No. ______

In the Supreme Court of the United States

TABITHA TRIPP, *et al.*,
Petitioners,

v.

CHARLES W. SCHOLZ, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the cumulative effect of the State's ballot access scheme—a 5%-minimum signature requirement for new party State Representative candidates, a short 90-day window, with double-petitioning, in a large rural district with population centers split by gerrymandering, and with an every-sheet notarization requirement—is an unconstitutional burden on ballot access, in light of the evidence of the lack of contested elections for State Representative, statewide and specifically in Illinois's 115th and 118th Representative Districts, and in light of the complete absence of evidence or analysis showing any risk of ballot overcrowding?

Is the Seventh Circuit's position—that the State's speculative concern for ballot overcrowding is sufficient to outweigh the burdens of the ballot access obstacles demonstrated by Petitioners—in conflict with the positions of five Justices in *Crawford v. Marion County Election Bd.* and in conflict with the Eleventh Circuit?

Whether the Petitioners' significant evidence of partisan gerrymandering is entitled to some weight when a court reviews a challenge to a state's ballot access laws and conducts a balancing analysis, even though the Petitioners did not directly challenge the redistricted electoral map?

PARTIES TO THE PROCEEDING

The parties are the same as they were in the Seventh Circuit. Petitioners are Tabitha Tripp, Gary Shepherd, Charlie Howe, Felicia Vero, Holly Vero, Renee Cook, Candace A. Davis, and Illinois Green Party, a voluntary association of individuals. Respondents are Charles Scholz, as Chairman of the Illinois State Board Of Elections ("ISBE") and Member of the State Officers Electoral Board ("SOEB"); Ernest L. Gowen, as Vice-Chairman of ISBE and Member of SOEB; Betty J. Coffrin, Cassandra B. Watson, William M. McGuffage, John R. Keith, Andrew K. Carruthers, and William J. Cadigan, as Members of ISBE and SOEB; and Steven S. Sandvoss, as Executive Director of ISBE.

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OPINIONS BELOW

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BASIS FOR THIS COURT'S JURISDICTION

The Judgment of the Seventh Circuit was entered on October 6, 2017. App. 1. The Seventh Circuit's Order denying rehearing was entered on November 9, 2017. App. 61-62. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution, reproduced in Appendix D.

Sections 8-8, 10-2, and 10-4 of the Illinois Election Code, 10 ILCS 8-8, 10-2, 10-4, reproduced in Appendix D.

STATEMENT OF THE CASE

Petition For A Writ Of Certiorari

The Petitioners are two Green Party candidates for State Representative, five of their supporters, and the Illinois Green Party, which state law defines to be a new party under the circumstances involved in this case.

In 2014, Respondent election officials rejected the nomination papers of the two Green Party candidates for Illinois State Representative in the 115th and 118th

State Representative Districts, on the ground that each candidate had failed to file the minimum number of petition signatures required by statute.

On the Petitioners' constitutional challenges to the State's ballot access laws, the District Court denied the Petitioners' motion for summary judgment and granted summary judgment in favor of Respondent election officials, keeping the Green Party candidates off the 2014 ballot for State Representative. The Seventh Circuit affirmed the District Court.

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the Seventh Circuit.

Facts of the Case

In 2014, Petitioners Tabitha Tripp and Gary Shepherd ("Green Party candidates") sought to appear on the November 2014 General Election ballot as the Green Party's 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") considered the Green Party a "new" party in those districts under Illinois election law. Section 10-4 of the Illinois Election Code requires that all signatures on a new party 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, Petitioner Tripp filed nomination papers with about 1,700 petition signatures, while

Petitioner 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 new party candidates, Petitioner Tripp was required to file 2,399 petition signatures and Petitioner Shepherd was required to file 2,407 petition signatures, and the ISBE rejected the Green Party candidates' nominating papers.

For State Representative candidates of established parties, the minimum-signature requirement is 500 signatures. For the 2014 Primary in the 118th District, those 500 signatures represented 1.36% of the number of votes cast (1.04% of voters) in the 2012 General Election for that office. For the 2014 Primary in the 115th District, the 500 signatures 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. 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.

The 118th District stretches from Illinois's southernmost counties to the northern county line of Hamilton County. For Petitioner Tripp to travel her district by road from her home in Anna to McLeansboro, the county seat for 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 Petitioner 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) and Harrisburg (2010 Census population: 9,017). Of the seven largest population centers in the 118th District, three of them were divided by the Illinois General Assembly's 2011 redistricting so that a part of each of them lies outside the 118th District.

