No. 16-3279

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID M. GILL, DAWN MOZINGO, DEBRA KUNKEL, LINDA R. GREEN, DON NECESSARY, and GREG PARSONS

Plaintiffs-Appellees,

v.

CHARLES W SCHOLZ, sued in his official capacity as the Chairman of the Illinois State Board of Elections and the State Officers Electors Board, et al.

Defendants-Appellants.

On appeal from the United States District Court for the Central District of Illinois, No. 16-cv-3221
The Hon. Sue E. Myerscough, Presiding

APPELLEES' EMERGENCY PETITION FOR IMMEDIATE *VACATUR* OF STAY AND EXPEDITED INITIAL *EN BANC* HEARING THEREON

SAMUEL J. CAHNMAN
Attorney at Law
915 S. Second St.
Springfield, IL 62704
Tel (217) 528-0200
samcahnman@yahoo.com

ANDREW FINKO
Attorney at Law
180 West Washington, Suite 400
Chicago IL 60602
Tel (773) 480-0616
finkolaw@fastmail.fm

Dated: September 12, 2016

Counsel for Plaintiffs-Appellees

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **16-3279**

Short Caption: David M. Gill, Et al vs. Charles W. Scholz, as Chairman of ISBE & SOEB, Et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

David M. Gill; Dawn Mozingo; Debra Kunkel; Linda R. Green; Don Necessary; and Greg Parsons

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Andrew Finko

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/Samuel J. Cahnman Date: 9/10/16

Attorney's Printed Name: Samuel J. Cahnman

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

Address: 915 S. Second St., Springfield, IL 62704

Phone Number: 217/528-0200 Fax Number: 217/525-1047

E-Mail Address: samcahnman@yahoo.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3279

Short Caption: David M. Gill, et al. v. Charles W. Scholz, as Chairman of ISBE & SOEB, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

David M. Gill; Dawn Mozingo; Debra Kunkel; Linda R. Green; Don Necessary; and Greg Parsons

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Samuel J. Cahnman

Andrew Finko

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Andrew Finko Date: 9/10/2016

Attorney's Printed Name: Andrew Finko

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: 180 W. Washington St. / Suite 400
Chicago, IL 60602

Phone Number: (773) 480-0616 Fax Number: (773) 453-3266

E-Mail Address: Finkolaw@fastmail.FM

Table of Contents

Appendix

Table of Authorities

Emergency Petition For Immediate *Vacatur* of Stay and Expedited Initial *En Banc* Hearing Thereon

Pursuant to Fed. R. App. P, 35(b) Plaintiffs-Appellees (herein "Appellees") file this Emergency Petition For Immediate *Vacatur* of Stay And Expedited Initial *En Banc* Hearing Thereon. Appellees request that the full Court of Appeals for the Seventh Circuit review and vacate a panel decision which granted Defendants-Appellants' (herein "Appellants") Motion to Stay Pending Appeal, which has the effect, this close to the November election, of being a final decision on the merits of this "interlocutory appeal," without briefing by the parties. At issue are the First and Fourteenth Amendment rights of voters and the candidate to gain access to a place on the November 8, 2016 general election ballot.

We are quickly approaching the date of Friday, September 23, 2016, when, pursuant to the Uniform Overseas Citizens Absentee Voting Act (UOCAVA) (52 U.S.C. § 20301 et seq.), ballots must be available for mailing to uniformed and overseas citizens. Because Appellants chose not to request a waiver of that deadline due to the ballot being litigated pursuant to 52 U.S.C. § 20302(g)(2)(B)(ii) of the UOCAVA, Appellees request an immediate *vacatur* of the order entered September 9, 2016 by a 3-judge panel of this Court, which stayed the district court's preliminary injunction pending resolution of this appeal.

