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**NO. 16-3469**

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**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.**

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**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**

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**REPLY BRIEF OF PLAINTIFFS-APPELLANTS**

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## TABLE OF CONTENTS

STATEMENT OF THE CASE. ....	<a href="#"><u>1</u></a>
ARGUMENT.....	<a href="#"><u>1</u></a>
The Appropriate Standard for Challenges to Ballot Access Restrictions. ....	<a href="#"><u>1</u></a>
The 5% Minimum Signature Requirement. ....	<a href="#"><u>4</u></a>
The Notarization Requirement.....	<a href="#"><u>9</u></a>
Cumulative Impact.....	<a href="#"><u>15</u></a>
CONCLUSION. ....	<a href="#"><u>17</u></a>
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.....	<a href="#"><u>18</u></a>
CERTIFICATE OF FILING AND SERVICE.....	<a href="#"><u>19</u></a>

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>American Const'l Law Found., Inc. v. Meyer</i> , 120 F.3d 1092, 1099 (10th Cir. 1997).	10
<i>American Party of Texas v. White</i> , 415 U.S. 767, 787-88 (1974).	3, 10-12
<i>Anderson v. Celebrezze</i> , 460 U.S. 780, 788 (1983).	1, 2, 4, 8, 12
<i>Bergland v. Harris</i> , 767 F.2d 1551, 1553-54 (11th Cir.1985).	12
<i>Blackwell v. Libertarian Party of Ohio</i> , 462F.3d 579, 590 (2006).	17
<i>Buckley v. American Const'l Law Found., Inc.</i> , 525 U.S. 182, 192 (1999).	4, 5, 9, 10
<i>Burdick v. Takushi</i> , 504 U.S. 428, 438 (1992).	2, 4, 7, 8
<i>California Democratic Party v. Jones</i> , 530 U.S. 567, 584 (2000).	8
<i>Cartwright v. Barnes</i> , 304 F.3d 1138 (11th Cir. 2002).	12
<i>Constitution Party v. Cortes</i> , 824 F.3d 386 (3d Cir. 2016).	3
<i>Crawford v Marion County Electoral Bd.</i> , 553 U.S. 181, 223-24 (2008)	
(Scalia, J., concurring in the judgment, joined by Thomas and Alito, JJ.).	8
<i>Crawford v. Marion County Election Bd.</i> , 553 U.S. 181, 190-91 (2008).	4
<i>Eu v. San Francisco County Democratic Cent. Comm.</i> , 489 U.S. 214, 222 (1989).	2
<i>Green Party of Georgia v. Georgia</i> , 551 F. App'x 982, 984 (11th Cir. 2014).	13
<i>Green Party of Georgia v. Kemp</i> , No. 16-11689, 2017 WL 429257	
(11th Cir. 2017) (unpublished per curiam decision).	3
<i>Green Party of Georgia v. Kemp</i> , 171 F. Supp. 3d 1340 (N.D. Ga. 2016).	3, 4
<i>Green Party of Tenn. v. Hargett</i> , 791 F.3d 684 (6th Cir. 2015).	2, 3
<i>Green Party of Tenn. v. Hargett</i> , No. 16-6299 (6th Cir. May 11, 2017)	
(unpublished decision).	3
<i>Howlette v. City of Richmond, Va.</i> , 580 F.2d 704, 705 (4th Cir. 1978).	13
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971).	4, 5
<i>Kendall v. Balcerzak</i> , 650 F.3d 515, 525-26 (4th Cir. 2011).	13
<i>Libertarian Party of Ill. v. Rednour</i> , 108 F.3d 768, 773 (7th Cir. 1997).	4, 7

<i>Norman v. Reed</i> , 502, U.S. 279, 289 (1992). . . . .	<a href="#"><u>2</u></a>
<i>Stone v. Bd. of Election Comm'rs for the City of Chi.</i> , 750 F.3d 678, 681 (7th Cir. 2014). . . . .	<a href="#"><u>4</u></a> , <a href="#"><u>7</u></a>

## STATE STATUTES

10 ILCS 5/10-4. . . . .	<a href="#"><u>9</u></a> , <a href="#"><u>14</u></a>
5 ILCS 10/5-2. . . . .	<a href="#"><u>11</u></a>

## **SUPPLEMENTAL STATEMENT OF THE CASE**

The Plaintiffs hereby reply to several statements in the Defendants' brief, to clarify as follows.

