NO. 16-3469

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TABITHA TRIPP, GARY SHEPHERD, CHARLIE HOWE, FELICIA VERO, HOLLY VERO, RENEE COOK, CANDACE A. DAVIS, and ILLINOIS GREEN PARTY,

Plaintiffs-Appellants,

v.

CHARLES SCHOLZ, in his official capacities as the Chairman of the Illinois State Board of Elections and Member of the State Officers Electoral Board, ERNEST L. GOWEN, in his official capacities as Vice-Chairman of the Illinois State Board of Elections and Member of the State Officers Electoral Board, BETTY J. COFFRIN, CASSANDRA B. WATSON, WILLIAM M. McGUFFAGE, JOHN R. KEITH, ANDREW K. CARRUTHERS, and WILLIAM J. CADIGAN, in their official capacities as Members of the Illinois State Board of Elections and Members of the State Officers Electoral Board, and STEVEN S. SANDVOSS, in his official capacity as the Executive Director, Illinois State Board of Elections,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois
Case No. 14-CV-890
The Honorable Michael J. Reagan, Judge Presiding

BRIEF OF PLAINTIFFS-APPELLANTS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 16-3469

Short Caption: Tripp et al., Plaintiffs-Appellants, v. Scholz, et al., Defendants-Appellees

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JURISDICTIONAL STATEMENT

The district court's jurisdiction in this case was founded on 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4), in that the Plaintiffs' Amended Complaint alleges violations of 42 U.S.C. §§ 1983 and 1988 and the First and Fourteenth Amendments to the United States Constitution (Doc. 4 at 2).

The district court's August 17, 2016, Judgment disposed of all claims and was a final judgment. (Docs. 81-82; Appendices A & B) The Plaintiffs filed their Notice of Appeal on September 16, 2016. (Doc. 83) The Court of Appeals therefore has jurisdiction in this case based on 28 U.S.C. § 1291.

The Plaintiff Illinois Green Party is an unincorporated association in which membership is limited to Illinois residents or those registered to vote in Illinois as an American living overseas.

STATEMENT OF THE ISSUES

The Plaintiffs present the overarching issue of whether, when the facts and inferences are considered in the light most favorable to the Plaintiffs, the lower court's summary judgment for the Defendants must be reversed, and further, whether instead the Plaintiffs have established sufficient facts to warrant a summary judgment in their favor. The Plaintiffs present these specific issues:

I. Is the State's 5%-minimum signature requirement for new parties an unconstitutional burden on ballot access, in light of so few contested elections for State Representative statewide and in the 115th and 118th Representative Districts in particular, and in light of evidence of the discriminatory drawing of district boundaries in those Districts?

II. Is the State's notarization requirement for new political party nomination papers an unreasonable burden on ballot access?

III. Is the cumulative effect of the State's ballot access requirements for new parties an unconstitutional burden on the Plaintiffs' rights?

REQUEST FOR ORAL ARGUMENT

In support of the Plaintiffs' request for oral argument, the Plaintiffs note that some of the issues presented in this case have not previously been the subject of a reviewing court decision on ballot access, to the knowledge of the Plaintiffs' attorney, especially with respect to the question of the cumulative discriminatory impact of the drawing of district boundaries and the disparity in the geographic nature of electoral districts in the context of the lack of contested elections for State Representative. In addition, the issue of the State's notarization requirement has not been previously reviewed by this Court. Finally, the timing of the State's nomination and objection process—presenting a very short window from the time of the Defendants' ruling on a nomination petition objection to the printing of the ballots—makes it extremely difficult to obtain a full opportunity to be heard *before* the ballots are printed.

STATEMENT OF THE CASE

Facts Relevant to the Issues

The following facts are agreed upon in the parties' pleadings or cannot reasonably be disputed.

In 2014, Plaintiffs Tabitha Tripp and Gary Shepherd ("Green Party candidates") sought to appear on the November 2014 General Election ballot as Green Party candidates for the office of State Representative in Illinois's 118th and 115th Districts, respectively. The Illinois State Board of Elections and the State Officers Electoral Board (collectively ISBE") considers the Green Party a "new" party in those districts under Illinois election law. See 10 ILCS 5/7-1 et seq., 10-1 et seq. Section 10-4 of the Illinois Election Code requires that all signatures on the candidate's nominating petition sheets must be collected during the "90 days preceding the last day for the filing of the petition," 10 ILCS 5/10-4, in this case from March 25, 2014, to June 23, 2014. When the Green

Party candidates filed their nomination papers with the ISBE, Plaintiff Tripp filed nomination papers with about 1,700 petition signatures, while Plaintiff Shepherd filed nomination petitions with about 1,800 petition signatures.

Upon a challenge to each of the Green Party candidates' nomination papers, the ISBE ruled that pursuant to the 5%-minimum-signature requirement for candidates of new parties, 10 ILCS 5/10-2, Plaintiff Tripp was required to file 2,399 petition signatures and Plaintiff Shepherd was required to file 2,407 petition signatures, and the ISBE therefore rejected the Green Party candidates' nominating papers.

For State Representative candidates of established parties, the minimum-signature requirement is 500 signatures, 10 ILCS 5/8-8, and the State makes available the identity and addresses of the party's qualified primary electors.

In the 118th District, the 500 signatures required for an established party candidate to get on the 2014 Primary Election ballot for that District represented 1.36% of the number of votes cast (1.04% of voters) in the 2012 General Election for that office.[1] In the 115th District, the 500 signatures required for an established party candidate to get on the 2014 Primary Election ballot represented 1.34% of the number of votes cast (1.04% of voters) in the 2012 General Election for that office.

The 118th District covers 2,808 square miles, the 6th largest of the 118 Illinois Representative Districts.[2] The 115th District covers 1,810 square miles, the 13th largest of the Representative Districts. In contrast, 16 Representative Districts cover less than 10 square miles, and another 57 Districts cover less than 100 square miles.

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[1] Official election results are published on the Defendants' website: http://www.elections.il.gov/ElectionResults.aspx?ID=vlS7uG8NT%2f0%3d

[2] Maps of the 115th and 118th Representative Districts can be found in the Appendix to this brief.

The 118th District stretches from the southernmost counties of Illinois—Alexander, Pulaksi, and Massac—to the northern county line of Hamilton County. For Plaintiff Tripp to travel her district by road from her home in Anna to McLeansboro, the county seat of Hamilton County, the distance to travel is about 85 miles. Even this lengthy trip would not span the District entirely. The 115th District stretches from the southwestern corner of Union County on the Mississippi River to Jefferson County in the north. For Plaintiff Shepherd to travel through his District by road from the southwestern corner to the northeastern corner, the distance to travel is about 115 miles.

Neither the 118th District nor the 115th District includes any full "urbanized areas" as defined by the Census Bureau. The largest communities at least partly within the 118th District are Carbondale (2010 Census population: 25,902), Harrisburg (2010 Census population: 9,017), Metropolis (2010 Census population: 6,537), Anna (2010 Census population: 4,442), Eldorado (2010 Census population: 4,122), McLeansboro (2010 Census population: 2,883), and Cairo (2010 Census population: 2,831). The largest communities at least partly within the 115th District are Carbondale, Mt. Vernon (2010 Census population: 15,277), Murphysboro (2010 Census population: 7,970), Du Quoin (2010 Census population: 6,109), and Anna.

Of these seven largest population centers in the 118th District, three of them were divided by the Illinois General Assembly in the 2011 redistricting so that a part of each of them lies outside the 118th District. Carbondale and Anna are now divided between the 115th and 118th Districts, and McLeansboro is now divided between the 118th and the 117th Districts. Similarly, of the five largest population centers in the 115th District, three of them were divided in the 2011 redistricting so that a part of each of them lies outside the 115th District: In addition to Carbondale and Anna, divided with the 118th District, Du Quoin is now divided between the 115th and the 116th.

Under the district boundaries in effect from 2001 to 2011, neither the 118th District nor the 115th

District had its population centers divided as they do now under the current district boundaries. Prior to the 2011 redistricting (Pub. Act 97-6), for example, Carbondale was entirely within the 115th District. From 2003 until the 2011 redistricting, the Green Party was an established party in the 115th District and offered a 115th District candidate on every General Election ballot from 2002 through 2010. In 2010 the Green Party candidate for the 115th District—Plaintiff Charlie Howe—received 25.57% of the vote in the General Election. Before the 2011 redistricting, Plaintiff Howe's residence in Carbondale was in the 115th District; after the 2011 redistricting, Plaintiff Howe's residence—the same address—was no longer within the 115th District but was within the 118th District. The Green Party's 2006 and 2010 gubernatorial candidate also resides in Carbondale.

None of the other 15 geographically largest Representative Districts have had their population centers divided like they have been divided in the 118th and 115th Districts.[3]

Notarizing petition sheets is an extra step in preparing nominating papers, requiring additional time and effort; also, it costs money to become a notary—one Green Party member paid about $75 to $80 to obtain a notary commission. Doc. 50-1, Whitney Aff., pars. 9-14; Doc. 50-6, Test. of Rich Whitney, Hr'g of Sept. 4, 2014, at 7.

For some circulators, bank notaries are "not a practical or reliable option." Doc. 50-1, Whitney Aff., par. 9. In one Green Party candidate's petition drive, a bank refused to notarize a petition sheet, and that sheet did not get filed. Doc. 50-5, Bradshaw Aff., par. 6.

Some circulators were not able to attend the Green Party's notarization events. Doc. 50-1, Whitney Aff., par. 10; Tripp Aff., par. 12. Some people refused to circulate petitions because of the notarization requirement. Ex. G, Shepherd Dep. at 18-20. And even when circulators can take

[3] Maps of the other of the 15 largest representative districts were submitted as Exhibits J-1 through J-11 to the Plaintiffs' Response to the Defendants' Motion for Summary Judgment. (Doc. 53-7 through 53-17)

advantage of Green Party events at which Green Party notaries are available, the time spent by the circulators and the notaries at those events could have been spent collecting signatures. Ex. A, Whitney Aff, par. 9.

Rich Whitney, who has experience in collecting signatures for multiple electoral campaigns, including for Illinois Governor, testified that the negative impact of the notarization requirement on the ability to collect signatures was significant. Whitney Aff., Exhibit A, pars. 11-14. In addition, notarization takes up space on each page that could be used for additional signatures, and the notarization requirement thereby necessitates extra time and effort and expense—to renew petition sheets during petitioning, to compile sheets for filing, and for extra printing and paper.

No alternatives to the notarization requirement are authorized under the relevant provisions of the Illinois Election Code, 10 ILCS 5/10-4. But pursuant to section 1-109 of the Illinois Code of Civil Procedure, 735 ILCS 5/1-109, for court pleadings and other court documents, the Illinois General Assembly authorizes an individual to "certify" to the truth of factual allegations under penalty of perjury, in lieu of a sworn statement before a person authorized to administer oaths (a notary public). See also 28 U.S.C. §1746. In addition, the notarization of the circulator's signed statement could be limited to a separate document for every 10 or 20 petition sheets, as long as the circulator identified the specific sheets. July 31, 2015, Hearing on Cross-Motions for Summary Judgment, at 10.

After the ISBE disqualified Plaintiff Tripp from the 2014 General Election, the November General Election ballot included the name of only one candidate (an established party candidate) for the office of 118th District Representative, just as voters had been presented with only one name (an established party candidate) on the previous two previous General Election ballots for that office (2010 and 2012). For the previous five General Elections, the average number of candidates on the

ballot for 118th District Representative was 1.5.