The district court enjoined Appellants from enforcing the Election Code's signature requirement against Appellee-Candidate David Gill (herein "Candidate Gill") and ordered that he remain on the ballot "since he has obtained 8,593 valid signatures and shown a modicum of support." (Dkt.15 at 26, district court's opinion attached hereto as Exhibit A)

The modicum of support U.S. House candidates in Illinois' 13th Congressional District must show varies wildly under the Illinois Election Code. A candidate whose petitions are not objected to, need not obtain any signatures. (Dkt.15 at 17). In 2016 both major party candidates

needed fewer than 740 signatures to appear on the ballot. (Dkt. 15 at 5-6). In redistricting years (2012 or 2022) an independent candidate requires 5,000 signatures. (Dkt. 15 at 24). However, in 2016 an independent candidate in the 13th Congressional District must obtain 10,754 valid signatures in a circulation period limited to 90 days.

STATEMENT REQUIRED BY FED. R. APP. P. 35(B)(1)

An initial *en banc* expedited hearing is warranted because this case presents a question of exceptional importance in that the panel's stay order conflicts with authoritative decisions of this Court and the United States Supreme Court.

In *Stone v. Bd. of Elec. Comr'rs for City of Chicago*, 750 F.3rd 681 (7th Cir. 2014) this Court held that the ultimate question on whether a restriction on ballot access is severe is whether a reasonably diligent candidate could be expected to meet the requirements and gain a place on the ballot. *Stone*, 750 F.3d at 682. (relied on by the district court, Dkt. 15 at 11-12) Such a test was also articulated in *Storer v. Brown,* 415 U.S.724, 730 (1974), *Mandel v. Bradley,* 432 U.S. 173, 177 (1977), *Lee v. Keith*, 463 F.2d 763, 771-772 (7th Cir. 2006) and other cases.

Stone found the signature restriction in Chicago not severe because nine candidates, including one of the plaintiffs, had overcome the signature requirement that year and gained a place on the ballot. The uncontroverted facts in this case are that no U.S. House candidate in Illinois has overcome[1] a signature requirement of 10,754. Only one candidate in Illinois has ever overcome a signature requirement of 8,593 or more, but that was in 1974, before the Illinois General Assembly added a 90-day restriction on the time to collect signatures. (Dkt. 15 at 13-14)

If the burden on the Appellees' constitutional rights is severe, the state regulation must be narrowly drawn to advance a compelling state interest to be constitutional (i.e., strict scrutiny). *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Instantly, the district court found that "whether the

[1] For Illinois, "overcome" means not only gathering signatures, but defeating an objector's petition.

Court applies heightened scrutiny or a rational basis inquiry, Plaintiffs have shown a likelihood of success on the merits." (Dkt. 15 at 17) The district court found that:

> [T]he fact that Defendants allow individuals on the ballot with no or very few of the required signatures simply because no objections are filed calls into question Defendants' justification that the 5% signature requirement is necessary.

(Dkt. 15 at 17)

Clearly, when the Appellants let independent U.S. House candidates on the ballot with no or very few signatures, there is no compelling state interest in requiring Candidate Gill to file 10,754 signatures. This signature requirement is almost 15 times what the major party candidates must file. And yet, the total number of signatures is of no importance whatsoever to the Appellants, if no objection is filed to the nomination papers.

This Court has held that it is "required to evaluate challenged ballot access restrictions together, not individually, and assess their combined effect on voters' and candidates' political association rights." *Lee*, supra at 770. Accord, *Storer v. Brown*, 415 U.S. 724 (1974) and *Mandel v. Bradley*, 432 U.S. 173 (1977).

There never has been a case such as this one, which reviewed a 5% signature requirement, plus a 90-day restriction on signature collection, plus the fact that no candidate had ever overcome that signature requirement to gain a place on the ballot, which upheld these restrictions and facts together as constitutional.

