement "shall be sworn to before some officer authorized to administer oaths in this State" for the November 2020 election only, in light of the current public health emergency.

[4] And, to the extent Plaintiffs challenge the requirement that "submission of public questions to referendum must be filed with the appropriate officer or board" in 10 ILCS 5/28-2, nothing in that statute demands that petitions be filed in-person, and Plaintiffs have made no effort to explain how they are aggrieved by this provision. A petition must be filed to be considered and this provision is therefore both reasonable and necessary.

2011) (internal citations omitted). Since Illinois' law requiring a certain number of handwritten signatures for ballot access and the State's statutory filing deadline in no way touch upon *who* can engage in political speech or *how* they may do so, these limitations are subject only to rational basis review under applicable law in this circuit. *See Jones*, 892 F.3d at 937–38 (recognizing that since there is no constitutional right to place referenda on ballot, ballot access rules for referenda that do not distinguish by viewpoint or content are analyzed under the rational basis standard of review).

The number of signatures required, the handwritten signature requirement, and the filing deadline are nondiscriminatory, content-neutral restrictions that are rationally related to the State's interest in validly limiting the number of initiatives that appear on the ballot, which in turn improves the chance that each initiative "will receive enough attention, from enough voters, to promote a well-considered outcome." *Jones*, 892 F.3d at 938. Amending the Illinois Constitution effects a virtually permanent change to Illinois' state government: the signature requirement ensures such changes are properly reserved for amendments with sufficient public support. Likewise, the filing deadline ensures that sufficient time is allotted to citizens who wish to challenge the procedures used to seek ballot access, including the validity of petition signatures, before a proposed constitutional amendment appears on the ballot.

The handwritten nature of the signature in particular plays a crucial role in combatting fraud by petition circulators and unknown signers. *See Tripp*, 872 F.3d at 869–70. As federal courts have noted, Illinois is a state "notorious for election fraud." *Id.* at 869 (citations omitted). Illinois' handwritten signature requirement furthers the State's interests in avoiding election fraud and protecting the political process. *Id.* The handwritten signature requirement (and number of signatures required) also ensures the State is not "forced to undertake the substantial

preparation and expense of conducting a referendum unless the requisite number of qualified voters have actually signed the petitions and done so only after exercising due deliberation." *Kendall*, 650 F.3d at 526 (citing *Howlette v. City of Richmond, Va.*, 580 F.2d 704 (4th Cir. 1978)). Moreover, handwritten signatures are required for the State Board of Elections to satisfy its statutory duty to validate signatures to determine that a sufficient amount of support exists. *See* 10 ILCS 5/28-11. The handwritten signature requirement is easily justifiable under the rational basis test, especially considering the substantial period of time Plaintiffs had to obtain those signatures. *See Tripp*, 872 F.3d at 871 (candidates could reasonably notarize each sheet of petition within confines of petitioning window). Without handwritten signatures, the Board would have no mechanism to guard the ballot intiative against fraudulent signatures or ensure that the Plaintiffs' proposed initiative did in fact have sufficient public support to appear on the ballot. *See* 10 ILCS 5/28-11 (Board to compare petition signatures with signatures on signers' registration record cards to determine validity).

To the extent Plaintiffs seek to collect electronic signatures for their ballot initative, their request would leave the State's ballot initiative procedures in a tumult—especially in conjunction with Plaintiffs' request to extend the applicable filing deadline.

Plaintiffs have no constitutional right for their initative to appear on the November 3, 2020 general election ballot. Accordingly, they have no constitutional right to these requested accommodations, which unjustifiably sacrifice election integrity and an orderly election process. That Plaintiffs have provided no evidence that they have collected even a single signature or made any effort to comply with the State's ballot access procedures prior to this lawsuit merely compounds this conclusion.

For these reasons, Plaintiffs are unlikely to succeed on the merits of their claims and are not entitled to a preliminary injunction extending the May 3, 2020 deadline for initiative petitions or reducing the number of handwritten signatures needed to qualify for the ballot.

II. Plaintiffs Have Not Demonstrated They Are Likely to Suffer Irreparable Harm without Preliminary Relief.

To the extent Plaintiffs contend they are irreparably harmed by the difficulty they may face securing a place on the ballot for their initiative, this provides no grounds for preliminary injunctive relief: Plaintiffs have no constitutional right to ballot access for their proposed constitutional amendment in the first place. And even if one could establish irreparable harm by showing an inability to secure a place on the ballot, Plaintiffs have utterly failed to do so in this case.