After the ISBE disqualified Plaintiff Shepherd from the 2014 General Election, the November General Election ballot included the names of only two candidates (representing each of the two established parties) for the office of 115th District Representative. In 2012 only one candidate (an established party candidate) appeared on the General Election ballot for that office. For the previous five General Elections, the average number of candidates on the ballot for 118th District Representative was 2.25.

On the 2014 General Election ballot, statewide, elections took place for each of the 118 State Representative Districts. Of those 118 races, 82 of them had *only one* name on the ballot.

In both the 118th and 115th Districts additional time was needed to engage potential signers, and events with large crowds were relatively scarce, especially during the early days of the 90-day petitioning period, during which the weather was harsher. Whitney Aff., pars. 5-7; Tripp Aff., pars. 5-6; Shepherd Aff., pars. 6-8; Howe Aff., pars. 5-6.

In both Districts, gathering signatures in population centers divided between two Representative Districts was especially difficult for several reasons: (a) circulators and voters were confused about which district the voter lived in (see the District maps) , (b) additional time was necessary to determine the correct district in which the voter's residence was located, and (c) at larger events, even attendees residing in that city did not all reside in the same Representative District, thereby further reducing the pool of potential signers. Doc. 501-1, Whitney Aff., par. 8; Doc. 50-2, Tripp Aff., pars. 7-11; Doc. 50-3, Shepherd Aff., pars. 6, 9-12; Doc. 50-4, Howe Aff., pars. 5, 7-9; Doc. 50-5, Bradshaw Aff., par. 5.

In both Districts, gathering signatures was more time-consuming for an additional reason. The circulators often also carried the nominating petition for the ILGP statewide candidates (dou-

ble-petitioning), which resulted in the circulator spending more time per engaged potential signer and some potential signers not having time to sign the Green Party State Representative candidate's petition after signing the statewide petition. Doc. 50-1, Whitney Aff., pars. 8, 8(c); Doc. 50-2, Tripp Aff., pars. 4, 10(c); Doc. 50-3, Shepherd Aff., pars. 9(b); Doc. 50-4, Howe Aff., pars. 9(b); Doc. 50-5, Bradshaw Aff., par.5.

Procedural History

On August 13, 2014, the Plaintiffs filed this lawsuit claiming that Illinois election law violates their rights under the First and Fourteenth Amendments to the United States Constitution. The district court denied preliminary injunctive relief before the November 2014 General Election. On August 17, 2016, the district court entered its Memorandum and Opinion, ruling against the Plaintiffs on their Amended Complaint, by granting the Defendants' Motion for Summary Judgment and denying the Plaintiffs' Motion for Summary Judgment. (Appendix A) The Judgment was filed the same day. (Appendix B)

SUMMARY OF ARGUMENT

The facts and reasonable inferences from the facts, when considered in the light most favorable to the Plaintiffs, lead to the conclusion that the summary judgment in favor of the Defendants must be reversed. Instead, the facts and reasonable inferences from those facts warrant the entry of a summary judgment in the Plaintiffs' favor—a declaration that the State's barriers to ballot access in Illinois's 115th and 118th Representative Districts are an unconstitutional burden on new parties.

In Issue I (involving Counts II and III of the Plaintiffs' Amended Complaint), the Plaintiffs demonstrate that the 5%-minimum signature requirement, to be collected within a 90-day window beginning in March, with the new ballot access obstacles created by the 2011 redistricting of the

115th and 118th Representative Districts, is not neutral, is discriminatory against new parties, does little--if anything—to further the State's interest in avoiding ballot overcrowding or ballot confusion. The Defendants have presented absolutely no relevant evidence of ballot overcrowding. Plaintiffs argue that they have established that the 5%-minimum signature requirement is overkill in light of so few contested elections for State Representative statewide, and in the 115th and the 118th in particular, and light of the geographic nature of the districts. The severe burdens outweigh any demonstration of the State's interests.

In Issue II (involving Count I of the Plaintiffs' Amended Complaint), the Plaintiffs argue that the notarization requirement does little—if anything—to serve the State's interest in deterring fraud and that, therefore, in combination with the burdens described elsewhere in this brief, the burden on candidates and citizens, especially new party candidates, outweighs the State's interest in attempting to prevent fraud.

In Issue III, the Plaintiffs argue that, when considered cumulatively, the notarization requirement, the 5%-minimum signature requirement, the 90-day petitioning window, and the redrawn 115th and 118th District boundaries create an unconstitutional legislative scheme.

ARGUMENT

Standard of Review

This Court reviews *de novo* the grant or denial of summary judgment. Where, as here, the district court was faced with cross-motions for summary judgment, this Court's review requires that all facts and inferences be construed in a light most favorable to the Plaintiffs—the party against whom the motion was made, *Tsareff v. ManWeb Servs., Inc.*, 794 F.3d 841, 844 (7th Cir. 2015); *Greengrass v. Int'l Monetary Sys. Ltd.*, 776 F.3d 481, 485 (7th Cir. 2015), as long as the inferences are supported by more than speculation or conjecture, *Boss v. Castro, 816 F.3d 910,* 916 (7th Cir. 2016).

Constitutional Principles

A. The Rights of the Candidates and the Voters

In order to appear on the 2014 General Election ballot, the Green Party candidates here were required to file nomination papers in compliance with the State's specifications to form a new political party. Thus, this case involves two rights recognized by the United States Supreme Court, "two different, but overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs" and "the right of qualified voters ... to cast their votes effectively." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983), quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968).

The right of citizens to form a political party is a fundamental right of the First Amendment, and this right plays a significant role in the political development of our Nation. The United States Supreme Court has stated that "the First Amendment protects 'the freedom to join together in furtherance of common political beliefs.' " *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000), citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-215 (1986). The Court has

explicitly acknowledged that third parties make valuable contributions to our democratic process. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185-86 (1979) ("Over broad restrictions on ballot access jeopardize this form of political expression"). And when the burdens of the restrictions fall disproportionately and unjustifiably upon certain types of candidates, the Equal Protection clause is implicated. *Williams*, at 30-31 (1968) (minority parties are protected from unequal burdens that amount to invidious distinctions).

Regarding a candidate's right to be on the ballot, the Court explained, "The exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson*, 460 U.S. at 787-88. These rights have been described as "fundamental". *ISBE*, 440 U.S. at 184.

"Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, and may not survive scrutiny under the First and Fourteenth Amendments." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986), citing *Williams*, 393 U.S. at 30.

"So the barriers to the entry of third parties must not be set too high; yet the two major parties, who between them exert virtually complete control over American government, are apt to collude to do just that." *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004).

B. The Test for Ballot Access Restrictions

Thus, courts must engage in a balancing test—a flexible standard-–to weigh the rights of States to condition access to the General Election ballot against the rights of citizens to form political parties that can vie for election and the rights of citizens to cast votes effectively for their chosen candidate:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional."

Anderson, 460 U.S. at 789 (internal citation omitted). The *Anderson* Court explained, "Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.' " *Anderson*, 460 U.S. at 786, quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

This Court has described this test most recently in *Stone v. Bd. of Election Comm'rs for Chicago*, 750 F.3d 678, 681 (2014):

> "The Supreme Court has often stated that in this area there is no 'litmus-paper test' to 'separate valid from invalid restrictions.' *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564 (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)). Rather, a court must make a practical assessment of the challenged scheme's justifications and effects:
>
> > '[A] court ... must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the [c]ourt must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.'
>
> *Id.*; see also *Navarro* [*v. Neal*], 716 F.3d [425,] 430 (2013); *Lee v. Keith*, 463 F.3d 763, 768 (7th Cir. 2006).
>
> Practically speaking, much of the action takes place at the first stage of *Anderson*'s balancing inquiry. If the burden on the plaintiffs' constitutional rights is 'severe,' a state's regulation must be narrowly drawn to advance a compelling state interest. *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). If the burden is merely

> 'reasonable' and 'nondiscriminatory,'' by contrast, the government's legitimate regulatory interests will generally carry the day. Id. Even this rule can only take us so far, though, for there is no 'litmus test for measuring the severity of a burden that a state law imposes,' either. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008)."

In other words, within the balancing test, strict scrutiny is one standard that can apply. For example, in *Meyer v. Grant*, 486 U.S. 414 (1988), involving ballot initiative petitioning, a close cousin of ballot access petitioning, the Supreme Court observed that petition circulation necessarily involved "both the expression of a desire for political change and a discussion of the merits of the proposed change," id. at 421, and that because petition circulation involves the type of interactive communication concerning political change, it is appropriately described as "core political speech," id. at 422, and the Court characterized Colorado's statute barring the use of paid circulators as "a limitation on political expression" and applied "exacting" scrutiny because the statute imposed an unacceptable burden on the exercise of First Amendment rights. Id. at 420-22.

There should be no doubt that adding a third or, especially, a second choice to a ballot for State Representative implicates the *Meyer* type of interactive communication concerning political change and is, therefore, "core political speech." The *Meyer* court characterized the First Amendment protection for that interaction to be at its "zenith." *Meyer*, 486 U.S. at 425.

The Sixth Circuit acknowledged the difficulties inherent where one or two parties control state government:

> [W]e realize that the State may not be a "wholly independent or neutral arbiter" as it is controlled by the political parties in power, "which presumably have an incentive to shape the rules of the electoral game to their own benefit." *Clingman v. Beaver*, 544 U.S. 581, 125 S.Ct. 2029, 2044, 161 L.Ed.2d 920 (2005) (O'Connor, J., concurring). Thus, though the court's role in reviewing election regulations is limited, it is also vital in that it protects interests that may not be adequately represented in the political process.

Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 587 (6th Cir. 2006). The *Blackwell* court

pointed to "a more important function of a political party—its ability to appear on the general election ballot," and noted that in "[i]n cases analyzing restrictions on ballot access, the Supreme Court focus[es] on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." Id. at 589. " '[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group.' " Id. at 588, quoting *Anderson*, 460 U.S. at 793, 103 S.Ct. 1564.

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates—and of particular importance—against those voters whose political preferences lie outside the existing political parties. *Anderson*, 460 U.S. at 793-94, 103 S.Ct. 1564. While a voter is not guaranteed that one of the political parties will reflect his or her values, 'the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.' *Williams*, 393 U.S. at 31, 89 S.Ct. 5; see also *Anderson*, 460 U.S. at 787, 103 S.Ct. 1564. 'In short, the primary values protected by the First Amendment . . . are served when election campaigns are not monopolized by the existing political parties.' *Anderson*, 460 U.S. at 794, 103 S.Ct. 1564.

Blackwell, 462 F.3d at 588-89.

C. Application of the Test

In Illinois, for many years running, there has been a dearth of candidates, with the vast majority of primary contests uncontested and almost every election being uncontested or merely between the two established parties. In 2012, the first election after redistricting, out of a possible 236 primary elections for State Representative, Illinois held only 41 contested primaries, and in 2014, only 30. The year 2016 saw even less competition, with Illinois holding only 25 contested primaries for State Representative.[4] In other words, in 2012, 2014, and 2016, in the primary elections for State

[4] The Plaintiffs ask the Court to take judicial notice of the Defendants' official results of the 2016 Primary Election; official election results are posted on the Defendants' website: http://www.elections.il.gov/ElectionResults.aspx?ID=vlS7uG8NT%2f0%3d

Representative, 82.6%, 87.3%, and 89.4% of the races had no candidate or only one candidate on the ballot.