From 2001 to 2010, the boundaries for the 115th and 118th State Representative Districts generally followed county lines. Based on election results in the 115th District, the Green Party was an established party in the 115th District after each election from 2002 through 2010. R411-12. However, with the 2011 redistricting, the State created boundary lines in the 115th and 118th Districts that divided counties *and* communities.

In the current 115th District, the State divided three of the largest five communities so that they were split between the 115th District and the 118th District. R440, 790; R51, 309. Most notably, the district boundary line now runs right through the middle of Carbondale, the District's largest city by far, population-wise (R790), which was also the home of the Green Party's previous gubernatorial and 115th District Representative candidates (R748, 695). Also, the State gerrymandered the home of the Green Party's 2010 candidate for the 115th District into a different district (R695, par. 3). And other, smaller communities were divided as well. R440, 522-23.

In the current 118th District, the State divided three of the seven largest population centers between two districts. R.443, 790, 46, 306-07. Contrary to a statement in the Defendants' Brief (at 6), the communities of McLeansboro and Anna were divided (R46, 307).

## **ARGUMENT**

### **The Appropriate Standard for Challenges to Ballot Access Restrictions**

Courts have found *some* clarity for the standard to evaluate a challenge to ballot access restrictions and often refer to the *Anderson/Burdick* test (*Anderson v. Celebrezze*,

460 U.S. 780, 788 (1983); *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). However, there is seeming disagreement about whether it should be called a two-part test, or a three-part test, or a two-tiered approach.<sup>1</sup>

Whatever it is called, if the burden on the plaintiffs’ constitutional rights is severe, the restrictions will be upheld only if they are “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434, quoting *Norman v. Reed*, 502, U.S. 279, 289 (1992); accord *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). The Plaintiffs have shown the severe impact of the State’s ballot access restrictions, on state legislative candidates in general and in the 115th and 118th Districts in particular, and have shown both that the restrictions are not narrowly drawn and that any of the State’s purported interests are not compelling.

Even if this Court should find that the burden on the Plaintiffs’ constitutional rights is not severe enough to trigger strict scrutiny and the Court balances the character and magnitude of the burden with the legitimacy and strength of the State’s precise interests (*Anderson*, 460 U.S. at 789), the Plaintiffs should still prevail on that balancing test.

The Defendants suggest that First and Fourteenth Amendment challenges to state ballot access restrictions “rarely succeed.” (Appellees’ Br. at 20.) However, the Plaintiffs can point to several recent Court of Appeals decisions holding that First and Fourteenth Amendment violations have occurred in ballot access cases.

The Plaintiffs note the recent Sixth Circuit opinion in *Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015) (*Green Party of Tenn. 2015*). In *Green Party of Tenn. 2015*,

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<sup>1</sup> The Plaintiffs in their opening brief stated that the strict scrutiny evaluation occurs *within* the balancing test. (Appellants’ Brief at 13.) The Defendants refer to the test as a “three-part balancing test.” (Appellee’s Brief at 22.)

the Sixth Circuit invalidated a Tennessee ballot retention statute, holding that the burden on the constitutional rights of the new party's candidates was severe, but 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. The Court found an equal protection violation because the state statute at issue "imposes a greater burden on minor parties without a sufficient rationale put forth by the state" and "impermissibly 'freezes the status quo' and does not allow 'a real and essentially equal opportunity for ballot qualification.' " *Id.* at 695, quoting *American Party of Tex. v. White*, 415 U.S. 767, 787-88 (1974).<sup>2</sup>

In *Constitution Party v. Cortes*, 824 F.3d 386 (3d Cir. 2016), the Third Circuit held that the state had violated the First and Fourteenth Amendments in the context of the financial burden on a new party candidate.

