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

LIBERTARIAN PARTY OF ILLINOIS, ILLINOIS GREEN PARTY, DAVID F. BLACK, SHELDON SCHAFER, RICHARD J. WHITNEY, WILLIAM REDPATH, BENNETT W. MORRIS, MARCUS THRONEBURG,	)	
Plaintiffs	)	**Case No. 1:20-cv-02112**
v.	)	**Judge: Charles R. Norgle**
J.B. PRITZKER, in his official capacity as Governor of Illinois,	)	**Magistrate: Jeffrey Cummings**
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.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION

FOR RECONSIDERATION

Neither Federal Rules of Civil Procedure 59(e) nor 60(b) authorize Motions for Reconsideration. Rule 54, however, has been interpreted to allow motions for reconsideration under limited circumstances. Even when allowed, "motions for reconsideration of interlocutory orders are discouraged." *Watts v. 84 Lumber Co.*, 2016 WL 379545, *1 (S.D. Ill. 2016)

(citing *Wilson v. Cahokia Sch. Dist. # 187,* 470 F.Supp.2d 897, 913 (S.D.Ill.2007)). "This is because true manifest errors of law and fact 'rarely arise' and, consequently, 'the motion to reconsider should be equally rare.'" *Watts*, *supra*, at *1.

As this Court explained in *Gerba v. National Hellenic Museum*, 351 F. Supp.3d 1097, 1099 (N.D. Ill. 2018), along with their "generally disfavored" nature, "the circumstances for [reconsideration] are limited," and do not include reconsideration based on arguments that "basically rehash[] previously rejected arguments or raise[] arguments or evidence that ought to have been raised in the first go around."

Here, of course, Defendants do all that. Indeed, they ask the Court to reconsider the very relief they proposed and agreed to. They do so weeks after agreeing to it, and after the parties have relied upon it. They do so without new evidence or new binding precedent that could not have been raised before, but only with an unpublished decision from a sister Circuit that is not even binding in that Circuit, much less this one. Their motion should be denied.

I. Defendants Proposed and Agreed to the Very Order They Now Challenge.

The Court in its Order observed that "the parties have proposed an order that grants appropriate relief in these unprecedented circumstances." Memorandum Opinion and Order, R. 26, at PAGEID # 396 (emphasis added). It further noted that "from the outset of these proceedings, even Defendants have acknowledged that the ballot access restrictions must be relaxed, in some shape or form, to account for the havoc that COVID-19 has wreaked." *Id*. The parties, including Defendants, then conferred over an appropriate Order, leading them to submit to the Court slightly different versions of proposed relief. The version finally agreed to by all parties and adopted by the Court was that submitted by the Defendants. The Court then stated that "[t]he court is satisfied

that the parties' agreed order will ameliorate Plaintiffs' difficulty meeting the statutory signature requirement due to the COVID-19 restrictions …." *Id*.

Defendants thus ask the Court to reconsider the very relief they proposed and that they had agreed to in this case. Even if *Esshaki v. Whitmer*, 2020 WL 1910154 (E.D. Mich., Apr. 20, 2020), *aff'd in part*, 2020 WL 2185553. __ Fed. Appx. __ (6th Cir., May 5, 2020), were the law of this Circuit, the Sixth Circuit there recognized that the State itself has the authority and responsibility to adjust its rules and requirements for ballot access during a pandemic. That is exactly what Defendants did here. They can now hardly complain that they made a bad bargain.

II. The Sixth Circuit's Holding in *Esshaki* Does Not Control.

Esshaki v. Whitmer, 2020 WL 1910154 (E.D. Mich., Apr. 20, 2020), *aff'd in part*, 2020 WL 2185553. __ Fed. Appx. __ (6th Cir., May 5, 2020), does not control the remedial aspect of this case. There, the Sixth ruled that the combination of the pandemic, restrictions on the public, and requirement of signature collection violated the First Amendment. Michigan's Governor had issued two executive orders, Ex. Order 2020-21 (COVID-19) (March 23, 2020),[1] and Ex. Order 2020-43 (COVID-19) (Apr. 8, 2020),[2] that are virtually identical to those issued in Illinois at the same time. *See Esshaki*, 2020 WL 1910154, at * 6. Michigan, like Illinois, "insist[ed] on enforcing the signature-gathering requirements as if its Stay-at-Home Order … had no impact on the rights of candidates and the people who may wish to vote for them." *Id*. at * 1. Michigan also argued precisely what Illinois argued here, that circulators should brave the crisis and gather more signatures. The District Court rejected the argument as "both def[ying] good sense and fl[ying] in

[1] https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html.
[2] https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525182--,00.html.

the face of all other guidance that the State was offering to citizens at the time." *Id*. at *5. "[P]rudence at that time counseled in favor of doing just the opposite." *Id*.

