UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCUIT

Case No. 22-1653

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

Plaintiff-Appellants,

- v. -

CHARLES W. SCHOLZ, IAN K. LINNABARY, WILLIAM J. CADIGAN, LAURA K. DONAHUE, WILLIAM R. HAINE, KATHERINE S. O'BRIEN, and CASSANDRA B. WATSON,

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

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Appellate Court No: 22-1653

Short Caption: GILL, ET AL. v. SCHOLZ, ET AL.

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Attorney's Signature: /s/Oliver B. Hall Date: May 31, 2022

Attorney's Printed Name: Oliver B. Hall

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STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, because this 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 March 31, 2022, and the notice of appeal was timely filed on April 19, 2022.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case involves a constitutional challenge to the ballot access requirements that Illinois imposes on independent candidates for the United States House of Representatives. This is the Plaintiff-Appellants' (collectively, "Gill") second appeal from a District Court order granting summary judgment to the Defendant-Appellees. On remand from the first appeal, Plaintiff-Appellants asserted only one claim – that the Challenged Provisions are unconstitutional as applied in combination. The questions presented for review are as follows:

I. Whether the District Court erred by denying Gill's motion for summary judgment where the undisputed facts demonstrate that the Challenged Provisions are severely burdensome as applied in combination and that they are not narrowly tailored to serve any compelling state interest?

II. Whether the District Court erred by failing conduct the fact-intensive analysis of Gill's as applied in combination claim as required under the *Anderson-Burdick* framework?

III. Whether the District Court erred by violating the legal standards applicable to motions for summary judgment filed under Federal Rule of Civil Procedure 56(c)?

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 (ECF No. 1) ("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 (together, the "Challenged Provisions"). [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 (ECF No. 62-1) ("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 as an emergency room doctor, 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.]

Initial Proceedings Before the District Court

Gill initiated this action in the District Court on August 1, 2016, [ECF No. 1], and filed a motion for preliminary injunction on August 18, 2016. [ECF No. 4.] On August 25, 2016, the District Court entered an order granting Gill's motion. [ECF 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. [ECF 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. [ECF 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. [ECF No. 24.]

Meanwhile, the proceedings continued in the District Court. The parties took discovery and thereafter filed cross-motions for summary judgment. After the motions were filed and briefed, the District Court order setting a hearing on the motions was vacated and the case was reassigned from Judge Myerscough to Judge Colin S. Bruce. [Text-only orders entered November 7 and 8, 2018.]

In support of his motion for summary judgment Gill submitted a wealth of evidence demonstrating that the challenged provisions – and the 5 percent requirement in particular – are among the most burdensome and restrictive in the nation, whether measured by comparison to other state requirements, by comparison to Illinois's requirements for other offices, or by their 45-year history of completely excluding the candidates subject to them, as well as evidence demonstrating Gill's extraordinary, nearly unprecedented diligence as a candidate. For example, the undisputed facts demonstrate that:

1. *Gill Was Extraordinarily Diligent in His Effort to Comply With the Challenged Provisions*

   - Gill began collecting signatures for his independent candidacy on March 27, 2016, the first day of the 90-day statutory collection period, [Pl. SUMF ¶ 40];[1]

   - Gill devoted all time that he was not working as an emergency room doctor, commuting, eating or sleeping to collecting signatures, and personally gathered nearly 5,000 signatures during the 90-day period, [Pl. SUMF ¶ 41];

   - Gill recruited 18 other petition circulators, and together they worked diligently to collect a total of 11,348 signatures within the 90-day period, [Pl. SUMF ¶ 42];

   - Gill obtained more signatures than 99.9 percent of all candidates who ran in more than 25,000 races for Congress nationwide since states began regulating ballot access in 1890. [Pl. SUMF ¶¶ 23, 29, 30.]

