UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCUIT

Case No. 19-1125

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

Plaintiff-Appellants,

- v. -

CHARLES W. SCHOLZ, ERNEST L. GOWEN, BETTY J. COFFRIN, CASSANDRA B. WATSON, WILLIAM M. McGUFFAGE, JOHN R. KEITH, ANDREW K. CARRUTHERS, WILLIAM J. CADIGAN and STEVE SANDVOSS

Defendant-Appellees.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS AT No. 16-CV-03221

BRIEF OF APPELLANTS

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294 (ph)
oliverhall@competitivedemocracy.org

Attorney for Plaintiff-Appellants

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1125

Short Caption: DAVID GILL, ET AL V. CHARLES SCHOLZ, ET AL.

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

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

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

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

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

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

COURT OF APPEALS: CENTER FOR COMPETITIVE DEMOCRACY
DISTRICT COURT: ANDERSON BINKO, P.C.; SAMUEL J. CHANMAN, ATTORNEY AT LAW

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

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

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

Attorney's Signature: S/ Oliver Hall Date: 1.24.2019

Attorney's Printed Name: OLIVER B. HALL

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

Address: P.O. Box 21090
WASHINGTON, DC 20009

Phone Number: 202-248-9294 Fax Number: ____

E-Mail Address: OLIVERHALL@COMPETITIVEDEMOCRACY.ORG

rev. 01/15 GA

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes and Rules

Miscellaneous

STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, because the case arises under First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The order appealed from was entered on December 18, 2018, and the notice of appeal was timely filed on January 17, 2019.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellants respectfully present the following issues for review:

1. Whether the District Court erred by applying this Court's decision in *Tripp v. Scholz* as a "litmus test" to dispose of this ballot access case, where the Supreme Court and this Court have both recognized that such cases require a fact-specific and fact-intensive analysis under the *Anderson-Burdick* framework?

2. Whether the District Court erred by adopting a demonstrably false finding of fact from *Tripp* to support its holding that the 5 percent requirement is constitutional?

3. Whether the District Court violated the summary judgment standard by granting summary judgment based on a finding of fact that is outside the record of this case?

STATEMENT OF THE CASE

This appeal arises from an action commenced on August 1, 2016, by David Gill, an independent candidate for U.S. Representative in the 13th Congressional District of Illinois, and Dawn Mozingo, Debra Kunkel, Linda R. Green, Don Necessary and Greg Parsons, registered voters in the 13th Congressional District (collectively, "Gill"), against members of the Illinois State Board of Elections and the State Officers Electoral Board in their official capacities (collectively, "ISBE"). [Complaint for Declaratory Judgment and Preliminary and Permanent Injunction ("Compl.") at 1-2.] Gill filed suit pursuant to 42 U.S.C. § 1983, and alleges that several provisions of the Illinois Election Code violate the First and Fourteenth Amendments to the United States Constitution. [Compl. ¶ 1.] Specifically, Gill challenges: 1) the 5 percent minimum signature requirement; 2) the notarization requirement; and 3) the cumulative effect of the 5 percent requirement, the notarization requirement, the 90-day signature gathering period, and the splitting of population centers in his large, rural district. [Compl. ¶¶ 26-96.] Gill requested declaratory relief and preliminary and permanent injunctive relief. [Compl. ¶¶ 26-96.]

Factual and Procedural Background

Pursuant to the Illinois Election Code, Gill, as an independent candidate for U.S. House, was required to file nomination papers signed by qualified voters of the district equaling not less than 5 percent nor more than 8 percent of the number of

persons who voted in the preceding regular election in such district. *See* 10 ILCS 5/10-3 ("the 5 percent requirement"). In 2016, that requirement translated to 10,754 valid signatures for independent candidates in the 13th Congressional District. [Plaintiffs' Statement of Undisputed Material Facts ("Pl. SUMF") ¶ 6.] In election years following a redistricting, however, an independent candidate need only obtain 5,000 signatures. *See* 10 ILCS 5/10-3. The signatures cannot be gathered more than 90 days before the last day for the filing of petitions. *See* 10 ILCS 5/10-4 ("the 90-day period"). In addition, the circulator of the petition must certify that the signatures on each sheet of the petition were signed in his presence, were genuine, and, to the best of his knowledge, were signed by registered voters in the district, and the certification must be sworn before a notary. *See* 10 ILCS 5/10-4 (the "notarization requirement"). Nomination papers that are "in apparent conformity with the provisions of this Act" are deemed to be valid unless an objection is made. *See* 10 ILCS 5/10-8.

On June 27, 2016, Gill filed with the Illinois State Board of Elections a Statement of Candidacy, accompanied by a nominating petition containing the signatures and addresses of 11,348 persons representing themselves to be registered voters within Illinois's 13th Congressional District. [Pl. SUMF ¶¶ 1, 8.] Gill began collecting signatures on the very first day allowed by law. [Pl. SUMF ¶ 40.] He devoted all the time that he was not working, commuting, eating or sleeping to collecting signatures, and gathered nearly 5,000 signatures personally during the

90-day signature collection period. [Pl. SUMF ¶ 41.] He and 18 other circulators collected the 11,348 signatures. [Pl. SUMF ¶ 42.]

On July 5, 2016, Jerrold Stocks of Mt. Zion filed an Objector's Petition against Gill's petition alleging, in part, that Gill did not have a sufficient number of valid signatures. [Pl. SUMF ¶ 10.] On July 22, 2016, the hearing examiner for the State Officers Electoral Board issued his recommendation, which concluded Gill had 8,593 valid signatures. [Pl. SUMF ¶ 11.] Upon further review, the hearing examiner revised the total down to 8,491 valid signatures. [Pl. SUMF ¶ 12.] Because that was less than the statutory requirement of 10,754 valid signatures, the hearing examiner recommended that Gill's name not appear on the General Election ballot. [Pl. SUMF ¶ 12.]

Gill initiated this action in the District Court on August 1, 2016, [Dckt. No. 1], and filed a motion for preliminary injunction on August 18, 2016. [Dckt. No. 4.] On August 25, 2016, the District Court entered an order granting Gill's motion. [Dckt. No. 15 (Myerscough, J.)]. Judge Myerscough enjoined ISBE from enforcing the 5 percent requirement against Gill and, finding that the 8,593 valid signatures he collected demonstrated "a modicum of support," ruled that he remain on the ballot. *Id.*

On August 26, 2016, ISBE appealed Judge Myerscough's order, and also filed a motion to stay pending appeal. [Dckt. Nos. 16, 17.] Judge Myerscough denied the motion to stay that same day, and ISBE filed the motion with this Court. On

September 9, 2016, this Court entered an order granting ISBE's motion to stay pending resolution of the appeal. [Dckt. No. 21.] As a result, when the general election was held on November 8, 2016, Gill did not appear on the ballot. Thereafter, on December 6, 2016, this Court entered an order dismissing ISBE's appeal as moot, but denying ISBE's motion to vacate Judge Myerscough's order granting Gill's motion for preliminary injunction. [Dckt. No. 24.]