Also, the Defendants do not cite the litigation in *Green Party of Ga. v. Kemp*. On February 1, 2017, after the filing of the Plaintiffs' brief in this case but before the filing of the Defendants' brief, the Eleventh Circuit affirmed the judgment and reasoning of the District Court for the Northern District of Georgia in holding unconstitutional Georgia's 1% signature requirement for new party presidential candidates. *Green Party of Ga. v. Kemp*, No. 16-11689, 2017 WL 429257 (11th Cir. 2017) (unpublished per curiam decision); *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340 (N.D. Ga. 2016). While that case involves a state ballot for presidential candidates, not state representative, the overall analysis mirrors that which is applicable to this case. The Georgia courts held that

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<sup>2</sup> The Plaintiffs acknowledge that a different panel of the same Court of Appeals recently rejected other claims of the Green Party of Tennessee in the same litigation. *Green Party of Tenn. v. Hargett*, No. 16-6299 (6th Cir. May 11, 2017) (unpublished decision).

the burden on the Plaintiffs' rights there was so severe that strict scrutiny applied, and the Courts further held that even if strict scrutiny did not apply, the State's interest was not sufficiently important to warrant Georgia's restrictions. *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d at \_\_\_, slip op. at 41.

### **The 5% Minimum Signature Requirement**

The Defendants make much of previous decisions approving a 5% minimum signature requirement. (Appellants' Brief at 24, 32-37.) However, the Defendants' argument reads like a litmus test, which the courts have repeatedly disavowed. *E.g.*, *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190-91 (2008); *Buckley v. American Const'l Law Found., Inc.*, 525 U.S. 182, 192 (1999) (and cases cited therein); *Stone v. Bd. of Election Comm'rs for the City of Chi.*, 750 F.3d 678, 681 (7th Cir. 2014).

In addition, the cases cited by the Defendants in this section are distinguishable on significant grounds.

The Defendants' strong reliance on *Jenness v. Fortson*, 403 U.S. 431 (1971), is misplaced. Appellants' Brief at 32-34. First, *Jenness* was decided more than four decades ago, and well before *Anderson* (1983) and *Burdick* (1992). Also, *Jenness* discounts associational rights for ballot access. *Jenness*, 403 U.S. at 438 ("Any political organization, however, new or however small, is free to endorse any otherwise eligible person as its candidate for whatever public office it chooses").

Yet "a candidate serves as a rallying-point for like-minded citizens," *Anderson*, 403 U.S. at 787-88, and as the Defendants acknowledge in their Brief (at 21), the right to vote and the right to associate for political purposes are two fundamental constitutional rights, *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 773 (7th Cir. 1997).

Also, when the *Jenness* Court referred to “primary election obligations” and “primary election duties,” *Jenness*, 403 at 438, as if they were some terrible burden for established parties, it must not have had in mind Illinois’s electoral system for State Representative candidates at the time this lawsuit was filed, when nearly 90% of Primary Election elections were uncontested (Appellants’ Br. at 14-15) and an established party candidate needed less than one-third the showing of support than a new party candidate needed, *infra* at 6.

However, this much of what *Jenness* had to say is still true:

“The fact is that there are obvious differences in kind between the needs of a political party with historically established broad support, on the one hand, and a new or small political organization on the other . . . . Sometimes the grossest discrimination can lie in treating things that are different as thought they were exactly alike . . . .” *Jenness*, 403 U.S. at 441-42.

In *Buckley*, 525 U.S. at 191, the Court invalidated requirements imposed on ballot initiative circulators, not new party candidates, and the Court did not make the statement attributed to it in the Defendants’ Brief (at 21).

In the case *sub judice*, the record shows that the State’s ballot access restrictions for new party state legislative candidates—an on-every-page full notarization requirement, a minimum 5% signature requirement, and a 90-day collection period—have resulted in a dearth of legislative candidates statewide.