STATEMENT OF FACTS

The facts presented in this appeal are uncontroverted. Appellees presented their evidence through the affidavits of Candidate Gill and Richard Winger. (Dkt. 13 and 9)[2]. Winger is a recognized ballot access expert who has testified in cases before the 7th Circuit, and in over half the states. Appellees made both witnesses available to testify at the August 24, 2016 preliminary

[2] Affidavits previously filed on behalf of Appellees are attached hereto as Exhibits B, C and D.

injunction hearing, but the Appellants accepted the affidavits as direct testimony, and declined the opportunity to cross examine the witnesses. (Hearing trans. p. 6-7) even though Appellants presented no evidence.

Candidate Gill first ran for the office of U.S. Representative for Illinois' 13th Congressional District in 2012, and received 136,032 votes. He had 1,002 votes, or 0.3%, less than his opponent. (Dkt. 5, p. 3-4). For the current election, Gill started collecting signatures on March 27, 2016, the first day Illinois law permitted candidates to commence circulating petitions. Gill collected nearly 5,000 signatures or 45% of the 11,368 signatures filed. The remaining signatures were collected by 18 circulators who turned in between 1 and 131 sheets. The district court called Candidate Gill's signature gathering "a Herculean effort." (Trans. at 18.)

Until February 1, 1984 there was no time restriction on when candidates could circulate signature petitions. In 1983 the Illinois legislature enacted Public Act 83-1055, restricting signature collection to 90 days before filing, and the legislative debate shows this was enacted to limit ballot access for non-party organization and non-incumbent candidates. (IL House Debate 6/24/83, p. 93, Exhibit "B" to Dkt. 5).

Gill's signature requirement was 10,754 but no U.S. House candidate had ever overcome that signature requirement in Illinois. Gill was found by a State hearing examiner to have 8,593 valid signatures. Only one U.S. House candidate in Illinois has ever overcome a signature requirement of that amount or more, and that was H. Douglas Lassiter in 1974. However, this occurred before the 90-day restriction on signature collecting was enacted. (Dkt. 15 at 13-14).

Only three other states have signature requirements of over 10,000 signatures for U.S. House candidates to gain access to the general election ballot: North and South Carolina, and Georgia. However, the Carolinas have no time restriction on the signature gathering, and Georgia allows six months to gather signatures, twice as long as Illinois. See supplemental affidavit of

Richard Winger attached hereto as Exh. D.

An independent candidate for the U.S. Senate in Illinois has to obtain five times more signatures that an established party candidate. (Dkt. 15 at 25). However, an independent candidate for the U.S. House has to obtain almost 15 times more signatures than the established party candidate. (Dkt. 1, Exhibit A). Also, the 25,000 signature requirement for independent U.S. Senate candidates is 0.694% of the last U.S. Senate vote, whereas an independent U.S. House candidate must secure the signatures of 5% of the last U.S. House vote. (Dkt. 1 at 15-16).

Illinois is the only state which allows candidates who file less than the required number of signatures on the ballot if no objector's petition is filed against the nomination papers. (Dkt. 9)

ARGUMENT

I. Whether to Vacate the Panel's Order To Stay the District Court's Preliminary Injunction Pending Appeal is a Matter of Exceptional Importance.

A. *Appellants' Motion To Stay Preliminary Injunction Did Not Satisfy the Requirements for a Stay Pending Appeal.*

This is an "interlocutory" appeal, seeking to review the district court's order granting Appellees' motion for preliminary injunction. The district court's 26 page order contained the court's findings of fact and analysis of legal issues, before concluding that:

> Defendants are ENJOINED from enforcing the Illinois Election Code's signature requirement against David M. Gill, independent candidate for U.S. Representative in the 13th Congressional District in light of the fact that he has obtained 8,593 valid signatures and shown a modicum of support. Consequently, because it appears Gill otherwise qualifies to be on the ballot, this ruling requires that Gill remain on the ballot.

Dkt. 15 at 26.

