IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN M. SCHMITZ, ANNA SVEC, GOLDA BOU, and JUAN RAMOS,	)	
Plaintiffs,	)	Case No. 1:19-cv-03314-TWP-MPB
v.	)	
MARION COUNTY BOARD OF ELECTIONS, CONNIE LAWSON, and MYLA ELDRIDGE,	)	
Defendants.	)	

DEFENDANTS MARION COUNTY BOARD OF ELECTIONS AND MYLA ELDRIDGE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION

I. Introduction

Plaintiffs are John Schmitz ("Schmitz") and three individuals who signed Schmitz's petition to be a candidate for the office of mayor of Indianapolis in the November 5, 2019 municipal election (collectively, "Plaintiffs"). Indiana law prescribes the requirements Schmitz must meet to run as an independent candidate not affiliated with a major political party. *See* Ind. Code ch. 3-8-6.

Plaintiffs' challenge in this injunction proceeding is narrow. They contend that Indiana's requirement—which appears three separate times in the applicable Code chapter—that the voters who sign Schmitz's petition must also list the address at which they are registered to vote ("Registered-Address Requirement") unduly burdens their First Amendment rights.

Yet Schmitz cites no authority suggesting he has a First Amendment right to appear on a ballot without satisfying the statutory requirements to do so. And, in fact, binding authority

confirms he does not. The remaining Plaintiffs offer no authority suggesting that they have a First Amendment right, as voters, to have Schmitz appear on a ballot even though he has not met the statutory requirements, or a First Amendment right for their signatures to be counted on his petition even though they did not comply with statutory requirements.

In any event, Indiana law unambiguously establishes the Registered-Address Requirement, which imposes, at most, only a very minor burden on Plaintiffs—that of writing the address at which they are registered to vote on a form. The Seventh Circuit previously upheld a similar requirement under Illinois law, and the burden on Plaintiffs here is demonstrably less than it was in that case. Plaintiffs fail to address this authority or offer any other evidence to substantiate the burden they allege the Requirement imposes. And because the Requirement is both reasonable and non-discriminatory, it need only be supported by important state interests, which it unquestionably is. Plaintiffs' First Amendment challenge to the Registered-Address Requirement is therefore highly unlikely to succeed on the merits.

The balance of harms also strongly weighs against second-guessing the Election Board's unanimous decision to adhere to Indiana law by entering an injunction that would add a candidate to the ballot mere weeks before voting commences. The Registered-Address Requirement has been in place since well before Schmitz began his attempted run. *See, e.g.*, Ind. Code §§ 3-8-6-2, -6, & -8. Plaintiffs' delayed challenge to the Requirement is significantly prejudicial to the defendant Election Officials, other candidates, and Indiana voters. An order requiring the Election Board to place Schmitz on the ballot will necessitate revising the November 2019 ballot, introducing confusion and uncertainty into the upcoming election. Excusing a prospective candidate from complying with Indiana law undermines public trust in Indiana's democratic system and the rights of candidates and voters to have only lawful

candidates on the ballot—particularly if the Court later decides that preliminary order was unwarranted. Accordingly, Plaintiffs' requested relief should also be denied because it will irreparably harm the State and its citizens.

Before proceeding to the merits, the Election Board wishes to describe for the Court why time is of the essence. Marion County ballot coding commences on August 26. *See* Ex. 1, Decl. of Brienne Delaney ("Delaney Decl."), ¶ 24A. September 16, 2019 is the deadline under Indiana law for the Election Board to print and deliver absentee ballots, which must be mailed on September 21 to voters who have filed an application with the circuit court clerk. *Id.*, ¶¶ 24E-F; *see also* Ind. Code § 3-11-4-18. But first, the Election Board must work with its vendor to finalize ballots. The Election Board's ballot-verification meeting is scheduled for September 6, 2019, and on September 9, its vendor will begin preparing the approximately 3,000 pieces of media hardware required to administer the election. *Id.*, ¶¶ 24B-D. Early in-person voting commences on October 8, 2019. *Id.*, ¶ 24I. Moreover, the 2019 municipal election is only the second election to occur since Marion County transitioned to vote centers and use of electronic poll books earlier this year. *Id.*, ¶ 25K. Given the significantly higher turnout expected at the November 5 municipal than the May 7 primary election, the Election Board has planned for substantial testing of its electronic poll books and balloting system during the period between September 9 and Election Day. *Id.*, ¶¶ 24G-L.