The largest communities at least partly within the 115th District are Carbondale, Mt. Vernon (2010 Census: 15,277), Murphysboro (2010 Census population: 7,970), and Du Quoin (2010 Census population: 6,109). 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.

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 are now under the current district boundaries. Prior to the 2011 redistricting (Pub. Act 97-6), for example, Carbondale was entirely within the 115th District.

Not coincidentally, 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 and every Primary Election ballot from 2004 through 2010. In 2010, the last election before redistricting, the Green Party candidate for the 115th District—Petitioner Charlie Howe—received 25.57% of the vote in the General Election. Before the 2011 redistricting, Petitioner Howe's residence in Carbondale was in the 115th District; after the 2011 redistricting, Petitioner 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, Rich Whitney, 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.

Notarizing petition sheets is an extra step in preparing nominating papers, requiring additional time and effort. It costs money to become a notary in Illinois—one Green Party member paid $75 to $80 to obtain a commission.

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. 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. But pursuant to section 1-109 of the Illinois Code of Civil Procedure, 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.

After the ISBE disqualified Petitioner 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 Petitioner 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, in part reflecting the presence of a Green Party candidate in four of those elections.

Statewide in 2014, General Elections took place for each of the 118 State Representative seats. Of those 118 races, 75 of them (63.6%) 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 (March 25 to June 23), when the weather was harsher.

Procedural History

On August 13, 2014, Petitioners filed this lawsuit claiming that Illinois election law violates their rights under 42 U.S.C. §§ 1983 and 1988 and 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 Judgment and its Memorandum and Opinion, ruling against Petitioners on their Amended Complaint, by granting Respondents' Motion for Summary Judgment and denying Petitioners' Motion for Summary Judgment. App. 32-60.

Petitioners appealed to the Seventh Circuit, and on October 6, 2017, that Court issued its Opinion affirming the District Court. App. 1-31. Petitioners'

Petition for Rehearing and Rehearing En Banc was denied on November 9, 2017, and the Court's judgment was entered the same day. App. 61-62.

Basis for Initial Jurisdiction

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 Petitioners' Amended Complaint alleges violations of 42 U.S.C. §§ 1983 and 1988 and the First and Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING A WRIT

I. THE CUMULATIVE EFFECT OF ILLINOIS'S BALLOT ACCESS LAWS IS AN UNCONSTITUTIONAL BURDEN ON PETITIONERS' RIGHTS, WHERE THE 5% SIGNATURE REQUIREMENT IS NOT SUPPORTED BY A WEIGHTY STATE INTEREST, AND IN LIGHT OF THE 2011 GERRYMANDERED DISTRICTS AND THE OTHER RESTRICTIONS ON BALLOT ACCESS

In Illinois, for many years running, there has been a dearth of candidates, with nearly all the majority of Primary Elections uncontested and almost every General Election being uncontested or merely between the two established parties. Since the 2011 redistricting, in the 2012, 2014, and 2016 Primary Elections for State Representative, 82.6%, 87.3%, and 89.4% of the races had no candidate or only one candidate on the ballot. In the 2012, 2104, and 2016 General Elections for State Representative, 58.5%, 63.6%, and 59.3% were uncontested. In only 1 of those

354 elections did more than two candidates appear on the ballot--in other words, the ballot was limited to one or both of the two established parties in 99.7% of the elections. The lack of voter choice exists for the two districts at issue here, as well, as set out supra.

The disqualification of Petitioner Tripp from the 2014 General Election for 118th State Representative meant that only one name 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 Petitioner 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 had appeared on the ballot in 2012. That race averaged only 2.5 candidates for the elections from 1998 through 2014.

This electoral history exemplifies the impact of Illinois's severe, overzealous, overly burdensome restrictions and barriers to new parties and their candidates getting on the ballot.

When this evidence is considered cumulatively with the evidence of the partisan gerrymandering of the 115th and 118th State Representative Districts and the 90-day signature-gathering window and the every-sheet notarization requirement, the State's ballot access scheme is unconstitutionally restrictive.