"[T]he sole purpose of such a stay [pursuant to Federal Rule of Appellate Procedure 8(a)(2)] is to preserve the *status quo* pending appeal so that the appellant may reap the benefit of a potentially meritorious appeal." 30 Am.Jur.2d, *Executions and Enforcement of Judgments* § 34 (2003).

The *status quo* before the district court was that Gill's name was ballot. This is an indisputable fact since Appellants have not issued a decision to remove Candidate Gill's name from the ballot before the ballot certification date of August 26, 2016[3].

Rather, the Appellants took the extraordinary step of re-opening the electoral board fact finding process. The Appellants directed their hearing examiner to undertake a further evidentiary hearing on two additional areas of inquiry (pagination and circulation), that were previously deemed moot in the hearing examiner's recommendation issued before the district court's preliminary injunction order[4].

The Supreme Court provided the following standard for review of motions to stay:

> Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See Fed. Rule Civ. Proc. 62(c); Fed. Rule App. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. See, e. g., *Virginia Petroleum Jobbers Assn. v. FPC*, 104 U.S. App.D.C. 106, 110, 259 F.2d 921, 925 (1958); *Washington Metropolitan Area Comm'n v. Holiday Tours, Inc.,* 182 U.S. App.D.C. 220, 221-222, 559 F.2d 841, 842-844 (1977); *Garcia-Mir v. Meese,* 781 F.2d 1450, 1453 (11th Circuit 1986); *Accident Fund v. Baerwaldt*, 579 F.Supp. 724, 725 (WD Mich. 1984); see generally 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2904 (1973).

Hilton v. Braunskill, 481 US 770, 776-777 (1987).

This Circuit has also applied this same four-factor analysis to review requests for a stay pending appeal. See, *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985), citing *Adams v. Walker,* 488 F.2d 1064, 1065 (7th Cir. 1973). A district court's denial of a motion for stay is reviewed under an abuse of discretion standard. *Id.*

---

[3] After the district court's preliminary injunction order on August 26, 2016, the Appellants certified Candidate Gill's name on the ballot to all relevant election authorities but with the notation "pending objection" clouding the certification.

[4] A copy of Appellants' August 26, 2016, remand order is attached hereto as Exh. E. No final decision has been issued by the Appellants as of the date of this filing.

This Court has given substantial deference to a district court's decision to grant a preliminary injunction insofar as that decision involved the discretionary acts of weighing evidence or balancing equitable factors. *US v. Baxter Healthcare Corp.*, 901 F.2d 1401, 1407, (7th Cir. 1990), citing *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429 (7th Cir.1986); *American Hosp. Supply Corp. v. Hospital Products Ltd.,* 780 F.2d 589, 594-595 (7th Cir. 1985). See also: *Michigan State A. Phillip Randolph Inst. v. Johnson*, _ F.3d _, 2016 WL 4376429 at *3:

> Under the abuse-of-discretion standard, '[t]he injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.' citing *Mascio v. Pub. Emps. Ret. Sys of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998).

Since the Appellees have prevailed on their motion for preliminary injunction before the district court, the weight of the evidence, or balancing of equitable factors, has been determined in favor of the Appellees. Each of the four factors is discussed below

B. ***Appellants are Not Likely to Prevail on the Merits in This Appeal.***

In determining whether the burden on ballot access is severe this Court held that:

> What is ultimately important is not the absolute or relative number of signatures required but whether a 'reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot.' *Bowe v Bd. of Election Comm'rs of City of Chicago,* 614 F.2d 1147, 1163 (7th Cir. 1980) (citing *Storer*, 415 U.S. at 742).

Stone v Bd. of Elections Comm'rs of City of Chicago, 750 F. 3d 678,682 (7th cir 2014).

In *Storer* the U.S. Supreme Court acknowledged that "[p]ast experience will be a helpful, if not always, an unerring guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Storer v. Brown*, 415 U.S. 724, 742, 94 S. Ct. 1274, 1285 (1974).

