UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM MORGAN, ELIZABETH NORDEN, DAVID VAUGHT, DORIS DAVENPORT, ANDREA RAILA, JACKSON PALLER, and the COMMITTEE FOR THE ILLINOIS DEMOCRACY AMENDMENT, an unincorporated political association, Plaintiffs, JESSE WHITE, in his official capacity as Illinois Secretary of State, DEVON REID, in his official capacity as the Evanston City Clerk, KAREN A. YARBROUGH, in her official capacity as Cook County Clerk, and WILLIAM J. CADIGAN, KATHERINE S. O'BRIEN, LAURA K. DONAHUE, CASSANDRA B. WATSON, WILLIAM R. HAINE, IAN K. LINNABARY, CHARLES W. SCHOLZ, WILLIAM M. MCGUFFAGE, in their official capacities as Board Members for the Illinois State Board of Elections, Defendants.	CASE NO. 1:20-cv-02189 Honorable Judge Charles R. Norgle, Sr. Magistrate Judge M. David Weisman

DEFENDANT DEVON REID'S RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY OR PERMANENT INJUNCTION AND DECLARATION AS A MATTER OF LAW

Defendant, DEVON REID, in his official capacity as Clerk of the City of Evanston (hereafter "Reid"), by his attorney KELLEY A. GANDURSKI, Corporation Counsel, and through, Nicholas E. Cummings, Deputy City Attorney, and one of her assistants, Alexandra

Ruggie, Assistant City Attorney respond to Plaintiffs' Motion for a Preliminary or Permanent Injunction and Declaration as a Matter of Law (hereafter "Plaintiffs' Motion") as follows:

INTRODUCTION

On April 9, 2020, Plaintiffs filed their Complaint along with Plaintiffs' Motion. Dkt. 1, 4, 6. Plaintiffs sued a variety of entities, including the Evanston City Clerk in his official capacity. Dkt. 1. Glaringly absent from the Plaintiffs' Complaint are any other similarly situated municipalities in the State of Illinois named as defendants. Notwithstanding Plaintiffs' failure to state a claim upon which relief may be granted against Reid[1], Plaintiffs ask this Court to enjoin Reid and the other Defendants, by requiring them to implement measures to facilitate the means to gather signatures for petitions. Dkt. 6. Plaintiffs' Motion should be denied for the following reasons:

First, Plaintiffs' lack standing to bring a claim against Reid. Plaintiffs' desired outcome—that Reid accept petitions electronically—is not ripe before this court. Plaintiffs do not allege, nor can they, that Reid would not and has not accepted verified petitions in accordance with Illinois State law. Assuming Plaintiffs are successful in forcing a change in the law such that they can obtain and submit electronic signatures, it follows Reid would be obligated to accept them. The idea that Reid might not accept them is too speculative to create a concrete dispute before the court, and Plaintiffs can cite no past practice whereby Reid has failed to accept petitions.

Additionally, an injunction against Reid would be improper because Plaintiffs cannot show irreparable harm. There are no allegations and no evidence Reid, by following current state election law, is denying Plaintiffs from *filing* petitions. Plaintiffs primary complaint appears to be the inability to *collect* signatures; Reid has no authority or role under state law with respect to

[1] Reid separately filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This response was filed in the event that motion is denied.

the collection of signatures. Furthermore, the Illinois Constitutional provisions cited by Plaintiffs *allows* but not mandates petitions as a method to amend the State Constitution or otherwise pass law. Plaintiffs will not suffer irreparable harm as there remains other means to achieve their goal. Plaintiffs may submit by resolution their proposal for action to Evanston City Council pursuant to the Illinois Constitution. In the face of the current pandemic, Evanston continues to hold online City Council meetings, whereby the public has remote access.

Secondly, Plaintiffs will not likely succeed on the merits against Reid. According to Plaintiffs' Motion, it is the action of the State, not Reid, infringing their Constitutional rights. But for the current pandemic, Plaintiffs cannot show state law is facially unconstitutional. Moreover, the law Plaintiffs' attempt to challenge regulates the mechanics of the process rather than the content; accordingly, the City's interest in securing the health of citizens—including Plaintiffs—is compelling enough to limit the constitutional rights of Plaintiffs. Finally, Plaintiffs cannot show it is clearly established that Reid's refusal to accept petitions would violate Plaintiffs constitutional rights.