The disqualification of Plaintiff Tripp from the 2014 General Election for 118th State Representative meant that only one name has appeared on the ballot for three successive elections—with no choice of printed names on the ballot for the voters. That race had averaged only 1.5 candidates for the previous five elections. The disqualification of Plaintiff Shepherd from the 2014 General Election for 115th State Representative meant that only two names appeared on the ballot in 2014, and only one name appeared on the ballot in 2012. That race had averaged only 2.5 candidates for the elections from 1998 through 2014. This electoral history indicates the impact of Illinois's severe, overzealous, overly burdensome restrictions and barriers to new parties getting on the ballot.

For the State to merely utter the phrase "ballot overcrowding" or "regulation of the election process" is not sufficient to justify the burden on new parties. Justice Scalia, concurring in a judgment, recently described the necessity for the State to *demonstrate* a "sufficiently weighty interest":

> Accordingly, to the degree that a State would thwart "the opportunities of all voters to express their own political preferences" by "limiting the access of new parties to the ballot," the law demands "the demonstration of a corresponding interest sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). Further, when the burden is severe, States are required to"adopt the least drastic means to achieve their ends" even when pursuing legitimate interests. *Socialist Workers Party*, 440 U.S. at 185.
>
> Thus, the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring "nominal effort" of everyone, are not severe. See id., at 591, 593–597, 125 S.Ct. 2029. Burdens are severe if they go beyond the merely inconvenient. See *Storer v. Brown*, 415 U.S. 724, 728–729, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (characterizing the law in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), as "severe" because it was "so burdensome" as to be " 'virtually impossible' " to satisfy).

Marion Co. Elect. Bd v. Rokita, 553 U.S. 181, 205 (2008) (Scalia, concurring in judgment).

At a minimum, the State's ballot access restrictions challenged here cumulatively result in a severe burden on the Plaintiffs' constitutional rights, and they are not narrowly drawn to support compelling State interests. These restrictions are disparate, discriminatory, and nonneutral without sufficient State interests to justify them. The State's legislative scheme therefore violates the Plaintiffs' First and Fourteenth Amendment rights.

The Plaintiffs believe that their claims are both facial and as-applied challenges to the State's ballot access laws. See, e.g., *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 5-6 (6th Cir. 2015) ("a claim can have characteristics of as-applied and facial challenges: it can challenge more than just the plaintiff's particular case without seeking to strike the law in all its applications"). For example, the Plaintiffs argue that 5%-minimum signature requirement is unjustifiably burdensome for state representative candidates in general, based on the dearth of contested state representative elections, but the Plaintiffs also present challenges specific to all new parties and their candidates and supporters and challenges specific to the Green Party and its candidates and supporters.

I. The 5%-Minimum Signature Requirement is a Severe Burden in Light of the Complete Lack of Evidence of Ballot Overcrowding and the Nature of the 115th and 118th Districts

The 5% minimum signature requirement is a severe burden on new party candidates' ability to access the ballot:

A. The 5%-minimum-signature requirement is not a reasonable test for a showing of a modicum of support for a candidate in Illinois because there has been no showing that Illinois state representative elections have a history of ballot clutter or overcrowding statewide and, instead, recent 115th and 118th District elections for state representative show the opposite—a dearth of candidates.

B. The 5%-minimum-signature requirement is a burden on those seeking to run for state representative in the 115th and 118th Districts, where an extraordinary number of population centers have been divided between two districts, where the districts are extraordinarily large geographically, compared to the statewide average, where the division of population centers caused confusion among registered voters in those areas, and where the legislature's division of population centers necessitated additional steps in the petition-gathering process to the detriment of the candidates, all during a 90-day window that started on March 25.

The Plaintiffs presented plenty of evidence showing how candidates in the 115th and 118th Representative Districts, especially new party candidates, suffer severe ballot access burdens not shared by candidates in any other district. From uncontroverted evidence, a reasonable inference can and should be drawn that at least some of this was intentional on the part of the legislature when it redrew district boundaries in 2010.

The Plaintiffs presented plenty of evidence to show a dearth of candidates—established, new party, and independent—in the 115th and the 118th and statewide.

Yet to justify the ballot restrictions, the Defendants presented not a shred of evidence of ballot overcrowding for state representative ballots in Illinois, not during the 2014 election cycle or at any other time. The State merely utters the phrase "prevent ballot overcrowding" and expects ballot restrictions to withstand scrutiny. But if there is no ballot overcrowding over a lengthy period of time, and instead a dearth of candidates, then it follows that ballot restrictions are overly restrictive and deprive voters and potential candidates of their constitutional rights.

The district court acknowledged that established parties need "far less" than the 5% required for new parties. It is no wonder then, that ballot access for new parties and independents is virtually unknown in Illinois, especially at the state representative level.

Regarding the 5%-minimum-signature requirement, the Plaintiffs are aware of no case that has addressed the disparity and severe burden effected on the Plaintiff candidates when the minimum-signature requirement is applied to all State Representative Districts regardless of their size or population density. *(Libertarian Party of Illinois v. Rednour*, 108 F.3d 768 (7th Cir. 1997) involved statewide candidates.) The 5%-minimum signature requirement is not narrowly drawn when it calls for the same minimum number of signatures in a district where all voters are within three square miles as for a district in which the voters are spread out over 2,760 square miles (the 118th District) or 1,705 square miles (the 115th District) *and* communities are divided by boundary lines.

Also, the State's interest in avoiding ballot confusion or overcrowding is not involved with respect to State Representative elections, as shown by the 2014 General Election ballot, where for 82 of the 118 State Representative elections, only one candidate appeared on the ballot. Similarly in the 118th and 115th Districts, the number of candidates on the ballot for the five elections from 2006 to 2014 averages 1.5 candidates (118th) or 2.25 candidates (115th).

The district court does not make any finding that the 5% minimum was necessary or even helpful to prevent ballot overcrowding.

> Regardless, when "the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (internal quotations omitted). It must show that the "recited harms are real, not merely conjectural" and that the regulation will in fact materially alleviate the anticipated harm. Id.

Krislov v. Rednour, , 226 F.3d 851, 865 (7th Cir. 2000).

The district court's decision also does not acknowledge the additional burdens placed on new party candidates for in the 115th and 118th legislative districts because of the way the boundaries were redrawn, creating two very large geographic districts, yet splitting a majority of the largest

population centers. The legislature is no stranger to the redistricting process, and the discriminatory impact on new party candidates, Green Party candidates in particular, can be inferred from the electoral history of the Green Party in southern Illinois and the lengths to which the legislative boundaries go to make it harder for a new party to meet the 5%-minimum signature requirement.

In sum, the cumulative effect of the 5%-minimum signature requirement, the lack of state representative candidates on the ballot, and the redrawn legislative boundaries create a severe burden on new party candidates and the Green Party candidates in the 115th and 118th Districts especially.

II. The Impact of the Notarization Requirement

Illinois requires petition circulators for candidates seeking ballot access to sign a statement at the bottom of each petition sheet:

> certifying that the signatures on that sheet of the petition were signed in his or her presence; certifying that the signatures are genuine; and either (1) indicating the dates on which that sheet was circulated, or (2) indicating the first and last dates on which the sheet was circulated, or (3) certifying that none of the signatures on the sheet were signed more than 90 days preceding the last day for the filing of the petition; and certifying that to the best of his knowledge and belief the persons so signing were at the time of signing the petition duly registered voters under Articles 4, 5 or 6 of the Code of the political subdivision or district for which the candidate or candidates shall be nominated, and certifying that their respective residences are correctly stated therein.

10 ILCS 5/10-4 (2014). Section 10-4 adds what is referred to herein as the "notarization requirement": "Such statement shall be sworn to before some officer authorized to administer oaths in this State." Id. In their brief and affidavits supporting their motion for summary judgment, the plaintiffs demonstrated that this requirement: (1) imposes a substantial barrier upon minority-party candidates and their petition circulators, yet (2) does not materially support the state's interest in avoiding ballot confusion and overcrowding, except in the sense that it contributes to a regime that

inordinately impedes any and all ballot access efforts by minority parties, irrespective of whether the party has demonstrated a modicum of support among the voting populace. (Doc. 51, Pl.'s Br. Supp. Mot. Summ. J. at 5-6, 12-15 (Doc. 51); Ex. A, Whitney Aff., pars. 9-14; Ex. F, Test. of Rich Whitney, Hr'g of Sept. 4, 2014, at 7; Ex. E, Bradshaw Aff., par. 6; Ex. B, Tripp Aff., par. 12; Ex. G, Shepherd Dep. at 18-20.) Additionally, there are other reasonable, less restrictive alternatives to the notarize-every- sheet requirement.

The district court, in its memorandum and order (Doc. 81), begins its analysis on the notarization burden by noting that there were certain mitigating facts present in the case at bar that distinguish it from the more onerous notarization requirements present in *Perez-Guzman v. Gracia*, 346 F.3d 229, 243 (1st Cir. 2003), and *Green Party of Pa. v. Aichele*, 89 F. Supp. 3d 723, 744-45 (E.D. Pa. 2015). (Order at 12-14.) It is undisputed that the limited access to notaries in Puerto Rico, *Perez-Guzman*, 346 F.3d at 240, and the cost of notarization services in Pennsylvania, *Green Party of Pa.*, 89 F. Supp. 3d at 743, presented obstacles more burdensome than those faced by the plaintiffs in the case at bar. Nonetheless, the notarization requirement here imposes a burden more substantial than the court below supposed.

The court asserts that the burden of notarization in Illinois is not that great, in part, because the statute does not impose any limit on the number of signatures that may go on each sheet that must be notarized. (Order at 13.) However, each petition sheet must allow enough space, not only for each voter to provide an identifiable signature, but also space for his or her street address or rural route number, county, and city, village or town, and state. 10 ILCS 5/10-4. It must allow enough space for a uniform heading that informs signatories of the name of the "candidate or candidates in whose behalf such petition is signed; the office; the party; place of residence; and such other information or wording as required to make same valid." Id. It must allow enough space for the circulator's name

and address, the certification of the circulator previously quoted herein, and for the seal and signature of the notary. Id. Moreover, the page size is limited by the further requirement that the petition sheets must ultimately be fastened together in book form. In practice, therefore, these requirements do plainly limit the number of signatures that can go on a petition sheet. Defendant ISBE's own recommended form P-8 provides for 10 signatures per page. (Doc. 53-18, Ex. K, Aff. Richard J. Whitney, Supp. Pl.'s Resp. Opp. Def't's Mot. Summ. J.) While that form can evidently be adapted to allow as many as 20 signatures per page (Doc. 49-9, Def.'s Mot. Summ. J. Ex. 9, Aff. Ex. G), it does so only by using very small type and little room for voter signatures, demonstrating that this is at or near the upper limit to the number of signatures that can reasonably fit on a single page.

The court also maintained that the burden was further lessened by the fact that candidates Tripp and Shepherd "ran in districts with a city that had a free notary service," referring to the City of Carbondale. (Order at 13; Doc. 49, Def.'s Mem. Supp. Mot. Summ. J. at 9; Doc. 25-4 at 1.) However, that Carbondale provides free notary services during business hours shows only there is one such service within the 2,808 square miles of the 118th State Representative District and the 1,810 square miles of the 115th State Representative District. (Doc. 51, Pl.'s Br. Supp. Mot. Summ. J. at 2-3, citing www.census.gov/geo/maps-data/gazetteer/2014.html.) Thus it does very little to mitigate the difficulties in finding a notary at times convenient to volunteer circulators who may reside, or be circulating petitions, anywhere within these geographically large districts, as described in the Plaintiffs' brief in support of their motion for summary judgment (Doc. 51) at 5, and affidavits cited therein.