Meanwhile, the proceedings continued in the District Court, with the parties taking discovery and proceeding to cross-motions for summary judgment. In support of his motion' Gill submitted a wealth of evidence demonstrating that the challenged provisions, and the 5 percent requirement in particular, imposed a severe burden, whether measured by comparison to other state requirements, or by their exclusionary impact on the candidates subject to them. Although by no means an exhaustive accounting, the following evidence is among the most relevant to the issues raised in this appeal:

- The 25,000 signature requirement for an independent candidate for the U.S. Senator constitutes 0.694% of the number of persons who voted at the next preceding regular General Election for U.S. Senator in 2014, said number being 3,603,475, [Pl. SUMF ¶ 20];

- If Plaintiff Gill's nomination papers were governed under the same 0.694% ratio of signatures required to number of persons who voted for U.S. Senator at the last regular election, Plaintiff's signature requirement would have been 1,460 (0.694% of 210,272), which is far below the 8,491 valid signatures the SOEB Hearing Examiner found Plaintiff Candidate had submitted, [Pl. SUMF ¶ 21];

- No candidate for the U.S. House in Illinois has ever overcome a general

election signature requirement of 10,754 or more, [Pl. SUMF ¶ 23];[1]

- Since 1890 there have been more than 25,000 U.S. House races nationwide. In those 25,000-plus races, only three candidates overcame a general election signature requirement of 10,754 or more, [Pl. SUMF ¶¶ 23, 29];

- Only one candidate for the U.S. House has ever overcome a general election signature requirement of 8,593 or more in Illinois, and that was H. Douglas Lassiter in the 15th Congressional District in 1974. In 1974 there was no time restriction, either, upon the number of days allowed to gather signatures, and Mr. Lassiter collected 9,698 signatures, [Pl. SUMF ¶ 24];

- Only three other states besides Illinois require signatures of 10,000 or more for U.S. House candidates to get on the general election ballot: North Carolina, South Carolina and Georgia. South Carolina has never had an independent candidate for U.S. House qualify for the general election ballot; Georgia has not had an independent candidate qualify since 1964; and North Carolina has had only one candidate qualify, [Pl. SUMF ¶ 25];

- In only 0.048% of all the U.S. House races since 1890 has a candidate overcome a general election signature requirement of 8,593 or more; and in only 0.021% of all said races has a candidate overcome a general election ballot signature requirement of 10,754 or more, [Pl. SUMF ¶ 30];

- The median number of signatures required for U.S. House candidates petitioning to get on the general election ballot in all 435 House Districts is 1,000 signatures and the average is 3, 179 signatures, [Pl. SUMF ¶ 32];

- In the 2016 general election, 8,593 signatures would have gotten an independent U.S. House candidate on the ballot in 88.5% of the House Districts, [Pl. SUMF ¶ 33];

- For the November 8, 2016 general election, an independent candidate for the 13th Congressional District had to obtain 14.61 times more signatures than the established party candidate, [Pl. SUMF ¶ 17];

- The 13th Congressional District is a rural, geographically large district, stretching from the Champaign-Urbana and Bloomington-Normal areas to the St. Louis Metro-East area, where three of the major cities (Springfield, Bloomington and Normal), and five of the counties (Bond, Champaign,

1 "Overcome" means a candidate defeated an objector's petition to appear on the ballot.

Madison, McLean and Sangamon) have been divided so that part or most of each of them lies outside of the 13th Congressional district. The division of cities and counties created confusion, errors, and impediments to collecting signatures and substantial loss of signature gathering opportunities at public events, also hampered by inclement weather, [Pl. SUMF ¶ 18];

- The lack of population density and the paucity of events at which both large numbers voting age persons aggregated in one area in which petition was permitted also hampered petition signature gathering efforts, [Pl. SUMF ¶ 43];

- Gathering signatures by going to voter's homes, in a door-to-door manner was not practical or feasible to undertake in the 13th Congressional District, [Pl. SUMF ¶ 44];

- The notarization requirement imposed another obstacle to signature gathering because of travel to/from a notary location, and coordinating schedules when a notary was available, which slowed down signature gathering efforts; it would have required somewhere between 717 and 1,000 notarizations to submit 10,754 signatures if each petition sheet contained 15 lines/page, [Pl. SUMF ¶ 45];

- A majority of states do not restrict the number of days allowed to gather signature petition sheets, [Pl. SUMF ¶ 47];

- Illinois advanced the independent candidate filing deadline, previously in September, then August, and now in June, which is one of the earliest filing deadlines in the country, [Pl. SUMF ¶ 48];

- Based upon a signature review process, a candidate would need to submit at least 50% more raw signatures than the legal requirement, and sometimes, 2/3 more signatures than required is not enough; to be really safe, a candidate would need double the number that is required, [Pl. SUMF ¶ 49].

On November 8, 2018, the case was reassigned to Judge Bruce. On December 18, 2018, he entered an order denying Gill's motion for summary judgment, and granting ISBE's motion for summary judgment. Gill appeals from that order.

Although the District Court's order comprises a total of 22 pages, the great

majority of it focuses on an explication of this Court's decision in *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017). [App. 8-17 (Slip Op. 8-17).] Indeed, the District Court devoted only four pages of the order to its analysis of the merits, and invariably, it concluded that *Tripp* resolved each of Gill's claims. [App. 18-22 (Slip Op. 18-22).] With respect to each claim, the District Court reached this conclusion with only a cursory discussion, if any, of the foregoing evidence, most of which it disregarded entirely. [App. 18-22 (Slip Op. 18-22).] Ultimately, the District Court held, "based upon" this Court's decision in *Tripp*, that the challenged provisions are constitutional.

SUMMARY OF THE ARGUMENT

In clear violation of Supreme Court precedent and this Court's precedent, the District Court disposed of this ballot access case by adopting the factual findings and legal conclusions of a prior case wholesale, with barely more than a passing reference to the specific facts and evidence in the record before it. In so doing, the District Court improperly applied a "litmus test" to decide this case, contravening a foundational principle of federal ballot access jurisprudence. Compounding its error, the central finding of fact that the District Court adopted was itself erroneous. As a result, the District Court not only applied an improper legal analysis, but also, the purported factual basis for its holding is demonstrably false. The District Court's decision should be reversed.

STANDARD OF REVIEW

This Court reviews a district court's entry of summary judgment de novo and draw all reasonable inferences in favor of the nonmoving parties. *Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006) (citation omitted). Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 772 (7th Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the party opposing the motion and draw all justifiable inferences in favor of that party. *Libertarian Party of Illinois*, 108 F.3d at 772.

ARGUMENT

I. The District Court's Decision Should Be Reversed Because It Improperly Applies a Litmus Test to Decide This Ballot Access Case, in Clear Violation of Supreme Court and Seventh Circuit Precedent.

A. The Principle That Ballot Access Cases Cannot Be Decided Based on a Litmus Test Is Foundational.

Nearly 45 years ago, the Supreme Court made clear that ballot access cases cannot be decided by applying a "litmus-paper test" that neatly separates unconstitutional statutory schemes from those that pass muster. *Storer v. Brown*, 415 U.S. 724, 730 (1974). Decisions in such cases, the Court explained, are "a matter of degree," and require careful consideration of "the facts and circumstances behind the law." *Id.* (citations omitted). The "inevitable question for judgment" is

whether "a reasonably diligent … candidate [can] be expected to satisfy" the statutory requirements, and the answer to that question requires an examination of "past experience". *Id.* at 742 ("it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not"). Consequently, there is no simple rule that can act as a "substitute for the hard judgments that must be made" based on the record in each case. *Id.* at 730.

Time and again, the Supreme Court has reaffirmed that proper adjudication of ballot access cases requires a fact-intensive and fact-specific analysis of each particular case. As the Court observed, "No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *see also Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1616 (2008); *Burson v. Freeman*, 504 US 191, 210-11 (1992); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 US 182, 192 (1989); *Tashjian v. Republican Party of CT.*, 479 U.S. 208, 214 (1986); *Munro v. Socialist Workers Party*, 479 US 189, 193 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983); *Clements v. Fashing*, 457 U.S. 957, 963 (1982). This principle is, in short, foundational to the Supreme Court's ballot access jurisprudence.