STANDARD FOR PRELIMINARY INJUNCTION

In *Roland Machinery Co. v. Dresser Industries, Inc.*, the Seventh Circuit spelled out an "analytical procedure for deciding whether to grant or deny a motion for preliminary injunction" for this jurisdiction. 749 F.2d 380, 389 (7th Cir. 1984). The procedure outlined by the court "constitutes a true legal standard…[that] does not call for a discretionary—in the sense of standardless or intuitive—judgment, or for a consideration of numerous factors none enjoying any particular weight, or for an evaluation of factors inaccessible to a reviewing court." *Id.* "The factors to be considered are few and definite." *Id.* "[T]hey are to be compared in a particular sequence and in accordance with a specific formula which requires first deciding

whether the plaintiff has crossed the specified thresholds and then weighting the parities' likely harms from the grant and denial of the preliminary injunction, respectively, by the strength of the plaintiff's case." *Id.* "The granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Id.* (internal citations omitted).

To cross "the specified thresholds" of injunctive relief a plaintiff "must show that he has no adequate remedy at law, and…that he will suffer irreparable harm if the preliminary injunction is not granted." *Id.* at 386 (internal citation and quotes omitted). "Only if [plaintiff] will suffer irreparable harm in the interim—that is, harm that cannot be prevented or fully rectified by the final judgment after trial—can he get a preliminary injunction." *Id.*

Once the court determines a plaintiff has met this threshold, the court must then consider "an irreparable harm that the defendant might suffer from the injunction—harm that would not be either cured by the defendant's ultimately prevailing in the trial on the merits or fully compensated by the injunction bond that Rule 65(c) of the Federal Rules of Civil Procedures requires the district court to make the plaintiff post." *Id.* at 387. Additionally, the plaintiff must cross another threshold: "that of showing some likelihood of succeeding on the merits." *Id.* The plaintiff's chances must be better than negligible. *Id.* The greater the chance a plaintiff has at succeeding on the merits, "the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weight in his favor." *Id.* Finally, the court should consider whether granting or denying a preliminary injunction will have consequences beyond the immediate parties. *Id.* at 388. This is the proper standard the court should use in evaluating the validity of Plaintiffs' Motion.

ARGUMENT

I. PLAINTIFFS' ARGUMENT IS NOT RIPE FOR ADJUDICATION.

Plaintiffs' claims against Reid "are too speculative to create a concrete dispute." Construction and *General Laborer's Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120, 1127 (7th Cir. 2019). Plaintiffs assert Illinois statutory and constitutional requirements stifle their First Amendment right to petition by requiring physical signatures and an affidavit. Dkt. 1; Dkt. 6. It can be inferred (although not explicitly stated) Plaintiffs anticipate Reid will not accept petitions that are not generated according to state constitutional and statutory law. Yet Plaintiff alleges no facts and can put forth no evidence showing Reid will reject Plaintiffs' verified petitions.

In *General Laborer's Union*, the municipality passed an ordinance banning signs located in the public right of way. *Id*. at 1126. The Union sued, alleging the ordinance would restrict their First Amendment rights in the event the protested in the future and wanted to use an inflatable rat. *Id*. The court held their claim regarding the *possible* protests was too speculative. *Id*. at 1127. There were too many unanswered questions on how the protest would unfold to allow the court to act. *Id*.

Here, as in *General Laborer's Union*, Plaintiffs' allegations about petitions are too speculative. Reid may not accept Plaintiffs' petitions for a myriad of reasons beyond the fact they were submitted electronically. Perhaps the petitions contained fraudulent signatures or signatures of someone who is not a resident of Evanston. Not only have no petitions been submitted and subsequently rejected, there is no way of determining for what reason, if at all, Reid would reject Plaintiffs' petitions. Accordingly, Plaintiffs claims are not ripe, and their motion should be denied.

II. PLAINTIFFS CANNOT SHOW IRREPARABLE HARM IF THE STATUS QUO REMAINS.

There is no evidence Plaintiffs have (or can) put forth showing Reid is preventing Plaintiffs from collecting petitions signed by a number of qualified electors pursuant to the Illinois Election Code. The only role Reid as City Clerk of the City of Evanston plays in the process pursuant to Illinois Election law, the Illinois Municipal Code and the Evanston City Code is to allow the petitions to be filed. *See* 10 ILCS 5/28-7; 65 ILCS 5/3.1-35-90; and Evanston City Code § 1-7-2. Plaintiffs do not argue—nor can they demonstrate—the City Clerk's office will not accept petitions signed by a number of qualified electors. While City facilities remained closed to the public through April 30th[2], the deadline for submission to the Evanston City Clerk is more than three months away, August 3, 2020. Dkt 1, ¶ 35. Nevertheless, there is no evidence Plaintiff can put forth showing Reid would not or cannot accept verified petitions, even in person. Residents are free to call the Clerk's Office to conduct official business and arrange for petitions to be dropped off[3].