For the State to merely utter the phrase "ballot overcrowding" or "regulation of the election process" is not sufficient to justify these burdens on new parties; the mere speculative concern does not even amount to an interest "sufficiently weighty," *Timmons v. Twin*

Cities Area New Party, 520 U.S. 351, 364 (1997), to justify the restrictions, and the lower court's reliance on that interest in this case is contrary to Eleventh Circuit precedent and to the positions of five Justices in a 2008 decision of this Court.

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

A. The Constitutional Rights

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 this 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, regardless of their political persuasion, 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. As this Court has stated, "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"). 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 (minority parties are protected from unequal burdens that amount to invidious distinctions).

Regarding a candidate's right to be on the ballot, the Court has 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

Courts have consistently stated that it is improper to use any litmus-paper test for ballot access restrictions. Eg., *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Anderson*, 460 U.S. at 789; *Munro*, 479 U.S. at 193; *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Stone v. Bd. of Election Comm'rs*, 750 F.3d 678, 681 (7th Cir. 2014).

Instead, courts must engage in a balancing test—a flexible standard-–to weigh the rights of States to condition access to the ballot against the rights of citizens to form political parties that can vie for election, and 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).

In *Anderson* the 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).

Within the balancing test, "exacting" scrutiny is one standard that can apply. See *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988) (exacting scrutiny applied where petition circulators raised "a matter of societal concern," holding that petition circulation was protected "core political speech, " involving "both the expression of a desire for political change and a discussion of the merits of the proposed change").

There can be no doubt that adding a third or, especially, a second choice in an election for public office raises "a matter of societal concern," and that the effort to provide voters with more than one or two choices is, therefore, "core political speech" triggering "exacting scrutiny." The *Meyer* court characterized the First Amendment protection for that category of speech to be at its "zenith." *Meyer*, 486 U.S. at 425. See also *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (for a colorable First Amendment challenge, the rule of rationality "typically does not have the same controlling force").

This Court has acknowledged the chilling impact of a state's ballot access restrictions:

> "If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (internal citations omitted).

The State has failed to demonstrate that the weight of its governmental interests outweighs the burdens on Petitioners' constitutional rights.

Even in a case rejecting a constitutional challenge to ballot access laws, this Court warned that the State cannot be allowed to put up ballot access barriers to a degree that results in maintaining the status quo for the two major parties:

> "Consequently, the State may not act to maintain the 'status quo' by making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates." *Clements v. Fashing*, 457 U.S. 957, 964-65 (1982) (lead opinion).

Furthermore, this Court has recognized that new parties should not be assumed to have the same resources and abilities as established parties:

> "The fact is that there are obvious differences in kind between the needs and potentials 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 though they

> were exactly alike, a truism well illustrated in *Williams v. Rhodes*." *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971).

Thus, having an exactly alike 90-day signature collection period for "new" and established parties operates to the great detriment of the "new" party. Drawing district boundaries through communities will impact new parties to a greater degree than established parties. Requiring notarizations on every sheet will impact a new party candidate to a greater degree than an established party candidate. And the voter who clamors for more choices is the victim.

In their decisions, the lower courts here 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 as an established party and does not have the same name recognition.

Regarding Petitioners' equal protection claim, the lower courts also did not acknowledge the very recent case of *Green Party of Tennessee v. Hargett*, 791 F.3d 684 (6th Cir. 2015), which, like here, 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 Sixth Circuit 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.

As the Sixth Circuit noted in another case, new or minority parties are at a particular disadvantage 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: "In 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.

> "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. 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; see also *Anderson*, 460 U.S. at 787. '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." *Blackwell*, 462 F.3d at 588-89.

C. By relying heavily on the State's purported, speculative interest in avoiding ballot overcrowding, despite the lack of any historical or predictive evidence of overcrowding or confusion or any studies in support of it, the lower courts used a litmus test to decide the Petitioner's challenge to Illinois's 5% requirement and other ballot access laws, and their position is also in conflict with the majority of the Justices in *Crawford* and with Sixth Circuit precedent.

In this case, neither of the lower courts made any specific finding that the 5% minimum was necessary or even helpful to prevent ballot overcrowding. There is also a lack of support for the conclusion that 5% represents the threshold for a showing of a "modicum of support."

The Seventh Circuit stated, "The Supreme Court, however, has 'never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access,' " quoting *Munro*, 479 U.S. at 194-95, and it relied on its own decision in *Navarro v. Neal*, 716 F.3d 425, 432 (7th Cir. 2004), "[T]he mere 'speculative concern that altering the challenged signature requirement would lead to a large number of frivolous candidates qualifying for the ballot and, consequently, voter confusion is sufficient.' " App. 16.

