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

REPLY BRIEF OF APPELLANTS

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STATEMENT PURSUANT TO CIRCUIT RULE 34

Pursuant to Circuit Rule 34, Plaintiff-Appellants respectfully state that oral argument should be permitted in this matter because there is significant dispute between the parties as to both questions of fact and questions of law that bear upon the proper resolution of this appeal, and the Court's decisional process would be aided by affording the parties the opportunity to address them before a panel of the Court.

INTRODUCTION

Plaintiff-Appellants David Gill, Dawn Mozingo, Debra Kunkel, Linda R. Green, Don Necessary and Greg Parsons (collectively, "Gill") respectfully submit this Reply to the Brief of Defendants-Appellees (ECF. No. 28) ("ISBE Br.") filed by Defendant-Appellees Charles W. Scholz, Ernest L. Gowen, Betty J. Coffrin, Casandra B. Watson, William M. McGuffage, John R. Keith, Andrew R. Carruthers and William J. Cadigan in their official capacities as members of the Illinois State Board of Elections and the State Officers Electoral Board (collectively, "ISBE").

ARGUMENT

I. The District Court Improperly Applied *Tripp* as a Litmus Test to Dispose of This Case.

A. The District Court Failed to Conduct an Independent Analysis of the Merits Under the *Anderson-Burdick* Framework.

ISBE does not dispute the following points demonstrating that the District Court improperly applied a "litmus-paper test" to dispose of this case. *See Storer v. Brown*, 415 U.S. 724, 730 (1974). *First*, in its brief, four-page discussion of the merits, the District Court cited only one case – this Court's decision in *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017). *Second*, the District Court decided each claim and issue in this case by adopting *Tripp's* findings of fact and conclusions of law wholesale, expressly concluding that it was "bound" by them. *Third*, because the District Court began its analysis by concluding that *Tripp's* findings and conclusions are binding here, it failed to conduct its own independent analysis under the *Anderson-Burdick* framework. *See Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Despite its failure to dispute the foregoing points, ISBE nonetheless insists that the District Court's inordinate reliance on *Tripp* did not amount to an improper litmus-paper test. [ISBE Br.

at 9-15.] That is incorrect. A court improperly applies a litmus-paper test to dispose of a ballot access case when it fails to engage in the "comprehensive constitutional analysis required by both the Supreme Court and this court," *Gjersten v. Board of Election Com'rs*, 791 F.2d 472, 477 (7th Cir. 1986), such that it fails to "undertake an independent examination of the merits." *Stone v. Board of Election Com'rs for City of Chicago*, 750 F.3d 678, 686 (7th Cir. 2014) (quoting *Mandel v. Bradley*, 432 US 173, 177 (1977)). The District Court's failure to meet that standard in this case is manifest.

Gill's opening brief describes the fact-intensive and fact-specific analytic process required under the *Anderson-Burdick* framework. [Doc. No. 15 ("Gill Br.") at 10-13.] The District Court did not even attempt to apply it here. Although the District Court discussed *Anderson* and *Burdick*, it did so only in the context of the *Tripp* court's application of those cases. [App. at 10-11.] When the District Court purported to conduct its own analysis of the merits, however, it made no mention of those cases – or any case at all, except for *Tripp* – much less did it follow the specific steps a court must follow under the *Anderson-Burdick* framework. [App. at 18-21.]

Nowhere in the District Court's discussion of the merits does it identify the "character and magnitude" of Gill's alleged injury, or the "precise interests" that ISBE asserts to justify the challenged provisions, nor does the District Court make its own determination as to the "legitimacy and strength of each of those interests," or the extent to which they "make it necessary" to burden Gill's constitutional rights. *Anderson*, 460 U.S. at 789. Instead, in its discussion of two of Gill's claims – the challenge to the notarization requirement and the challenge to the cumulative impact of each provision as applied in combination – the District Court dispensed with those mandatory steps in the *Anderson-Burdick* analysis and simply adopted the *Tripp* court's reasoning and its holding that the provisions are constitutional. [App. at 20-21.]

The District Court's discussion of Gill's challenge to the 5 percent signature requirement is similarly deficient. [App. at 18-19.] Although the District Court made passing reference to the "evidence before the court", it failed to address almost all the evidence that Gill submitted in support of his claims, as summarized in Gill's opening brief. [Gill Br. at 6-8]. Thus, to support its finding that Gill was insufficiently diligent, the District Court cited not to the evidence in this case, but to *Tripp*. [App. at 18 n.3.] Further, to support its conclusion that the 5 percent signature requirement does not impose a "severe" burden, the District Court expressly adopted *Tripp's* erroneous finding that "third party and independent candidates had been able to meet" it – even though that purported "fact" *does not appear anywhere in the record of this case.* [App. at 19.] Having adopted *Tripp's* findings, the District Court also expressly adopted its holding that the five percent signature requirement "does not violate the First or Fourteenth Amendment." [App. at 18-19.]