"In every case in which the plaintiff ants a preliminary injunction he must show that he has 'no adequate remedy at law,' and that he will suffer 'irreparable harm' if the preliminary injunction is not granted." *Id.* at 386. "Only if he will suffer irreparable harm in the interim—that is, harm that cannot be prevented or fully rectified by the final judgment after trial—and he get a preliminary injunction." *Id.*

In this case, Plaintiffs cannot show harm cannot be prevented or fully rectified by a final judgment after trial against Reid. Indeed, Reid is not the proper party to enjoin. Illinois Election Code states in relevant part:

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[2] The City was served notice of this action at the City Clerk's office, as the Clerk's office remains staffed.

[3] https://www.cityofevanston.org/Home/Components/News/News/3744/17

> Any such public question may be initiated by the governing body of the unit of local government by resolution or by the *filing with the clerk or secretary of the governmental unit* of a petition signed by a number of qualified electors equal to or greater than at least 8% of the total votes cast for candidates for Governor in the preceding gubernatorial election, requesting the submission of the proposal for such action to the voters of the governmental unit at a regular election.
>
> If the action to be taken requires a referendum involving 2 or more units of local government, the proposal shall be submitted to the voters of such governmental units by the election authorities with jurisdiction over the territory of the governmental units. Such multi-unit proposals *may be initiated by appropriate resolutions by the respective governing bodies or by petitions of the voters of the several governmental units filed with the respective clerks* or secretaries.

10 ILCS 5/28-7 (emphasis added).

Moreover, the portion of the Illinois Constitution upon which Plaintiffs rely does not mandate petitions as the only means to initiate action. Section 11 of Article VII states: "Proposals for actions which are authorized by this Article or by law and which require approval by referendum may be initiated and submitted to the electors by resolution of the governing board of a unit of local government *or by petition of electors in the manner provided by law*." Ill Const. Art. VII § 11 (emphasis added). Accordingly, Plaintiffs inability to gather signatures, while stifled by a global pandemic, does not foreclose them from initiating change. The harm suffered by Plaintiffs is a lack of choice authorized by the Illinois Constitution, not an irreparable one violative of their Constitutional rights. Plaintiffs' Motion should be denied.

III. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS AGAINST REID

Assuming *arguendo* Plaintiffs can demonstrate they have no adequate remedy at law *and* will suffer irreparable harm, the court must also consider "any irreparable harm that the defendant might suffer from the injunction—harm that would not be either cured by the defendant's ultimately prevailing in the trial on the merits or fully compensated by the injunction bond that Rule 65(c) of the Federal

Rules of Civil Procedure requires the district court to make the plaintiff post." *Roland Machinery Co.*, 749 F.3d at 387. In this case, Reid is likely to succeed on the merits at trial.

a. Plaintiffs Cannot Produce Evidence of Reid Limiting Plaintiffs' Rights.

Plaintiffs' Complaint makes plain, and Plaintiffs' Motion argues the action allegedly infringing their rights is the Executive Order of the state's governor. Dkt. 1, ¶¶ 31-32. Interestingly, Plaintiffs cite "the health crisis" as a factor making it impossible to collect signatures. *Id.* The City of Evanston's Clerk has not created, or contributed, to either the health crisis or the subsequent state actions. There are no facts alleged in either Plaintiffs' Complaint or Motion showing any action by Reid limiting Plaintiffs' Constitutional Rights. Nevertheless, even if Reid's actions or policies served to restrict Plaintiffs' ability to exercise their rights, Plaintiffs would be hard pressed to overcome even strict scrutiny during a global pandemic.

"When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling governmental interest." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 207 (1999) (THOMAS, J. concurring) (citing *Burson v. Freeman*, 504 U.S. 191, 198 (1992)). However, "lessor burdens trigger less exacting review, and a State's important regulatory interests are typically enough to justify reasonable restrictions." *Id.* at 206 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997)). The difference lies on whether the challenged regulation controls the mechanics of the electoral process or is regulation of pure speech. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995).

Setting aside the fact the City Clerk is not the state actor enacting the challenged legislation and is only responsible for following it, the regulation at issue does not regulate pure speech. In *McIntyre*, the State of Ohio regulated handbills and their distribution. *Id.* at 340. The Supreme Court overturned

the Ohio Supreme Court's decision, holding the Ohio Supreme Court used the wrong test in determining whether Ohio's law was constitutional. *Id*. at 347. The Supreme Court distinguished between regulations of the mechanics of the electoral process and regulation of pure speech holding the Ohio law was a regulation of speech. *Id*. at 345.