2. *Illinois' 5 Percent Requirement Is Among the Most Restrictive in the Nation*

   - Only one state besides Illinois requires more than 10,000 signatures for congressional candidates to qualify for the general election ballot – Georgia – and no independent candidate has qualified in Georgia since 1964, [Pl. SUMF ¶ 25];[2]

   - Georgia allows candidates six months to gather signatures, which is twice as long as the 90-day period that Illinois imposes, [Pl. SUMF ¶ 36];

[1] For purposes of this appeal Gill cites to the statement of facts submitted in support of the Motion for Summary Judgment he filed on remand, and not to the one filed in support of his initial Motion for Summary Judgment. [ECF No. 38.] The filings are substantially the same except that the one cited herein includes certain facts arising after the initial proceedings in the District Court. [Pl. SUMF ¶¶ 55-58.]

[2] Plaintiffs incorrectly cite North Carolina and South Carolina as two additional states with signature requirements greater than 10,000. [Pl. SUMF ¶ 25.] In fact, however, in 2017 North Carolina reduced its requirement from 4 percent of registered voters to 1.5 percent of the total number of voters in the district in the previous gubernatorial election, and its requirements never exceed 10,000 signatures. *See* N.C. Gen. Stat. § 163-122(a)(2). Additionally, South Carolina caps its requirement at 10,000 signatures. *See* S.C. Code Ann. § 7-11-70.

- The median signature requirement for independent candidates for Congress in all 435 districts nationwide is 1,000, and the average is 3,179, [Pl. SUMF ¶ 32];

- In the 2016 general election, the 8,593 valid signatures that Gill obtained would have qualified him for the ballot as an independent candidate in 88.5% of all congressional districts, [Pl. SUMF ¶ 33];

- To overcome an objection, a candidate must submit at least 50 percent more signatures than required under the 5 percent requirement.[3] [Pl. SUMF ¶ 49.]

3. *The Limited Petitioning Period, Notarization Requirement and Large, Rural Nature of Gill's District Compound the Burden of Complying With the 5 Percent Requirement*

- Unlike Illinois, a majority of states do not impose a time limit on the petitioning period, [Pl. SUMF ¶ 47];

- Illinois' June filing deadline is one of the earliest in the country, [Pl. SUMF ¶ 48];

- Gathering signatures by going to voter's homes in a door-to-door manner was not practical or feasible in the 13th Congressional District because it 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, 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, [Pl. SUMF ¶¶ 18, 44];

- The lack of population density and the paucity of large public events also hampered signature gathering efforts, [Pl. SUMF ¶ 43];

- The notarization requirement increased the burden of complying with the 5 percent requirement because it necessitated travel to and from a notary location and coordinating schedules when a notary was available, which slowed down signature gathering efforts, [Pl. SUMF ¶ 45];

- At the standard total of 15 signatures per petition sheet, no fewer than 717 separate notarizations were required to submit 10,754 valid signatures (and many more given the typical rate of invalidation). [Pl. SUMF ¶ 45.]

[3] "Overcome" means a candidate appeared on the ballot by defeating an objector's petition, and not because no objection was filed and the candidate's nomination petitions were "presumed" to have the requisite number of signatures pursuant to 10 ILCS 5/10-10.

4. *The Challenged Provisions Operate as an Absolute Bar to Independent Candidates for Congress in Illinois*

- No candidate for Congress in Illinois has overcome the 5 percent requirement since 1974, and the candidate who did so that year, H. Douglas Lassiter, was not subject to the 90-day time limit, but rather had no restriction on the number of days he was permitted to collect signatures, [Pl. SUMF ¶¶ 23-24, 35];

- H. Douglas Lassiter collected 9,698 signatures in 1974, which is less than the 10,754 signatures Gill was required to submit, [Pl. SUMF ¶ 24];

- H. Douglas Lassiter is the only candidate for the U.S. House in Illinois who has ever overcome a signature requirement of 8,593 or more, which is the number of valid signatures that Gill submitted, [Pl. SUMF ¶ 24];