The *Stone* court found that because nine candidates met the 12,500 signature requirement for mayor of Chicago, that requirement was not severe. Instantly, no candidate for U.S. House in

Illinois has ever overcome a signature requirement of 10,754 or more.

In *Lee v. Keith* this Court struck down an excessive signature requirement for independent legislative candidates because no one had overcome the requirement from 1980 to 2006. *Lee v. Keith,* 463 F.2d 763, 771-772 (7th Cir. 2006). If no candidate for U.S. Representative has ever overcome the signature the 10,754 signature hurdle in Illinois, a reasonably diligent candidate could not be expected meet or exceed this requirement to gain a place on the ballot.

The Supreme Court held in *Burdick v. Takushi,* 504 U.S. 428 (1992) that when rights protected by the First and Fourteenth Amendments are subjected to severe restrictions, such as was presented to the district court here, the regulation must be narrowly drawn to advance a State interest of compelling importance. Instantly, there is no reason and certainly no compelling reason to keep off the ballot a candidate who filed 8,593 valid signatures, so that two candidates from the major parties, who had to each file fewer than 740 signatures, can have the ballot to themselves, and disenfranchise the multitude of voters yearning for another choice.

Because Illinois allows any candidate on the ballot no matter how few signatures they file, if no objector's petition is filed, it is clear Illinois has no interest in avoiding ballot overcrowding, or in making sure candidates have a modicum of support before being allowed on the ballot. Our Supreme Court has observed that interest in political stability 'does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351,366-87 (1997).

In arguing that because the Supreme Court upheld a 5% signature requirement in *Jenness v Fortson*, 403 U.S. 431 (1971) the instant signature requirement is constitutional, the Appellants employ a "litmus-paper test" to separate valid from invalid ballot access restrictions that our Supreme Court rejected in *Anderson v Celebreeze*, 460 U.S. 780, 789 (1983). The 11th Circuit Court of Appeals recently condemned this approach in *Green Party of Georgia v. Georgia,* 551

Fed. Appx 982 (11th Cir. 2014).

In the *Green Party of Georgia* case the district court initially dismissed the complaint, asserting that Georgia's 1% in 180-day signature requirement for presidential candidates *was* constitutional because *Jenness* had upheld a 5% signature requirement.

The Court of Appeals reversed and remanded because the district court employed the prohibited "litmus-paper test." On remand the Georgia district court determined that even a 1% requirement had such a severe impact that strict scrutiny applied, and held the 1% requirement unconstitutional because it violated the First and Fourteenth Amendments. *Green Party of Georgia v. Kemp,* 2106 WL 1057022, 19 (N.D.Ga. 2016). As a remedy, the district court reduced the signature requirement from 1%, which was in excess of 50,000 signatures, down to 7,500 collected anywhere within the state of Georgia within 180 days.

Applying the *Jenness* decision in a vacuum is inappropriate because of factual differences. For example, aside from the percentage of signatures, Georgia has fewer restrictions on signature collection than Illinois, and two candidates had overcome the signature requirement in 1960 and 1968. *Jenness v. Fortson*, 403 U.S. 431, 438-439 (1971). Whereas instantly no candidate has overcome the 10,754 signature requirement.

Georgia allowed six months to collect signatures, double what Illinois allows. Further, Georgia imposed "no suffocating restrictions whatever upon the free circulation of nominating petitions." *Id*. at 438. Illinois imposes suffocating restrictions in Section 10-4 of the Election Code (10 ILCS 5/10-4) and the threat of an objection being filed (10 ILCS 5/10-8). The impact of Illinois' restrictions is that candidates would be required to gather one and one-half to two times the number of signatures than stated under the Election Code. Finally, in Georgia, "[n]o signature on a nominating petition need be notarized." *Id*. In Illinois each petition sheet must contain a circulator's affidavit that is notarized. (10 ILCS 5/10-4).