In this case, the two regulations cited by Plaintiffs are the Illinois Election Code requiring petitions—if used—to be filed with the City Clerk, 10 ILCS 5/28-7, and the Governor's Executive Order. Dkt. 1, pg. 8. Evanston's City Clerk is not responsible for either regulation. Nonetheless, section 28-7 clearly regulates the mechanics of the electoral process rather than pure speech. *McIntyre*, 514 U.S. at 345. Accordingly, the only question properly before this Court should be to determine if Reid's actions (if any) justify Plaintiffs' inability to collect signatures. Any restrictions by the City Clerk to protect the health and welfare of city residents and staff in the face of a global pandemic are reasonably justified. *Buckley*, 525 U.S. at 207 (THOMAS, J concurring).

b. Plaintiffs Have an Alternative Method to Initiate Proposals for Action.

Furthermore, as argued *supra*, the Illinois Constitution allows for Plaintiffs to petition the Evanston City Council directly. ("Proposals for actions which are authorized by this Article or by law and which require approval by referendum may be initiated and submitted to the lectors by resolution of the governing board of a unit of local government…") Ill. Const. Art. VII § 11(a). Petitions are a means to achieve this goal but not mandated. *Id*. Thus, any restriction(s) by the City Clerk is/are justified in the face of a global pandemic threatening the health and welfare of city residents.

Even if this court determines a higher level of scrutiny was required, Plaintiffs cannot succeed. There can be no doubt the City's interests in maintaining the health and welfare of employees and residents and preventing the spread of a potentially life-threatening virus is a compelling interest. Although Plaintiffs do not cite any action taken by the City or Reid—at all—any burden on Plaintiffs'

speech by the City's action is minimal in comparison of the importance of the lives of Evanston's employees and residents. There is simply no evidence Plaintiffs can put forward showing the City will not accept valid petitions in the wake of COVID-19, the Governor's Executive Order, or any supposed action Reid took to stifle Plaintiffs' Constitutional rights. Consequently, they are unlikely to succeed at trial and their motion must be denied.

c. Reid is Entitled to Qualified Immunity.

"[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "[A]n allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right; in other words, in the light of preexisting law the unlawfulness must be apparent." *Shipman v. Hamilton*, 520 F.3d 775, 778 (7th Cir. 2008)(internal citation and quotations omitted). In this case, Reid "could not reasonably be expected to anticipate subsequent legal developments, nor could [they] fairly be said to 'know' that the law forbade conduct not previously identified as lawful." *Harlow*, 457 U.S. at 818.

But for the global pandemic, the regulations Plaintiffs seek to challenge are facially valid. Plaintiffs can provide no preexisting law making sufficiently clear that Reid's refusal to accept petitions in compliance with state law would violate Plaintiffs' Constitutional rights. Therefore, Plaintiffs are unlikely to succeed on the merits and their motion should be denied.

CONCLUSION

Defendant, DEVON REID, in his official capacity as Clerk of the City of Evanston, for all of the foregoing reasons, respectfully requests this Honorable Court deny Plaintiffs' Motion for Preliminary or Permanent Injunction and Declaration as a Matter of Law and any other relief this Court deems appropriate.

Respectfully submitted,

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WILLIAM MORGAN, ELIZABETH NORDEN, DAVID VAUGHT, DORIS DAVENPORT, ANDREA RAILA, JACKSON PALLER, and the COMMITTEE FOR THE ILLINOIS DEMOCRACY AMENDMENT, an unincorporated political association, Plaintiffs, JESSE WHITE, in his official capacity as Illinois Secretary of State, DEVON REID, in his official capacity as the Evanston City Clerk, KAREN A. YARBROUGH, in her official capacity as Cook County Clerk, and WILLIAM J. CADIGAN, KATHERINE S. O'BRIEN, LAURA K. DONAHUE, CASSANDRA B. WATSON, WILLIAM R. HAINE, IAN K. LINNABARY, CHARLES W. SCHOLZ, WILLIAM M. MCGUFFAGE, in their official capacities as Board Members for the Illinois State Board of Elections, Defendants.	CASE NO. 1:20-cv-02189 Honorable Judge Charles R. Norgle, Sr. Magistrate Judge M. David Weisman

NOTICE OF FILING

To: See Service List

PLEASE TAKE NOTICE that on April 15 2020, we caused to be filed with the United States District Court for the Northern District of Illinois, Eastern Division, the attached Response to Plaintiffs' Motion for Preliminary or Permanent Injunction and Declaration as a Matter of Law, a copy of which is hereby served upon you.

CERTIFICATE OF SERVICE

Nicholas E. Cummings, an attorney, certifies that copies of foregoing were served upon the above named persons via the CM/ECF system, on April 15, 2020.

/s/ Nicholas E. Cummings
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