For all of these reasons, the Election Board very respectfully requests that the Court issue an order on Plaintiffs' preliminary injunction motion by September 5, if at all possible. The Election Board regrets the burden this places on the Court.

II. Legal Standard

A preliminary injunction is "an extraordinary and drastic remedy . . . that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Goodman v. Ill. Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 437 (7th Cir. 2005) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). Plaintiffs may obtain this relief only if they show (1) a likelihood they will succeed on the merits, (2) absent intervention, they will suffer irreparable harm before their claims are decided, and (3) traditional legal remedies are inadequate. *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1058 (7th Cir. 2016). Of these three "primary" requirements, "Plaintiffs' probability of success on the merits is the most crucial in this context." *Id.* Only after Plaintiffs have made this showing will the Court "weigh the factors against one another, assessing whether the balance of harms favors them or whether the harm to other parties or the public is sufficiently weighty that the injunction should be denied." *Id.*

III. Plaintiffs are not entitled to injunctive relief.

Plaintiffs' request for a preliminary injunction trips at the first hurdle because Plaintiffs have not shown that they are likely to succeed on the merits. Schmitz has no fundamental right to run for office. *See, e.g.*, *Brazil-Breashears v. Bilandic*, 53 F.3d 789, 792-93 (7th Cir. 1995). And, while ballot-access restrictions may implicate voters' constitutional rights, "not all restrictions on candidates' eligibility for the ballot impose constitutionally-suspect burdens." *Stone v. Bd. of Election Comm'rs for City of Chi.*, 750 F.3d 678, 681 (7th Cir. 2014) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983)). Because it is unambiguous, nondiscriminatory, and reasonable, the Registered-Address Requirement does not violate the First Amendment. Plaintiffs' failure to show they are likely to succeed on their claims is dispositive. *See, e.g.*, *Stone v. Bd. of Elections Comm'rs for the City of Chi.*, No. 10-CV-7727, 2011 WL 66040, at *2 (N.D.

Ill. Jan. 10, 2011) ("[I]f a plaintiff fails to demonstrate any likelihood of success on the merits, the motion for preliminary injunction must be denied."). The Court should deny Plaintiffs' injunction request on this basis alone.

A. The Registered-Address Requirement does not violate the First Amendment.

The Registered-Address Requirement does not unconstitutionally infringe on Plaintiffs' First Amendment rights. "A state is not required to list everyone who wants to stand for office . . . . It can impose reasonable restrictions on access." *Protect Marriage Ill. v. Orr*, 463 F.3d 604, 607-08 (7th Cir. 2006). Voters' "'basic constitutional rights' to associate politically with like-minded voters and to cast a meaningful vote . . . are not absolute," and states have broad constitutional authority "to regulate the conduct of elections." *Tripp v. Scholz*, 872 F.3d 857, 863 (7th Cir. 2017) (quoting *Stone*, 750 F.3d at 681, *Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 773 (7th Cir. 1997), and *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004)).

States "must play an active role in structuring elections." *Tripp*, 872 F.3d at 863 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433, (1992)). This Court and others have recognized that, "[a]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Emrit v. Lawson*, No. 1:17-cv-03624-JMS-TAB, 2017 WL 4699279, at *2 (S.D. Ind. Oct. 19, 2017) (quoting *Tripp*, 872 F.3d at 863). As the Seventh Circuit put it, "there have to be hurdles to getting on the ballot". *Nader v. Keith*, 385 F.3d 729, 733 (7th Cir. 2004). So "states enjoy 'considerable leeway' with respect to election procedures", and courts shy away from "micromanag[ing] them". *Tripp*, 872 F.3d at 863 (quoting *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999)); *Stevo v. Keith*, 546 F.3d 405, 409 (7th Cir. 2008).

Under the "flexible" *Anderson-Burdick* standard on which Plaintiffs rely, "the level of scrutiny with which [the Court] review[s] a ballot-access restriction depends on the extent of its imposition: the more severely it burdens constitutional rights, the more rigorous the inquiry into its justifications." *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (internal quotations omitted). The Court must thus first evaluate "whether the law imposes severe or reasonable and nondiscriminatory restrictions on candidates' and voters' constitutional rights", and then "determine whether the state interest offered in support of the law is sufficiently weighty under the appropriate level of scrutiny." *Navarro v. Neal*, 716 F.3d 425, 430 (7th Cir. 2013). Because "the government must put in place a structure for elections", a state's "important regulatory interests are generally sufficient" to justify statutes that "impose only 'reasonable, nondiscriminatory restrictions.'" *Emrit*, 2017 WL 4699279 at *2; *Neal*, 716 F.3d at 430 (quoting *Burdick*, 504 U.S. at 434). The Registered-Address Requirement easily withstands this scrutiny.