In 2014, on the 236 Primary Elections ballots for State Representative, 75 had no candidate and 131 had only one candidate, for a total of 206 no-choice elections (87.3%).<sup>3</sup> For the 2014 General Election, 70 of the 118 ballots for State Representative had only one

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<sup>3</sup> The District Court took judicial notice of the results of recent Illinois elections (R272, 274): [www.elections.il.gov/Downloads/ElectionInformation/GetVoteTotals.aspx](http://www.elections.il.gov/Downloads/ElectionInformation/GetVoteTotals.aspx); now, 2014 Primary results can be viewed here: [www.elections.il.gov/ElectionResultsStateHouseFull.aspx?I-D=X3lcQfXu1Jg%3d](http://www.elections.il.gov/ElectionResultsStateHouseFull.aspx?I-D=X3lcQfXu1Jg%3d).

candidate (59.3%) and the other 48 had only 2.<sup>4</sup> No third-party candidates were on the State Representative General Election ballots in 2014.

Similarly in 2016, on the 236 Primary Election ballots for State Representative, 66 had no candidate and 144 had only one candidate, for a total of 210 no-choice elections (89%).<sup>5</sup> For the 2016 General Election, again 70 of the 118 ballots for State Representative had only one candidate (59.3%) and the other 48 had only 2.<sup>6</sup> No third-party candidates were on the State Representative General Election ballots in 2016.

In 2014, the two Plaintiff Green Party candidates each submitted about 3.5 times more signatures for the General Election ballot, about 1,700 and about 1,800 (R823-1032; R1033-1238), than an established party candidate needs to submit to get on the Primary Election ballot (500, fixed by statute, 10 ILCS 5/8-8).

In short, for established parties, getting on the Primary Election ballot almost automatically leads to a place on the General Election ballot. From 2011 through 2017, Illinois has had 2 established parties statewide. Illinois has 118 State Representative Districts. Thus, for 2012, 2014, and 2016, the position of State Representative appeared on Primary Election ballots 708 times. In each of those first three Primary Elections after redistricting (2012, 2014, 2016), primary voters were faced with between 82.6% and 89.4% uncontested elections for State Representative. (Supra and Appellants' Brief at

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<sup>4</sup> 2014 General Election State Representative results are here:  
[www.elections.il.gov/ElectionResultsStateHouseFull.aspx?ID=GZWfi7zKeiU%3d](http://www.elections.il.gov/ElectionResultsStateHouseFull.aspx?ID=GZWfi7zKeiU%3d).

<sup>5</sup> 2016 Primary Election State Representative results are here:  
[www.elections.il.gov/ElectionResultsStateHouseFull.aspx?ID=%2fagBnKro9Cc%3d](http://www.elections.il.gov/ElectionResultsStateHouseFull.aspx?ID=%2fagBnKro9Cc%3d)

<sup>6</sup> 2016 General Election State Representative results are here:  
[www.elections.il.gov/ElectionResultsStateHouseFull.aspx?ID=6J91bqQM1V8%3d](http://www.elections.il.gov/ElectionResultsStateHouseFull.aspx?ID=6J91bqQM1V8%3d).

14-15.) In the corresponding General Elections, voters faced 60% (212/354) uncontested elections for State Representative. (Supra and Appellants's Brief at 14-15.)

In addition, specifically regarding the 115th and 118th Representative Districts, the 2011 legislative redistricting increased the ballot access qualification burden in those Districts, the geographic area that historically has included the heart of the Green Party's support (R412, 675, 695).

All this at a time when the overwhelming majority of voters choose not to participate in the Democratic or Republican primaries. At Illinois's March 2014 Primary Election, only 18% of registered voters chose to take a Democratic or Republican ballot, and that was the lowest voter turnout for an Illinois primary election since 1960. R245.

These facts, along with other facts in the record showing the lack of ballot overcrowding or ballot confusion and, instead, overly restrictive ballot access, distinguish this case from *Libertarian Party of Ill.* and *Stone*.

Even where the burdens on the Plaintiffs' constitutional rights are not "severe," the State's interests, to be upheld, must be important, and the regulations must be reasonable, nondiscriminatory, and politically neutral. *Burdick*, 504 U.S. at 438.

