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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

DARIN WHITTEN, LISA C. KAISER, WILLIAM D. KAISER, DOROTHY TAFT, and JARED KERWIN, Plaintiffs, v. ROCHESTER TOWNSHIP REPUBLICAN CENTRAL COMMITTEE; Rochester Township Republican Central Committeepersons THOMAS K. MUNROE, MARK C. WHITE, ANTHONY SAPUTO, MATTHEW BUTCHER, and DAVID ARMSTRONG, in their official capacities as Committeepersons for the Rochester Township Republican Central Committee; LYNN CHARD, in her official capacity as Clerk of Rochester Township; DON GRAY, in his official capacity as Clerk of Sangamon County, and DARRELL MAXHEIMER, Defendants.	)	Case No: 3:21-cv-03023-RM-TSH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY OR PERMANENT INJUNCTION

INTRODUCTION

This is an action to protect the constitutional rights of a candidate and voters at the December 1, 2020, Rochester Township Republican Caucus. The Caucus was held pursuant to 60 ILCS 1/45-10 to nominate the Republican candidate for Township Road Commissioner in the April 6, 2021 Consolidated Election. At the Caucus, the incumber Road Commissioner, Defendant Darrell Maxheimer's name was pre-printed on the ballot before any nominations were

taken. Voters had the option of circling Maxheimer's name or having to write in Plaintiff Darin Whitten's name to vote for him, even though both were nominated in the Caucus in exactly the same way. Further, voters were allowed to vote outside in their cars before the caucus started and any nominations were taken, using the ballot with Maxheimer's name pre-printed on it. Maxheimer won the caucus by 3 votes or less. Illinois law holds that that "The caucus is the equivalent of a primary election." *Lenehan v. Twp. Officers Electoral Bd. of Schaumburg Twp*., 2013 IL App (1st) 130619 ¶45, 988 N.E.2d 1003, 1015, 370 Ill.Dec. 647, 659 (Ill. App. 2013). In the present case, the Caucus was violative of the Plaintiffs' rights under the Federal and Illinois Constitutions and the violations of said rights are as grievous as had these violations taken place in a primary election. The remedy requested is to reconvene a one-night caucus solely for the purpose of nominating a candidate for Road Commissioner with a fair ballot, or in the alternative, a conducting a re-vote with a paper ballot containing the names of Maxheimer and Whitten. The key facts in support of this action are set forth in Plaintiffs' Verified Complaint. Dkt. 001.

PRELIMINARY EQUITABLE RELIEF STANDARD

To determine whether a preliminary injunction should be granted, the Court must weigh four factors: (1) the likelihood the Plaintiffs will succeed on the merits; (2) the potential for irreparable harm to the Plaintiffs if the injunction is denied; (3) the balance of relevant impositions — the hardship to the Defendants if enjoined as contrasted with the hardship to the Plaintiffs if no injunction issues; and (4) the effect of the Court's ruling on the public interest. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008).

ARGUMENT

All four factors necessary for a preliminary injunction weigh in favor of this Court entering an immediate order in favor of the Plaintiffs as set forth below in the prayer for relief.

I. The Plaintiffs are Likely to Succeed on the Merits.

The U.S.Supreme Court has recognized that ballot access restrictions "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *see also, e.g.*, *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (similar); *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (stating that the "primary concern" with ballot access restrictions is their "tendency . . . 'to limit the field of candidates from which voters might choose'" (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). "Both of these rights . . . rank among our most precious freedoms." *Rhodes*, 393 U.S. at 30.

It is important to note that the Defendant Rochester Township Republican Central Committee, and the Defendants who are Committeepersons of the Central Committee were acting under color of state law because they conducted the Caucus pursuant to Article 45 of the Illinois Township Code. 60 ILCS 1/45-5 et seq.

In this case, the right of the Plaintiff voters to select the candidate of their choice was violated because the caucus was egregiously unfair. One nominated candidate's name was printed on the ballot before the caucus while the other candidate's name had to be written in. Voters were even given this defective ballot to vote outside before nominations were taken. Therefore, the voters were not able to cast their votes effectively.

In *Ferguson v Ryan,* the Illinois Appellate Court noted that "in the absence of fraud or a showing that the merits of the election were affected" the caucus would not be set aside. 251 Ill. App. 3d 1042, 1048 (Ill. App. 3d Dist. 1993). Here, Maxheimer received 1, 2, or 3 more votes, depending on how a ballot is counted, wherein the voter both circled Maxheimer's name and wrote in Whitten's. Here, Plaintiff Whitten had been prejudiced by the fact that curbside voters were given ballots with the name Maxheimer pre-printed on them before nominations were even taken, and therefore may not even have known Whitten was running. The inside caucus voters were given the prejudicial ballots with the name Maxheimer pre-printed while Whitten had to be written in. While some voters inside may have heard Whitten being nominated, others may not have heard. Clearly putting only one of two candidate's names on the ballot gives the candidate whose name is on the ballot a very unfair and illegal advantage. Because of these gross and illegal violations of Plaintiffs' right to a free and equal election and violation of Plaintiffs' constitutional rights, if the Caucus had been run correctly, it is very likely that Plaintiff would have received 1, 2 or 3 additional votes and therefore have been nominated as the Republican candidate for Township Road Commissioner. The closeness of the caucus vote combined with the grossness of the violations shows that under the precedent of *Ferguson,* this court has the right to void the Caucus vote and order a new Caucus that complies with the procedures of the Township Code and the requirements of the Illinois and Federal Constitution, or in the alternative, a re-vote to determine the Republican nominee for Road Commissioner.