1. The Registered-Address Requirement is unambiguous and non-discretionary.

a. The Registered-Address Requirement is not ambiguous.

Plaintiffs' statutory obligation to satisfy the Registered-Address Requirement is clear. In three separate, consistent statutes, the Indiana Election Code plainly confirms that a prospective independent or minor-party candidate must obtain from each petitioner the address at which he or she is registered to vote. "The first and often the last step in interpreting a statute is to examine the language of the statute. When confronted with an unambiguous statute, [the Court does] not apply any rules of statutory construction other than to give the words and phrases of the statute their plain, ordinary, and usual meaning." *McCullough Constr. Co., Inc. v. Gardner Denver, Inc.*, No. 1:09-cv–368-WTL-JMS, 2010 WL 1849229, at *2 (S.D. Ind. May 6, 2010); *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803, 806-07 (7th Cir. 1988) (same).

That directive applies here. The Court need look no further than the plain language of Indiana law to confirm that it establishes the Registered-Address Requirement:

- Indiana Code § 3-8-6-6 explains that "a petitioner may not be counted unless the petitioner is registered and qualified to vote in conformity with [Indiana Code § 3-8-6-8]" and "[e]ach petition must contain . . . *[t]he residence address of each petitioner as set forth on the petitioner's voter registration record.*" (Emphasis added).

- Indiana Code § 3-8-6-2 instructs that "[a] candidate may be nominated for an elected office by petition of voters who are (1) *registered to vote at the residence address set forth on the petition* on the date the county voter registration office certifies the petition under [Indiana Code § 3-8-6-8]; and (2) qualified to vote for the candidate."[1] (Emphasis added).

- Indiana Code § 3-8-6-8 confirms that the county voter registration office "must certify that each petitioner *is a voter at the residence address listed in the petition* at the time the petition is being processed" and that this certification "must accompany and be part of each petition." (Emphasis added).

Plaintiffs assert that the first-listed provision (Indiana Code § 3-8-6-6) conflicts with the others (Indiana Code § 3-8-6-2 and Indiana Code § 3-8-6-8). Prelim. Inj. Memo., Dkt. 11 at 2. This is simply not the case. All three statutes use the same language ("residence address") to describe the address that must be listed on the petition. Each requires a petitioner to write his registered residence address on the petition, and each confirms a petitioner's signature may be certified *only if* he includes this address. *See also* Ind. Code § 3-5-6-5 ("if the residence address . . . of an individual contains a substantial variation from the residence address . . . of a registered voter as set forth in the records of the county voter registration office, the signature is invalid and may not be certified"); Ind. Code § 3-5-6-1.

Plaintiffs seek to draw a distinction between the "residence address" referenced in these statutes and the location where a petitioner resides at the time he or she happens to sign the form. But none of these statutes make any reference to the petitioner's "current address," as Plaintiffs allege. Prelim. Inj. Memo., Dkt. 11 at 10. In fact, the General Assembly explicitly rejected

[1] Plaintiffs' Complaint quotes this statute but appears to omit the word "address." *See* Compl., Dkt. 1, ¶ 19A.

Plaintiffs' proposed interpretation of the Requirement when it amended Indiana Code § 3-8-6-6(a)(3) in 2013 to eliminate any reference to petitioner's "mailing address" and confirm, instead, that a petitioner must provide the "residence address . . . as set forth on the petitioner's voter registration record." *See* Voters and Voting—Ballots, 2013 Ind. Legis. Serv. P.L. 194-2013 (S.E.A. 518); *see also, e.g.*, *Hickman v. W. Heating & Air Conditioning Co.*, 207 F. Supp. 832, 834 (N.D. Ind. 1962) ("A statutory amendment which changes the language of a prior statute indicates a legislative intention that the meaning of the statute has been changed . . . and raises a presumption that the Legislature intended to change the law." (internal citations omitted). Indiana's legislature could not have been more clear, and where the "wording of the statute[s] is clear, that is the end of the matter." *Phoenix Bond & Indem. Co. v. MCM Enter., Inc.*, 319 B.R. 157, 162 (S.D. Ind. 2005).