The district court finally notes that "the Green Party was able to throw notarization gatherings to assist circulators in getting sheets notarized, the Green Party Chairman was himself a notary, and other circulators could become notaries to ease things." (Order at 13.) However, the

first two of these factors do not describe "mitigating" circumstances at all—rather, they describe efforts that the plaintiff Illinois Green Party itself undertook to overcome the burden created by the notarization requirement. The third is simply an observation that a party could undertake a different burden – viz., have more of its members fill out paperwork, review the rules on becoming a notary, and shell out $75 to $80 to obtain a notary commission—to help it overcome the burden imposed by the notarization requirement itself. (Doc. 51, Pl.'s Br. Supp. Mot. Summ. J. at 5, citing Ex. A, Whitney Aff., pars. 9-14; Ex. F, Test. of Rich Whitney, Hr'g of Sept. 4, 2014, at 7.)

With respect to the State justification for the notarization requirement, the court buys into the notion that it serves the interest of combating fraudulent petition signing, because it can facilitate the identification and prosecution of circulators who intentionally submit petitions with fraudulent signatures. (Order at 18-20) However, the added layer of protection supposedly provided by the notary is vastly overstated by the court. The court rejects the plaintiffs' suggestions for imposing a lesser burden on minority party candidates – for example, having circulators sign non-notarized verifications as currently provided under the Illinois Code of Civil Procedure at 735 ILCS 5/1-109 (2017), or allowing circulators to submit one notarized verification for all of their petition sheets – by pointing out that there are ways by which a determined fraudulent circulator could get around such checks. (Order at 19-20)

The flaw in that rationale is that it is not appreciably more difficult for a determined fraudulent circulator to get around the check of a notarization requirement. As the court itself observed a few pages earlier, "there doesn't seem to be any major limitations on who can become a notary in Illinois." (Order at 12.) Indeed, anyone who has a state ID, has not been convicted of a felony, has resided in the State of Illinois for 30 days or is a resident of a state bordering Illinois who has worked or maintained a business in Illinois for 30 days may become a notary. See Illinois Notary Act, 5 ILCS

312/2-102 (2016). There is no requirement that notaries have law enforcement training or any other skill that would help them ferret out a fraudulent circulator who presented a fake ID and one or more petition sheets that facially appear to contain the signatures and addresses of registered Illinois voters. To be clear, the notary merely witnesses the signature of the circulator, who, in turn, certifies that the persons who signed his or her petition did so in his presence and presented themselves as bona fide registered Illinois voters who resided at the address provided. 10 ILCS 5/10-4. If the circulator provides facially credible identification and signs his or her name to each sheet in the notary's presence, that is all the notary will need to notarize the sheet. The notion that most notaries will either significantly deter a determined fraudulent circulator or provide meaningful assistance to law enforcement officers seeking to apprehend a fraudulent circulator is fanciful at best.

Indeed, some of the cases cited by the court below to highlight the problem of circulator fraud (Order at 18-19) illustrate the near total uselessness of the notarization requirement in that regard. For example, in *In re Armentrout*, 99 Ill. 2d 242 (1983), there was no indication that the notarization requirement played any role in exposing the widespread forgery of signatures for which the respondent attorneys were disciplined. Indeed, one of the respondent attorneys was exposed for having forged the signatures of notaries. Id. at 250. In *Canter v. Cook Cnty. Officers Electoral Bd.*, 170 Ill. App. 3d 364 (1st Dist. 1988), the circulator had no trouble signing affidavits on his petition sheets in front of a notary, but later admitted that others had circulated the sheets in question, then refused to testify, invoking Fifth Amendment privilege. Id. at 366-67. In *Huskey v. Mun. Officers Electoral Bd. for Vill. of Oak Lawn*, 156 Ill. App. 3d 201, 204 (1st Dist. 1987), a circulator admitted that she had permitted individuals to sign the names of family members who were not present on her petition sheets, and that, "at least half of the time, she was not the person who presented the petition for signature." Yet the circulator still signed the affidavits on the tainted petition sheets under oath.

Id.

In *Fortas v. Dixon*, 122 Ill. App. 3d 697, 700 (1st Dist. 1984), the notarization requirement did not expose the fraudulent gathering of signatures; rather, the fraud was exposed by the objector gathering evidence that someone other than the person signing the circulator's oath had circulated some of the sheets. If the same phony circulator had been permitted to simply sign an unnotarized verification of the sheets, instead of having them notarized, the fraud still would have been exposed by the same evidence.

The court cited several additional cases for the proposition that the notarization requirement "ensures that a circulator can be easily identified, questioned and potentially prosecuted for perjury during the course of any signature fraud investigation, a looming threat that separately helps to deter future fraud by circulators." (Order at 18-19.) However, none of the authorities cited by the court, at 19, demonstrated anything of the kind.

In *Knobeloch v. Elec. Bd. for City of Granite City*, 337 Ill. App. 3d 1137 (5th Dist. 2003), the sole issue was whether a candidate's petition sheets that had been notarized by a notary commissioned by the State of Missouri, rather than Illinois, passed muster under the Election Code, under a theory of "substantial compliance." Id. at 1138-39. The appellate court held that the provision requiring an Illinois notary had to be strictly enforced, even though the parties agreed that there was no knowledge or evidence of fraud or corruption involved in the case. Id. at 1138-40. Thus it had absolutely nothing to do with the proposition for which it was cited by the district court in the case sub judice.

In *Dunham v. Naperville Twp. Officers Electoral Bd.*, 265 Ill. App. 3d 719, 720-21 (2d Dist. 1994), a notary testified on behalf of an objector, stating that she was instructed by the petitioner (the candidate) to insert false notarization dates on some of his petition sheets and notarize petitions when

the circulators were not present to sign them in front of her. Id. at 720-21. Three of the circulators provided affidavits contesting the notary's version of events. Id. at 721. The trial court found the notary more credible with respect to some of the challenged signatures but found that one of the circulators was more credible than the notary. Id. at 722. On that ground, it restored some of the signatures, though not enough to qualify the candidate for ballot placement. Id.

The appellate court affirmed, but its published opinion only concerned the issue of whether the petitioner had forfeited the issue of whether the objector had standing to contest her candidacy. Id. at 722-24. All other issues in the appeal were resolved by an order entered pursuant to Illinois Supreme Court Rule 23—which may not be cited as precedent. Id. at 724; Ill. Sup. Ct. R. 23(b), (e)(1). Thus, at most, Dunham merely illustrates that there are some circumstances under which a notary may provide testimony regarding compliance with the notarization requirement itself. Here again, the case did not demonstrate that the notarization requirement facilitates fraud investigations or perjury prosecutions or effectively deters fraudulent acts by circulators.

In *Schwartz v. Kinney*, 2016 IL App (3d) 160021, the petitioner's nomination petitions included the typed name of the petitioner in the affidavit paragraph, but several petitions were sworn to and signed by his wife. Id. at ¶ 5. Petitioner and his wife both testified that they were present when the signatures were obtained, but the appellate court affirmed the ruling of the local electoral board, primarily on the ground that they had failed to identify which of them had been the actual circulator. Id. at ¶¶ 6-7, 17-18. The role of the notary was incidental to the disposition of the case. If the petitioner had printed his name on a verification paragraph instead of an affidavit paragraph, and the verification had instead been signed by his wife, the exact same issue would have been before the court.

Finally, in *Cunningham v. Schaeflein*, 2012 IL App (1st) 120529, the evidence established, inter

alia, that a notary had knowingly notarized signatures of two circulators who did not appear before her when they signed the certification of their petition sheets. Id. at ¶¶ 9-11. The appellate court affirmed the disqualification of the candidate's nominating papers on that basis. Id. at ¶¶41-44. Thus, the fraud committed in Cunningham was one in which the notary had participated, not one that she had thwarted. In the final analysis, the district court's holding that the notarization requirement "ensures" that a circulator can be easily identified, questioned and potentially prosecuted for perjury, and "helps to deter future fraud by circulators," was supported by no case authority whatsoever, despite appearances to the contrary?

Plaintiffs do not take the position that the notarization requirement, of itself, imposes an unconstitutional burden on their right to free speech and association, and to equal protection under the law. However, it poses a significant obstacle to ballot access. Just as one boulder on a road may not make the road impassible, it may yet have that effect when several others are placed in the same spot. When considered in conjunction with the short 90-day circulation period, the 5 percent (of recent voters) requirement, the limited opportunities for petition gathering in these geographically large, low-density districts, and the specific impact of redistricting in this instance, the notarization requirement impermissibly burdens the rights of minority party candidates, their supporters and prospective voters, and cannot be justified by the legitimate State interest at issue—because it does not support that interest in a meaningful or material way.

III. Cumulative Effect

To date, no court has considered "the totality" of the restrictions challenged here–that is, the cumulative impact of a high 5%-minimum-signature threshold, in a short 90-day window, along with double-petitioning, in a large rural district with population centers split by gerrymandering, along

with the requirement that each and every one of the hundreds of petition sheets submitted must be sworn to by the circulator and notarized, all in the context of not only a lack of evidence of ballot overcrowding in state representative elections but evidence of a dearth of candidates.

Regarding the Plaintiffs' equal protection claim, the district court in its decision did not acknowledge the very recent case of *Green Party of Tennessee v. Hargett*, 791 F.3d 684 (6th Cir. 2015), which also involved cross-motions for summary judgment. In that case the Sixth Circuit found an equal protection violation where a state statute "impose[d] a greater burden on minor parties without a sufficient rationale put forth by the state." *Green Party of Tennessee*, 791 F.3d at 695. The Court noted, "Tennessee's ballot-retention statute clearly imposes a heavier burden on minor parties than major parties by giving them less time to obtain the same level of electoral success as established parties." Id. at 694.

The Sixth Circuit held that the burden was severe, and stated, especially relevant to this case, that in any event, "the differences between these two types of parties justify having less onerous burdens on recognized minor parties than statewide political parties." Id. at 694.

In its decision, the district court here also did not acknowledge that a 90-day signature gathering window would necessarily be more difficult for a new party, which does not have as many resources to draw upon than an established party, and does not have the same name recognition.

The two Plaintiff candidates each submitted about 3.5 times more signatures (1700 & 1800) than an established party candidate needs to submit to get on the Primary Election ballot (500, fixed by statute– 10 ILCS 5/8-8). And getting on the Primary Election ballot almost always leads to a place on the General Election ballot. Illinois has two established parties, and 118 State Representative Districts, but a contested primary is relatively rare for either of those parties. In 2012, out of a possible 236 primary elections for State Representative, Illinois held only 41 contested primaries,

and in 2014, only 30. The year 2016 saw even less competition, with Illinois holding only 25 contested primaries for those seats. In other words, in 2016, 89.4% of the primary elections for State Representative had no candidate or only one candidate on the ballot (211 of 236).

These facts, along with other facts in the record showing the lack of ballot overcrowding or ballot confusion and, instead, overly restrictive ballot access and the discriminatory impact of legistlatively drawn boundaries, distinguish this case from other ballot access cases, like *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768 (7th Cir. 1997).

The State has failed to demonstrate the necessary weight of its governmental interests to outweigh these burdens on the Plaintiffs' constitutional rights.

CONCLUSION

The Plaintiffs urge this Court to reverse the summary judgment in favor of the Defendants and enter a summary judgment for the Plaintiffs.

Respectfully Submitted,

s/ Vito A. Mastrangelo
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Attorney for Plaintiffs-Appellants

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CERTIFICATE OF SERVICE

All Case Participants Are CM/EMF Participants

I hereby certify that on January 24, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Vito A. Mastrangelo
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APPENDIX A

August 17, 2016

Judgment

of the Southern District of Illinois

United States District Court
for the
Southern District of Illinois

TABITHA TRIPP,
GARY SHEPHERD,
CHARLIE HOWE,
FELICIA HOLLY,
VERA HOLLY,
RENEE COOK,
ILLINOIS GREEN PARTY, and
CANDACE A. DAVIS,

Plaintiffs,

v.