Assuming *arguendo* that the 5% signature requirement was constitutional when enacted, it became unconstitutional when the legislature restricted signature collection to a 90-day period, to protect incumbents. In the House debate on the Amendment that added the 90-day restriction to the bill, the sponsor in his closing argument said:

> [I]t's very clear what the Amendment is attempting to do. It's trying to protect all of the members of the House who are down here doing the people's business while somebody is back in your district circulating petitions, and if he has enough time, there won't be any petitions left for you to circulate or to sign. I think it's a good Amendment. I move for the adoption of Amendment 2 to Senate Bill 1218

IL House debate 6/24/83, p. 95. (House debate transcript attached hereto as Exhibit F)

Opponents of the 90-day restriction amendment argued it limited ballot access; was a roadblock in the way of people who wanted to run; and hurt candidates who don't have party organizations. *Id.* at 93.

Our Supreme Court pointed out the importance a time limit restriction could have on the constitutionality of a signature requirement when it pointed out in footnote 2 in *Mandel v Bradley*, that it had recognized in *Storer v. Brown* that such a limitation, when combined with other provisions of the election law, might invalidate the statutory scheme. *Mandel v Bradley,* 432 U.S. 173, 177 (1977).

It is instructive that the only three US House candidates in the entire country who overcame a signature requirement of 10,754 or more all had much more time to collect signatures than instantly. (See Winger Supplemental Affidavit attached as Exh. D). One had 189 days and the other two had no time restrictions. Gill's campaign collected valid signatures at the rate of 95.47 a day. In 23 more days, he would have had more than the required 10,754. Thus, but for the legislature's enactment of the 90-day rule, targeted at independents like him, Candidate Gill would have met the 10,754 requirement.

C. Appellants Will Not Be Irreparably Harmed.

The Appellants' motion to stay pending appeal does not specifically discuss how the Appellants will be irreparably harmed if the stay is denied. Appellants presented no factual evidence to the district court on this issue, either. The district court ordered the proper amount of security is zero. (Dkt. 15 at 26)

(1) Appellants are Neutral Decision Makers With No Substantive Interest.

Appellants herein are members of two state boards: (1) State Board of Elections, and (2) State Officers Electoral Board. In both capacities, Appellants are neutral decision-makers. The Appellants, sitting as the State Officers Electoral Board, review objection petitions and issue decisions to the State Board of Elections whether nomination papers substantially comply with the Illinois Election Code. The State Board of Elections then certifies the names of all duly qualified candidates to the various election authorities throughout the state. See generally, 10 ILCS 5/10-8 through 10-10.1 (objection process and electoral boards), and 10 ILCS 5/5A-1, et seq. (creation of board and powers).

As an ephemeral entity that comes into existence solely to hear and pass upon objections (and then ceasing to exist), an electoral board must maintain neutrality and impartiality. The role of an electoral board, sitting as a decision-maker, was addressed by the *Allord* court:

> The electoral board is a neutral decision maker; it is made a party [to a petition for judicial review] so that the court can require it to deliver up its record for review and to require it to follow the court's orders once rendered. **The electoral board does not have a substantive interest affected.**

Allord v. Municipal Officers Electoral Board, 288 Ill.App.3d 897, 900 (1997). [Emphasis added.] See also, *Girot v. Keith*, 212 Ill.2d 372, 818 N.E.2d 1232, 1237-1238 (2004).

In addition, the district court in its Opinion (Dtk. 15 at 20-21) evaluated the undisputed facts and legal argument, and found that the harm to Appellants was minimal, as follows:

> Putting a candidate on the ballot who obtained 8,593 valid signatures for nomination constitutes a negligible injury when compared against the constitutional rights of Plaintiffs and the interests of the public. *Id.* Allowing a candidate with 8,593 valid signatures would do minimal, if any damages, to Defendants' and the State's interest in having candidates on the ballot who have shown a modicum of support. And while the Court recognizes Defendants' interest in uniformity of the law, the harm to Defendants in this instance is negligible compared to the harm to Plaintiffs.