But in this case the lower courts did not require anything from the State to support the stated speculative concern. More recent jurisprudence from this Court calls for more than a mere speculative concern.

In this Court's decision in *Crawford v. Marion Co. Election Bd.*, 553 U.S. 181 (2008), five Justices stated that *support* is required for a State's interest to be entitled to significant weight.

In *Crawford*, Justice Scalia stated in a concurring opinion, joined by Justices Thomas and Alito, as follows:

> "But the ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it (certainly when the law is one of the most restrictive of its kind, see n. 26, supra), and on this record it would be unreasonable to accord this assumed state interest more than very modest significance.
>
> * * *
>
> It should go without saying that none of this is to deny States' legitimate interest in safeguarding public confidence. The Court has, for example, recognized that fighting perceptions of political corruption stemming from large political contributions is a legitimate and substantial state interest, underlying not only campaign finance laws, but bribery and antigratuity statutes as well. *But the force of the interest depends on the facts (or plausibility of the assumptions) said to justify invoking it.*"

> *Crawford*, 553 U.S. at 230, 235 (Scalia, concurring) (citations omitted) (emphasis added).

In *Crawford*, Justice Souter's dissenting opinion was joined by Justice Ginsburg and stated as follows:

> "The statute is unconstitutional under the balancing standard of *Burdick v. Takushi*, 504 U.S. 428 (1992): a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, see ante, at 1616 – 1620, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed." *Crawford*, 553 U.S. at 209 (Souter, dissenting).

That makes five of the nine Justices in *Crawford*---a majority---who took the position that something more than a mere speculative concern is necessary in order to give significant weight to a purported State's interest.

In addition, the Seventh Circuit's position on this point is in conflict with the Eleventh Circuit. The Eleventh Circuit has held that the State must produce evidence of both the interests it asserts and the burdens it imposes. *Fulani v. Krivanek*, 973 F.2d 1539, 1546 (11th Cir. 1992) ("The problem is that the state has plucked these interests from other cases without attempting to explain how they justify the discriminatory classification here at issue); accord *Hall v. Merrill*, 212 F. Supp. 3d 1148 (D. Ala. 2016); see *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985) (the analyzing court should weigh the precise

interests advanced by the State as justifications for the burdens imposed by its rules, and "[i]n doing so, the court may analyze the past experience of minor party and independent candidates in Georgia as an indication of the burden imposed on those who seek ballot access").

If, then, simply uttering "avoid ballot overcrowding" could be sufficient, without any historical or predictive evidence of voter confusion or ballot overcrowding, and in the face of strong evidence of the opposite of ballot overcrowding, then all other factors in the balancing test are irrelevant, and to accept the State's utterance of the words as the decisive factor is to use a litmus test, not a balancing test.

That would also be contrary to other First Amendment precedents:

> "Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force. This Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.' *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (citations omitted).

In another freedom of speech decision, Justice Kennedy wrote:

> "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than

> simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting Sys., Inc. v F.C.C.*, 512 U.S. 622, 664 (1994) (lead opinion).

In this case, even in the face of the Petitioner's evidence of a dearth of State Representative candidates, with the resulting lack of diversity in political speech, the State did not proffer a single piece of evidence or any studies or statistics, or even offer an underlying assumption, to explain or justify its stated concern with ballot overcrowding in State Representative elections.

To be clear, Petitioners do not contest the principle that the State has an interest in regulating elections. But in order to comply with the *Anderson/Burdick* test, the courts must weigh that interest and determine the necessity for imposing the ballot access restrictions at issue. Without the presentation of evidence or underlying assumptions or explanations to support the claimed need to avoid voter confusion or to protect against ballot overcrowding, the weight to be given to the State's interest must be minimal, if it moves the scales at all, and it is thus insufficient to outweigh the burdens placed on Petitioners.