JESSE R. SMART,
CHARLES W. SCHOLZ,
BRYAN A. SCHNEIDER,
BETTY J. COFFRIN,
HAROLD D. BYERS,
CASSANDRA B. WATSON,
WILLIAM M. McGUFFAGE,
ERNEST L. GOWEN, and
STEVE SANDVOSS,

Defendants.

Case Number: 14-cv-00890-MJR-PMF

JUDGMENT IN A CIVIL ACTION

By order dated August 16, 2016, the Court granted summary judgment in favor of Defendants JESSE R. SMART, CHARLES W. SCHOLZ, BRYAN A. SCHNEIDER, BETTY J. COFFRIN, HAROLD D. BYERS, CASSANDRA B. WATSON, WILLIAM M. McGUFFAGE, ERNEST L. GOWEN, and STEVE SANDVOSS. Judgment is entered in favor of all defendants and against all plaintiffs.

Dated: August 17, 2016

Justine Flanagan, Acting Clerk of Court
s/ Debbie DeRousse
Deputy Clerk

Approved: s/ Michael J. Reagan
Michael J. Reagan, U.S. District Judge

APPENDIX B

August 17, 2016

Memorandum & Order

Of the Southern District of Illinois

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

TABITHA TRIPP,	)	
GARY SHEPHERD,	)	
CHARLIE HOWE,	)	
FELICIA HOLLY,	)	
VERA HOLLY,	)	
RENEE COOK,	)	
ILLINOIS GREEN PARTY, and	)	
CANDICE A. DAVIS,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 14-cv-0890-MJR-PMF**
	)	
JESSE R. SMART,	)	
CHARLES W. SCHOLZ,	)	
BRYAN A. SCHNEIDER,	)	
BETTY J. COFFRIN,	)	
HAROLD D. BYERS,	)	
CASSANDRA B. WATSON,	)	
WILLIAM M. McGUFFAGE,	)	
ERNEST L. GOWEN, and	)	
STEVE SANDVOSS,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

REAGAN, Chief District Judge:

In 2014, Green Party members Tabitha Tripp and Gary Shepherd sought to appear on the upcoming Illinois General Election ballot as candidates for state representative—Tripp sought to appear as a candidate for the 118th district and Shepherd for the 115th district. At the time, the Green Party was an "unestablished" party under Illinois law, so Tripp and Shepherd needed signatures from 5% of the voters in their respective districts to get on the ballot. Like all candidates for the

geographically large 118th and 115th districts, Tripp and Shepherd needed to collect those signatures in 90 days, and each sheet of signatures needed to be signed by the circulator who gathered them and then each sheet had to be notarized. Tripp and Shepherd didn't collect enough signatures during the 90-day collection period, so the Illinois State Board of Elections ruled that they would not appear on the ballot.

After the Board refused Tripp and Shepherd a place on the ballot, the two candidates, alongside the Illinois Green Party and a few of the candidates' supporters, filed suit in this Court. The plaintiffs alleged that the 5% signature requirement for unestablished parties and the notarization requirement for all parties each violated the First Amendment and the Fourteenth Amendment of the United States Constitution. Failing that, the plaintiffs also claimed that the signature requirement and the notarization requirement—when taken with the 90-day time period for collecting signatures and Illinois' 2011 decision to remap the district boundaries in a manner that split up a number of the state's population centers—cumulatively burdened their ballot rights in an unconstitutional fashion. The plaintiffs wanted these ballot restrictions declared unconstitutional, and they also requested a preliminary injunction from the Court directing Illinois to list Tripp and Shepherd on the 2014 ballot. The Court denied the request for preliminary relief, and the case has since proceeded through discovery.

Tripp, Shepherd, and the other plaintiffs have now moved for summary judgment, asking the Court to declare the 5% signature requirement, the notarization requirement, and the cumulative effect of some of Illinois' election regulations as unconstitutional. Smart and the other Illinois State Board of Elections defendants, too,

have moved for summary judgment, maintaining that the challenged restrictions survive constitutional challenge. For the reasons below, the defendants' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied.

Background

In 2014, Tabitha Tripp and Gary Shepherd decided to run as Green Party candidates for state representative for their respective districts—Tripp for the 118th district, which covers 2.808 square miles and runs from the southernmost counties of Illinois to the northern county line of Hamilton County; and Shepherd for the 115th district, which covers 1,808 square miles and stretches from the southwestern corner of Union County on the Mississippi River to the edge of Jefferson County. At that time, the Green Party had not received 5% of the vote in the last gubernatorial election or 5% of the vote in the last elections in the 115th and 118th districts, so the Green Party qualified as an "unestablished" party for Tripp and Shepherd's purposes. The Illinois requirements for getting on an election ballot differ slightly based on whether a party is an established party or an unestablished party: unestablished party candidates need nominating signatures from 5% of the number of voters who vote at the next preceding regular election in their district to appear on the district's ballot, while established party candidates need far less, the thinking being that established party candidates don't need to demonstrate as much popular support given the party's showing in the last election. There are other Illinois balloting requirements but those apply to both established parties and unestablished ones—both parties have 90 days to collect signatures from voters, both parties are subject to the same district boundaries for the relevant district,

and both parties are required to submit signatures sheets with the circulator identified and the sheet notarized, so as to verify the circulator's identity.

Tripp and Shepherd could start collecting signatures in March 2014, and regardless of when they actually started collecting—there's some question in the record as to whether Tripp and Shepherd both started collecting signatures in April 2014 or if one of them started a bit later—their efforts seemingly got off to a disappointing start. Tripp and Shepherd maintain that things went slow because of Illinois' burdensome ballot regulations. Those regulations, according to Tripp and Shepherd, were a source of constant frustration for Tripp, Shepherd, their party, and their supporters in a number of ways. For one, Tripp and Shepherd had to obtain more signatures to get on the ballot then an established party, a requirement that stretched the Green Party's resources. Once more, to get those signatures, Tripp, Shepherd, and their circulators had to tour through large rural districts with cities that were split up in the last Illinois redistricting, meaning that they had to endure some travel-related burdens and had to routinely hassle voters about their district of residency. Making matters worse, each circulator's signature sheet had to be signed by the circulator and then notarized. To clear that hurdle, circulators had to independently obtain free or paid notary services, become notaries themselves, or attend Green Party notarization events.

By mid-June 2014, Tripp and Shepherd still didn't have the signatures they needed to make it onto their respective ballots, so then Green Party Chairman Rich Whitney sent an email to Tripp and Shepherd's supporters. His email touted his recent success in obtaining signatures for Tripp and Shepherd at a large event in Metropolis,

Illinois, but stressed that more needed to happen for the two to make it onto their ballots. Whitney encouraged circulators to do some door-to-door work to obtain signatures throughout the 115th and 118th districts, and reminded all involved that the signature collection effort really was "do-able" and wasn't "that hard." Despite Whitney's efforts, Tripp and Shepherd still fell short when the signatures were due in late June. By the due date, Tripp needed 2,399 signatures but only had about 1,700 and Shepherd needed 2,407 signatures but only had about 1,800. Given the shortfall, the Illinois State Board of Elections rejected each candidate's nominating papers.

Tripp, Shepherd, their party, and their supporters were convinced that Tripp and Shepherd missed their ballots not because they lacked popular support but because Illinois' ballot restrictions imposed a severe burden on their ballot access rights. In August 2014, they filed a complaint in this Court against a number of Illinois State Board of Elections officials, seeking a preliminary injunction requiring Tripp and Shepherd to be placed on the ballot, as well as permanent injunctive relief concerning Illinois' ballot restrictions. The collection of plaintiffs asserted that two provisions of the Illinois Election Code—the circulator notarization requirement and the 5% minimum signature requirement—violated the free speech and association clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment, both as applied to unestablished parties in the 115th and 118th districts and facially to all. They also claimed that there was a constitutional problem with the signature and notarization requirements when those requirements were considered in combination with the 90-day time period for obtaining signatures and the State of Illinois' 2011

decision to redraw many of the representative districts, including the 115th and 118th districts, in a manner that split up some of the districts' population centers.

In September 2014, the Court denied the plaintiffs' motion for a preliminary injunction, ruling that the 2014 election would go forward without Tripp and Shepherd on their respective ballots. The case then proceeded through discovery, and at the end of that, the parties filed cross motions for summary judgment. The Court held a hearing on those motions in July 2015 and then accepted supplemental briefing concerning a few election law cases that were decided around the time period of the hearing as well as briefing regarding the preclusive effect of any ruling in this case that was dependent on Tripp and Shepherd's purported lack of diligence—in other words, the candidates' alleged failure to start collecting signatures at the beginning of the 90-day period. The cross motions for summary judgment are now before the Court for review.

Discussion

The parties' cross motions for summary judgment are mirror images of each other—Tripp, Shepherd, their party, and their supporters maintain that some of Illinois' ballot restrictions violate the First Amendment and the Fourteenth Amendment, while Smart and the other Illinois Board of Election officials named as defendants insist that Illinois' requirements clear constitutional scrutiny. The Court's task, when faced with cross motions like that, is to take each motion "one at a time," construing "all facts and draw[ing] all reasonable inferences in favor of the non-moving party" for each motion. ***Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746 (7th Cir. 2015)**. After parsing the motions, summary judgment is proper only if one of the movants shows

that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. ***Archdiocese of Milwaukee v. Doe*, 743 F.3d 1101, 1105 (7th Cir. 2014)**. If one of the movants makes that showing, summary judgment can be entered for that side; if neither makes that showing, the case must go to trial. ***Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 511 n.7 (4th Cir. 2002).**

The Court will start with Smart's motion for summary judgment, and his threshold argument that some or all of this case is moot because the 2014 election already occurred. The Court says "some or all" because it isn't entirely clear whether Smart is arguing that all of the injunctive relief requested is moot or if plaintiffs' request for relief concerning the 2014 election alone is moot. To the extent Smart is arguing that the election-related injunctive relief is moot, he is of course correct. The Court denied the plaintiffs' request for a preliminary injunction and the 2014 election went forward as scheduled, so the Court can't order Tripp and Shephard to be placed on the ballot this late in the game. That said, the rest of the case isn't moot. The plaintiffs are challenging the ballot restrictions that they claim kept Tripp and Shepherd off the ballot, and that is the kind of claim that ducks mootness even when the election has occurred—election controversies being capable of repetition yet usually evading review. ***E.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006); *Tobin for Gov. v. Ill. State Bd. of Elec.*, 268 F.3d 517, 528-29 (7th Cir. 2001).**

With mootness dealt with, the Court can address the merits of Smart's motion for summary judgment. Smart begins with the plaintiffs' First Amendment as applied challenge, arguing that the 5% signature requirement, the notarization requirement, and

the bulk of Illinois' election regulations taken cumulatively don't violate the plaintiffs' First Amendment ballot access rights. The Constitution does not in so many words confer a right to get oneself onto a ballot or to vote for the person of one's choice on a ballot, but the First Amendment, as incorporated against the states by the Fourteenth Amendment, does so implicitly by way of the speech and association clauses. ***E.g.*, *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983).** That said, citizens aren't the only ones with ballot-related rights—the states have their own right to manage the ballot process. ***E.g.*, *Gelb v. Bd. of Elections of City of New York*, 224 F.3d 149, 153 (2d Cir. 2000); *Duncan v. Poythress*, 657 F.2d 691, 701-02 (5th Cir. 1981).** Because of that grant of authority and because unregulated elections would be chaos, states may impose considerable restrictions on elections without violating the Constitution. ***Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004).**