- No candidate for the U.S. House in Illinois has ever overcome a signature requirement of 10,754 or more, which is the number that Gill was required to submit, [Pl. SUMF ¶ 23];

- Since 1890 there have been more than 25,000 U.S. House races nationwide. In those 25,000-plus races over a span of 126 years, only three candidates overcame a general election signature requirement of 10,754 or more, [Pl. SUMF ¶¶ 23, 29];

- Since 1890 a candidate has overcome a general election signature requirement of 8,593 or more in only 0.048 percent of the races for Congress – meaning Gill obtained more valid signatures than 99.9 percent of all congressional candidates in American history – and in only 0.021 percent of all such races has a candidate overcome a general election ballot signature requirement of 10,754 or more. [Pl. SUMF ¶ 30.]

5. *The Challenged Provisions Are Not Narrowly Drawn to Serve Legitimate or Compelling State Interests*

- Illinois has determined that a flat requirement of 5,000 signatures is sufficient to regulate ballot access in congressional races in each election cycle following a redistricting, [Pl. SUMF. ¶ 51]; *see* 10 ILCS 5/10-3;

- In election cycles following a redistricting, when the 5,000-signature requirement applies, Illinois does not experience ballot overcrowding, [Pl. SUMF ¶ 51]; *see* Illinois Board of Elections, *Election Results*, available at https://elections.il.gov/electionoperations/ElectionResults.aspx (accessed May 24, 2022);

- Illinois has determined that a flat requirement of 25,000 signatures is sufficient to regulate ballot access in races for U.S. Senate; in 2016, that figure was equal to 0.694 percent of the 3,603,475 voters who voted in the preceding 2014 general election for U.S. Senate, [Pl. SUMF ¶ 20];

- Illinois does not experience ballot overcrowding in elections for U.S. Senate, *see* Illinois Board of Elections, *Election Results*, available at https://elections.il.gov/electionoperations/ElectionResults.aspx (accessed May 24, 2022);

- If Gill were subject to a signature requirement equal to 0.694 percent of the 210,272 voters who voted in the preceding 2014 election for Congress in his district, Gill would have needed 1,460 valid signatures to qualify for the ballot – a figure he exceeded more than five times over, [Pl. SUMF ¶ 21];

- Illinois has repeatedly advanced its independent candidate filing deadline to an earlier date. Previously the deadline was in September, then August, and now it is in June, which is one of the earliest filing deadlines in the country. [Pl. SUMF ¶ 48.]

ISBE, for its part, declined to address the foregoing evidence, and simply asserted that "this case can be decided with a citation to the Seventh Circuit's decision in *Tripp*." [ECF No. 42 at 2 (citing *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017)]. *Tripp*, ISBE insisted, "is controlling precedent, *the* controlling precedent, and it requires that Plaintiffs' motion be denied, and that Defendants' cross-motion be granted." [*Id.*] According to ISBE, the notion that the District Court "should make an overall judgment" as to the constitutionality of the Challenged Provisions, based on the specific facts and evidence in the record, "is an analytical dead-end as a matter of law." [*Id*.]

On December 18, 2018, without holding oral argument, Judge Bruce entered an order denying Gill's motion for summary judgment and granting ISBE's motion for summary judgment. [ECF No. 47.] Concluding that he was "bound by *Tripp*," Judge Bruce held that ISBE is "entitled to summary judgment on all of Plaintiffs' claims." [*Id.* at 17.] Gill timely filed an appeal.

Gill's First Appeal to This Court

This Court's opinion reversing the District Court expressly rejects the District Court's conclusion that *Tripp* is dispositive of Gill's claims. The assertion "that the holding in *Tripp*

controls this case," the Court concluded, is "in error." *Gill v. Scholz ("Gill I")*, 962 F.3d 360, 365-66 (7th Cir. 2020). As the Court explained, that assertion is incorrect for two reasons.