Accordingly, with respect to each of Gill's claims, the District Court failed to "undertake an independent examination of the merits." *Stone*, 750 F.3d at 686 (quoting *Mandel*, 432 US at 177). The District Court failed to follow the analytic steps required under the *Anderson-Burdick* framework; it failed to make its own findings based on the evidence in this case; and it expressly held, with little or no analysis, that *Tripp* was dispositive of every aspect of this case. [App. at 17-21.] If ever there were a case where a court improperly applied a litmus-paper test to decide the constitutionality of a ballot access case, this is it.

B. ISBE Fails to Provide Any Basis for This Court to Affirm the District Court's Improper Application of *Tripp* to Dispose of This Case.

ISBE makes no attempt to demonstrate that the District Court conducted its own independent examination of the merits, or that it properly applied the *Anderson-Burdick* analysis. [ISBE Br. at 9-15.] Instead, ISBE attempts to distinguish cases in which other courts improperly

applied a litmus-paper test. [ISBE Br. at 10-12 (citing *Green Party of Georgia v. Georgia*, 551 Fed. App'x 982 (11th Cir. 2014); *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985)).] In those cases, ISBE notes, the district courts had improperly relied on non-presidential election cases to dispose of challenges to presidential election ballot access requirements. [ISBE Br. at 11]; *see Anderson*, 460 U.S. at 795 (finding that "the State has a less important interest in regulating Presidential elections than statewide or local elections"). ISBE thus places great emphasis on the fact that this case involves a challenge to the same requirements as those challenged in *Tripp*, as if that could justify the District Court's improper application of *Tripp* as a litmus-paper test to dispose of this case. [ISBE Br. at 12.] It cannot. If ISBE were correct, no plaintiff could ever challenge a ballot access provision that had been previously upheld, no matter what new facts and evidence might arise. As Gill has explained, each ballot access case must be decided based on the specific facts and evidence presented in that case. [Gill Br. at 13-14.]

ISBE thus attempts to justify the District Court's improper reliance on *Tripp* as the sole basis for deciding this case, without regard for their material differences, by asserting that Gill failed to show that the cases are in fact materially distinguishable. [ISBE Br. at 12-15.] According to ISBE, Gill "never argued" that no candidate had complied with the 5 percent requirement since 1974, but rather argued that no candidate had obtained as many signatures as the 5 percent requirement required him to obtain. [ISBE Br. at 12-13.] As the District Court itself recognized, however, the requirement is the same whether it is stated in "raw numerical terms … [or] as a percentage requirement." [ISBE Br. at 13 (quoting Doc. 47 at 18).] That is precisely why the District Court erred by adopting *Tripp's* incorrect finding – which, again, does not appear in the record of this case – that "candidates had been able to meet the 5% signature requirement in multiple districts across multiple elections." [App. at 18-19 (citing *Tripp*, 872 F.3d at 865).] The

undisputed evidence in this case contradicts that finding, and it was error for the District Court to rely on it here – especially because this purported "fact" does not appear anywhere in the record.

ISBE next asserts that Gill does not "explain on appeal" that when a candidate is able to "overcome" a signature requirement, it means that the candidate both obtained enough signatures to comply with the requirement, and the candidate prevailed when an objector filed a challenge to the candidate's nomination petitions. [ISBE Br. at 13.] ISBE is incorrect. Gill's opening brief expressly states that "'Overcome' means a candidate defeated an objector's petition to appear on the ballot." [Gill Br. at 7 n.1.] Indeed, this point is critical to understanding the burdens imposed by the challenged provisions, because under Illinois law, candidates' nomination petitions are "presumed" to have the requisite number of signatures unless such an objection is filed. *See* 10 ILCS 5/10-10. Thus, it is ISBE that fails to explain a critical point: the candidates who ISBE asserts "have successfully petitioned to appear on the ballot in Illinois with the 5% requirement" were candidates against whom no objector's petition was filed. [ISBE Br. at 17.] These candidates did not "overcome" that requirement, but were "presumed" to comply with it in the absence of an objection. *See* 10 ILCS 5/10-10.