Yet the Defendants point to no instance of ballot overcrowding or ballot confusion to justify the 5% minimum signature requirement. The Plaintiffs have shown an unreasonably oppressive application of ballot restrictions on state legislative candidates and an unreasonable and discriminatory application of restrictions on the Green Party candidates and voters in the 115th and 118th Districts.

The Defendants have uttered the phrase "well-established interests" in their brief multiple times, but nowhere does it state them with clarity or precision, let alone explain

why a 5% minimum signature requirement for new party candidates is reasonable in light of the dearth of candidates for State Representative since the redistricting.

In this record there is no evidence of ballot overcrowding or voter confusion, recently or ever in Illinois, and the Plaintiffs have shown just the opposite: the State's ballot access restrictions are a severe burden on the ability of new party candidates to get on the ballot for State Representative and are depriving voters of choices. The State has not suggested that Illinois voters would be confused by more than one or two candidates on the ballot, and rightfully so.

Justice Scalia has explained that the State's interests cannot be evaluated in the abstract:

"Because the lead opinion finds only 'limited' burdens on the right to vote, see ante, at 1620, it avoids a hard look at the State's claimed interests. See ante, at 1616 – 1620. But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment of 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' [and] 'the extent to which those interests make it necessary to burden the plaintiff's rights.' " *Burdick*, 504 U.S., at 434, 112 S. Ct. 2059 (quoting *Anderson*, 460 U.S., at 789, 103 S. Ct. 1564).

As this quotation from *Burdick* indicates, the interests claimed to justify the regulatory scheme are subject to discount in two distinct ways. First, the generalities raised by the State have to be shaved down to the precise aspect[s] of claimed interests addressed by the law at issue." *California Democratic Party v. Jones*, 530 U.S. 567, 584(2000) (emphasis deleted); see *ibid.* (scrutiny of state interests "is not to be made in the abstract, by asking whether [the interests] are highly significant values; but rather by asking whether the aspect of [those interests] addressed by the law at issue is highly significant" (emphasis in original)). And even if the State can show particularized interests addressed by the law, those interests are subject to further discount depending on "the extent to which [they] make it necessary to burden the plaintiff's rights." *Burdick*, *supra*, at 434, 112 S.Ct. 2059 (internal quotation marks omitted)." *Crawford v Marion County Electoral Bd.*, 553 U.S. 181, 223-24 (2008) (Scalia, J., concurring in the judgment, joined by Thomas and Alito, JJ.).

The Defendants in this case have made no showing to support a conclusion that the State has an interest that can withstand either strict scrutiny or a test of reasonableness and nondiscrimination.

### **The Notarization Requirement**

In their opening brief, the plaintiffs made clear that, while the notarization requirement found at § 10-4, 10 ILCS 5/10-4, imposes a substantial barrier upon minority-party candidates and does not materially support the state's interest in avoiding ballot confusion and overcrowding (Appellants' Br. at 19-26), this barrier, of itself, does not rise to the level of being unconstitutional. Rather, it is the totality or combined impact of several such burdens, the notarization requirement included, that renders the overall ballot (lack of) access regime in Illinois unconstitutional. (Appellants' Br. at 26.)

In response, the Defendants cite to cases in which the overall ballot access scheme being challenged was far less onerous than what plaintiffs and others similarly situated confront in Illinois. (Appellees' Br. at 26-28.) Each case is also inapposite in other respects. We will address the cases in the order in which they appear in the Defendants' brief.

In *Buckley v. American Const'l Law Found., Inc.*, 525 U.S. 182 (1999), the petitioners challenged a requirement that circulators attach an affidavit to each petition containing, inter alia, the circulator's name and address and a statement that "he or she has read and understands the laws governing the circulation of petitions." *Id.* at 188-89. However, this was one of six different provisions challenged by the petitioners, *id.*, and there is no indication in the opinion that they had requested the court to consider the *combined* impact of the various provisions challenged. To the contrary, the Supreme Court's summation of the proceedings in the courts below shows that each of the courts reviewing

Colorado's laws governing its referendum or ballot initiative process ruled on each of the challenged provisions separately. *Id.* at 190-91.