Plaintiffs also assert that the Indiana Election Division's State form ("CAN-44") is confusing when it refers to the address where the petitioner "resides." Prelim. Inj. Memo., Dkt. 11 at 7; Prelim. Inj. Mot., Ex. 1, Dkt. 10-1. But the form is consistent with the Registered-Address Requirement statutes; individuals must register at the address they reside and place that address on the CAN-44 form. Furthermore, voters "shall transfer the voter's registration to the address where the voter currently resides by sending a transfer of registration on a prescribed form to the circuit court clerk or board of registration." Ind. Code § 3-7-39-1. Thus, a voter's "current residence" and "residence address" should be one in the same.

Yet another statute confirms this conclusion. Indiana Code § 3-8-6-5(a)(5) requires that a petition state, among other things, "[t]hat the petitioners desire *and are registered and qualified* to vote for each candidate." (emphasis added). Read together with the three Registered-Address Requirement statutes listed above, there is only one logical and consistent reading: the petition

must reflect the address at which each voter is registered to vote—*i.e.*, their residence for purposes of their voter registration. This makes sense. The Marion County Board of Voter Registration ("Voter Registration") would have no means of confirming that each petitioner—and, therefore, that the petition itself—satisfies this statute without petitioners' registration addresses. Delaney Decl., ¶ 8.

Put simply, the statutes in Indiana Code ch. 3-8-6 are clear. They consistently and unambiguously establish and give effect to the Registered-Address Requirement. To appear on the ballot, it was Schmitz's obligation to ensure that the requisite number of petitioners met this clear statutory requirement. That did not happen here.

b. The Election Board may not disregard the Registered-Address Requirement.

The Election Board's enforcement of these statutes was non-discretionary. Plaintiffs disparage the Election Board for stating that they "had to 'follow the law.'" Prelim. Inj. Memo., Dkt. 11 at 7. But "[the] Election Board is duty-bound to follow Indiana election statutes passed by the Indiana legislature . . . . It has no independent power to do otherwise." *Common Cause Ind. v. Ind. Sec'y of State*, No. 1:12-CV-01603-RLY-DML, 2013 WL 12284648, at *3 (S.D. Ind. Sept. 6, 2013); *see also* Ind. Code § 3-8-6-12.5 (prohibiting Election Board from "includ[ing] on a ballot the name of a candidate whose nomination is ineffective" for failure to timely file documents required under Indiana Code §§ 3-8-6-10 and -12). Accordingly, the Election Board's adherence to unambiguous Indiana statutes is hardly a "capricious or irrelevant factor" on which to have based its decision. Prelim. Inj. Memo., Dkt. 11 at 9.

And, as just explained, Plaintiffs' unsupported assertion that the Election Board followed only "one sub-section of the statute" (Indiana Code § 3-8-6-6(a)(3)) is incorrect. *Id.* at 7. Rather, the Election Board followed all three Code provisions that establish and give consistent effect to

the Registered-Address Requirement, as it was lawfully required to do. As described, the Election Board reads the CAN-44 as consistent with the Registered-Address Requirement statutes. But regardless, Plaintiffs cite no authority suggesting that the Election Board had the authority to give effect to Plaintiffs' incorrect reading of that form contrary to clear Indiana law.

2. The Registered-Address Requirement is reasonable and non-discriminatory.

The Registered-Address Requirement is not burdensome or discriminatory. It unquestionably survives the minimal scrutiny that *Anderson-Burdick* mandates.

a. The Registered-Address Requirement is not burdensome.

Plaintiffs have not argued, or alleged facts showing, that any burden the Registered-Address Requirement imposes is severe—the only type of burden that could warrant strict scrutiny. *See also, e.g.*, *Acevedo*, 925 F.3d at 948. To the extent Plaintiffs contend that the Requirement is unduly burdensome based on some alleged conflict in the statutes or the CAN-44, that argument fails for the reasons discussed above.