The Court has therefore established an analytic framework that governs constitutional review of ballot access cases, pursuant to which a reviewing 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. This framework, the Court explained, establishes a "flexible standard," according to which "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged restriction burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. Under this standard, "reasonable, nondiscriminatory restrictions" are subject to less exacting review, whereas laws that imposes "severe" burdens are subject to strict scrutiny. *See id.* (citations omitted). But in every case, "However slight [the] burden may appear ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 128 S.Ct. at 1616 (citation and quotation marks omitted).

Lower courts, including this Court, have duly followed what has come to be known as the *Anderson-Burdick* analysis, with its careful focus on the "character and magnitude" of the plaintiff's alleged injury, as balanced against the "precise interests" the state asserts to justify the challenged regulations, the "legitimacy and strength of each of those interests," and the extent to which they "make it necessary" to burden plaintiff's constitutional rights. *Anderson*, 460 U.S. at 789. "Much of the action takes place at the first stage of *Anderson's* balancing inquiry,"

this Court has observed, because the severity of the burden imposed is what determines whether strict scrutiny or a less demanding level of review applies. *Stone v. Board of Election Com'rs for City of Chicago*, 750 F.3d 678, 681 (7th Cir. 2014) (citing *Burdick*, 504 U.S. at 534). Even so, the *Anderson-Burdick* analysis "can only take us so far," because "there is no 'litmus test for measuring the severity of a burden that a state law imposes,' either." *Id.* (quoting *Crawford*, 128 S.Ct. at 1616).

What follows is that courts reviewing ballot access laws must be cognizant not to treat prior cases as determinative of the specific questions of fact and issues of law raised in the particular case before them. Indeed, this Court has expressly recognized that it is "difficult to rely heavily on precedent" in deciding ballot access cases, due to the "great variance among states' schemes." *Id.* at 684 (quoting *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004) (Posner, J.). Similarly, the Eleventh Circuit has recognized that because the factual record of each case necessarily differs, its own prior decision upholding the constitutionality of a challenged statute does not "foreclose the [plaintiff's] right to present the evidence necessary to undertake" the *Anderson-Burdick* analysis in a new case. *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1984). In sum, in the words of the Ninth Circuit, "the Supreme Court and our sister circuits have emphasized the need for context-specific analysis in ballot access cases." *Arizona Green Party v. Reagan*, 838 F.3d 983, 990 (9th Cir. 2016) (citations omitted). Proper application of the *Anderson-Burdick*

analysis therefore "rests on the specific facts of a particular election system, not on strained analogies to past cases." *Id.* (citation omitted).

B. The District Court Improperly Applied This Court's Decision in *Tripp v. Scholz* as a Litmus Test to Dispose of This Case.

The District Court's order granting summary judgment to the ISBE demonstrates a near-total disregard for the guidance provided by the Supreme Court, this Court and other federal courts of appeals with respect to the proper application of the *Anderson-Burdick* analysis. Not only did the District Court rely exclusively on *Tripp* – its scant discussion of the merits cites no other case – but also, it adopted *Tripp's* findings of fact and conclusions of law wholesale, explicitly concluding that they are binding here, without addressing the critical differences between the facts and evidence in each case. The District Court did not even attempt to conduct its own *Anderson-Burdick* analysis, but instead applied *Tripp* as a litmus test to dispose of this case, in direct contravention of nearly five decades of Supreme Court precedent.

The very language that the District Court employed to dispose of Gill's claims betrays its failure to appreciate the "hard judgments that must be made" to decide a ballot access case properly, *Storer*, 415 U.S. at 730, much less to apply the rigorous, fact-specific analysis required under *Anderson-Burdick*. The District Court began its brief discussion of the merits by declaring that it was "bound by *Tripp*," and that the ISBE was therefore entitled to summary judgment on all counts. [App. 17 (Slip Op. at 17).] Acknowledging Gill's argument that it would be improper to apply

Tripp as a "litmus test" to resolve the claims in this case, the District Court nonetheless announced its intention to do just that: "Unfortunately for Plaintiffs, they are advancing the same challenges to the same restrictions at issue in *Tripp*," the District Court observed. [App. 17-18 (Slip Op. at 17-18).] As if that fact alone were sufficient to decide this case without any need to address the specific facts and evidence in the record, and how they differ from the facts and evidence in *Tripp*, the District Court then summarily concluded that "*Tripp* resolved those issues against the Plaintiffs' positions." [App. 18 (Slip Op. at 18).]

Turning to Gill's challenge to the 5 percent requirement, the District Court acknowledged that the "operative question" is "whether a reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot." [App. 18 (Slip Op. at 18) (quoting, without citation, *Bowe v. Bd. of Election Comm'rs of City of Chicago,* 614 F.2d 1147, 1152 (7th Cir. 1980)).] On this point the evidence is undisputed: no candidate for U.S. House in Illinois has overcome the 5 percent requirement since 1974, and the candidate who did so that year was not subject to the 90-day time limit. [*Compare* Pl. SUMF ¶¶ 23-24, 35 (Dckt. No. 38) *with* ISBE MSJ at 2-4, 7 ¶10 (Dckt. No. 42).] The evidence that Gill and his team of circulators were diligent is also largely undisputed. [*Compare* Pl. SUMF ¶¶ 40-50 (Dckt. No. 38) *with* ISBE MSJ at 2-4 (Dckt. No. 42)]. It is undisputed, for example, that Gill worked non-stop to collect signatures for the entire duration of the 90-day circulation period, except when he was eating,

sleeping, commuting, or working at his job as an emergency room doctor; it is undisputed that Gill personally collected nearly 5,000 signatures; and it is undisputed that Gill's team collected a total of 11,348 signatures in only 90 days. [*Compare* Pl. SUMF ¶¶ 41-42 (Dckt. No. 38) *with* ISBE MSJ at 2-3 (Dckt. No. 42).] Finally, it is undisputed that since 1890, only three candidates for U.S. House in the entire country have collected as many signatures as Gill did. [*Compare* Pl. SUMF ¶ 23 (Dckt. No. 38) *with* ISBE MSJ at 2-3 (Dckt. No. 42).]

When this Court struck down Illinois' 10 percent signature requirement for independent state legislative candidates, it emphasized "the importance of the historical record to the constitutional equation." *Lee*, 463 F.3d at 770. It therefore relied heavily on the "complete exclusion" of such candidates in the preceding 25 years. *See id.* Based on "the stifling effect" the signature requirement had on independent candidacies (in combination with an early filing deadline and prohibition on primary voters signing nomination petitions), the Court found it imposed a "severe" burden that was not justified by the asserted state interests. *Id.* at 768, 770.

Here, by contrast, the District Court disregarded the undisputed evidence that no U.S. House candidate has overcome the 5 percent requirement in the preceding 45 years, and relied instead on *Tripp's* contrary finding that "candidates had been able to meet the 5% signature requirement in multiple districts across multiple elections." [App. at 18-19 (Slip Op. at 18-19) (quoting *Tripp*, 872 F.3d at

865).] This alleged fact not only contradicts the undisputed evidence in this case, but also, it is nowhere to be found in the record, because it is demonstrably false (*see infra* Part II). The District Court nonetheless found it to be "powerful evidence that the burden of satisfying the 5% signature requirement is not severe." [App. 18-19 (Slip Op. at 18-19) (quoting *Tripp*, 872 F.3d at 865).] The District Court thus relied on an erroneous finding of fact from *Tripp*, which contradicts the undisputed evidence in this case, as its primary basis for concluding that *Tripp's* holding that the 5 percent requirement is not unconstitutional "applies to this case." [App. 19 (Slip Op. at 19).]