II. WHERE THERE IS NO HISTORICAL OR PREDICTIVE EVIDENCE OF BALLOT OVERCROWDING OR CONFUSION, AND INSTEAD MORE THAN 60% OF STATE REPRESENTATIVE GENERAL ELECTION RACES ARE UNCONTESTED, AND IN LIGHT OF THE 2011 GERRYMANDERING OF THE DISTRICTS AND THE OTHER RESTRICTIONS ON BALLOT ACCESS, THE 5%-MINIMUM SIGNATURE REQUIREMENT IS AN UNCONSTITUTIONALLY SEVERE BURDEN

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 also significant evidence of a dearth of candidates.

The 5%-minimum signature requirement is a unconstitutionally severe burden on new party candidates' ability to access the ballot for multiple reasons.

A. The 5%-minimum signature requirement is not a reasonable test for a showing of a modicum of support for a candidate in Illinois, where there has been no showing that Illinois State Representative elections have a history of, or are at risk of, ballot clutter or overcrowding, and, instead, statewide and 115th and 118th District elections since the 2011 redistricting show the opposite—a dearth of candidates.

Petitioners presented plenty of evidence to show a dearth of State Representative candidates since the 2011 redistricting—established, new party, and independent—statewide and specifically in the 115th and the 118th Districts, and for both Primary Elections and General Elections.

Yet to justify the ballot restrictions, Respondents did not present 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 the inference can and should be drawn that ballot restrictions are overly restrictive. Here, with respect to State Representative elections, the State's interest in avoiding ballot confusion or overcrowding cannot have much weight, if any.

Regarding Primary Elections, the two Petitioner candidates each submitted about 3.5 times more signatures (1,700 & 1,800) than an established party candidate needs to submit to get on the Primary Election ballot (500, fixed by statute---10 ILCS 5/8-8, App. 63). 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 Election is relatively rare for either of those parties.

In 2012, for 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. In 2016, in other words, 89.4% of the Primary Elections for State Representative had no candidate or only one candidate on the ballot (211 of 236).

Illinois General Elections statewide since 2011 have been similar. In 2012, 69 of 118 (58.5%) State Representative elections featured only one candidate; in 2014, 75 of the 118 (63.6%) were uncontested; and in 2016, 70 of 118 (59.3%) were uncontested. Over those three election cycles, 99.7% of the elections included only one or two candidates. Similarly in the 118th and 115th Districts, the number of candidates on the ballot for the five General Elections from 2006 to 2014 averages 1.5 candidates (118th) or 2.25 candidates (115th).

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 legislatively drawn boundaries, distinguish this case from other ballot access cases, like *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768 (7th Cir. 1997).

As the District Court acknowledged, established parties need "far less" than the 5% required for new parties. App. 35. It is no wonder, then, that ballot access for new parties and independents is virtually unknown in Illinois, especially at the State Representative level. Illinois has been recognized as among the worst of the states for the lack of State Representative candidates. Dan Vicuna et al., *Restoring Voter Choice: How Citizen-Led Redistricting Can End the Manipulation of Our Elections*, at 8, http://www.restoringvoterchoice.org/ (last visited January 30, 2018).

B. The 5%-minimum signature requirement is a severe burden on those seeking to run for State Representative in the 115th and 118th Districts where (i) an extraordinary number of population centers have been divided between two districts, (ii) where the districts were drawn in a partisan manner to discriminate against the Green Party, (iii) where the 115th and 118th are extraordinarily large geographically, compared to the statewide average, (iv) where the division of population centers caused confusion among registered voters in those areas, (v) where the legislature's division of population centers necessitated additional steps in the petition-gathering process to the detriment of the candidates, (vi) all during a 90-day window that started on March 25.

Petitioners have presented plenty of evidence showing how candidates in the 115th and 118th State Representative Districts, especially new party candidates, suffer severe ballot access burdens not shared by candidates in other districts. This case is at the summary judgment stage, so from the uncontroverted evidence presented, a reasonable inference can and should be drawn that this result was intended by the legislature when it redrew the district boundaries in 2011.

Regarding the 5%-minimum signature requirement, Petitioners are aware of no case that has addressed the

disparity and severe burden effected upon new party 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 District A, where all voters are within 3 square miles, as for District B, where the voters are spread out over 2,760 square miles (the 118th District) or 1,705 square miles (the 115th District) *and where half of the largest communities are divided by boundary lines*.

As a part of Petitioners' claim that the 2011 redistricting imposed a severe burden on Petitioners, and that the new boundaries discriminated against the Green Party in Southern Illinois, Petitioners proved that the new 115th and 118th boundaries divided communities unlike in any other districts. Petitioners' argument is that petitioning in a two-block area, which, for example, is the smallest of State Representative districts, is going to be much less time-consuming than petitioning in the 115th or 118th, even before the division of population centers.