Beyond that incorrect contention, Plaintiffs appear to complain simply that individuals executing the CAN-44 form had to provide the addresses that matched their voter registrations, as opposed to some other address. In other words, the only other burden Plaintiffs potentially allege is that of having to write one address on a form instead of another. But the Seventh Circuit has already held that a ballot-access rule like the Registered-Address Requirement is constitutional. *See Nader v. Keith*, 385 F.3d 729, 733 (7th Cir. 2004). In that case, the candidate challenged as burdensome "three rules . . . in combination," one of which was that signatures were excluded from his petition where the "petitioner wasn't registered to vote at the address" provided. *Id.* at 731-32. In upholding this requirement, the Court noted "[i]f the petition were not required to contain any identifying information (such as . . . the address at which the petitioner is

registered to vote), there would be no practical impediment to a person's signing the name of anyone he knew to be a registered voter." *Id*. at 734.

Here, Schmitz challenges not three, but only one ballot-access requirement. If a Registered-Address Requirement in combination with other restrictions was not found to be unduly burdensome in *Nader*, the Registered-Address Requirement standing alone cannot be deemed unduly burdensome here. This conclusion is consistent with other cases upholding ballot-access restrictions that are also arguably more burdensome—including a "12,500-signature requirement" from "legal voters of the city", a "ninety-day window for collecting signatures", and a rule that "a given voter cannot sign more than one candidate's petition in any election cycle". *Stone*, 750 F.3d at 680-83; *see also, e.g.*, *Tripp*, 872 F.3d at 865 (finding signature requirement nondiscriminatory and reasonable); *Neal*, 716 F.3d at 430 (same). Plaintiffs ignore this precedent and fail to show that the Registered-Address Requirement is somehow *more* burdensome. *See also, e.g.*, *Emrit*, 2017 WL 4699279 at *2 (rejecting challenge to petition-submission requirement as "frivolous" based, in part, on Supreme Court precedent upholding stricter requirements).

As further evidence of the lack of burden, other potential independent and minority-party candidates also have been able to satisfy the Registered-Address Requirement in at least the last three election cycles. Delaney Decl., ¶¶ 23, 27B. *See, e.g.*, *Stone*, 750 F.3d at 683 (7th Cir. 2014) (declining to find burden of ballot-access requirements "severe" when other candidates were able to satisfy them); *Rednour*, 108 F.3d at 775 (two third-party candidates gaining access to ballot "illustrate[d] that the requirements do not pose an insurmountable obstacle to [ballot] access").

Finally, though Plaintiffs emphasize their constitutional right to vote, they stop short of alleging that they are actually disenfranchised by the Registered-Address Requirement. And

there is no evidence in the record about which candidate the signatories to Schmitz's petition will ultimately vote for in the election. In fact, Schmitz's counsel acknowledged at the Election Board hearing that "a lot of [the petitioners] probably won't vote for . . . Schmitz." Ex. 2, July 30, 2019 Hearing Tr., 12:3-5. In addition, Plaintiffs do not and cannot contend that they are unable to vote in the election, only that they may be unable to vote for the candidate of their choosing should they ultimately desire to vote for Schmitz and he is not on the ballot. Even that could have been remedied through timely and appropriate action by Schmitz, but he did not avail himself of the option to appear on the ballot as a write-in candidate. Ind. Code § 3-8-2-2.5.

b. The Registered-Address requirement is not discriminatory.

The Registered-Address Requirement also meets the *Anderson-Burdick* standard of being nondiscriminatory—and Plaintiffs do not argue otherwise. Unlike ballot-access restrictions that the Seventh Circuit has suggested would be suspect, the Registered-Address Requirement does not "discriminate against particular advocates or viewpoints." *Orr*, 463 F.3d at 606; *see also Jones*, 842 F.3d at 1059 (quoting *Orr*). The Requirement applies to every nomination of an independent or minority-party candidate and every petitioner.

States may lawfully impose these types of minor ballot-access restrictions on candidates of non-major parties. *See, e.g.*, *Am. Party of Tex. v. White*, 415 U.S. 767, 780-81 (1974) (rejecting argument that state unconstitutionally discriminates against smaller parties by imposing different ballot-access restrictions from those of major parties); *Jenness v. Fortson*, 403 U.S. 431, 438-40 (1971) (rejecting challenge to signature requirements for prospective independent and new- or minority-party candidates); *Horning v. Indiana*, No. 2:15-cv-00284-LJM-MJD, 2016 WL 845740, at *1 (S.D. Ind. Mar. 4, 2016) (McKinney, J.) (applying *American Party*'s holding to dismiss claim that Indiana statute providing different procedures for

candidates of major political parties "create[d] two unequal classes of citizens in terms of political and electoral rights" (quotations omitted)); *Marion Cty. Comm. of Ind. Democratic Party v. Marion Cty. Election Bd.*, No. IP00-1169-CH/G, 2000 WL 1206740, at *7 (S.D. Ind. Aug. 3, 2000) (Hamilton, J.) ("[T]he State's differential treatment of large and small political parties is not invidiously discriminatory in light of the state interests that support classifying political parties according to past electoral support and the extensive body of case law upholding such differential treatment.").