The affidavit (and thus notarization) requirement at issue in *Buckley* was not challenged, as here, on the ground that circulators may not be able to locate and engage a notary willing and able to attest to each petition at the same time and locale in which the circulator is able to look for one, and that this poses a substantial burden on circulators. Rather, it was challenged on the ground that it "significantly burdens political expression by decreasing the pool of available *circulators*." *American Const'l Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1099 (10th Cir. 1997) (emphasis added). The contention that the affidavit requirement somehow prevented potential circulators from circulating petitions *altogether* is farfetched on its face, making it unsurprising that it did not survive review.

Most importantly, the overall scheme at issue in *Buckley* was less burdensome than that faced by the plaintiffs in the case *sub judice*. Circulators seeking to get an initiative on the ballot in Colorado had to meet a similar threshold of 5 % of the vote cast in the previous election (specifically, the vote cast for secretary of state), Colo. Const. Art. V, § 1 (1998) – but they literally had twice as much time to meet their goal, a period of six months. *Buckley*, 522 U.S. at 188, citing Colo. Rev. Stat. Ann. § 1-40-108 (1998). The additional burdens posed by geography, population density, and redistricting in the case at bar also were not present in *Buckley*.

In *American Party of Tex. v. White*, 415 U.S. 767 (1974), the plaintiffs challenged a tripartite ballot-access scheme in which, *inter alia*, "[c]andidates of parties whose candidate polled . . . more than 2% of the total vote cast for governor in the last general election may be nominated and thereby qualify for the general election ballot by primary election or nominating conventions" – the equivalent of "established party" status in

Illinois. *White*, 415 U.S. at 773, citing Tex. Election Code, Art. 13.45(1) (Supp.1973).

Had Illinois had a similar threshold in place for established party status instead of the 5% required under § 10-2, 5 ILCS 10/5-2, then plaintiff Illinois Green Party would not have lost its statewide established party status in 2010 (R44), and plaintiffs, in all likelihood, would not now be before this Court.

For parties that did not satisfy this established party threshold, the Texas scheme required that party to “evidence support by persons numbering at least 1% of the total vote cast for governor at the last preceding general election.” *American Party of Tex.*, 415 U.S. at 777. It did not have to rely on petitioning alone but had two methods available to satisfy the 1% signature requirement: by showing the requisite support from voters registering support at precinct nominating conventions, held the same day as the major parties’ primary, and/or by supplemental petitions to be signed within approximately 55 days thereafter. *Id.* at 777-78. Thus, while the petition-gathering period at issue in *American Party of Texas* was about 39% shorter than in Illinois, new or minority parties could appeal to voters to meet most or all of the goal at state-recognized nominating conventions held throughout the state – and their overall show of support from voters was 80% *lower* than the current scheme in Illinois.

Unlike the plaintiffs in the instant matter, the plaintiffs in *American Party of Texas* made “little or no effort to demonstrate [the] impracticability” of the notarization requirement at issue or show that it was “unusually burdensome,” and one of them “even conceded as much.” *Id.* at 787. The Defendants in the case at bar characterize the notarization requirement in Texas as “far more burdensome” than the current requirement in Illinois, because “all voters who signed a petition for an independent candidate also had to submit a notarized declaration that they had not participated in any political party’s

nominating process.” (Appellees’ Br. at 27, citing *American Party of Texas*, 415 U.S. at 787-88.) Leaving aside the puzzling and probably unintended reference to independent (as opposed to minority party) candidates, this is misleading, because under the Texas scheme, “[o]ne certificate of the officer administering the oath may be so made as to apply to all to whom it was administered.” *Id.* at 774 n. 6, quoting Tex. Election Code, Art. 13.45(2) (Supp.1973). No comparable provision exists in Illinois, where a notary must notarize every sheet. Thus – especially in instances where the minority or new party in Texas managed to obtain the majority of its show of support at the nominating conventions – the burden imposed by the notarization requirement would be substantially eased. *Id.*