Given these countervailing rights, ballot access restrictions are evaluated under a flexible standard that weighs the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden[s] imposed by its rule[s]," taking into account "the extent to which [the state's] interests make it necessary to burden the plaintiff's rights." ***Anderson*, 460 U.S. at 786.** Under this framework, the "rigorousness" of the Court's inquiry into the "propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." ***Burdick v. Takushi*, 504 U.S. 428, 434 (1992).** A strict assessment of a state's balloting regulations isn't the default—the courts save

that level of scrutiny for balloting restrictions that impose severe burdens, ***Norman v. Reed*, 502 U.S. 279, 289 (1992)**, for exposing every balloting regulation to a strict level of review would grind the state election system to a halt through federal judicial intervention. ***Crawford v. Marion Co. Election Bd.*, 472 F.3d 949, 952, 954 (7th Cir. 2007).** When a state's restrictions aren't so draconian—when the state laws impose only reasonable, nondiscriminatory restrictions on ballot access—the state's "important regulatory interests are generally sufficient to justify the restrictions." ***Common Cause Ind. v. Individual Members of the Ind. Elec. Com'n*, 800 F.3d 913, 917 (7th Cir. 2015).**

So the first question is whether the ballot restrictions imposed by the State of Illinois severely encumbered the plaintiffs' rights. It bears mentioning at the outset that the two restrictions the plaintiffs individually target here have been upheld before, so Illinois isn't acting that far outside the norm in adopting them. The first restriction individually targeted in this case—that candidates from unestablished parties gather a certain number of signatures before the candidate can appear on a ballot—is a common one, designed to make sure that ballots aren't filled to the brim with candidates who have little support from the electorate. Illinois requires candidates from unestablished parties to submit signatures from 5% of the voters who vote at the next election in that candidate's district before the candidate can get on the ballot, and that kind of requirement has been found permissible. ***E.g.*, *Jenness v. Fortson*, 403 U.S. 438, 442 (1971); *Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 775 (7th Cir. 1997).** The second kind of requirement—that some amount of sheets be notarized—is a bit rarer than the percentage requirement, but it too has been upheld in both the petition and

ballot contexts, owing to the need to combat fraud. ***E.g., Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 196 (1999); *Am. Party of Texas v. White*, 415 U.S. 767, 787 (1974); *Am. Const. Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1099 (10th Cir. 1997).**

While past cases are helpful in charting the landscape of election law, restrictions on balloting must be considered together rather than separately, ***Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004)**, so it doesn't matter all that much, for the burden analysis anyway, that certain restrictions have been individually upheld before. (That point renders precedent a bit unhelpful, as almost every case will involve slightly different ballot schemes given the variance among the fifty states' election statutes.) The real inquiry is whether the "totality" of the state's restrictions caused a severe burden. ***Green Party of Arkansas v. Martin*, 649 F.3d 675, 683 n.9 (8th Cir. 2011).** A burden is "severe" if the restrictions, taken together, freeze out unestablished parties, as they would if they made it impossible for a reasonably diligent candidate to get on the ballot. ***Stone v. Bd. of Election Comm'rs for City of Chicago*, 750 F.3d 678, 682 (7th Cir. 2014).**

Taken together, the restrictions the plaintiffs complain about here don't severely burden their ballot access rights. Consider first Illinois' five-percent signature requirement, the 90-day period it allots to candidates to obtain signatures, and the split nature of some of Illinois' districts by virtue of its 2011 redistricting. Tripp needed to obtain 2,399 signatures from eligible voters in her district to make it onto the ballot and Shephard needed 2,407—numbers that roughly equate to 27 signatures per day for each candidate. That many signatures per day hasn't been read to create a severe burden in other cases, ***see White*, 415 U.S. at 767 (22,000 signatures in 55 days); *Storer*, 415 U.S. at**

740 (325,000 signatures in 24 days); ***Stone*****, 750 F.3d at 684 (12,500 signatures in 90 days);** ***Nader*****, 385 F.3d at 736 (25,000 signatures in 90 days)**, and the Court isn't of the view that it created a severe burden here. To be sure, both Tripp and Shephard lived in spread-out districts with some cities that were split with other districts, and that kind of district makeup presents some challenges to signature collection efforts. But the kinds of challenges that come with campaigning in a rural district—namely a bit more drive time to pound the pavement and solicit signatures and some added questioning of voters concerning their district residency—are the kinds of challenges endemic to political campaigning. There are environment-specific challenges in every type of district: more rural districts, like Tripp and Shepherd's districts, involve more travel for circulators, while more compressed urban districts often involve higher costs for paid circulators and even more confusion among voters as to their residency, especially when a candidate throws a large signature event in a commercial area that will be attended by many urban residents. The burdens imposed by drive time and residency questioning here look far more like the "hard work and sacrifice" required of volunteers and candidates during an election, and not the kind of burden that "unreasonably interferes" with access to the ballot. ***Schulz v. Williams*****, 44 F.3d 48, 57 (2d Cir. 1994)**.[1] That estimation should come as no surprise to the plaintiffs—the Green Party's chairman at the time of Tripp and Shepherd's circulating efforts characterized the

[1] As an aside, if these types of environment-specific challenges could be thought to trigger severe burdens in the usual course, it would likely lead to different balloting requirements for different districts—disparities that could themselves cause constitutional issues. ***See Dart v. Brown*****, 717 F.2d 1491, 1501-02 (5th Cir. 1983).**

signature process as "really not that hard," and said that he was able to collect 110 signatures for Tripp during a weekend and 40 for Shepherd over the course of 3 hours.

So if this case involved only a 5% signature requirement, a 90-day signature collection period, and the redistricting decisions for the 115th and the 118th districts, the Court would easily say that the burden wasn't severe. The notarization requirement adds a wrinkle, though. As the Court already said, these type of requirements have been upheld by the Supreme Court in the past, ***White*, 415 U.S at 787; *Buckley*, 525 U.S. at 196**, but the Supreme Court didn't assess the notarization requirement in either case in much depth because the parties didn't devote much time to it. Those cases don't squarely discredit all notarization challenges—there is, after all, no "litmus" test for determining whether the burdens imposed by a law are severe, ***Stone*, 750 F.3d at 681**—so it stands to reason that more draconian notarization requirements could cause a severe burden, either on their own or in combination with other state regulations. The First Circuit held as much in ***Perez-Guzman v. Gracia*, 346 F.3d 229, 243 (1st Cir. 2003)**, when it subjected a Puerto Rico notarization requirement to strict scrutiny because that restriction required every voter signature to be notarized in a state where only lawyers could be notaries. The Eastern District of Pennsylvania ruled similarly in ***Green Party of Pa. v. Aichele*, 89 F. Supp. 3d 723, 744-45 (E.D. Pa. 2015)**, when it determined that a Pennsylvania law requiring every signature page to be notarized caused a severe burden as applied to the named plaintiffs, as the cost to those plaintiffs to obtain notarizations made it nearly impossible for them to get on a ballot.

The issue, then, is whether the Illinois notarization requirement, coupled with the other Illinois ballot restrictions, imposed a severe burden on the Green Party, their candidates, and their supporters. The plaintiffs bear the initial burden to show a severe burden, ***Washington State Republican Party v. Washington State Grange*, 676 F.3d 784, 791 n.4 (9th Cir. 2012)**, and the evidence they've offered falls short of showing one here. The plaintiffs reference the hassle for circulators to get a number of signature sheets notarized, but most of the evidence they've offered on that point is rather non-specific,[2] and in any event that hassle has been reduced by a number of mitigating circumstances. For one, the Illinois notarization requirement permitted Tripp and Shephard to submit as many signatures on one sheet as they could fit and get that entire sheet notarized. Illinois didn't limit the number of signatures per page or require each signature to be notarized, and that reduces the burden a bit. Lessening the burden even further was the fact that both candidates' ran in districts with a city that had a free notary service, a common service in most communities around the United States and a method that Tripp and Shephard essentially concede was available to them and others like them (they "assume," for purposes of laying out the burden, that some notary services are "free"). Finally, the Green Party was able to throw notarization gatherings to assist circulators in getting sheets notarized, the Green Party Chairman was himself a notary, and other circulators could become notaries to ease things. The plaintiffs balk at that

[2] Smart insists that much of the plaintiffs' evidence offered to show a severe burden as to the notarization requirement and the other Illinois regulations is inadmissible, for the statements aren't based on personal knowledge, are inadmissible hearsay, or constitute unsupported conclusions. The Court needn't take those challenges up—assuming the plaintiffs' evidence is admissible, it still doesn't demonstrate a severe burden.

last option given the hassle and cost, but the time and expense to become a notary in Illinois is not extreme, as is the case for most states. ***See Perez-Guzman*, 346 F.3d at 240 ("In most jurisdictions, it is neither impractical nor burdensome for party members to become notaries so that they may verify the petitions that they circulate.").**

The plaintiffs compare the burdens here to the burdens that were viewed as severe in ***Perez-Guzman*, 346 F.3d at 238-40**, and ***Aichele*, 89 F. Supp. 3d at 744-45**, but those cases don't help the plaintiffs as much as they'd like. The Illinois notarization requirement pales in comparison to the one held to cause a severe burden in ***Perez*—** unlike ***Perez*,** there doesn't seem to be any major limitations on who can become a notary in Illinois, and Illinois doesn't require each signature on a sheet to be notarized in the signor's presence. The Pennsylvania requirement in ***Aichele*** is closer to the one at issue in this case, but that case involved a mandatory fee per notarization not present in Illinois, and the plaintiffs in ***Aichele*** offered proof that, considering the notary fee and other aspects of Pennsylvania's notarization process, the notarization requirement imposed such significant costs as to functionally exclude them from the ballot. As the Court said above, the evidence offered in this case doesn't show that the notarization requirement imposed that kind of burden, either on its own or taken in combination with Illinois' other regulations. The plaintiffs go so far as to imply as much in their briefing, conceding that the burden imposed by notarization "can be debated."

