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Federal courts weigh in on state's Nov. 3 ballot access requirements

ELECTION LAW

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As Illinois and other states continue to grapple with the COVID-19 health crisis, it seems likely that the courts will continue to be asked to decide whether ballot access requirements should be relaxed given the realities of social distancing recommendations and restrictions on public gatherings.

In the recent 7th U.S. Circuit Court of Appeals decision in *Morgan v. Secretary of State of Illinois,* No. 20-1801, seven plaintiffs sought emergency injunctive relief against Illinois' signature gathering requirements for ballot initiatives, contending that the requirements were unconstitutional given the difficult burden of collecting original signatures in person.

The court questioned the standing of all plaintiffs except one, William Morgan, who had begun getting petition signatures before filing suit (the others had not begun getting signatures before filing). Standing, though, was all that Morgan was to get.

The court noted that, when weighing whether to grant preliminary injunctive relief, an important question is whether the plaintiff has brought the emergency on himself. The district court concluded Morgan had done so and the 7th Circuit agreed.

During most of the time available to obtain signatures to put a question on the ballot — an 18-month period ending May 3 — Morgan was doing nothing to obtain signatures. In fact, Morgan did not begin his signature gathering campaign until early April, which was several weeks after Gov. J.B. Pritzker began to issue orders requiring social distancing and limiting public gatherings. This self-inflicted harm, held the court, was a good reason to deny emergency relief. The court also noted that the federal Constitution does not require states and local governments to put referenda on the ballot, the issue being wholly of state law. So even if Illinois decided to make it impossible to put referenda on the ballot in 2020 there would be no federal problem present.

The outcome for plaintiffs in *Libertarian Party of IL, et al. v. J.B. Pritzker* was much more productive. In that case, decided in April, the plaintiffs filed an action to modify or enjoin independent and third-party candidate signature collection procedures and requirements given the COVID-19 health emergency. Judge Rebecca Pallmeyer noted that federal courts usually refrain from "micromanagement of state regulation of elections" but that a district court still has broad equitable authority to fashion appropriate relief when an election procedure violates the Constitution. The district court noted that it "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." The court found that the combined effect of the restrictions on public gatherings and the stay-at-home order on in-person signature requirements was a "nearly insurmountable hurdle" for new party and independent candidates.

The district court then fashioned relief that reduced the signature requirement to 10% of the normal threshold for independents and new party candidates, eliminated the signature requirement for Green and Libertarian Party candidates for most races, ordered that physical or electronic copies of signatures are allowed, and extended the filing deadline from June 22 to Aug. 7.

The relief ordered by the district court was agreed to by the State Board of Elections in April, and the district court concluded that the agreed order would relieve some of the plaintiffs' difficulty meeting the signature requirement while still also accommodating that state's interests. But despite agreeing to the order, the state board filed a motion to reconsider two weeks later arguing that, after consulting with local election officials, the later filing deadline would impact the ability to conduct an accurate and orderly election. The state board asked the district court to amend its preliminary injunction order and move the filing deadline for nominating petitions from Aug. 7 to July 6 and set the minimum signature threshold at 25% of the statutory minimum. The district court entered an amended order moving the filing deadline up to July 20 but denied the rest of the relief sought by the state board.

The state board then waited more than three weeks to appeal to the 7th Circuit, at which time it requested a stay of the preliminary injunctive order. In *Libertarian Party of Illinois v. Cadigan, et al.*, No. 20-1961, the 7th Circuit denied the stay on June 21, finding that the state board

had failed to make a strong showing or show it would suffer irreparable harm. None of the evidence presented showed that the July 20 filing deadline or the reduced signature requirement was likely to impede the ability of election officials to meet certain deadlines. In contrast, the impacted candidates would have been significantly injured by a stay of the preliminary injunction.

The entry of injunctive relief in April eliminated the signature requirement for Green and Libertarian Party candidates, and so they had not been gathering signatures and would be unable to secure enough signatures by the deadline to get on the ballot. Independent candidates had been collecting signatures based on a 10% of normal threshold and several candidates declared that they would not be able to collect enough signatures if the threshold were suddenly raised. The state board also argued that it was in the best position to determine what election modifications were appropriate, but the 7th Circuit noted that the state board never stated what changes it would make or acknowledge the continuing impacts of the COVID-19 health crisis on the ballot access process.

These two cases could offer a preview of what is yet to come, especially as the ballot access process for the 2021 Consolidated Election gets going this fall. Since the General Assembly did not take up COVID-19 ballot access concerns during its 2020 special session, it seems that the courts will continue to be the forum where such concerns are vetted and modifications implemented. Stay tuned.