The Registered-Address Requirement is consistent with this authority. Schmitz remains "wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought [he] wish[es]." *Jenness*, 403 U.S. at 438. That the Requirement applies to independent and minority-party candidates does not render it discriminatory.

3. The Registered-Address Requirement furthers important state interests.

In addition to being nondiscriminatory and imposing, at most, "only slight burdens," the Registered-Address Requirement is justified by Indiana's "relevant and legitimate state interests." *Acevedo*, 925 F.3d at 949. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election-and campaign-related disorder." *Stone*, 750 F.3d at 681 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997)).

The Registered-Address Requirement "is a mechanism for ensuring that the signers of nominating petitions are actually registered voters." *Nader v. Keith*, No. 04 C 4913, 2004 WL 1880011, at *8 (N.D. Ill. Aug. 23, 2004). It furthers several legitimate—even compelling—state interests, including:

- "[R]egulating the number of candidates on the ballot" [*Bowe v. Bd. of Election Comm'rs of City of Chi.*, 614 F.2d 1147, 1151 (7th Cir. 1980); *Neal*, 716 F.3d at 430];

- "[A]ssuring that the winner commands at least a strong plurality of votes without the necessity of a runoff election" [*Bowe*, 614 F.2d at 1151];

- "[P]reserving the integrity of [the state's] electoral process" and "avoiding . . . deception, and even frustration of the democratic process at the general election [*Bowe*, 614 F.2d at 1151; *Rednour*, 108 F.3d at 774 (quoting *Jenness*, 403 U.S. at 442); *see also, e.g.*, *Neal*, 716 F.3d at 430, 432; *Parker*, 757 F.3d at 707]; and

- "[P]reventing voter confusion" [*Stone*, 750 F.3d at 685; *Neal*, 716 F.3d at 430].

The Registered-Address requirement lawfully protects these interests by "requir[ing] a preliminary showing of a significant modicum of support before a candidate may appear on the ballot." *Bowe*, 614 F.2d at 1151. Because Schmitz failed to satisfy this Requirement, the Election Officials were required to omit him from the ballot. *See* Ind. Code § 3-8-6-12.5; *see also, e.g.*, *Bowe*, 614 F.2d at 1151 n.7 (confirming state may "remov[e] from the ballot those who fail to meet the minimum [ballot-access] requirement[s]").

B. Plaintiffs have not argued they are likely to succeed on any other claims.

The Court need not consider the viability of any of Plaintiffs' remaining claims because Plaintiffs have not argued that they are likely to succeed on them in support of their preliminary injunction motion. *See, e.g.*, *Wash. v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 846 n.9 (7th Cir. 1999) (instructing that court does not consider theories plaintiffs did not advance in support of preliminary injunction motion or arguments raised for the first time in a reply brief); *Star Sci. Inc. v. Carter*, No. IP01-0838-C-T/G, 2001 WL 1112673, at *1 (S.D. Ind. Aug. 20, 2001) (Tinder, J.) (confirming that the Court considers only those grounds the plaintiff cited in support of a preliminary injunction motion).

Plaintiffs' complaint contains three counts. *See* Compl., Dkt. 1, ¶¶ 33-56. Count I ("Violation of Constitutional Rights") references constitutional doctrines other than the First

Amendment, but Plaintiffs have not supported their injunction request by arguing that any claims other than their First Amendment claim are likely to succeed on the merits. The Court's analysis therefore should be limited only to Plaintiffs' First Amendment claim.