The district court also referenced *Johnson v. Cook Cnty. Officers Electoral Bd.*, 680 F.Supp. 1229, 1233 (N.D. Ill. 1988) (noting that "[w[hile the ultimate resolution of this lawsuit could severely impair Illinois' election regulation scheme, the harm at issue here is that engendered by a temporary injunction" which at most would require the board to put on the ballot an individual who obtained 491 valid signatures out of 500 needed) (emphasis in original).

Similarly, there is no harm to the Appellants from Candidate, Gill's, name appearing on the ballot for the November 8, 2016 general election.

(2) No Financial or Other Harm to Appellants.

Appellants do not print ballots, or mail out overseas ballots. Local election authorities are each responsible for these tasks.

Financial harm could only come to Appellants if Candidate Gill's name was removed from the November 8, 2016 ballot, and the district court later ruled in favor of Appellees. A special election, if then ordered by the district court, would require invalidation of the November 8, 2016 election results in the 13th Congressional District, and the printing of new ballots and holding a special election solely for the 13th Congressional District. This is a very costly alternative particularly for a state that is facing dire financial strains.

D. *Stay Pending Appeal Would Substantially Injure Appellees and All of Candidate Gill's Petition Signers.*

Appellants' request for a stay pending appeal will serve no purpose, but to disenfranchise Illinois voters, who are already at odds with the limited choices that appear on most ballots

throughout Illinois. One of Appellants' ballot certifications (attached as Exh. G) confirms about half the races in Sangamon County are uncontested.

The district court reviewed the uncontested facts and undertook a sliding scale analysis of facts raised in the Appellees' motion for preliminary injunction. The district court's order (Dkt. 15 at 19) explained that:

> Here, Plaintiffs will have no adequate remedy at law if Gill is not on the ballot. Moreover, they will be irreparably harmed. An otherwise qualified candidate suffers irreparable harm if he is wrongfully deprived of the opportunity to appear on an election ballot. *Jones*, 921 F. Supp. 2d at 901. Similarly, voters who would have voted for the candidate would also suffer irreparable harm. *Jones*, 921 F.Supp.2d at 901; see also *Citizens for a Better Env't v. City of Park Ridge,* 567 F.2d 689, 691 (7th Cir. 1975) (noting that "even the temporary deprivation of First Amendment rights constitutes irreparable harm in the context of a suit for an injunction"). Therefore, Plaintiffs have shown they have no adequate remedy at law and would suffer irreparable harm if preliminary relief is not granted.

It is far easier for the Appellants to honor the preliminary injunction, and certify ballots that include Candidate Gill's name upon them. In this scenario if Candidate Gill does not prevail on the merits in the district court, any votes cast for him would then not be counted. This is a far simpler course for the Appellants to take. If Gill's name is removed from the ballot now, but Gill later prevails before the district court, the Appellants would then have to re-certify Gill's name to the ballot, which would then require re-printing of ballots and mailing a second set of ballots to overseas, military and early mail-in voters. Or, a worse alternative, if Gill prevails after the November 8, 2016, the validity of the election would be at issue without Gill's name being printed upon the ballot, and potentially, a special election would have to be held for the 13th Congressional District.

Ideally, if Appellants certify the ballot in the 13th Congressional District which includes Gill's name upon it, and Gill later does not prevail, then the only possible voters who would become disenfranchised, would be Gill's supporters.

E. *Public Interest is Served by Allowing Preliminary Injunction to Stand.*

After first noting that *Jones v. McGuffage,* 921 F.Supp.2d 888, 902 (N.D.Ill. 2013), granted a preliminary injunction after finding no public interest existed in preserving a two-party ballot, or excluding qualified candidates, the district court here found that on the whole, "the public interest heavily favors Plaintiffs." (Dkt. 15 at 22).