Plaintiffs' paltry allegations contain no assertion that the "Illinois Democracy Amendment" was likely to qualify for the November 3, 2020, general election ballot absent the current public health emergency or even that is likely to qualify if Plaintiffs' requested relief is granted. Tellingly, only William Morgan is alleged to have begun an initiative petition drive for a constitutional amendment referendum; all other named Plaintiffs simply "wish" to circulate an initative petition. (Dkt. 1, at ¶¶ 3 – 7.) As discussed above, allegations regarding Plaintiffs' efforts and opportunities to circulate petitions in the preceding sixteen months are conspicuously absent.

Given Plaintiffs' ample opportunity to petition and engage in political speech prior to a public health emergency, they have failed to establish that they are likely to suffer irreparable harm without preliminary injunctive relief. It bears noting that there is nothing preventing Plaintiffs from attempting to qualify their initiative for the ballot in a future general election.

III. The Harm to Defendants and the Public If an Injunction Issues Outweighs the Harm to Plaintiffs Absent an Injunction.

In addition to Plaintiffs' own delays in initiating and promoting their proposed constitutional amendment, Plaintiffs' requested relief does not account for the substantial burdens to the State attendant with their desired modifications. For instance, although Plaintiffs may believe the May 3, 2020 deadline they seek to change is of little import, any extension of such could seriously jeopardize the State's compliance with other applicable election deadlines.

The current May 3, 2020 deadline provides the State Board of Elections with sufficient time to perform its substantial statutory duties following the filing of a proposed constitutional amendment; thus, extending the filing deadline out would impose a serious burden on the State's resources. *See generally* 10 ILCS 5/28; 10 ILCS 5/28-4 (allowing for objections to proposed constitutional amendments within 42 business days after petition is filed and requiring electoral board to hear and pass upon objections); 10 ILCS 5/28-5 (State Board of Elections shall certify any proposed constitutional amendment 74 days before the general election); 10 ILCS 5/28-11, 12 (Board shall design an alternative signature verification for proposed constitutional amendments and determine if signatures are valid). Illinois is also bound by the federal Uniformed and Overseas Citizens Absentee Voting Act to ensure military ballots are timely sent to troops overseas. *See* 42 U.S.C. 1973-ff-1 *et seq*. Granting Plaintiffs' requested relief imposes a severe burden on the Board's ability to satisfy its legal duties and responsibilities.

After failing to diligently advocate for their initiative, Plaintiffs now attempt to foist a massive administrative burden upon various state agencies to accommodate their own delay. Indeed, it appears that Plaintiffs desire Illinois' entire procedure to be upset on the eve of an

important filing deadline while the general election quickly approaches in order to accommodate their own delay or inability to garner the requisite public support for their referendum.

In addition to the serious concerns about the constitutionality of ordering the state to undertake "open-ended and potentially burdensome obligations," *see Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 29 (1981), ordering the State to wholly redesign its election processes so near to an election presents the distinct likelihood of confusion, among the state agencies responsible for overseeing these processes, voters, and initative proponents alike. *See RNC v. DNC*, --- S.Ct. ---, 2020 WL 1672702, *1 (U.S. April 6, 2020) (federal courts should ordinarily not alter election rules on the eve of an election).

Additionally, granting an injunction in this scenario would not serve the public interest. As stated by the Supreme Court, a "[s]tate indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This interest, however, is not a uniquely governmental interest: the fairness of the election process is important to voter confidence, which is in turn "essential to the functioning of our participatory democracy." *Id.*

As explained above, the ballot access procedures that Plaintiffs challenge are safeguards against voter fraud and overly crowded ballots. These safeguards not only serve the State's interest, but also the voting public's interest. Tied in with these procedural safeguards, the Election Code expressly allows individuals to file objections to petitions proposing constitutional amendments within 42 business days after the petition is filed. 10 ILCS 5/28-4. Plaintiffs' requested relief to modify the filing deadline for their proposed constitutional amendment would essentially strip the public of its statutory right to file objections by depriving the Board of the time required to oversee such a process.

Moreover, granting Plaintiffs' requested preliminary relief could invite a flood of similarly dilatory initiative proponents seeking to take advantage of substantially reduced requirements to qualify various initiatives for the general election. (*See, e.g.*, Committee for the Illinois Democracy Amendment, Statement of Organization, Filed April 9, 2020, attached hereto and incorporated as Exhibit A, showing committee creation date of April 1, 2020.) [5]

Granting the drastic relief of enjoining the State from performing its numerous, important duties on such sparse evidence does not serve the public interest. For these reasons, Plaintiffs have not met their burden and are not entitled to their requested injunctive relief.

CONCLUSION

WHEREFORE, the State Board of Elections Defendants respectfully pray that this Honorable Court enter an order denying Plaintiffs' motion for a preliminary or permanent injunction and declaration as a matter of law.

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[5] A court may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).