First, by relying on *Tripp* to dispose of Gill's claims, "the district court failed to conduct a fact-based inquiry as mandated by the Supreme Court…." *Id.* at 361. That inquiry "requires careful analysis of the facts and should 'not be automatic.'" *Id.* at 364 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The District Court's reliance upon *Tripp* was therefore error "because the facts in *Tripp* do not align with Gill's challenge." *Id.* at 365. Unlike Gill, who ran for a seat in the United States House of Representatives, the plaintiffs in *Tripp* were running for seats in the Illinois House of Representatives. *See id.* As a result, they only needed approximately 2,400 signatures to satisfy the 5 percent requirement, whereas "Gill was required to obtain 10,574 signatures… [–] over 8,000 more signatures than the plaintiffs in *Tripp*." *Id.* Furthermore, due to the vast difference in size between Gill's congressional district and the *Tripp* plaintiffs' Illinois House districts, "Gill had the more difficult task of collecting more signatures from a different and larger geographical area." *Id.* at 365 & n.6. Additionally, the rural nature of Gill's district impacts the analysis because "[g]athering signatures in rural districts may prove more difficult than doing so in urban districts…." *Id.* at 365 n.6. The Court thus concluded that "the burden the 5% signature requirement imposes on candidates (and possibly the interests Illinois possesses in regulating those candidates) varies between elections and between districts," and "[i]t is precisely these sorts of factual differences that the Supreme Court has stated must be considered by district courts when applying the *Anderson-Burdick* balancing test." *Id.* at 365-66 (citations omitted).

Second, the District Court's reliance on *Tripp* would be "problematic" even if the facts in this case were substantially similar to those in *Tripp* – which they are not – because *Tripp* rests on

a critical error of fact that undermines its rationale. *Id.* at 366 & n.7. The *Tripp* court erroneously found that minor party candidates had successfully complied with the 5 percent requirement "in multiple districts across multiple elections," *id.* at 366 (quoting *Tripp*, 872 F.3d at 865), whereas in fact, the cited candidates did not comply with the 5 percent requirement but rather the much lower numerical requirements that apply in elections that follow a redistricting. *Id.* (citing 10 ILCS 5/10-3) (establishing requirement of 5,000 signatures for congressional candidates). Because these numerical requirements "are much less burdensome than the 5% signature requirement" that Gill challenges, "*Tripp's* analysis … is only persuasive as it pertains to a candidate subject to the numerical requirements." *Id.* And since Gill does not challenge the numerical requirements, the Court concluded, "*Tripp's* applicability to this case is limited." *Id.*

Accordingly, this Court reversed the judgment entered in ISBE's favor and remanded with instructions that the District Court "apply the fact-intensive *Anderson-Burdick* balancing test." *Id.* at 366-67.

Proceedings on Remand to the District Court

On remand, the parties filed new cross-motions for summary judgment. [ECF Nos. 58, 62.] Briefing on the motions was completed on March 26, 2021. [ECF No. 69.] Five months later, Judge Bruce entered an order recusing himself pursuant to 28 U.S.C. § 455. [Text-only order entered August 24, 2021.] The case was then reassigned to Judge Harold A. Baker. [Text-only order entered August 30, 2021.] Thereafter, the case was reassigned again, this time to Chief Judge Sara Darrow. [Text-only order entered September 7, 2021.]

More than six months later, again without scheduling oral argument, the District Court entered its order granting ISBE summary judgment for the second time. [ECF No. 73; (Appendix ("App.") 1).] Despite acknowledging that on remand Gill only pursued his Count IV claim that

the Challenged Provisions are unconstitutional as applied in combination, [*see* Slip Op. at 5 n.6; (App. 5)], the District Court nonetheless focused the large majority of its discussion on an analysis of each provision as applied separately. [*See* Slip Op. at 8-19; (App. 8-19).] Based on that analysis, it concluded that no single provision, standing alone, imposes a "severe" burden. [*See id.*] Then, expressly relying on its preceding analysis, the District Court briefly addressed Gill's claim that the Challenged Provisions are unconstitutional as applied in combination and concluded that Gill failed to show "that the cumulative barriers to ballot entry in Illinois are severely burdensome." [Slip Op. at 24; (App. 24).]