The District Court did address Gill's effort to comply with the 5 percent requirement, but only to suggest that he could have been more diligent. Because Gill was able to collect 8,491 valid signatures within the 90-day period, the District Court reasoned, he could have met the requirement of 10,754 valid signatures if he simply recruited more circulators. [App. 18 (Slip Op. at 18).] But while any candidate who falls short of a signature requirement might have complied given more time, more money, or more help, such tautological reasoning does not imply a lack of diligence. In this case, moreover, the undisputed evidence shows that Gill exercised extraordinary diligence, of historic proportions, by collecting more signatures than all but three U.S. House candidates nationwide since 1890. [*Compare* Pl. SUMF ¶ 23 (Dckt. No. 38) *with* ISBE MSJ at 2-3 (Dckt. No. 42).] To suggest that he should have been even more diligent is to disregard the relevant

facts and circumstances, in stark violation of the clear dictates of the *Anderson-Burdick* analysis.

The District Court's treatment of Gill's challenge to the notarization requirement follows the same pattern. The District Court began by declaring that it was "bound by *Tripp's* holding that the notarization requirement is constitutional." [App. 20 (Slip Op. at 20).] Then, without pausing to address the evidence in this case, it adopted *Tripp's* finding that the requirement does not impose a severe burden. [App. 20 (Slip Op. at 20) (citing *Tripp*, 872 F.3d at 866, 870).] In doing so, the District Court expressly relied on *Tripp's* rejection of the plaintiffs' "concerns" in that case that "the notarization requirement adds an extra step, requiring additional time and effort." [App. 20 (Slip Op. at 20) (citing *Tripp*, 872 F.3d at 866-67, 871).]

The District Court did not address the evidence that Gill presented to establish the burden imposed by the notarization requirement. Not surprisingly, however, it differs from the evidence presented by the plaintiffs in *Tripp*, and the difference matters a great deal to the proper application of the *Anderson-Burdick* analysis. In *Tripp*, this Court discussed the plaintiffs' evidence in detail, and found that the candidates in that case needed "as few as 120 and 121 notarized petition sheets, respectively." *Tripp*, 872 F.3d at 869. In this case, by contrast, the undisputed evidence indicates that Gill needed between 717 and 1,000 notarized petition sheets. [*Compare* Pl. SUMF ¶ 45 (Dckt. No. 38) *with* ISBE MSJ at 4 (Dckt.

No. 42).] This evidence demonstrates that the notarization requirement imposed a burden far greater than the one in *Tripp* – between 5.9 and 8.3 times greater, to be exact. That is precisely the sort of fact the District Court is required to address when identifying the "character and magnitude" of the burden imposed on Gill's rights. *Anderson*, 460 U.S. at 789. The District Court's failure to address that fact, or any other evidence in the record of this case relating to the notarization requirement, and its decision instead to adopt the finding of another court in another case, was error.

Finally, the District Court rejected Gill's challenge to the "cumulative impact" of the 5 percent requirement, notarization requirement and 90-day period in the same manner. [App. 20-21 (Slip Op. at 20-21).] It cited the findings in *Tripp* and made passing reference to certain similarities between the two cases, while disregarding the evidence that distinguishes them. [App. 21 (Slip Op. at 21).] The District Court then concluded that because *Tripp* upheld the challenged requirements, it "must" do so as well. [App. 21 (Slip Op. at 21).] This, too, was error. *See Nader*, 385 F.3d at 684 (recognizing that it is "difficult to rely heavily on precedent" in ballot access cases); *Bergland*, 767 F.2d at 1554 (same).

* * *

A court's duty to follow precedent is the *sine qua non* of the common law system. At the same time, courts adjudicating ballot access cases may not "blindly rely" on a prior case, just because it involves similar issues or claims. *See Gjersten*

v. Board of Election Com'rs, 791 F.2d 472, 477 (7th Cir. 1986). Here, the District Court adopted *Tripp's* factual findings and legal conclusions wholesale, explicitly concluding that it was "bound" by them, without regard for the critical differences between the factual and evidentiary records in the two cases. Under the *Anderson-Burdick* framework, however, the District Court was required to conduct its own independent analysis, based on the facts and evidence in this case, not *Tripp*. In failing to do so, the District Court crossed the line from properly following precedent to impermissibly applying a litmus test. *See Stone*, 750 F.3d at 686 (reversal would be proper if a district court upheld a signature requirement "merely because other, more numerous signature requirements … had previously been held constitutional"). The District Court should be reversed.

II. The District Court's Decision Should Be Reversed Because It Relies on a Demonstrably False Finding of Fact Adopted From *Tripp*, Which Renders Its *Anderson-Burdick* Analysis Fatally Flawed.

The District Court also should be reversed because the central finding it adopted from *Tripp* is erroneous, and this error renders the District Court's *Anderson-Burdick* analysis fatally flawed. Specifically, the District Court adopted *Tripp's* finding that "candidates had been able to meet the 5% signature requirement in multiple districts across multiple elections." [App. 18-19 (Slip Op. at 18-19) (citing *Tripp*, 872 F.3d at 865).] That is incorrect.

To support its finding that "multiple" candidates had met the 5 percent requirement, the Court in *Tripp* cited the examples of a Green Party candidate for

state representative that appeared on the general election ballot in 2002, and two Green Party candidates for U.S. House and an independent candidate for U.S. House that appeared on the general election ballot in 2012. *See Tripp*, 872 F.3d at 865. Those candidates, however, appeared on the ballot in election years following a redistricting after the decennial census. *See generally*, United States Census Bureau, *Decennial Census of Population and Housing*, available at https://www.census.gov/programs-surveys/decennial-census/decade.2010.html (last visited March 25, 2019) (confirming that census was conducted in 2000 and 2010).[2] Consequently, the candidates were not subject to the 5 percent requirement, but rather to the much lower requirement of 5,000 signatures, which applies in election years following the census. *See* 10 ILCS 5/10-3.

Tripp's erroneous finding is no minor detail. Rather, this mistake of fact serves as the primary basis for the Court's conclusion in that case that the 5 percent requirement did not impose a severe burden. In deciding this issue, the Court observed, "What is ultimately important is not the absolute or relative number of signatures required but whether a 'reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot.'" *Tripp*, 872 F.3d at 865 (quoting *Stone*, 750 F.3d at 682) (citation omitted). Finding the answer to be "yes," the Court concluded that the appearance of Green Party and independent candidates on the general election ballot in 2002 and 2012 "serves as 'powerful

2 Gill respectfully requests that the Court take judicial notice of the years the United States Census Bureau conducted the decennial census. *See Denius v. Dunlap*, 330 F.3d 919, 929 (7th Cir. 2003) (quoting Fed.R.Evid. 201(b), (d)).

evidence' that the burden of satisfying the 5% signature requirement is not severe." *Id.* (quoting *Stone*, 750 F.3d at 683). But since those candidates were not subject to the 5 percent requirement, but rather to the lower requirement that applies in election years following the census, the Court's conclusion was incorrect. *See* 10 ILCS 5/10-3. Their appearance on the ballot had no bearing whatsoever on the severity of the burden imposed by the 5 percent requirement.

The mistake of fact in *Tripp* thus goes to the heart of the Court's holding in that case. Because "the action" mainly occurs at the first stage of the *Anderson-Burdick* balancing inquiry, the Court's error in assessing the burden imposed by the 5 percent requirement undermines its entire analysis. *See Stone*, 750 F.3d at 681. The error invalidates the Court's primary basis for holding the 5 percent requirement constitutional.

As applied to this case, the error in *Tripp* compounds the District Court's error in applying that case as a litmus test to dispose of Gill's claims. The District Court erred by adopting *Tripp's* findings of fact and legal conclusions wholesale, without conducting its own independent *Anderson-Burdick* analysis, and then piled error upon error by adopting *Tripp's* demonstrably false finding of fact. As in *Tripp*, that mistake of fact serves as the primary basis for the District Court's own holding that the 5 percent requirement is constitutional. [App. 18-19 (Slip Op. at 18-19).] Therefore, that holding should be reversed.