Moreover, ISBE's "unrebutted evidence" that candidates "have obtained signatures comparable to what Gill needed" actually supports Gill's claim that the 5 percent requirement imposes a severe burden. [ISBE Br. at 14 (citing Doc. 42 at 12.).] In the last 64 years, encompassing many thousands of races for U.S. Representative nationwide, ISBE is able to identify just 10 such candidates – and of those rare exceptions, ISBE concedes, "some or all" benefited from "longer circulation periods than the 90 days allowed in Illinois." [Doc. 42 at 13.] The historical paucity of candidates who succeeded in obtaining as many signatures as Gill needed, even when they had more time to do it, is compelling evidence that independent candidates will

"only rarely" comply with Illinois' 5 percent requirement. *See Storer*, 415 U.S. at 742 (observing that "past experience" is a "helpful" guide to determining the severity of the burden a ballot access requirement imposes). Indeed, the undisputed evidence in this case demonstrates that no candidate has overcome that requirement since 1974, when the 90-day time limit was not in effect. [ISBE Br. at 14; Pl. SUMF ¶ 24.]

As a final salvo, ISBE attempts to demonstrate that the District Court "considered the record evidence" as to Gill's diligence, the burden imposed by the notarization requirement and the cumulative impact of the challenged provisions, [ISBE Br. at 14-15], but tellingly, ISBE is unable to cite any part of the District Court's opinion that reflects such consideration. Instead ISBE points to the District Court's conclusion that Gill could have satisfied the challenged provisions if he had more resources, [ISBE Br. at 14], but that conclusion is tautologically true of every candidate in every case, and fails to address the evidence in this case – much less does it support a finding that such evidence is insufficient to demonstrate Gill's diligence. Here, the undisputed evidence demonstrates 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).] Further, 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).] If the District Court found such evidence insufficient to establish Gill's diligence, it was obliged to address the evidence and explain the basis for its finding. *See*, *e.g.*, *Gjersten*, 791 F.2d at 477 (concluding that district court applied "no 'litmus-

paper test'" where its opinion reflected "a careful analysis of the pleadings, the statute, the affidavits, *the evidence of the statute's effect in past elections and the evidence presented*" by the parties) (emphasis added). The District Court's failure to do so was error.

The District Court also failed to address the undisputed evidence that the notarization requirement in this case imposes a far greater burden – specifically, between 5.9 and 8.3 times greater – than the notarization requirement in *Tripp*. [Gill Br. at 18-19.] ISBE attempts to justify the District Court's failure by asserting that the burden here "remains a far cry" from the unconstitutional burden imposed by a notarization requirement in a case that *Tripp* distinguished, [ISBE Br. at 14-15 (citing *Pérez-Guzmán v. Gracia*, 346 F.3d 229, 247 (1st Cir. 2003)], but once again, the District Court made no such finding. The District Court's adoption of *Tripp's* finding as to the notarization requirement, without acknowledging the evidence showing that the burden here is more severe by several orders of magnitude, was error. *See Stone*, 750 F.3d at 681 (observing that "much of the action takes place at the first stage of *Anderson*'s balancing inquiry," because the severity of the burden determines the level of scrutiny that applies").

Finally, ISBE incorrectly asserts that Gill identifies "no difference between this case and *Tripp*" with respect to the cumulative impact of the challenged provisions. [ISBE Br. at 15.] On the contrary, the facts giving rise to this case and the evidence that Gill presented to support his claims are materially different from the facts and evidence in *Tripp*. [Gill Br. at 6-8.] The District Court's failure to address almost all of that evidence confirms that it improperly applied *Tripp* as a litmus-paper test to dispose of this case. Reversal is therefore warranted, because the District Court failed to conduct an independent analysis of the merits, based on the specific facts and evidence that Gill presented, as the District Court was required to do. *See Gjersten*, 791 F.2d at 477; *Stone*, 750 F.3d at 686.

II. The District Court's Reliance on *Tripp's* Erroneous Finding That Candidates Have Complied With the 5 Percent Signature Requirement Was Improper.

A. The District Court Violated Rule 56(c) By Relying on a Purported "Fact" That Does Not Appear in the Record of This Case.

The finding of fact that the District Court adopted from *Tripp* – that "candidates had been able to meet the 5% signature requirement in multiple districts across multiple elections" – does not appear in the record of this case. [App. at 18-19.] As such, the District Court violated Rule 56(c) by adopting that finding. *See* Fed. R. Civ. P. 56(c)(1)(A) (providing that summary judgment must be supported by citation "to particular parts of materials *in the record*") (emphasis added). The District Court's reliance on this finding as the primary if not sole basis for its conclusion (also adopted from *Tripp*) that "the burden of satisfying the 5% signature requirement is not severe" therefore requires reversal. [App. at 18-19 (quoting *Tripp*, 872 F.3d at 865).]

ISBE makes no attempt to address the District Court's error in violating Rule 56. Instead, ISBE asserts that Gill "forfeited" this argument, and that it "should not be considered on appeal." [ISBE Br. at 16.] That is incorrect. Gill could not possibly have raised the District Court's error in violating Rule 56(c) until the District Court committed that error in the very order from which Gill now appeals. Therefore, Gill did not "forfeit" this argument.