Applying "the framework established in *Anderson [v. Celebrezze*, 460 U.S. 780 (1983),] as later refined in *Burdick v. Takushi*, 504 U.S. 428 (1992)," the District Court found a severe burden and applied strict scrutiny to invalidate the combined effects of the emergency orders, Michigan's in-person signature collection requirements, and the pandemic: "[T]his Court has little trouble concluding that the unprecedented—though understandably necessary— restrictions imposed on daily life by the Stay-at-Home Order, when combined with the ballot access requirements … have created a severe burden on Plaintiff's exercise of his free speech and free association rights under the First Amendment …." *Id*. at *6 (emphasis added).

The Sixth Circuit, in an unpublished decision, affirmed this part of the District Court's judgment:

> The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored to the present circumstances.

2020 WL 2185553, at *1. The Sixth Circuit sustained "the district court's order enjoin[ing] the State from enforcing the ballot-access provisions at issue unless the State provides some reasonable accommodations to aggrieved candidates." *Id*. It was only in terms of remedy that the Sixth Circuit remanded the matter to the District Court: "we are instructing the State to select its own adjustments so as to reduce the burden on ballot access, narrow the restrictions to align with its interest, and thereby render the application of the ballot access provisions constitutional under the circumstances." *Id*. at *2.

The Sixth Circuit also advised the State that the simplest way to proceed was for it to implement what the District Court had ordered, *id*., which is exactly what happened in the end. On Friday, May 8, 2020, Michigan agreed to reduce its signature collection requirement by 50%, which is what the District Court had previously required. *See* Richard Winger, *Michigan Secretary of State Now Agrees to 50% Cut in Number of Primary Petition Signatures*, Ballot Access News, May 8, 2020.[3]

Putting aside that *Esshaki* comes from the Sixth Circuit, which has no binding authority here, even if it were a Seventh Circuit decision it would not be binding precedent. "[A]n unpublished decision cannot elevate the decision that it affirms to the status of circuit precedent." *Anderson v. Romero,* 72 F.3d 518, 525 (7th Cir.1995). Indeed, *Esshaki* is not binding precedent even within the Sixth Circuit. *See United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007) ("an unpublished decision … is not precedentially binding under the doctrine of stare decisis, but is considered by us for its persuasive value only."). Thus, as explained by Judge Stranch in her concurring opinion in *Esshaki*, 2020 WL 2185553, *3, federal courts may issue "both negative injunctions that instruct a defendant not to act and mandatory injunctions that instruct states to take particular action." This remains true with ballot access, as numerous Sixth Circuit cases make plain. *See, e.g.*, *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 661 (6th Cir. 2016) (denying Michigan a stay of a preliminary injunction ordering that it reinstate ballot used in an earlier election because the new ballot was likely to cause voter confusion); *Graveline v. Johnson*, 747 F. App'x 408, 414 (6th Cir. 2018) (denying Michigan a stay of a preliminary injunction requiring that a candidate's name be placed on the ballot if certain conditions were

[3] https://ballot-access.org/2020/05/08/michigan-secretary-of-state-now-agrees-to-50-cut-in-number-of-primary-petitions/.

met); *Nelson v. Miller*, 170 F.3d 641, 646 (6th Cir. 1999) (acknowledging that a district court's remedial power to issue "an affirmative injunction ordering" a state "to offer voting devices assuring full privacy to blind voters" is proper). The precedential rule in the Sixth Circuit, as in the Seventh Circuit, is that federal courts possess equitable power to remedy unconstitutional ballot access laws. Esshaki is therefore limited to its unique facts, even within the Sixth Circuit.

In this Circuit, of course, federal courts have long enjoyed the authority to correct constitutional violations with affirmative, as well as negative, injunctions. In *Democratic National Committee v. Bostlemann*, 2020 WL 1638374 (W.D. Mich., Apr. 2, 2020), for example, the District Court, because of the pandemic, entered an injunction extending Wisconsin's deadline for the receipt of absentee ballots and for the request of absentee ballots. and also ordered that Wisconsin's witness signature requirement be replaced with an affirmation requirement for the absentee voter. The Supreme Court (as Judge Stranch explained in her concurring opinion in *Esshaki*) in *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (U.S., Apr. 6, 2020), stayed only a portion of that affirmative relief. The Court left undisturbed the extension of the absentee ballot deadline. It did not say that federal courts lack the power to issue affirmative relief. It merely said "lower federal courts should ordinarily not alter the election rules on the eve of an election," *id.* at 1207, which is what improperly happened there.