The Seventh Circuit referenced the 26th State Representative District as a comparison. That district has a population density of 14,012 per square mile, compared to the 115th District's 60 people per square mile and the 118th District's 38 people per square mile. Clearly, it will be more of a burden to petition in a district with only 60 or 38 people per square mile, and the burden is severely compounded when so many of

the districts' largest population centers have been divided between districts.

The lower court decisions did not acknowledge Petitioners' evidence of the additional burdens placed on new party candidates for the 115th and 118th Representative Districts because of the way the boundaries were redrawn. The legislature is no stranger to the redistricting process, and the resulting 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.

Where, as in this case, the State tamps down the constitutional rights of voters and new parties and their candidates to such a degree that there exists the almost complete opposite of ballot overcrowding, only one conclusion is supported: the ballot access laws are overly restrictive and are not reasonable, and constitutional rights have been significantly infringed.

C. A 5%-minimum signature requirement is *not* a safe haven---it has been held to be unconstitutional by other courts, and under the circumstances in this case, it should be held to be unconstitutional here also.

In declaring that the signature-gathering requirement based on 5% of the number of voters who cast ballots in the last election is reasonable per se, the Seventh Circuit both mischaracterizes the Supreme Court's opinion in *Norman v. Reed*, 502 U.S. 279 (1992), and relies on a body of older case law that has since been called into question. The Seventh Circuit's Opinion states as follows:

> "[T]he 5% signature requirement, standing alone, does not impose a severe burden on plaintiffs' constitutional rights. On multiple occasions, the Supreme Court has upheld signature requirements equaling 5% of the eligible voting base." App. 12, citing *Norman*, 502 at 282 n.2, 295.

However, *Norman* did not involve Illinois's 5% requirement but instead the alternative 25,000-signature requirement, which was a requirement "of slightly more than 2% of suburban voters." *Norman*, 502 U.S. at 295.

In addition, both of the other cases cited in the Opinion on this point predate the Court's exposition of the balancing test in *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 438 (1992), and one of them predates this Court's

adoption of the "no litmus-paper test" principle, see *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The 5% requirement *cannot* be per se reasonable, because many courts have invalidated signature requirements of 5% or less. Eg., *Rockefeller v. Powers*, 78 F.3d 44 (2d Cir. 1996) (lesser of 5% of party voters or 1,250); *McLain v. Meier*, 637 F.2d 1139 (8th Cir. 1980) (3.3% of eligible signers); *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340 (N.D. Ga. 2016) (1% of registered voters), *aff'd*, No. 16-11689 ((February 1, 2017) (unpublished order); *Hall v. Merrill*, 212 F. Supp. 3d 1148 (M.D. Ala. 2016) (for special election, 3% of voters in previous gubernatorial election); *Libertarian Party v. State Election Bd.* (W.D. Okla. 1984) (5% of total votes cast, in "only a 90-day window").

There is an additional reason that the 5% requirement cannot be a safe haven or be used as a litmus test. In the 115th District in 2010, *prior* to redistricting, the Green Party demonstrated support from the voters in a number more than five times the 5% threshold, and *it is only the fact of redistricting that cost the party its established party status*. This fact also undermines the very premise underlying Illinois's ballot access scheme: that gathering a large number of petition signatures from registered voters is an accurate way of gauging the degree of support for a political party from the voting populace. The record demonstrates that there is a wide disparity between the degree of support for a party and its candidates in a given geographic area, based on the numbers who wish to cast a vote for that party, which is the core constitutional concern at issue, and the degree to which that same body of voters includes sufficient numbers of

people willing and able to gather an onerous number of petition signatures, either by soliciting them at a limited number of public gatherings where possible, or by soliciting their signatures door-to-door.

The Seventh Circuit also referenced evidence of (a) one Green Party state representative candidate's successful ballot access *before* the 2011 redistricting and (b) two Green Party candidates' access and one independent candidate's access in three federal *congressional* districts in 2012. App. 14.

But to rely on evidence of *pre-2011* Green Party ballot access for the conclusion that the state's ballot access laws are constitutionally acceptable misses the point of Petitioners' claims, the supporting evidence, and the inferences drawn from it: *the 2011 redistricting* negatively impacted the Green Party's ability to access the ballot, and from the evidence presented, the inference can and should be drawn that the negative impact was intentional on the part of the legislature.