Although ISBE insists that its summary judgment motion "repeatedly argued that *Tripp* controlled in this case," [ISBE Br. at 16], ISBE never argued that candidates had complied with the 5 percent signature requirement "in multiple districts across multiple elections," as the District Court erroneously found – nor could it have. [App. at 19.] As ISBE well knows, no candidate has overcome that requirement since 1974. [Pl. SUMF ¶ 24.] Accordingly, while ISBE urged the District Court to decide this case "with a citation to the Seventh Circuit's decision in *Tripp*," [Doc. No. 42 at 2], ISBE pointedly declined to argue that "several independent and new party candidates"

have been able to comply with that requirement since 1974, as it does now for the first time on appeal. [ISBE Br. at 17.]

Gill had no notice that the District Court would decide this case in reliance on a finding of fact that is outside the record. By doing so, the District Court violated Rule 56, and Gill did not forfeit that argument.

B. The Factual Finding That the District Court Adopted From *Tripp* Is Demonstrably False.

As set forth in Gill's opening brief, the *Tripp* court erroneously found that candidates had complied with the 5 percent signature requirement because it overlooked the fact that the requirement does not apply in election years following the census. [Gill Br. at 20-21.] As a result, the candidates cited in *Tripp* were not subject to the 5 percent requirement, but to the much lower requirements of 5,000 signatures for candidates for the U.S. House, 3,000 signatures for candidates for State Senate, and 1,500 signatures for candidates for State House, which apply in years following the census. *See* 10 ILCS 5/10-3. The *Tripp* court's finding that "candidates have successfully petitioned at least 5% of the vote in multiple districts across multiple elections" is therefore demonstrably false. *Tripp*, 872 F.3d at 865.

ISBE does not dispute that the *Tripp* court's finding rests on the foregoing error, but it insists that the finding is "correct" nonetheless. [ISBE Br. at 17.] It is not. As previously explained, *see supra* at Part I.B, the candidates that ISBE claims "successfully petitioned to appear on the ballot in Illinois with the 5% requirement in elections that did not immediately follow a U.S. Census" are all candidates who appeared on the ballot because no objectors' petition was filed. [ISBE Br. at 17.] This may be confirmed by reference to the same public records to which ISBE cites. [ISBE Br. at 17 (citing Illinois State Bd. of Elections' website).] Therefore, these candidates appeared on the Illinois ballot only because their nomination petitions were "presumed"

to comply with the 5 percent signature requirement pursuant to 10 ILCS 5/10-10. As Gill has argued, and ISBE does not dispute, these candidates did not "overcome" the challenged signature requirement.

III. ISBE Fails to Provide This Court Any Alternative Basis for Affirming the District Court's Decision.

ISBE concludes its brief with a single paragraph citing a number of cases that, according to ISBE, held "similar requirements" constitutional. [ISBE Br. at 17-18.] These cases, ISBE asserts, "compelled" the District Court's holding in this case. [ISBE Br. at 18.] On the contrary, ISBE's assertion repeats the error it committed when it urged the District Court to decide this case "with a citation to the Seventh Circuit's decision in *Tripp*." [Doc. No. 42 at 2.] Constitutional challenges to ballot access cases are fact-specific and fact-intensive, and they must be decided based on the evidence in each case. *See Stone*, 750 F.3d at 681 (acknowledging that, just as "there is no 'litmus-paper test' to 'separate valid from invalid restrictions,' … there is no 'litmus test for measuring the severity of a burden that a state law imposes,' either"). Therefore, the fact that other cases upheld other states' ballot access requirements based upon different facts and evidence did not "compel" the District Court to hold the challenged provisions constitutional here. *See Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004) (Posner, J.) (observing that it is "difficult to rely heavily on precedent" in deciding ballot access cases, due to the "great variance among states' schemes"); *see also Storer*, 415 U.S. at 730 ("What the result of [the court's constitutional analysis] will be in any specific case may be very difficult to predict with great assurance").

In this case, the District Court granted summary judgment to ISBE in reliance on a "fact" that remains very much disputed: the District Court found, based on evidence outside the record, that candidates have complied with the 5 percent signature requirement, whereas Gill contends, based upon undisputed evidence in the record, that they have not. That this central question of

fact remains in dispute on appeal confirms that the District Court erred in granting summary judgment to ISBE. The District Court should be reversed.

CONCLUSION

For the foregoing reasons, and those stated in Gill's opening brief, the order of the District Court should be reversed, and this case should be remanded for further proceedings.

Dated: September 27, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

a. The brief contains no more than 7,000 words, and is prepared in Times New Roman 12 Point Font.

/s/ Oliver B. Hall
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2019, I caused the foregoing Reply 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