The Defendants correctly note that in *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002), the Eleventh Circuit dismissed the plaintiff political party’s argument that a Georgia notarization requirement rendered that state’s ballot-access scheme unconstitutional, because it “places no restriction upon the ability of a voter to sign a petition.” (Appellees’ Br. at 27, citing *Cartwright*, 304 F.3d at 1141.) However, as the *Cartwright* court added shortly afterwards, the 5% requirement at issue in that case was not unduly burdensome, because “petition circulators have ample time to obtain signatures – about six months,” *id.*, once again upholding a scheme that allows twice as much time as does Illinois. Moreover, the Eleventh Circuit later distinguished *Cartwright*, not on the notarization requirement, but with respect to a broader point that applies here, warning that reviewing courts must avoid taking a “litmus-paper test” approach to ballot-access cases, and should recognize that prior decisions “do not foreclose the parties’ right to present the evidence necessary to undertake the balancing approach” outlined in *Anderson*, 460 U.S. at 789, and *Bergland v. Harris*, 767 F.2d 1551,

1553-54 (11th Cir.1985). *Green Party of Ga. v. Georgia*, 551 F. App'x 982, 984 (11th Cir. 2014).

The Defendants' citation to *Howlette v. City of Richmond, Virginia*, 580 F.2d 704, 705 (4th Cir. 1978) (per curiam), is entirely unedifying, as the Fourth Circuit summarily upheld a municipal referendum notarization requirement by relying wholly on the unpublished opinion of the district court. (Appellees' Br. at 27.) The Defendants then cite to *Kendall v. Balcerzak*, 650 F.3d 515, 525-26 (4th Cir. 2011), which explained the governmental interest served by the requirement in *Howlette* (including "the substantial preparation and expense of conducting a referendum," which is not implicated in the case at bar), but which still does not inform this Court about the correlative burdens that the City of Richmond imposed on its voters seeking to place a referendum on the ballot. Context matters. The burden imposed by an individual voter notarization requirement may not be that great if only 100 or a few hundred signatures are required for a citywide referendum, or if the time limits for obtaining them are lenient, but the Fourth Circuit may have taken a different view if Richmond required 10,000 signatures and only 90 days in which to obtain them. With no information on the overall scheme, neither *Howlette* nor *Kendall* provides any useful persuasive authority to this Court.

In their opening brief, plaintiffs reviewed *every single case* relied upon by the court below in support of its conclusion that the notarization requirement is needed to help deter or detect fraud (Doc. 81 at 18-19), exposing the reality that none of the eight cases cited demonstrated anything of the kind, that the fraud occurred despite the notarization requirement, and, indeed, in two cases, the notary had participated in fraudulent actions. (Appellants' Br. at 23-26.) From this, the Defendants want this Court to draw the conclusion that "Illinois may need more and stronger, not fewer or lighter, measures to

prevent circulator and voter fraud.” (Appellees’ Br. at 29.) However, that is not the lesson to be drawn from this body of case law. In each case, the fraudulent or unlawful activity *was* exposed – it simply wasn’t exposed as a consequence of the notarization requirement. The only debatable, partial exception was the notary in *Dunham v. Naperville Twp. Officers Electoral Bd.*, 265 Ill. App. 3d 719, 720-21 (2d Dist. 1994), who gave testimony regarding the fraud in which she herself had participated. Thus, the notary herself was either caught and confronted, or possibly came forward on her own from the weight of a guilty conscience, but she did not deter or prevent its occurrence.<sup>7</sup>

The balance of the Defendants’ response to plaintiffs’ notarization argument consists mainly of repeating the point that the notarization requirement did not restrict voters’ ability to sign petitions in the first instance, and other points already addressed herein or in the opening brief. (Appellees’ Br. at 29-31.) However, the plaintiffs never argued that the notarization requirement found at § 10-4 was burdensome because it somehow interfered with voters who wanted to sign petitions. They made abundantly clear that the burden falls on the *circulators*. (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 – all cited in Appellants’ Br. at 20.)