Reliance on petitioning successes in *congressional* districts, especially in 2012, the year after redistricting, when the signature requirement is approximately one-half or one-third of the requirement in other years, is comparing apples and oranges.

The Seventh Circuit also relied on language from its *Rednour* decision, 108 F.3d at 776: " 'The established party has already jumped the hurdle of receiving 5% of the vote in the last general election.' " App. 14. But receiving 5% of the vote is virtually automatic when a candidate is the only candidate on the ballot or is one

of only two parties on the ballot, as is nearly always the case in Illinois.

D. The Notarization Requirement is a Burden for New Parties

The Seventh Circuit's Opinion assumed, in several places, that new party circulators should be filling out a complete page, and the Opinion adopted the State's argument that the sheets could be 20 lines per page. The Opinion does not acknowledge that circulators cannot be expected to fill each page to completion before turning them in, or that some of the 34 or 31 circulators referred to did not turn in a full page of signatures. The omission skews the math.

The Opinion states that Tripp "employed" 34 separate circulators and Shepherd "utilized" 30. App. 25. It then postulates that each Tripp circulator would have "only" had to obtain 71 signatures, and each Shepherd circulator 80, to meet the requirement. This analysis incorrectly suggests that the Green Party had sufficient resources to "employ" all the circulators, but even assuming that it was using the term "employed" broadly, as a synonym for "utilized," it would still be incorrect.

First, the Opinion fails to consider that each campaign would have to gather more than the minimum number of signatures in order to successfully resist a challenge, since inevitably some signatories would not be registered to vote or would not be registered at their current address.

Second, the Opinion failed to consider that there are differing levels of commitment from people who volunteer to assist a petitioning effort. Circulators

have full-time jobs, families, and other volunteer responsibilities. A person may decide that he or she wants to assist a candidate, but is only willing to obtain a few signatures from family and friends and is unwilling or unable to knock on doors or solicit signatures at fairs, farmers markets, or other public gatherings. Another person may want to help but is only available to do so for one, two, or three days during the entire petitioning period. Still others may have other limitations based on work schedule or other personal circumstances. Yet the Seventh Circuit's analysis takes no account of such circumstances when it concludes that the Tripp and Shepherd campaigns had 34 and 30 "circulators," respectively. Instead it assumes that every individual who volunteered to gather even one signature is to be counted as a fully dedicated conscript for the entire petitioning period, for purposes of calculating how "few" signatures each "circulator" had to obtain. Under that perverse rationale, future supporters of new parties would may now have to forgo volunteering to gather just a few signatures, lest they be counted as full-time circulators for purposes of undermining any future legal challenges to a state's ballot-access laws.

The Seventh Circuit also referenced the free notary service provided by the City of Carbondale. App. 22. Not only is that city service available only for limited hours, but that one service amounts to one free notary service for the 4,618 square miles of the two State Representative districts.

As for alternatives to the every-sheet notarization, Petitioners have noted that a one-time notarization of a circulator's signature could be made on a listing of all

the sheets circulated by that circulator. Candidates' nomination papers often include a similar listing on the required deletion sheets.

III. IN THE ABSENCE OF A DIRECT CHALLENGE TO THE ELECTORAL MAP, IS PETITIONERS' SIGNIFICANT EVIDENCE OF PARTISAN GERRYMANDERING ENTITLED TO ANY WEIGHT WHEN A COURT REVIEWS A CHALLENGE TO A STATE'S BALLOT ACCESS LAWS AND CONDUCTS A BALANCING ANALYSIS?

A. The Seventh Circuit misapprehended or ignored Petitioners' argument regarding political gerrymandering.

Based on comments at oral argument, the Seventh Circuit apparently took the position that because Petitioners did not allege a stand-alone claim of partisan gerrymandering with a corresponding request to redraw the legislative district map, the Petitioner's evidence of partisan gerrymandering could not be considered. The Opinion did not mention any of Petitioners' substantial evidence of partisan gerrymandering.

The Seventh Circuit references Election Code requirements on new parties and immediately thereafter states, "Three such requirements are relevant here," referring to the 5% requirement, the 90-day petitioning period, and the notarization requirement. App. 3.