In reaching this conclusion, the District Court largely failed to address the undisputed facts on which Gill's as applied in combination claim relies. [*See supra* pp. 6-9.] For example, the District Court acknowledged Gill's reliance on the undisputed facts demonstrating that the Challenged Provisions "are severely burdensome by every … relevant metric," as well as the undisputed facts demonstrating that Gill failed to comply with them despite being "more diligent … than 99.9 percent of all congressional candidates in American history," but declined to identify those facts or explain why they were insufficient to establish a severe burden. [Slip Op. at 20; (App. 20).] Instead, the District Court merely reiterated that, "[a]s discussed above," it did not find the five percent requirement "severely burdensome." [*Id.*]

The District Court next found that collecting 10,754 signatures in only 90 days is not "so onerous as to pose a severe burden…." [*Id.*] The District Court made this finding without acknowledging the undisputed facts demonstrating that no congressional candidate in American history has ever accomplished this feat. [*Compare* Slip Op. at 20-21 (App. 20-21) *with* Pl. SUMF ¶¶ 23, 24, 29, 30, 35.] The District Court simply reasoned that Gill could have done it if he had engaged more petition circulators. [*See* Slip Op. at 21; (App. 21).]

With respect to the undisputed facts demonstrating that the burden of complying with the Challenged Provisions was compounded in Gill's large, rural, sparsely populated district with boundaries dividing several counties and metropolitan centers, [Pl. SUMF ¶¶ 18, 43-44], the District Court opined that "a smaller and denser district … poses its own challenges, such as heavy traffic." [Slip Op. at 21; (App. 21).] The District Court cited no evidence to support such a finding. The District Court further opined that candidates could reduce the burden "by using clearly marked maps," and that "keeping track of district boundaries [might] be *more* onerous in small, densely populated districts…." [*Id.* (emphasis original).] The District Court again cited no evidence for such findings. The District Court nonetheless concluded, on the basis of this reasoning, that the combined effect of the Challenged Provisions does not "push[] the cumulative burden over the edge" to severity. [Slip Op. at 22; (App. 21).]

After reaching that conclusion, the District Court finally turned, in the final three pages of its discussion, to Gill's "main argument" that "the challenged provisions have completely excluded independent congressional candidates from Illinois's ballot since 1974." [Slip Op. at 22; (App. 22).] The District Court rejected this argument on the ground that such candidates can appear on the ballot even if they fail to comply with the Challenged Provisions "if no one objects to their nominating petitions." [Slip Op. at 22; (App. 22).] The District Court then cited evidence that some candidates had in fact appeared on Illinois's ballot without complying with the Challenged Provisions and concluded that such evidence "makes it clear" that the Challenged Provisions "in no way 'operate to freeze the political status quo….'" [Slip Op. at 23 (App. 23) (quoting *Jenness v. Fortson*, 403 U.S. 431, 439 (1971).]

Based on its finding that the Challenged Provisions do not impose a severe burden, the District Court concluded that "Illinois need only have a legitimate interest in its regulations…."

[Slip Op. at 24; (App. 24).] "[I]t does," the District Court found, citing its preceding analysis of the Challenged Provisions as applied in isolation. [*Id.*] "[S]imply because Gill was unable to get on the ballot does not mean that no reasonably diligent candidate could," the District Court reasoned. [*Id.*] It thus held that the Challenged Provisions, as applied in combination, do not violate the First and Fourteenth Amendments. [*See id.*] Accordingly, the District Court denied Gill's motion for summary judgment and granted ISBE's. [*See id.*]

Gill timely appealed from the District Court's order.