III. The District Court's Errors in Applying *Tripp* as a Litmus Test and Adopting Its Erroneous Finding Require Reversal.

The District Court's errors in this case require reversal for two reasons that warrant further discussion.

First, in holding the 5 percent requirement constitutional based on a demonstrably false finding of fact it adopted from *Tripp*, which does not appear anywhere in the record of this case, the District Court violated the cardinal rule governing the grant of summary judgment: the judgment must be supported by citation "to particular parts of materials *in the record*". Fed. R. Civ. P. 56(c)(1)(A) (emphasis added). Rule 56(c) thus provides a catalog of materials that may be admissible as evidence, including "depositions, documents, electronically stored information, affidavits or declarations, stipulations..., admissions, interrogatory answers, or other materials". *Id.* The rule further specifies that, while the court is obligated to consider the materials cited by the parties, it also "may consider other materials *in the record*." Fed. R. Civ. P. 56(c)(3) (emphasis added). What Rule 56(c) does not say, and most certainly does not allow, is that a court may grant summary judgment based on alleged facts that do not appear in the record. It may not.

Here, the District Court based its decision upholding the constitutionality of the 5 percent requirement on this Court's erroneous finding in *Tripp* that "multiple" candidates had complied with it. [App. 18-19 (Slip Op. at 18-19) (citing *Tripp,* 872 F.3d at 865).] But this alleged "fact" does not appear anywhere in the record. The ISBE itself has never made such an allegation, nor could it have, because the ISBE is well aware that the 5 percent requirement does not apply in election years

following a redistricting – *i.e.*, it did not apply to the candidates cited in *Tripp*. [ISBE MSJ at 14 (Dckt. No. 42).] By relying on this alleged fact, therefore, the District Court was in clear violation of Rule 56(c) and the standards governing its proper application.

The second reason the District Court's errors require reversal is that "the inevitable question for judgment" in this case – "whether a reasonably diligent independent candidate could be expected to satisfy the signature requirements" – remains in dispute. *Lee*, 463 F.3d at 769 (quoting *Storer,* 415 U.S. at 742). The District Court incorrectly concluded that the answer to that question is yes, but it based that conclusion on a demonstrably false "fact" that does not appear in the record, while disregarding the undisputed facts that do appear in the record, which contradict its conclusion. In particular, the District Court disregarded the undisputed fact that no candidate has overcome the 5 percent requirement since 1974. [*Compare* Pl. SUMF ¶¶ 23-24, 35 (Dckt. No. 38) *with* ISBE MSJ at 2-4, 7 ¶10 (Dckt. No. 42).] This fact serves as "powerful evidence" that the correct answer is no, *Stone,* 750 F.3d at 683, *i.e.*, that independent candidates for the U.S. House "only rarely...succeed in getting on the ballot" in Illinois. *See Lee*, 463 F.3d at 769 (quoting *Storer*, 415 U.S. at 742). Reversal is therefore required to provide the parties the opportunity to resolve this disputed question of fact.

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed, and this case should be remanded for further proceedings.

Dated: March 28, 2019

Respectfully submitted,

s/Oliver B. Hall
Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit requirements of Circuit Rule 32(c) because:

a. The brief contains no more than 14,000 words, and is prepared in Century Schoolbook 12 Point Font.

/s/ Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2019, I caused the foregoing Brief of Appellants to be served electronically, via the Court's CM/ECF system, which will effect service on all counsel of record.

s/Oliver B. Hall
Oliver B. Hall
Counsel for Appellants

UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCUIT

Case No. 19-1125

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

Plaintiff-Appellants,

- v. -

CHARLES W. SCHOLZ, ERNEST L. GOWEN, BETTY J. COFFRIN, CASSANDRA B. WATSON, WILLIAM M. McGUFFAGE, JOHN R. KEITH, ANDREW K. CARRUTHERS, WILLIAM J. CADIGAN and STEVE SANDVOSS

Defendant-Appellees.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS AT No. 16-CV-03221

APPENDIX TO BRIEF OF APPELLANTS

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294 (ph)
oliverhall@competitivedemocracy.org

Attorney for Plaintiff-Appellants

STATEMENT PURSUANT TO RULE 30(d)

I hereby certify that all required materials within the scope of Circuit Rule 30(a) are included in this Appendix, and that there are no required materials within the scope of Rule 30(b).

s/Oliver B. Hall
Oliver B. Hall

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

DAVID M. GILL, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	**Case No. 16-cv-3221**
	)	
CHARLES W. SCHOLZ, et al.,	)	
	)	
Defendants.	)	

ORDER

On August 1, 2016, Plaintiffs filed a Complaint (#1) alleging that various provisions of Illinois' ballot access laws violate the U.S. Constitution's First and Fourteenth Amendments. Plaintiffs filed an (Amended Corrected) Motion for Summary Judgment and Memorandum of Law (#41) on July 26, 2018, after filing a Statement of Undisputed Material Facts (#38) on July 20, 2018. Defendants filed a Combined Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment (#42) on August 20, 2018. Plaintiffs filed a Combined Response and Reply Brief to Cross Motions for Summary Judgment (#45) on October 1, 2018. Defendants filed a Reply Memorandum in Support of Their Motion for Summary Judgment (#46) on October 26, 2018.

The parties' cross-motions for summary judgment are now ready for ruling. For the reasons that follow, Plaintiffs' Motion for Summary Judgment is DENIED, and Defendants' Motion for Summary Judgment is GRANTED.

I. FACTS

A. The Parties

Plaintiff David M. Gill sought to appear on the November 8, 2016, Illinois general election ballot as an independent candidate for the 13th Congressional District of Illinois' Representative in the United States House of Representatives. He is a resident of Bloomington in McLean County, Illinois. The other Plaintiffs, Dawn Mozingo, Debra Kunkel, Linda R. Green, Don Necessary, and Greg Parsons, are all registered voters in the 13th Congressional District who circulated or signed Gill's petition to be included on the general election ballot and wished to vote for Gill in the general election.

The 13th Congressional District ("the District") comprises over 5,793 square miles and is largely rural. Illinois' 15th, 16th, 17th and 18th Congressional Districts are larger, ranging from 6,933 to 14,695 square miles. Parts of, but not all of, three major cities (Springfield, Bloomington, and Normal) are within the District, which also contains Champaign-Urbana and the St. Louis Metro-East area. The District boundaries do not entirely align with county boundaries, resulting in five counties being split between the District and other Congressional Districts.

Plaintiffs name as Defendants all of the appointed members of the Illinois State Board of Elections ("ISBE"), in their official capacities: Charles W. Scholz, Ernest L. Gowen, Betty J. Kuffrin, Cassandra B. Watson, William M. McGuffage, John R. Keith, Andrew K. Carruthers, and William J. Cadigan. Together, these Defendants constitute the Illinois State Board of Elections. They also constitute the State Officers Electoral Board ("SOEB"), the body that hears and passes upon objections to the nominations of

candidates for State and Congressional offices of Districts situated in more than one county, including the District. Plaintiffs also sue the Executive Director of ISBE, Steve Sandvoss, in his official capacity.

B. The Illinois Election Code

The Illinois Election Code governs the nomination of independent candidates, stating:

> Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political subdivision, equaling not less than 5%, nor more than 8% (or 50 more than of the minimum, whichever is greater) of the number of persons, who voted at the next preceding regular election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

10 Ill. Comp. Stat. 5/10-3.

The parties agree that under this provision (the "5% signature requirement"), 5% "of the number of persons voting at the next preceding regular election" in the District amounted to 10,754 persons for the 2016 election. Gill therefore needed at least 10,754 signatures to be on the 2016 general election ballot as an independent candidate for the District.