However, even if Plaintiffs have properly plead claims under the Equal Protection Clause or the Due Process Clause, or moved for an injunction on that basis (neither of which the Election Officials concede), Plaintiffs are not likely to succeed on those either. As explained above, the law is non-discriminatory. *See supra* at 12-13; *see also, e.g.*, *Jenness*, 403 U.S. at 440 (confirming that state does not violate Equal Protection Clause by providing prospective candidate with "two alternative paths" to "get[] his name printed on the ballot": "enter[ing] the primary of a political party, or . . . circulat[ing] nominating petitions either as an independent candidate or under the sponsorship of a political organization"). Accordingly, any Equal Protection claim Plaintiffs are pursuing in this action does not support their preliminary injunction request. And Plaintiffs' Due Process claim fails because Indiana's statutes prescribing the Registered-Address Requirement are clear and not vague or ambiguous, and the Election Board's application of them was not arbitrary.

Similarly, the Court need not consider the likelihood Plaintiffs will succeed on their claims under the National Voter Registration Act of 1993 ("NVRA") or the Voting Rights Act of 1965. *See* Compl., Dkt. 1, ¶¶ 45-56. Though Plaintiffs' preliminary injunction briefing makes passing reference to the NVRA claim, *see* Prelim. Inj. Memo., Dkt. 11 at 1, 5, Plaintiffs make no argument that they are likely to succeed on this claim. They also have provided no evidence that the Election Officials failed to meet any obligations under these statutes.

Because Plaintiffs have not advanced any claim besides their First Amendment claim as a basis for their preliminary injunction request, Plaintiffs' other claims, even if the Court were to

construe them as well-plead, cannot support entry of an injunction. *See supra* at 14 (citing *Wash.*, 181 F.3d at 846 n.9; *Carter*, 2001 WL 1112673 at *1); *see also, e.g.*, *Wallace v. Miller*, No. 09-cv-342-JPG, 2010 WL 4284915, at *2 (S.D. Ill. Oct. 21, 2010) ("It is the movant's burden to supply the necessary evidence in connection with the motion with which he wants them considered, to cite to that evidence at the appropriate places in his brief and to explain how they support his argument.").

C. The equities support denial of the requested injunction.

Even if the Court finds there is some likelihood Plaintiffs will succeed on their First Amendment claim, the equities do not support Plaintiffs' preliminary injunction request. Against the harm Plaintiffs allege they will suffer if Schmitz remains off the November 2019 ballot, the Court must weigh the harm that the Election Officials, the State, and its citizens will suffer if Schmitz is erroneously added to it. *See, e.g.*, *Stone*, 2011 WL 66040 at *2 (explaining that court balances harms against non-moving party and "effects of the relief on non-parties"). The Court employs a "sliding scale approach" for this analysis: the less likely Plaintiffs are to win, the more they must show that the balance of the harms weigh in their favor. *Jones*, 842 F.3d at 1059-60.

Plaintiffs cannot meet this burden. For the reasons discussed above, Plaintiffs are highly unlikely to succeed on their claims, and important state interests are at stake. Moreover, "a victory at this stage would effectively win the case for the [plaintiffs] by putting [Schmitz] on the November ballot regardless of the eventual outcome." *Tripp v. Smart,* No. 14-CV-0890-MJR-PMF, 2014 WL 4457200, at *6 (S.D. Ill. Sept. 10, 2014). Put another way, placing Schmitz on the ballot "would, in effect, invalidate a ballot-access requirement that has been held constitutional." *Summers v. Smart*, 65 F. Supp. 3d 556, 566 (N.D. Ill. 2014). "A plaintiff should not gain, via preliminary injunction, the actual advantage which would be obtained in a final

decree." *Tripp,* 2014 WL 4457200 at *6. Not only, in that event, would Schmitz have unfairly obtained ultimate relief at the preliminary injunction stage, but it would be impossible for the Election Board to un-ring the bell of an election that will have taken place with an improperly constituted ballot.

Plaintiffs' delay in seeking relief from the Registered-Address Requirement also weighs against them. The Registered-Address Requirement has been on the books since well before Schmitz began running for office, and the Election Officials gave Schmitz notice of the Requirement well in advance of the petition-submission deadline. *See* Ex. 3, Decl. of Michele Cash ("Cash Decl."), ¶¶ 4-9. A representative of Voter Registration spoke with Schmitz on multiple occasions about the Registered-Address Requirement, and that the Election Board revised its staffing to ensure that it could timely verify the signatures on Schmitz's petition and keep him updated on his progress toward satisfying this statutory obligation. *See id.*, ¶¶ 8-10.