It's critical to remember that ballot regulations only impose severe burdens when they operate to freeze out reasonably diligent candidates—if other groups or individuals subject to similar burdens have been able to clear them, their success

suggests a lack of any significant hindrance. ***See, e.g., Stone*, 750 F.3d at 678 (fact that nine candidates satisfied the regulation was "powerful evidence" that the burden was "not severe"); *Lee*, 463 F.3d at 769 (evidence that "not a single independent" candidate qualified suggested that the burden was severe); *Rednour*, 108 F.3d at 775 (evidence that two third-party candidates cleared the requirement suggested that the requirements didn't "pose an insurmountable obstacle").** Under that lens, there's been no systemic freeze out in Illinois, for a number of individuals or parties faced with the same restrictions have been able to secure a place on their respective ballots. In 2012, Paula Bradshaw successfully petitioned to have her name placed on the ballot as a Green Party candidate for the 12th Congressional District of Illinois; the Green Party was unestablished at the time, and consistent with Illinois requirements, Bradshaw submitted 571 notarized sheets containing up to ten signatures per sheet. In the same year, John Hartman successfully petitioned to have his name placed on the ballot as an independent candidate for the 13th Congressional District of Illinois; independent candidates are similarly unestablished, and consistent with the Illinois statutes, Hartman submitted 821 notarized sheets containing up to ten nominating signatures per sheet. Finally, in 2014, the Libertarian Party submitted a nominating petition for state-wide offices as an unestablished party by gathering 2,348 notarized sheets with up to twenty nominating signatures on each sheet. These examples don't constitute proof indisputable that there is no severe burden here, but they are "powerful evidence" that the Illinois regulations impose no major hindrance, ***Stone*, 750 F.3d at 683**, especially given that Bradshaw and Hartman were from congressional districts with somewhat

similar characteristics as the 115th and 118th districts. This evidence, coupled with case law and the "common-sense" considerations laid out above, lead the Court to find that Illinois' election regulations impose no severe burden. ***See id.* at 684-85.**

Without a severe burden, a less exacting review typically applies. The Court says "typically" because a less rigorous look might be appropriate only when the burden is not severe ***and*** when the challenged restrictions are facially nondiscriminatory. ***See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (requirement that applied to "major and minor parties" alike was nondiscriminatory, despite the fact that it may, "in practice," favor established parties); *see also Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1329 n.8 (S.D. Fla. 2008) (collecting cases on the facial point).** The only restriction that is outwardly discriminatory here is the 5% signature requirement for unestablished parties, but that difference is not the kind of invidious treatment that would trigger heightened scrutiny. The differences between established parties and unestablished ones—and for that matter between parties and independent candidates—can justify treating the groups differently, so long as the differences in treatment make sense and the different systems don't impose a substantially greater hardship on one group versus the other. ***E.g.*, *White*, 415 U.S. at 781-83; *Jenness*, 403 U.S. at 441-42; *Libertarian Party of Washington v. Munro*, 31 F.3d 759, 765 (9th Cir. 1994).** Illinois' differing requirements for unestablished parties versus established ones clears those hurdles: candidates from established parties in Illinois need to submit fewer signatures to be eligible for the ballot but then are forced to go through a primary to whittle down the number of people who

will appear on the ballot, while unestablished parties need to submit more signatures to show that they have a modicum of support from the electorate but then don't need to deal with the hassle of a primary process. The difference in treatment is logical, and the requirements for unestablished parties aren't inherently more burdensome than the requirements imposed on established parties. ***See Jenness*, 403 U.S. at 441-42**,

Because Illinois' election regulations aren't invidiously discriminatory and don't impose severe burdens on the plaintiffs' rights, the challenged restrictions will be upheld as constitutional if they are "justified by relevant and legitimate state interests sufficiently weighty" to warrant the restrictions on the plaintiffs' rights. ***Crawford v. Marion Co. Election Bd.*, 553 U.S. 181, 190-91 (2008).** The 5% signature requirement, the 90-day time period to obtain signatures, and Illinois' redistricting decisions easily pass muster. Illinois argued in its briefing and at the summary judgment hearing that the 5% signature requirement and the 90-day period to collect those signatures together avoids overcrowding on the ballot by making sure that the ballot isn't filled to the brim with candidates who lack any real, recent support, and that the 90-day requirement is further justified by logistics needs related to the finalization of the ballot. These requirements have served legitimate goals in the past, they continue to do so here, and Illinois' interests are weighty enough to justify the non-severe limitations on the plaintiffs' ballot rights. ***See Rednour*, 108 F.3d at 774-75 (5% requirement justified by state's need to ensure popular support); *Stone*, 750 F.3d at 685 (12,500 signature requirement and 90-day period justified by ballot regulation concerns); *cf. Nader*, 385 F.3d at 735-36 (suggesting that a 90-day collection period was justified in considering the**

cumulative nature of Illinois' restrictions, despite the fact that the candidate didn't directly challenge that requirement). In addition, mapping districts by population obviously serves a legitimate goal—with some variance, states are required to do so by other constitutional provisions. ***Reynolds v. Sims*, 377 U.S. 533, 538 (1983).** Tripp and Shephard's main objection to any of these interests is that Illinois hasn't proven that its ballots have been crowded in the past so it doesn't need the 5% and 90-day requirement right now, but Illinois doesn't need to prove up that problem beforehand—it can regulate overcrowding before its ballots go to pot. ***E.g.*, *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986); *Navarro v. Neal*, 716 F.3d 425, 431-32 (7th Cir. 2013).**

Whether Illinois' notarization requirement is justified is a closer question—this Court and a few others have cast suspicious glances at these kinds of restrictions before. That said, the Court can't say that the requirement isn't backed up by a legitimate need. Smart insists that the notarization provision is designed to ferret out circulator fraud, and the cases bear out Illinois' problems on that front—Illinois has endured fraud by roundtabling, where a group of circulators sit around a table falsely signing petitions in the name of voters to submit to election authorities, ***In re Armentrout*, 457 N.E.2d 1262, 1264 (Ill. 1983)**, as well as other types of circulator fraud. ***E.g.*, *Canter v. Cook Co. Officers Electoral Bd.*, 523 N.E.2d 1299, 1302 (Ill. App. Ct. 1988); *Huskey v. Mun. Officers Electoral Bd.*, 509 N.E.2d 555, 557 (Ill. App. Ct. 1987); *Fortas v. Dixon*, 462 N.E.2d 615, 617 (Ill. App. Ct. 1984).** Per Smart, notarization helps to secure the "integrity" of the signature gathering process—it ensures that a circulator can be easily identified, questioned, and potentially prosecuted for perjury during the course of any

signature fraud investigation, a looming threat that separately helps to deter future fraud by circulators. ***See Knobeloch v. Electrical Bd. for City of Granite City*, 788 N.E.2d 130, 132 (Ill. App. Ct. 2003); *Dunham v. Naperville Tp. Officers Electoral Bd.*, 640 N.E.2d 314, 317 (Ill. App. Ct. 1994); *cf. Schwartz v. Kinney*, 50 N.E.3d 59, 63-65 (Ill. App. Ct. 2016); *Cunningham v. Schaeflein*, 969 N.E.2d 861, 876 (Ill. App. Ct. 2012).** The need to prosecute election fraud is a legitimate interest, ***Buckley*, 525 U.S. at 196**, and that interest can't be written off in Illinois given its robust history of election-related misconduct. ***E.g.*, *Griffin*, 385 F.3d at 1131; *Nader*, 385 F.3d at 734.**

Tripp and Shephard insist that the notarization requirement is unnecessary because lesser efforts could be used to get at the problem of signature fraud, but none of their proposed alternatives would capably allow for circulator prosecution. Lesser, non-notarized verifications could still be submitted by fake circulators: those verifications can be submitted under the Illinois Code of Civil Procedure without pain of an identification check, and thus provide less of a chance for law enforcement authorities to trace down the true origin of fraud. Binder checks by state staff, where they check signatures obtained by circulators to determine if the signatures were false, would help strike fake signatures from petitions but wouldn't help much with the prosecutorial end of things—if the circulator signs a fake name, it will be quite difficult for law enforcement to locate the circulator and ferret out the source of the fraud.

The best argument Tripp and Shephard have is that the prosecution problem could be remedied by allowing a circulator to submit a notarized verification for a group of his collected signature sheets, but even that method wouldn't protect

circulator fraud as well as a notarization on each signature sheet. Circulators in this case, as is seemingly typical for most collection efforts, collect signature pages independently and then submit them to the candidate—the pages are then pooled by coordinators for numbering and presentment to the state. A notarization on the last sheet in a group of sheets wouldn't safeguard fraudulent nomination petitions as effectively as a notarization on each sheet, for there would be no assurance that the sheets lacking a notarization were actually presented to a notary by that particular circulator, rather than inserted into another circulator's larger stack of sheets with a closing notarization after the fact. In other words, a grouped system would still leave a hole for errant signature sheets to be inserted into one circulator's set of sheets, allowing the circulator who obtained a notarization of his group of sheets to claim ignorance if law enforcement arrived to inquire about a specific page of signatures. A notarization on each page insures that the person responsible for that sheet can be questioned by authorities should any of the signatures on that page have questionable provenance.

To be sure, Tripp and Shepherd's argument about using a "grouped" method of notarization rather than per-page notarization might have more force if the burden imposed by Illinois' regulatory scheme was severe—in that case the Court would apply more exacting scrutiny, scrutiny that can often put the restrictions into jeopardy because the state is required to employ means that are carefully tailored to fit a compelling interest. ***E.g.*, *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000); *Hall v. Simcox*, 766 F.2d 1171, 1173 (7th Cir. 1985).** The restrictions here didn't cause a severe burden, though, so the Court undertakes a "less exacting review," one that turns largely

on reasonableness and justification. ***Crawford*, 553 U.S. at 191; *Timmons*, 520 U.S. at 358.** That isn't to say that reduced scrutiny has no teeth: if there is a lesser restriction that protects most of the state's interest than the state's decision to impose a far greater restriction could suggest a lack of reasonableness on the state's part. ***Hall*, 766 F.2d at 1173.** But this case doesn't involve the kind of far-afield restriction that would suggest that Illinois is behaving unreasonably in dealing with the problem of circulator fraud. A "grouped" notarization approach may help Illinois hone in lawbreakers, but it wouldn't do it nearly as well as a per-page notarization, especially given the method used by many candidates to pool signature sheets collected by circulators for presentment to the state. In all, the notarization restriction and the other Illinois restrictions targeted by the plaintiffs here are justified by the interests advanced by Illinois and those interests are weighty enough to warrant the resulting limitations on the plaintiffs' ballot access rights. So the plaintiffs' as applied challenges must fail.

Tripp, Shepherd, their party, and their supporters also raise an as applied equal protection challenge to Illinois' restrictions. The plaintiffs don't ably tease out this claim in their response to Smart's motion for summary judgment and don't make much effort to legally develop the claim throughout their briefing, especially the part of their claim dealing with Illinois' 2011 district mapping. That said, the Court will do its best to address the equal protection claim despite these defects. To the extent the plaintiffs are challenging the 5% signature requirement as discriminatory, the Court has already addressed the substance of that challenge—the different signature requirements for established parties and unestablished parties in Illinois are necessitated by the

distinctive characteristics of those groups. ***E.g.*, *Jenness*, 403 U.S. at 440; *Libertarian Party of Washington*, 31 F.3d at 765.** To the extent the plaintiffs claim that other neutral requirements—namely the 90-day collection period, the notarization requirement, and Illinois' decision to remap its districts in a way that split up some of the cities in the 115th and 118th districts—caused a disparate impact on them versus established parties because of their higher signature requirements, it's doubtful that a disparate impact challenge is viable without some proof of discriminatory intent, ***Washington v. Davis*, 426 U.S. 229, 248 (1976); *Crawford*, 533 U.S. at 207 (Scalia, J., concurring)**, and the plaintiffs haven't offered a developed argument on that front here.

Even if the plaintiffs' disparate burden claim might be viable without proof of discriminatory intent, the plaintiffs' claim still fails on the merits. The plaintiffs rely on the equal protection framework from ***Jenness v. Fortson*, 403 U.S. at 440**, and ***Williams v. Rhodes*, 393 U.S. at 30-31**, to back up a violation of the Fourteenth Amendment here, but those cases don't get them as far as they'd hope. ***Williams*** directs the Court to consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification, and ***Jenness*** says that if the system applied to one group is inherently more burdensome than the system applied to the other, there may be an equal protection problem if the difference makes no sense. For the reasons already laid out above, Illinois has advanced legitimate reasons for its system of regulations, and the burdens imposed by those regulations on the plaintiffs' rights don't rise to the level of severe. Once more, the differing burdens imposed on established parties versus unestablished ones are

justified by Illinois' interests, particularly its need to make sure that unestablished candidates have recent, popular support before adding them to the ballot, and the system imposed on unestablished parties isn't substantially more burdensome than the system imposed on established ones, especially given that established parties must deal with a primary. ***White*, 415 U.S. at 781-83; *Jenness*, 403 U.S. at 440-41.** Given all of these considerations, the plaintiffs' as applied equal protection challenge must be rejected.