But the district boundaries are also a part of the state's ballot access law, and all aspects of a state's

ballot access scheme must be evaluated when a court is faced with a challenge. Here, the pleadings, evidence, and arguments have demonstrated that the redistricted boundaries negatively and discriminatorily impacted the Green Party in particular.

Anderson, 460 U.S. at 788, requires a court to consider cumulatively the burdens imposed by the overall ballot access scheme. See also *Clingman*, 544 U.S. at 607–08, 125 S. Ct. 2029 (O'Connor, J., concurring) ("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition").

Petitioners presented substantial evidence of partisan gerrymandering. From 2001 to 2010, the 115th and 118th State Representative Districts generally followed county lines. However, with the 2011 redistricting, the State created boundary lines in the 115th District that divided counties *and* even communities.

In the current 115th District, the State divided three of the largest five communities between the 115th District and the 118th District. Most notably, the district boundary line now runs right through the middle of Carbondale, the District's largest city by far, population-wise, and the home of the Green Party's 2006 and 2010 gubernatorial candidate (Rich Whitney) and 2006, 2008, and 2010 115th District State Representative candidate (Charlie Howe). The State gerrymandered Howe's home into a different district, away from the center of his support, and separated Whitney's district from Howe's new district.

In the current 118th District, the State divided three of the seven largest population centers between two Districts. The 2011 boundaries now bisect alleys in downtown McLeansboro and downtown Anna!

These are the only two State Representative districts in the entire state to suffer such an extensive division of communities.

As the Seventh Circuit acknowledged, "all reasonable inferences are drawn in favor of the party against whom the motion at issue was made." App. 7.

In this case, there is a reasonable inference to be drawn from this evidence, that is, the evidence of the division of Carbondale between two districts, the gerrymandering of the residence of the Green Party's 2010 State Representative candidate into a different district, and the division of other communities in the 115th and 118th: The evidence is sufficient to infer that the legislature intended to disproportionately burden the Green Party and its candidates and voters.

Petitioners do not make a stand-alone claim that the redistricting maps are unconstitutional. Petitioners' pleadings and argument about gerrymandering do not request that the redistricting map be thrown out.

Instead, Petitioners' evidence demonstrates burdens created by the redistricted boundaries that---when considered cumulatively---are discriminatory and severe, outweigh the State's interests, and are therefore unconstitutional. Nothing in the law requires that each or any of the burdens be unconstitutional individually before the cumulative effect can be considered unconstitutional.

Partisan gerrymandering is widespread, and Petitioners note that several very recent court decisions, both federal and state, have acknowledged unconstitutional partisan gerrymandering: *Gill v. Whitford*, 218 F. Supp. 3d 837 (D. Wis. 2016) (unconstitutional statewide partisan gerrymander), cert. granted (U.S. June 19, 2017) (No. 16-1161); *Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016) (ruling that a claim of unconstitutional partisan gerrymander is justiciable, but injunction denied), cert. granted sub nom. *Benisek v. Lamone* (U.S. Dec. 8, 2017) (No. 17-333); *Common Cause v. Rucho*, Nos. 1:16-CV-1026 & 1:16-CV-1164 (D. N.C. Jan. 9, 2018) (unconstitutional partisan gerrymander of House districts), stay granted (U.S. Jan. 18, 2018) (Order No. 17A745); *League of Women Voters v. Pennsylvania*, No. J-1-2018 (Pa. Jan. 22, 2018) (2011 redistricting violated state constitution as partisan gerrymander).

As far as acceptable standards for redistricted boundaries, Petitioners point to the Pennsylvania Supreme Court's direction to the state legislature after finding an unconstitutional partisan gerrymander under the state constitution:

> "Fourth, to comply with this Order, any congressional districting plan shall consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." Order at 3.

In contrast, the Illinois legislature drew district boundaries right through the heart of multiple population centers in the 115th and 118th Districts, even through city alleys. Any suggestion that this was done to equalize population is belied by the dividing of a community at one end of the district but then also dividing another community at the other end of the district.

CONCLUSION

Petitioners have shown that Illinois's ballot access laws impose severe burdens on their constitutional rights and that the burdens far outweigh the State's generalized, speculative interests in regulating elections or avoiding ballot overcrowding.

In the words of the *Anderson* Court:

> "[T]he right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.' " *Anderson*, 460 U.S. at 787, quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

Respectfully Submitted,

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