What happened at this caucus is similar to the scenario described by this Court in *Stevo v. Keith*,

> An example of an Equal Protection violation would be an Illinois law that required independent candidates' to submit the signatures of 5% of a district's voters, while requiring less (or more) of that number for other independent candidate in order to appear on the ballot for the same office

Stevo v. Keith, 08-cv-03162-RM-BGC, Page 11 (C.D.Ill. 2008). Here, even though both candidates were nominated at the Caucus in the exact same way, one had the extremely unfair advantage of having his name printed on the ballot, while the other had to have his name written in to receive votes. The ballots with the incumbent's name pre-printed were distributed to curbside voters before any nominations were even taken. Thus, there were different rules for different candidates who were both duly nominated in the exact same way under the Illinois Township Code, in clear violation of the Equal Protection Clauses of the Federal and Illinois Constitutions, as well as the First Amendment of the U.S. Constitution.

In effect, the Caucus forced Plaintiff Whitten to run as a write-in candidate while Defendant Maxheimer's name was on the ballot. Running as a write-in candidate is fundamentally unequal in comparison to running as a candidate whose name was printed on the ballot per the precedent of the Supreme Court. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 830-31 (1995) the Court stated, "Our prior cases, too have suggested that write-in candidates have only a slight chance of victory." Then it dropped this footnote 45:

> We noted in *Lubin* v. *Panish*, 415 U.S. 709 (1974), that "[t]he realities of the electoral process . . . strongly suggest that `access' via write in votes falls far short of access in terms of having the name of the candidate on the ballot." *Id*. at 719, n. 5; see also *Anderson* v. *Celebrezze*, 460 U.S. 780, 799, n. 26 (1983) ("We have previously noted that [a write in] opportunity is not an adequate substitute for having the candidates name appear on the printed ballot"); *United States* v. *Classic*, 313 U.S. 299, 313 (1941) ("Even if . . . voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primaryand have their ballots counted, the practical operation of the primary law . . . is such as to impose serious restrictions upon the choice of candidates by the voters");***.

The appropriate remedy is to order by injuctive relief a second, fair and lawful caucus, or, in the alternative, a re-vote with a ballot containing the names of both Maxheimer and Whitten. This is appropriate, as the 7th Circuit has said:

> [T]he district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent action entirely. . . . To the extent that Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield.

Judge v. Quinn, 624 F.3d 352, 355–56 (7th Cir. 2010) (quoting *Judge v. Quinn*, 387 F. App'x 629, 630 (7th Cir. 2010)). Therefore, it is appropriate for this Court to order a second caucus or a re-vote with both Maxheimer's and Whitten's names on the ballot, to determine the Republican nominee for Rochester Township Road Commissioner.

See also: Somer v. Bloom Twp. Democratic Org., 2020 IL App (1st) 201182 (Ill. App. 2020), wherein the Illinois Appellate Court held that federal constitutional rights are implicated by how how a party township caucus is run. *id.* at PP 22.

II. The Plaintiffs are Suffering, and Will Continue to Suffer, Irreparable Harm if the Injunction is Denied.

Under the current circumstances, the Plaintiffs are suffering ongoing deprivations of their First and Fourteenth Amendment Rights. It is well settled that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Murphy v. Zoning Comm'n of the Village of New Milford*, 148 F.Supp.2d 173, 180-81 (D.Conn. 2001).

Additionally, the Objection Process under the Illinois Election Code would not have provided an adequate Remedy at Law. Filing an objector's petition against the Candidacy of Darrell Maxheimer under 10 ILCS 5/10-8 would not provide an adequate remedy for Plaintiff Whitten. If an objection was filed against Maxheimer, the most an Electoral Board could do is remove him from the April 6, 2021 Consolidated Election ballot as the Republican Nominee for

Road Commissioner. This would create a vacancy in nomination that would be filled by the Rochester Township Republican Central Committee, the same five committeepersons who ran the illegal and unconstitutional caucus. They would likely re-nominate Maxheimer as the Republican candidate for Road Commissioner. This is similar to the situation in *McCarthy v Streit* where the Illinois Appellate Court affirmed when an Electoral Board removed Republican Candidates who were improperly nominated at a Caucus, and then the exact same candidates were renominated by the Cook County Republican Committeeman to fill the vacancy in nomination:

> The legislature has provided that a vacancy in nomination occurs where a candidate dies before the election, declines the nomination or "for other reasons." (See Ill.Rev.Stat.1987, ch. 46, par. 7-61.) The fact that the first electoral board determined that the original "Streit Slate" was ineligible, pursuant to Section 6A-1 (Ill.Rev.Stat.1987, ch. 139, par. 59a), did not effect their eligibility at a later date to be appointed to fill in existing vacancies. (Ill.Rev.Stat.1987, ch. 46, pars. 7-61, 10-11.) Accordingly, we find that the trial court correctly determined that vacancies existed in the nominations of the Worth Township Republican Party, that the vacancies could be filled by resolution of the Republican committeeman pursuant to statute (Ill.Rev.Stat.1987, ch. 46, pars. 10-11, 7-61), and that the vacancies also could be legally filled by the same candidates who had filled the "Streit Slate" of candidates which had been found by the Worth Township Electoral Board to have been improperly nominated originally by party caucus.

McCarthy v. Streit, 182 Ill.App.3d 1026, 1033, 538 N.E.2d 873, 878, 131 Ill.Dec. 498, 503 (Ill. App. 1989). Here, if Plaintiff Whitten had filed an Objector's Petition to the Candidacy of Maxheimer, the most an Electoral Board could do is remove Maxheimer from the ballot as the Republican nominee for Road Commissioner. This would create a vacancy to be filled by the same Defendant Committeepersons who ran the original caucus, who would likely re-nominate Maxheimer. Filing an Objector's Petition does not enable Plaintiff Whitten to get what he seeks, a fair caucus and therefore is not an adequate remedy at law.

Additionally, because Plaintiff Whitten participated in and voted at the Caucus, he is forbidden by the Township Code to run for Road Commissioner as an Independent or New Party Candidate because a caucus participant "shall not become an independent candidate or a candidate of another established political party or a new political party for the same election." 60 ILCS 1/45-50(c)(6). Obviously, money damages would not provide the Plaintiffs with an adequate remedy. Therefore, since the nature of the Plaintiffs' injury is to their First Amendment rights and since there is no adequate remedy at law, including none under the Illinois Election Code, Plaintiffs are suffering and will continue to suffer irreparable harm if the Injunction is denied.

III. The Balance of The Harms Favors the Plaintiffs.

Any speculative harm to the Defendants from the requested relief would be far outweighed by the actual harm that the Plaintiffs would suffer by being deprived of their constitutional rights to seek office and support the candidate of their choice in a fair election. Injunctive relief here would require the Republican Party Defendants to set aside one night to hold a fair and lawful Republican Township Caucus solely to nominate the Republican candidate for office of Road Commissioner, or in the alternative, to conduct a re-vote on a paper ballot containing the names of both Maxheimer and Whitten. Injunctive relief against the Township and County Clerk defendants would only require them to delay certifying the Republican nominee for Road Commissioner until said fair caucus can take place. This can be done expeditiously and will not affect the schedule for printing the ballots, starting early voting, or sending out mail ballots, which does not start until Feburay 19, 2021.

IV. Granting the Requested Relief Will Serve the Public Interest.

In this case, the Plaintiffs' First Amendment rights were violated. "Vindicating First Amendment freedoms is clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005). *See also*, *ACLU of Georgia v. Miller*, 977 F.Supp. 1228, 1235 (N.D. Ga. 1997) ("No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech.") (quotation and citation omitted). As the 7th Circuit has stated, "injunctions protecting First Amendment freedoms are always in the public interest." *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012)(quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). Additionally, the requested relief is in the public interest because it will ensure that the voters of Rochester Township are able to have a fair caucus vote to choose the Republican candidate for Road Commissioner. The Caucus was unfair and unconstitutional, and no candidates have filed as Independent Candidates or as the Candidates of any other party for Road Commissioner, so the selection of the Caucus was tantamount to the election to the office of Rochester Township Road Commissioner.

CONCLUSION

For all the reasons set forth above, the Plaintiffs respectfully request that this Court:

A. Assume original jurisdiction over this matter;

B. Issue a temporary restraining order, followed by preliminary and permanent injunctions, against Defendants and all those acting in concert, a) enjoining the Rochester Township Clerk and Sangamon County Clerk from certifying Darrell Maxheimer as the Republican Candidate for Rochester Township Road Commissioner at the April 6, 2021 Election or

printing his name on said ballot as a candidate for said office; and b) ordering the Rochester Township Republican Central Committee to hold a second Republican Caucus for the purpose of nominating a candidate for Road Commissioner that complies with the U.S. and Illinois Constitutions and the Illinois Township Code, or in the alternative, a revote for 1 or 2 hours on a week-day evening, where voters could come to the Township Hall and cast a secret paper ballot containing the names of Maxheimer and Whitten for the Republican nomination for Road Commissioner.

C. Order Defendants to pay to Plaintiffs their costs and reasonable attorneys' fees under 42 U.S.C. § 1988(b);

D. Grant such other relief as this Court deems appropriate.

Respectfully submitted this 19th day of January, 2021.

/s/ DARRIN WHITTEN, ET AL.,

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