The public is served by including Gill's name upon the November 8, 2016 general election ballot. Voters who support a different candidate would be unaffected, and would not be prevented from voting for the candidate of their choice. There still remain many voters who vote strictly upon party lines, regardless of the candidate that is on the ballot, and these voters will be unaffected.

However, 11,300+ people (or 8,593 voters) who signed Candidate Gill's nominating petitions expressed their support for independent Candidate Gill to be on the ballot, and have First Amendment rights to organize and nominate the candidate of their choice, and to see that candidate's name on the ballot. Vacating the order for stay of the preliminary injunction would protect those First Amendment rights.

The public interest is served by inclusion, rather than exclusion, particularly when the candidate has shown "Herculean efforts" to overcome historically insurmountable barriers.

II. AN INITIAL *EN BANC* HEARING IS WARRANTED

Appellees further request that this Court grant their emergency petition for an expedited initial *en banc* hearing. See Fed. R. App. P. 35(a). Because Appellants seek to effectively overrule circuit precedent, it is appropriate for the full court, rather than a three-judge panel, to review the issue. See, e.g., *Helseth v. Burch*, 258 F.3d 867, 869 (8th Cir. 2001) (*en banc*) (granting petition for initial *en banc* review and overruling circuit precedent); *Chapman v. United Auto Workers Local 2005,* 670 F.3d 677, 678-79 (6th Cir. 2012) (*en banc*) (same);

Meadows v. Holland, 831 F.2d 493, 494, 498 (4th Cir. 1987) (*en banc*) (same), vacated on other grounds, 109 S. Ct. 1306.

An initial *en banc* hearing is warranted because the failure to vacate the stay pending appeal, would effectively constitute a final decision on the merits regarding the preliminary injunction (without full briefing). If the stay is not vacated, the Appellants would then remove Gill's name from the ballot, and such action would deprive voters of the ability to vote for a candidate with a very large voter base in the 13th Congressional District in the November 8, 2016 general election.

This court has authority to revist any ruling by a panel. *Boim v. Holy Land Found. For Relief and Development*, 549 F.3d 685, 688 (7th Cir. 2008) (*en banc*). Indeed, it is "the uniform position of the circuits that an *en banc* court may overrule an erroneous panel opinion filed at an earlier stage of the same case." *Cottier v. City of Martin,* 604 F.3d 553, 557 (8th Cir. 2010) (citing decisions from the First, Second, Third, Sixth, and Ninth Circuits); see also, e.g., *Farrakhan v. Gregoire*, 623 F.3d 900 (9th Cir. 2010) (*en banc*) (overruling prior panel decision in voting rights case); *Watkins v. United States Army*, 875 F.2d 699, 704-05 (9th Cir. 1989) (*en banc*) (reinstating equitable estoppel claim during second appeal, after a panel had dismissed the claim in the first appeal).

CONCLUSION

For the above reasons, this Court should grant Appellees' Emergency Petition for Immediate *Vacatur* of Stay and Expedited Initial *En Banc* Hearing Thereon.

Respectfully submitted:
Plaintiffs-Appellees, DAVID M. GILL, et al.

By: s/ Samuel J. Cahnman
Attorney for Plaintiffs-Appellees

Samuel J. Cahnman Andrew Finko

Attorney at Law
915 S. Second Street
Springfield, IL 62704
Tel (217) 528-0200
samcahnman@yahoo.com

180 W. Washington St.
Suite 400
Chicago, IL 60602
Tel (773) 480-0616
finkolaw@fastmail.fm

Certificate of Service

The undersigned certifies that on September 12, 2016, that he electronically filed the foregoing with the Clerk of the Appellate Court for the Seventh Circuit using the CM/ECF system, which will send notification of such filing to all parties and counsel of record who are ECF filers, and that on this same date, a PDF copy was also emailed to counsel, Deputy Solicitor General, Brett Legner, blegner@atg.state.il.us

s/ Andrew Finko