As their final claims, the plaintiffs have raised facial challenges to Illinois' restrictions, claiming that they are invalid across the board under the First Amendment and the Fourteenth Amendment. In light of the Court's conclusions above, those challenges must also fail. In most contexts, a facial challenge can succeed only "where plaintiffs can establish that no set of circumstances exists under which [the restriction] would be valid," ***Fields v. Smith*, 653 F.3d 550, 557 (7th Cir. 2011)**, so the failure of an as applied challenge forecloses any facial attack. ***E.g.*, *Hightower v. City of Boston*, 693 F.3d 61, 82 (1st Cir. 2012); *Diaz v. Paterson*, 547 F.3d 88, 101 (2d Cir. 2008); *US Awami League, Inc. v. City of Chicago*, 110 F. Supp. 3d 887, 892 n.1 (N.D. Ill. 2015).** A facial challenge might still succeed despite the failure of an as applied challenge in the First Amendment context, but even then, the plaintiff would need to demonstrate that the statute is invalid in the majority of its applications. ***E.g.*, *New York v. Ferber*, 458 U.S. 747, 769-71 (1982); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 386-87 (5th Cir. 2013).** In that vein, if the plaintiffs fail to "describe the instances of arguable overbreadth of the contested law," the Court is not required to employ the "strong medicine" of a facial overbreadth analysis. ***Washington State Grange v. Washington State Republican***

***Party*, 552 U.S. 442, 450 (2008).** Here, the plaintiffs say nothing in response to Smart's motion for summary judgment as to how the Illinois regulations are unconstitutional when applied to other circumstances, so their First Amendment facial challenge is bunk.

That covers all of the plaintiffs' constitutional claims in this case, and because they all lack merit, the defendants' motion for summary judgment must be granted and the plaintiffs' motion for summary judgment must be denied. One closing note is in order concerning a briefing directive the Court issued prior to the July 2015 summary judgment hearing in this case. Throughout Smart's summary judgment briefing, Smart hinted that Tripp and Shepherd's purported failure to use the entire 90-day signature collection period meant that their claims must fail—according to Smart, the candidates' lack of diligence caused their omission from the ballot, and not any onerous restriction imposed by the State of Illinois. Given that argument, the Court directed the parties to address the res judicata or collateral estoppel effect of any ruling by the Court that relied on the candidates' diligence (or lack thereof). The parties have taken different positions on that point, but the Court needn't resolve the issue, as the Court has not relied on the diligence point to decide this case. To be sure, diligence has considerable relevance in the preliminary injunction context, where more flexible equitable considerations are at play, and some relevance in assessing whether the burdens imposed by a state reached the level of severe, but it has no real bearing on the causation front. ***Perez-Guzman*, 346 F.3d at 242-43.** If there are other preclusion issues that crop up in future cases based on the Court's ruling, they will have to be addressed by the tribunals facing them at that time—the Court expresses no opinion on them now.

Disposition

For the reasons stated above, the defendants' motion for summary judgment (Doc. 48) is **GRANTED**, and the plaintiffs' motion for summary judgment (Doc. 50) is **DENIED**. This ruling disposes of all of the claims in this case, so the **CLERK** is **DIRECTED** to enter judgment in favor of defendants and against plaintiffs.

IT IS SO ORDERED.

DATED: August 17, 2016

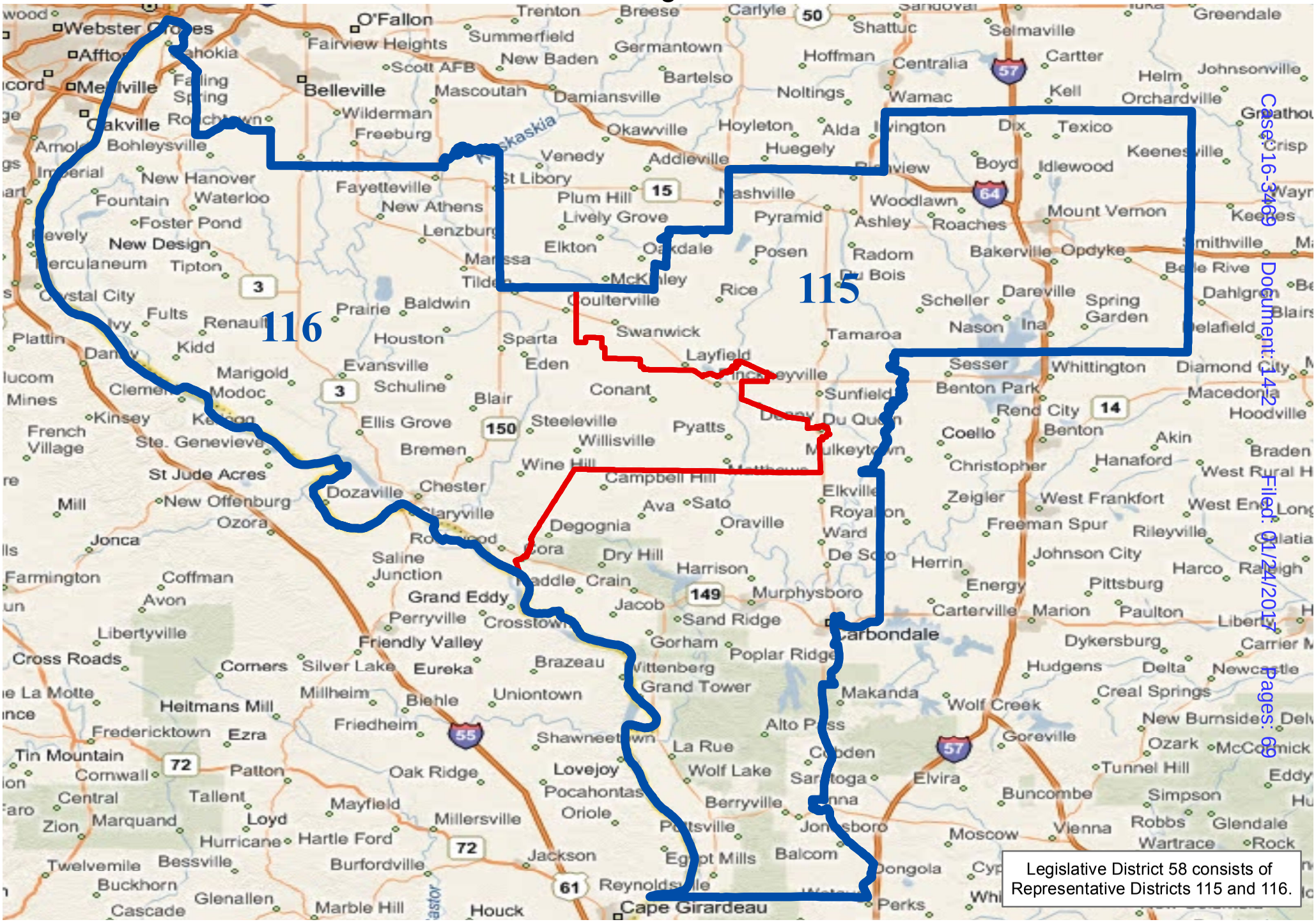
/s/ **Michael J. Reagan**
Chief Judge Michael J. Reagan
United States District Court

APPENDIX C

Map of the 115th Legislative District after 2011 redistricting

[redacted]

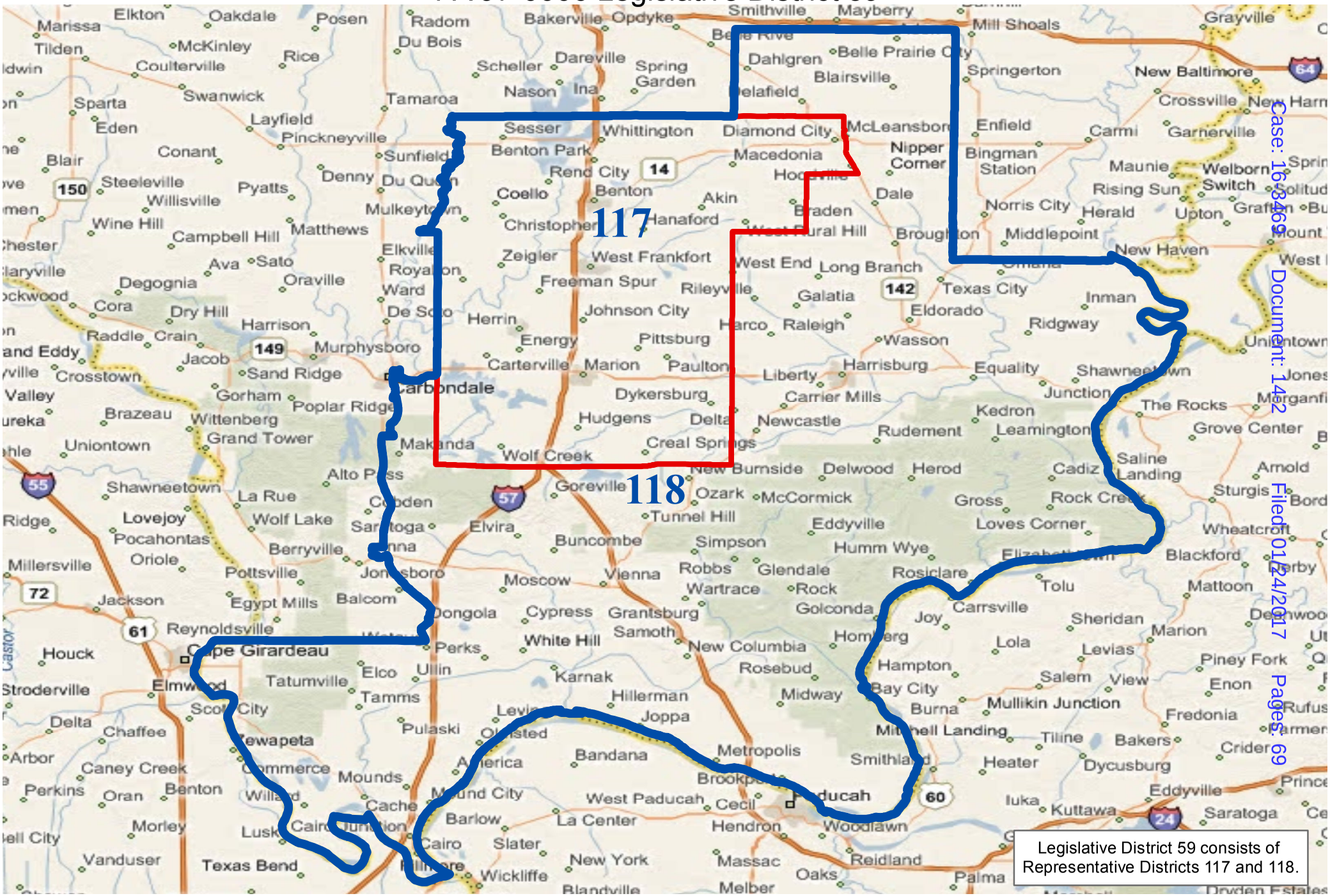
PA 97-0006 Legislative District 58



APPENDIX D

Map of the 118th Legislative District after 2011 redistricting

PA 97-0006 Legislative District 59



APPENDIX E

Statement of Compliance with Circuit Rule 30(d)

STATEMENT OF COMPLIANCE
WITH CIRCUIT RULE 30(d)

Pursuant to Circuit Rule 30(d), undersigned counsel states that all the materials required by parts (a) and (b) of Circuit Rule 30 are included in the Appendix to this brief.

s/ Vito A. Mastrangelo
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