Schmitz could have brought a declaratory judgment action at any time if he believed that the statutes establishing the Registered-Address Requirement are unclear. He did not do so. And Plaintiffs cannot properly explain their delay by characterizing their challenge as an "appeal" of the Election Board decision, for two reasons. First, Plaintiffs are asserting constitutional and statutory claims that are beyond the Election Board's authority to adjudicate. Moreover, had Plaintiffs actually wanted to seek review of the Election Board's decision, they were required to file that challenge in Marion Circuit Court. *See* Ind. Code § 3-6-5-34. Plaintiffs cannot have it both ways: they cannot contend that their claims were not ripe until after the Election Board's decision but then also fail to avail themselves of the statutory process for review of that decision, or establish futility excusing them from doing so. Because Plaintiffs have crafted their arguments as Constitutional violations, they could have and should have been filed much sooner.

At this point, Plaintiffs' challenge is "'gratuitously late' in the election season, such that preliminary injunctive relief would be inequitable." *Tripp*, 2014 WL 4457200 at *6 (quoting *Nader*, 385 F.3d at 736); *see also, e.g.*, *Jones*, 842 F.3d at 1063 (finding district court "did not abuse its discretion" in denying preliminary injunction because, among other things, "considerable harm would have been visited on the electoral system if the requested relief had been granted", particularly in light of plaintiffs' delay in filing); *Summers*, 65 F. Supp. 3d at 567 ("This is a situation of the plaintiffs' own making. Rather than bring a timely lawsuit to enjoin the provisions that the Plaintiffs allege to be unconstitutional . . . the plaintiffs waited to sue until the only possible preliminary injunctive remedy was to place them on the ballot").

The Election Officials and Marion County voters will be severely prejudiced by the injunctive relief Plaintiffs seek. If the Court orders the Election Board to place Schmitz on the November 2019 ballot now, the Election Board will have to re-start its entire process for creating those ballots. *See* Delaney Decl., ¶ 25. That burden continues to grow with each day that passes because the Election Board is already in the midst of preparing for the November 2019 election. *See id.*, ¶¶ 24-25. Modifications to the ballot at this late hour will introduce confusion into the election process, and excusing one prospective candidate from Indiana's statutory requirements will undermine public trust and confidence in the democratic system. *See id.*, ¶¶ 25, 27. Moreover, if Schmitz is ordered to be placed on the ballot now, and the Court later determines that this placement was improper, the harm to the properly placed candidates and voters is irreparable. The properly placed candidates will lose votes that would have been cast in their favor but for inclusion of the improperly placed candidate, and voters who may vote for Schmitz believing him to be a proper candidate will lose the opportunity to vote for one of the candidates

who is properly on the ballot. *See id.* These are serious and compelling burdens; they are certainly not "negligible," as Plaintiffs' contend. Prelim. Inj. Memo., Dkt. 11 at 8.

For all of these reasons, opinions in this Circuit denying (or upholding the denial of) requests for preliminary injunctions in similar contexts are frequent. *See, e.g.*, *Nader*, 385 F.3d at 737, *Nader*, 2004 WL 1880011 at *8; *Bowe*, 614 F.2d at 1153; *Marion Cty. Comm.*, 2000 WL 1206740 at *11; *Stone*, 2011 WL 66040 at *2; *Tripp*, 2014 WL 4457200 at *6; *Summers*, 65 F. Supp. 3d at 566. The same outcome is appropriate here.

IV. Schmitz must post a bond if an injunction is issued.

If the Court enters an injunction requiring Schmitz to be added to the ballot and determines after the election that Plaintiffs' claims fail on their merits, no amount of money will be able to remedy the harm to the election process. And while the Election Board will incur some expense in holding the election regardless of an injunction, there are certain expenses that are quantifiable and would be attributable to an injunction requiring Schmitz to be added to the ballot. Plaintiffs should be required to post security for this potential harm.

Rule 65 requires Plaintiffs to post "security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c). Election preparations are underway, and with the investments increasing over time. For example, the work scheduled from September 9 through 13 is expected to cost $30,000, and the work the following week is expected to cost upward of $100,000. Delaney Decl., ¶ 26. Plaintiffs should have to post a bond as security against costs that must be repeated to add Schmitz to the ballot.

V. Conclusion

Plaintiffs' Motion for Preliminary Injunction should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2019, a copy of the foregoing was filed electronically. Service of this filing will be made on all ECF-registered counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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