Not only the evidence but common sense and common experience supports the conclusion that the notarization requirement necessarily imposes a substantial burden on political parties and candidates seeking ballot access by its impact on circulators. The

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<sup>7</sup> The notary in *Cunningham v. Schaefflein*, 2012 IL App (1st) 120529, also “came clean” about her involvement in petitioning fraud, but only changed her story after two other witnesses had testified about her role. *Id.* at ¶ 11.

supply of notaries in a given jurisdiction is finite. The number of notaries whose status as a notary is known to the people in their communities is necessarily a smaller subset of that supply. The number of known notaries who are both willing and able to sign off on political party petitions in general, and (in this instance) the petitions of Illinois Green Party candidates in particular, or whose employers will permit them to provide such a service during business hours, is necessarily an even smaller subset. The availability of that smaller subset at any given time is going to be smaller still, and the number willing to do so without charging a fee is still smaller. The number available on weeknights or weekends – which may be the only time that a circulator who works for a living may be able to get to a notary – will be yet smaller. The number of hours that a circulator has to contact, locate, travel to, and submit his or her petitions to such a notary is also limited. Yet the circulator must be able to match that limited time with the corresponding subset of available notaries, and traverse the required distance, in order to get his or her petitions notarized.

Thus there is no gainsaying the fact that the notarization requirement imposes a substantial burden on circulators. One may debate the degree of substantiality, but the existence of the burden itself cannot reasonably be denied. Since this provision does little or nothing to advance the State’s interest in deterring or detecting fraudulent or unlawful petition-gathering, it, in combination with the other burdens identified by plaintiffs, contributes to an overall regime of unconstitutional dimension.

### **Cumulative Impact**

In their Brief’s Summary of Argument (Appellees’ Brief at 18), the Defendants make the erroneous claim that “any reasonably diligent candidate could have qualified [for the ballot], as similar candidates have demonstrated.” But the Defendants do not support that

conclusion with relevant facts—Congressional candidates are not “similar” to State Representative candidates.

The Defendants also fail to acknowledge the ease of ballot access for an established party candidate on a Primary Election ballot, especially an incumbent. (Appellees’ Brief at 18.) It is safe to say that the State’s requirement of 500 petition signatures can be gathered quite easily from known supporters of the party who voted in the previous primary,<sup>8</sup> and even more easily when the candidate is an incumbent. The names, addresses, and voting history for these supporters are provided. Contrast that with a new party candidate, who does not have the same source of information about supporters and who must get signatures on a petition that requires the signer to join in the formation of a new party. Courts must recognize that new party candidates are at a distinct disadvantage in the quest for ballot access.

The Plaintiffs have shown the severity of the State’s ballot access restrictions, on state legislative candidates in general and in the 115th and 118th Districts in particular, and have shown both that the restrictions are not narrowly drawn (the 5% requirement, the notarization requirement, the 90-day window, and the splitting of communities by district boundaries), and that the State’s purported interests are not compelling (no evidence of the need to protect against ballot overcrowding or ballot confusion).

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<sup>8</sup> In the 2012 Primary, in the 115th District, 8,459 voters took a Republican ballot (no Democratic primary), while in the 118th District, 6,342 voters took a Democratic ballot (no Republican primary).  
[www.elections.il.gov/ElectionResultsStateHouseSet5.aspx?ID=X9dp9I75JOY%3d](http://www.elections.il.gov/ElectionResultsStateHouseSet5.aspx?ID=X9dp9I75JOY%3d)

In particular, the Plaintiffs note the absence of any evidence at all to show the need to protect against ballot overcrowding or ballot confusion in Illinois's State Representative Districts, or anywhere else for that matter.

The cumulative burden imposed by the state's ballot access restrictions on new party candidates for state representative in Illinois are more an effort to preserve the status quo and keep new party candidates off the ballot. The impact is even more acute in the 115th and 118th State Representative Districts.

As stated in *Blackwell v. Libertarian Party of Ohio*, 462F.3d 579, 590 (2006):

“Put simply, the restrictions at issue in this case serve to prevent a minor political party from engaging in the most fundamental of political activities—recruiting supporters, selecting a candidate, and placing that candidate on the general election ballot in hopes of winning votes and ultimately, the right to govern.”

## 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,

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