Here, by contrast, the affirmative relief that this Court granted is consistent not only with the foregoing precedent in this Circuit, but also long-standing precedent in other Circuits. In Pennsylvania, for example, a district court held the Commonwealth's signature requirements for minor parties unconstitutional as applied. *See Constitution Party of Pa. v. Cortes*, 116 F.Supp.3d 486 (2015), *aff'd*, 824 F.3d 386 (3rd Cir. 2016). Thereafter, the district court entered an order establishing new signature requirements that shall apply "[u]ntil such time as the Pennsylvania

Legislature enacts a permanent measure" to replace the invalidated provisions. *See* Order, *Constitution Party of Pa. v. Aichele*, No. 12-2726, Doc. No. 115 (E.D. Pa. February 1, 2018). To this day, that order remains the law of the land in Pennsylvania. *See* Pennsylvania Department of State, *Minor Political Party and Political Body Signature Requirements for Statewide Offices for General Election – November 3, 2020*, available at https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Documents/2020/3rd%20party%20signature%20requirements%202020.pdf (accessed May 15, 2020) (relying on district court order to establish signature requirements for 2020 general election).

Similarly, in Georgia, after invalidating that state's signature requirement for minor parties, a federal district court found it necessary and proper to grant affirmative relief by establishing a new signature requirement. *See Green Party of Georgia v. Kemp,* 171 F. Supp. 3d 1340 (N.D. Ga. 2016) (holding a one-percent signature requirement unconstitutional and setting a new requirement of 7,500 signatures). As the district court explained, "the best way to address this infirmity is by a reduction in the number of signatures required." *Id.* at 1373-74. The court of appeals affirmed. *See Green Party of Georgia v. Kemp,* 674 F.App'x 974 (11th Cir. 2017) ("The judgment of the district court is affirmed based on the district court's well-reasoned opinion.").

And in the Sixth Circuit itself, the court of appeals relied on this same reasoning to uphold the district court's order enjoining Michigan's signature requirement for independent candidates and establishing a new signature requirement:

> But far from "impos[ing] [its] own idea of democracy" on the State, the district court crafted this remedy to allow some portion of Michigan's democratically enacted statute to survive. Surely some signature requirement better serves the State's asserted interests than none at all. And to the extent Defendants dislike the number, they failed to introduce any evidence into the record or argue for a different requirement at the preliminary injunction hearing, despite ample prompting to do so. The district court's remedy was within its equitable discretion. *See McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976) (Powell, J.); *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d at 1374 (entering a permanent injunction

> requiring 7,500 valid signatures on a petition in order to be "sensitive to the State's interests").

Graveline, 747 F. App'x 408. Here, too, the affirmative relief this Court granted Plaintiffs is an appropriate exercise of its equitable powers, and consistent with the precedent of federal courts nationwide.

III. Defendants Are Precluded By Laches From Challenging the Relief They Agreed To.

Defendants waited over two weeks to seek reconsideration from the very relief they proposed and agreed to. The Court's preliminary injunction, of course, took immediate effect under Federal Rule of Civil Procedure 62(a)(1), and Defendants have not yet even sought a stay of that Order. The Plaintiffs have accordingly relied upon the Court's Order in their attempts to gain ballot access. Rewriting that Order at this late date would cause them substantial harm.

Defendants' unjustified delay bars them from challenging the very Order they proposed and agreed to under the equitable doctrine of laches. "The doctrine of laches 'derive[s] from the maxim that those who sleep on their rights, lose them.'" *Navarro v. Neal*, 716 F.3d 425, 429 (7th Cir. 2013) (citation omitted). "For the doctrine to apply," the two requirements are "(1) lack of diligence," and "prejudice to" the other parties. Id. Courts have routinely applied this doctrine in election settings because of the deadlines involved and because of the reliance interests at stake. *See*, *e.g.*, *Knox v. Milwaukee County Board of Elections*, 581 F. Supp. 399 (E.D. Wis. 1984) (applying doctrine); *McNeil v. Springfield Park District*, 656 F. Supp. 1200 (C.D. Ill. 1987) (same); *Rose v. Board of Elections*, 2015 WL 1509812 (N.D. Ill. 2015) (same).

Plaintiffs have these past two weeks taken actions to comply with this Court's Order. They have constructed petitions to be used in the electronic gathering of signatures and have begun distribution. Defendants seek to pull the rug out from under them at this late date for no reason other than Defendants have had a change of heart. Defendants waited too long. Even if they had

a legitimate argument -- which they plainly do not possess -- it should be rejected based on their unreasonable and inexplicable delay.

CONCLUSION

For the foregoing reasons, Defendants' Motion should be **DENIED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, the foregoing document was filed using the Court's CM/ECF system, which will effect service on all parties.

/s/Oliver B. Hall

Oliver B. Hall