The Election Code provides a different procedure for candidates from established parties. For individuals seeking to run as established party candidates, primary elections precede the general election. In order to be on the primary ballot for a

United States Congressional office, a party member must obtain signatures from "0.5% of the qualified primary electors of his or her party in his or her congressional district." To be on the general election ballot, the party member must win his or her primary election.

The Illinois Election Code requires all signatures on nomination papers be obtained within 90 days of the last day for filing the nomination petition ("90-day petitioning window"). 10 Ill. Comp. Stat. 5/10-4. This 90-day petitioning window applies to established parties' potential candidates as well as independent and new parties' potential candidates. Gill's 90-day signature collection period began March 29, 2016, and ended June 27, 2016.

The Election Code further requires that each individual petition signature sheet contain a notarized affidavit ("notarization requirement"). 10 Ill. Comp. Stat. 5/10-4. In the affidavit, the person who obtained the signatures ("circulator") must indicate on each sheet either the dates on which he or she circulated that sheet (or the first and last dates on which the sheet was circulated), or certify that none of the signatures on the sheet were signed more than 90 days before the last day for the filing of the petition. The circulator must also certify that each signature on that sheet was signed in the circulator's presence, is genuine, and, to the best of the circulator's knowledge and belief, is from a "duly registered voter[ ]" of the relevant district. The notarization requirement applies to established party, independent, and new party candidates.

C. Gill's Nomination Petition

On June 27, 2016, Gill timely petitioned to be an independent candidate for the District. He filed signatures and addresses of approximately 11,350 petition signers who represented themselves as qualified in-district voters. Gill had personally collected nearly 5,000 signatures. A team of 18 other petition circulators collected the rest.

At the time Gill filed his nomination papers, the ISBE considered timely-filed nomination papers valid unless an objection was filed within five business days of the last day for filing the nomination papers. On July 5, 2016, Jerrold Stocks filed a timely objection to Gill's nomination.

The ISBE conducted a records examination, and the SOEB determined that only 8,593[1] of the signatures submitted by Gill were valid signatures of registered, in-district voters. A hearing examiner revised that number down to 8,491 after further review.

Because Gill did not have 10,754 valid signatures, the SOEB sustained the objection to Gill's nomination and issued its decision that Gill's name would not be printed on the ballot.

[1]The parties both discuss this number's relationship to the number of signatures collected by candidates in other races. Plaintiffs make much of the fact that only one candidate in an Illinois race has ever collected more signatures than Gill: Douglass Lassiter. In 1974, Lassiter became a candidate for Illinois' 15th Congressional District after collecting 9,698 signatures. Defendants point out that a small number of Congressional candidates in other states have collected more signatures than Gill. Plaintiffs note that Lassiter and all of the candidates pointed to by Defendants had, or at least may have had, more than 90 days in which to collect signatures.

On August 1, 2016, Plaintiffs responded by filing the four-count Complaint (#1) in this case, challenging the constitutionality of Illinois' ballot access requirements for independent candidates. Subsequently, upon the close of discovery, the parties filed the cross-motions for summary judgment at issue in this order.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In making this determination, the court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Singer v. Raemisch*, 593 F.3d 529, 533 (7th Cir. 2010). However, a court's favor toward the nonmoving party does not extend to drawing "[i]nferences that are supported by only speculation or conjecture." *Singer*, 593 F.3d at 533, quoting *Fischer v. Avanade, Inc.*, 519 F.3d 393, 401 (7th Cir. 2008).

When cross motions for summary judgment have been filed, this court must review the record construing all inferences in favor of the party against whom the motion under consideration is made. See *BASF AG v. Great Am. Assur. Co.*, 522 F.3d 813, 818 (7th Cir. 2008).

B. The Parties' Cross-Motions for Summary Judgment

Plaintiffs' Complaint (#1) contains four counts. Both parties argue that they are entitled to summary judgment on all counts.

Count I challenges the constitutionality of the notarization requirement. In Count I, Plaintiffs allege that the notarization requirement violates the First and Fourteenth Amendments to the United States Constitution, both facially and as applied to the District. They allege that the lesser restriction of certification under 735 Ill. Comp. Stat. 5/1-109 would serve the same purpose as the notarization requirement, and that the notarization requirement adds an extra step that requires additional time and effort that could be spent collecting signatures. They further allege the notarization requirement disproportionately impacts candidates outside of established political parties who need more signatures than established party candidates.

Counts II and III challenge the constitutionality of the 5% signature requirement. In those Counts, Plaintiffs allege that the 5% signature requirement violates the First and Fourteenth Amendments to the United States Constitution, both facially and as applied to the District. They allege that, in the rural, geographically large District whose boundaries split some counties and some of the few population centers in the District, the 5% signature requirement places an unduly severe burden on their constitutional right to ballot access. They further allege that the 5% signature requirement is unconstitutional because established party candidates face a much lower numerical signature requirement, that a more modest signature requirement in line with other

jurisdictions would be more appropriate, and that no candidate for the U.S. House in Illinois has ever collected 10,754 signatures while very few candidates nationwide have ever collected more than 8,593 signatures.

Count IV challenges the constitutionality of the 5% signature requirement and the notarization requirement considered cumulatively with the 90-day petitioning window and the geographical challenges of the District, which is largely rural and contains population centers split by District boundaries after a recent redistricting.

The court finds that Defendants are entitled to summary judgment on all of Plaintiffs' claims based upon the Seventh Circuit's decision in *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017). Because the case is directly on point, the court will discuss and quote the *Tripp* case at length and then compare the issues in this case in the order they were discussed in *Tripp*.

1. *The Seventh Circuit's Opinion in Tripp v. Scholz*

In *Tripp v. Scholz*, Green Party members sought to appear on the general election ballot in Illinois as candidates for state representative in two districts in the 2014 General Election. *Tripp*, 872 F.3d at 859. The districts were rural and geographically large, covering 2,808 and 1,810 square miles. As a result of a recent redistricting, a population center that had been entirely within one of those districts was split between the districts. *Id.* at 861.

Under the Illinois Election Code, the Green Party was a "new" political party in those districts. As members of a new party, the Election Code required the potential candidates to meet the 5% signature requirement by obtaining nomination petition

signatures equaling 5% of the number of voters in the prior regular election for state representative in their districts. The notarization requirement and the 90-day petitioning window also applied. *Tripp*, 872 F.3d at 859-61, 871.

Because neither potential candidate collected a sufficient number of notarized signatures during the 90-day period, the ISBE ruled that neither would appear on the general election ballot. The potential candidates and some of their prospective voters then sued ISBE officials in federal court, arguing that the 5% signature requirement and the notarization requirement violated the Free Speech and Association Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, both facially and as applied to the relevant districts. They also challenged the constitutionality of the signature and notarization requirements considered cumulatively with the 90-day petitioning window and the geographical challenges of the relevant districts. *Tripp*, 872 F.3d at 861-62.

Before rejecting all of the plaintiffs' claims, the *Tripp* court discussed the relevant Constitutional framework and noted, "[t]he impact of candidate eligibility requirements on voters implicates basic constitutional rights to associate politically with like-minded voters and to cast a meaningful vote." *Tripp*, 872 F.3d at 862 (internal quotations and citations omitted). The court further noted, such rights "are not absolute." Instead, these rights are balanced against the "broad authority to regulate the conduct of elections" that the Constitution confers upon the states. *Id.* at 863 (internal quotation and citation omitted).

The *Tripp* court then relied upon several Supreme Court cases in discussing a state's need to regulate elections. The court in *Tripp* quoted the Supreme Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992), stating, "in addition to constitutional law, '[c]ommon sense . . . compels the conclusion that government must play an active role in structuring elections.'" *Tripp*, 872 F.3d at 863. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "As a result, states enjoy 'considerable leeway' with respect to election procedures." *Id.* (quoting *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999)).

With these competing considerations in mind, restrictions on candidates' eligibility for the ballot are considered under a flexible standard, involving a practical assessment of the justifications for and effects of the restrictions. *Tripp*, 872 F.3d at 864. A restriction "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Id.* (internal quotations and citations omitted). "Not all restrictions . . . on candidates' eligibility for the ballot impose constitutionally-suspect burdens, and the mere fact that a State's system creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." *Id.* at 863 (internal quotations and citations omitted).

More specifically, ballot access restrictions are evaluated under a balancing inquiry where:

> . . . the 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.

Tripp, 872 F.3d at 864 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

As a practical matter, the first stage of that *Anderson* balancing inquiry is often where "much of the action takes place," in that a restriction imposing a severe burden on constitutional rights faces a much higher hurdle to pass constitutional muster than a restriction that does not do so. *Tripp*, 872 F.3d at 864. "If the burden on the plaintiffs' constitutional rights is severe, a state's regulation must be narrowly drawn to advance a compelling state interest. On the other hand, if the burden is merely reasonable and nondiscriminatory, then the government's legitimate regulatory interests will generally carry the day." *Id*. (internal quotations and citations omitted).

a. The 5% Signature Requirement

The *Tripp* court first examined the 5% signature requirement, standing alone, and concluded that it does not violate the First or Fourteenth Amendment. The court disagreed with the plaintiffs' assertion that the 5% signature requirement imposed a severe burden on their constitutional rights. Noting multiple Supreme Court cases

upholding signature requirements equaling 5% of the eligible voting base, the *Tripp* court concluded that the 5% signature requirement was not severe on its face. *Tripp*, 872 F.3d at 864-65.

The court then asked "whether a reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot," and found that the answer was "yes." *Id.* at 865. Stating that "ballot access history is an important factor in determining whether restrictions impermissibly burden the freedom of political association," the court noted that third party candidates were able to meet the 5% requirement in multiple districts across multiple elections, serving as "powerful evidence that the burden of satisfying the 5% signature requirement is not severe." *Id.* (internal quotations and citations omitted).

The court dismissed the plaintiffs' focus on the fact that established parties faced a much lower numerical signature requirement. "[C]omparing the petitioning requirements for an 'established' party's candidate in a primary election and a 'new' party's candidate in a general election" is to "compare apples with oranges." *Tripp*, 872 F.3d at 865 (quoting *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000)). As explained in *Rednour*:

> Unlike an established party . . . a new party has not yet demonstrated a significant modicum of support. The established party has already jumped the hurdle of demonstrating its public support by receiving 5% of the vote in the last [relevant] election. Thus, it is neither irrational nor unfair to require a candidate from a new party to obtain a greater percentage of petition signatures to appear on the general election ballot than a candidate from an established party for the primary election ballot.

> The two petitioning requirements contain different percentages because they are used at two different times for two different purposes.

Rednour, 226 F.3d at 859 (quoted in *Tripp*, 872 F.3d at 865).

Having found that the 5% signature requirement was not severe, the *Tripp* court turned to whether it was sufficiently justified by important state interests. The Supreme Court has addressed that question, concluding:

> [t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Munro v. Socialist Workers Party, 479 U.S. 189, 193-94 (1986) (internal quotation and citation omitted) (quoted in *Tripp*, 872 F.3d at 866).

The *Tripp* court also dismissed the plaintiffs' argument that the state's interest in ballot access restrictions was illegitimate in the absence of any showing of a history of ballot clutter. The Supreme Court 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." *Tripp*, 872 F.3d at 866 (quoting *Munro*, 479 U.S. at 194–95). The *Tripp* court discussed the Supreme Court's rationale, stating:

> "If courts were to require that government defendants marshal evidence to prove actual voter confusion, such a requirement would 'necessitate that a State's political system sustain some level of damage before the legislature could take correct action.'" *Navarro v. Neal*, 716 F. 3d 425, 432 (7th Cir. 2013) (quoting *Munro*, 479 U.S. at 195). The Court has instead

> endorsed a policy that permits state legislatures "to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro*, 479 U.S. at 195.

Tripp, 872 F.3d at 866.

The conclusion of this analysis was succinctly stated, "[i]n sum, Illinois's 5% signature requirement, standing alone, does not violate the First or Fourteenth Amendment." *Tripp*, 872 F.3d at 866.

b. The Notarization Requirement

The *Tripp* court turned next to the plaintiffs' claims concerning the notarization requirement, and found "Illinois's notarization requirement, standing alone, also does not impose a severe burden on plaintiffs' constitutional rights." *Tripp*, 872 F.3d at 866.

The *Tripp* court noted that, while not assessing the condition in depth, the Supreme Court had upheld a notarization requirement in *American Party of Texas v. White*, 415 U.S. 767, 778 (1974).

In *White*, the Texas Election Code required non-established parties to pursue ballot qualification by showing evidence of support from qualified voters numbering at least 1% of the total vote cast for governor at the last preceding election.[2] This requirement could be met by submitting a list of qualified voters who attended a

[2]For the potential candidates in *White*, the 1%requirement amounted to approximately 22,000 electors. *White*, 415 U.S. at 776.

precinct nominating convention, along with other pertinent information. If the party did not obtain 1% participation in the convention, it could make up the difference by obtaining signatures on supplemental petitions from qualified voters.

Each signatory was required to "be administered and sign an oath that he is a qualified voter and has not participated in any other party's nominating or qualification proceedings." The Election Code required that the oath be notarized. *White*, 415 U.S. at 778. Addressing the notarization requirement, the Supreme Court stated:

> The parties object to this requirement, but make little or no effort to demonstrate its impracticability or that it is unusually burdensome. The District Court determined that it was not, indicating that one of the plaintiff political parties had conceded as much. The District Court also found no alternative if the State was to be able to enforce its laws to prevent voters from crossing over or from voting twice for the same office. On the record before us, we are in no position to disagree.

White, 415 U.S. at 778.

The *Tripp* court noted that nomination petitions in Illinois could reasonably contain 20 signatures per page, there are no major limitations on who can become a notary in Illinois, the time and expense required to become a notary is not extreme, and free notary services were available. While "Illinois's notarization requirement certainly imposes some logistical burden on plaintiffs' ballot access rights," the court found "it cannot be fairly characterized as 'severe.'" *Tripp*, 872 F.3d at 869.

Further, the notarization requirement is constitutional as it is sufficiently supported by a legitimate need to protect the integrity of the electoral process. *Tripp*, 872 F.3d at 869. Illinois has a legitimate interest in prosecuting election fraud, especially

given the fact that "Illinois is a state notorious for election fraud." *Id*. (internal quotations and citations omitted). "Notarization ensures that circulators can be easily identified, questioned, and potentially prosecuted for perjury." *Id.*

The plaintiffs in *Tripp* argued that lesser restrictions such as certification under 735 Ill. Comp. Stat. 5/1-109 could combat circulator fraud, but the court declined to "enter the policy fray." *Id.* The notarization requirement did not need to be narrowly tailored because it did not impose a severe burden, and it was not a "far-afield restriction" that would suggest unreasonable behavior in dealing with circulator fraud. *Id.* at 870. The court was not concerned with the plaintiffs' arguments that the extra step of notarizing petition sheets deterred people from circulating petitions and required additional time and effort that could have been spent collecting signatures. *Id.* at 866-67.

c. The Cumulative Impact of the Restrictions

Lastly, the *Tripp* court turned to the cumulative impact of the signature and notarization requirements, the 90-day petitioning window, and the geographic layouts of the districts. The court held the requirements were constitutional even when considered together. *Tripp*, 872 F.3d at 870-72.

The 90-day petitioning window and the geographic layout of the districts did "not dramatically tilt the constitutional scales." *Tripp*, 872 F.3d at 870. With about 30 circulators per candidate, 90 days was sufficient to collect the required number of signatures, even in the rural districts. *Id.* at 870-71.

The court supported its conclusion with cases in which it and the Supreme Court had "found more onerous signature timelines permissible." *Tripp*, 872 F.3d at 871 (citing *White*, 415 U.S. at 786–87 (fifty-five days to collect 22,000 signatures); *Stone v. Bd. of Election Comm'rs for City of Chi.*, 750 F.3d 678, 684 (7th Cir. 2014) (90 days to collect 12,500 signatures); *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (90 days to collect 25,000 signatures).

The *Tripp* court concluded that the 90-day petitioning window did not have a significant impact on the notarization requirement, either. A circulator could notarize all of his or her sheets at the same time, before the same notary. *Tripp*, 872 F.3d at 871.

Adding in the large geographic size of the districts and the redistricting of population centers across district boundaries, the ballot restrictions remained constitutional. *Tripp*, 872 F.3d at 871-72. In so holding, the *Tripp* court noted that the size of the districts "pale in comparison to representative districts found in other parts of the United States," the districts still contained population centers, and confusion over district boundaries impacts all political parties following every redistricting. *Id.* at 872.

2. *Tripp's Application in This Case*

Bound by *Tripp*, this court finds that Defendants are entitled to summary judgment on all of Plaintiffs' claims. Plaintiffs argue that because there is no litmus test for constitutional restrictions on ballot access, the restrictions in this case are not resolved by *Tripp*. Unfortunately for Plaintiffs, they are advancing the same challenges to the

same restrictions at issue in *Tripp*. *Tripp* resolved those issues against the Plaintiffs' positions.

a. The 5% Signature Requirement

Plaintiffs argue that the court must ask "whether a reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot." The court agrees that is the operative question.

Here as in *Tripp*, the answer is "yes." The evidence before the court is that Gill and 18 other circulators collected 8,491 valid signatures in 90 days for Gill's candidacy. He needed 10,754. Plaintiffs argue that Gill's team worked very hard and could not have reasonably collected more signatures in the time allowed. Even if that is true, based on the average number of signatures per circulator, Gill could have collected sufficient signatures with a few more circulators, perhaps just six more.[3]

Plaintiffs argue that Gill showed a sufficient modicum of support. However, Illinois set a signature requirement of 5% of the actual turnout in the most recent election for the District as the modicum of support needed. While Gill did show that he had some support, he did not show the level of support required by Illinois' Election Code.

While "ballot access history is an important factor in determining whether restrictions impermissibly burden the freedom of political association," *Tripp*, 872 F.3d at 865, *Tripp* viewed the signature requirement not in raw numerical terms, but instead as a percentage requirement. *Tripp* noted that candidates had been able to meet the 5%

[3]The candidates in *Tripp* employed thirty and thirty-four circulators. *Tripp*, 872 F.3d at 870.

signature requirement in multiple districts across multiple elections, serving as "powerful evidence that the burden of satisfying the 5% signature requirement is not severe." *Id.* (internal quotations and citations omitted). Here, very few Congressional candidates have ever collected more signatures than Gill. However, as *Tripp* viewed the requirement, candidates have been able to meet the 5% signature requirement by collecting the required *percentage* of signatures in multiple districts across multiple elections. *Id*.

Plaintiffs focus on the raw number of signatures required rather than on the actual requirement, which is a percentage. Since the signature requirement is a percentage, the total number of signatures required necessarily goes up as the number of voters increases. This is a sensible mechanism because it becomes harder to make any kind of a significant showing in an election where a larger number of people vote.

While the overall number of required signatures in this case was higher than in *Tripp*, that is simply because the actual turnout in the most recent election for the District was higher. The 13th Congressional District contains many more voters than the *Tripp* state representative districts. This numerical calculation does not change the fact that the requirement at issue here is the same 5% requirement at issue in *Tripp*. *Tripp* noted that third party and independent candidates had been able to meet the 5% requirement. *Tripp* clearly held that "Illinois's 5% signature requirement, standing alone, does not violate the First or Fourteenth Amendment." *Tripp*, 872 F.3d at 866. That holding applies to this case.

b. The Notarization Requirement

This court is also bound by *Tripp*'s holding that the notarization requirement is constitutional. *Tripp* held that "Illinois's notarization requirement, standing alone, also does not impose a severe burden on plaintiffs' constitutional rights." *Tripp*, 872 F.3d at 866. While Plaintiffs suggest other ways of deterring circulator fraud, the *Tripp* court rejected the idea that courts must consider alternatives to the notarization requirement as the notarization requirement does not need to be narrowly tailored. *Id.* at 870. And, *Tripp* dismissed Plaintiffs' concerns that the notarization requirement adds an extra step, requiring additional time and effort that could have been spent collecting signatures. *Id.* at 866-67, 871.

In arguing that the notarization requirement is unconstitutional, Plaintiffs emphasize the fact that independent candidates need many more signatures to be on the general election ballot than party candidates need to be on a primary ballot. This emphasis is misplaced, however, because "comparing the petitioning requirements for an 'established' party's candidate in a primary election and a 'new' party's candidate in a general election" is to "compare apples with oranges." *Tripp*, 872 F.3d at 865 (quoting *Rednour*, 226 F.3d at 859). The notarization requirement was constitutional in *Tripp*, and it remains constitutional in this case.

c. The Cumulative Impact of the Restrictions

Lastly, *Tripp* specifically considered the cumulative impact of the signature and notarization requirements, the 90-day petitioning window, and the geographic layouts of the districts with split population centers, holding that the requirements were

constitutional even when considered together. *Tripp*, 872 F.3d at 871-72. The considerations are the same in this case.

The 90-day petitioning window and the geographic layout of the districts do "not dramatically tilt the constitutional scales." *Id.* at 870. Courts have upheld even more onerous signature timelines, and the notarization requirement is not overly burdensome on the time frame because the sheets can all be notarized at the same time, before the same notary. *Id.* at 871. The *Tripp* court also noted that other representative districts were larger than the ones at issue in that case. *Id.* at 871. Here, while the District is large, it is not even the largest Congressional District in Illinois, and it pales in comparison with the size of other Congressional Districts across the country. And, while some population centers are split across the boundary of the District, *Tripp* dismissed concerns over boundary lines drawn to split population centers. *Id.* at 872.

Tripp held that the 5% signature requirement, the notarization requirement, and the 90-day petitioning window were constitutional even in large, predominantly rural districts with population centers split across districts. Plaintiffs here challenge the same requirements in their large, predominantly rural District with some of its population centers split across the District's boundaries. Because the court in *Tripp* held those requirements constitutional under the same circumstances, this court must conclude that the challenged restrictions here are also constitutional, even when considered cumulatively.

III. CONCLUSION

Based upon the Seventh Circuit's decision in *Tripp*, the court holds that the 5% signature requirement, the notarization requirement, and the cumulative impact of restrictions on ballot access do not violate the First or Fourteenth Amendments to the Constitution. Therefore, the court DENIES Plaintiffs' Motion for Summary Judgment, and GRANTS Defendants' Motion for Summary Judgment.

IT IS THEREFORE ORDERED THAT:

(1) Plaintiffs' Motion for Summary Judgment (#41) is DENIED.

(2) Defendants' Motion for Summary Judgment (#42) is GRANTED. Judgment is entered in favor of Defendants and against Plaintiffs.

(3) The Final Pretrial Conference and Jury Trial dates are VACATED.

(4) This case is terminated.

ENTERED this 18th day of December, 2018.

s/COLIN S. BRUCE
U.S. DISTRICT JUDGE