Summary of the Argument

Few ballot access cases, if any, present a stronger summary judgment record for the plaintiffs than this one. The undisputed facts demonstrate that Gill was more diligent in his effort to qualify for Illinois's ballot than 99.9 percent of all congressional candidates in American history. That he nonetheless fell short is, by itself, powerful evidence that the Challenged Provisions are unconstitutionally burdensome as applied in combination. The record is also replete with facts demonstrating that the Challenged Provisions are severely burdensome by every other relevant metric – whether measured in comparison to other state ballot access requirements, in comparison to the requirements that Illinois imposes on candidates for other offices, or by reference to the stifling effect they have had on independent candidates for Congress. Indeed, no candidate has overcome the Challenged Provisions to qualify for Illinois' ballot in 45 years, and the last candidate who did was not subject to the 90-day period but had an unlimited time to collect signatures.

Because the undisputed facts demonstrate that the Challenged Provisions impose severe burdens on the First and Fourteenth Amendment rights of the candidates subject to them, they cannot withstand scrutiny under the *Anderson-Burdick* analysis unless they are "narrowly drawn to advance a state interest of compelling importance." *Lee v. Keith*, 463 F.3d 763, 768 (7th Cir.

2006). ISBE plainly failed to make that showing in the proceedings below. The "renewed" motion for summary judgment it filed on remand was virtually identical in substance to its prior motion, [*compare* ECF No. 42 *with* ECF No. 58], and ISBE thus again failed to address the undisputed facts and asserted the very arguments this Court squarely rejected in Gill's first appeal. *See Gill I*, 962 F.3d 360. Further, ISBE continued to rely on *Tripp* as the primary authority for its position, notwithstanding this Court's express conclusion that Tripp is not "persuasive" here and that its "applicability to this case is limited." *Id.* at 366.

In granting ISBE summary judgment on this record, the District Court committed several errors of law. First, the District Court violated this Court's precedent – including this Court's express guidance in *Gill I* – by failing to conduct the fact-intensive analysis of Gill's as applied in combination claim that is required under the *Anderson-Burdick* framework. Second, the District Court relied on improper evidence and imposed an improper evidentiary burden to reject Gill's argument that the Challenged Provisions are severely burdensome. Third, the District Court violated the legal standards applicable to motions for summary judgment filed under Federal Rule of Civil Procedure 56(c) by failing to address the undisputed facts on which Gill relies, and by resolving issues of fact against Gill.

But for the foregoing errors, the District Court could not have granted ISBE summary judgment and denied it to Gill. It is now abundantly clear that there are no genuinely disputed material facts and Gill is entitled to judgment as a matter of law. Moreover, the District Court has twice had the opportunity to apply the binding precedent of this Court and the Supreme Court to this case and it has twice failed to do so – this time in direct violation of this Court's guidance in *Gill I*. There is no need for further proceedings. This Court should reverse the District Court and remand with instructions to enter summary judgment for Gill.

Standard of Review

This Court reviews a district court's entry of summary judgment *de novo* and draws all reasonable inferences in favor of the nonmoving parties. *See Lee*, 463 F.3d at 767 (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. *Rednour*, 108 F.3d at 772.

When reviewing constitutional challenges to election laws, a reviewing court must:

> [F]irst 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). Under this "*Anderson-Burdick*" framework, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," *Gill I*, 962 F.3d at 364 (quoting *Anderson*, 460 U.S. at 788), but "when a challenged regulation imposes 'severe' burdens on First and Fourteenth Amendment rights," strict scrutiny applies. *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). When strict scrutiny applies, challenged restrictions are unconstitutional unless the state can show they are "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (citation omitted). Moreover, "the Court has reiterated 'that courts must identify and evaluate the interests put forward by the

State as justifications for the burden imposed by its rule'…." *Gill I*, 962 F.3d at 364-65 (quoting *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008)) (brackets omitted). Thus, "[h]owever slight that burden may appear … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 190.

Argument

I. Gill Is Entitled to Summary Judgment Because the Undisputed Facts Demonstrate That the Challenged Provisions Cannot Withstand Scrutiny Under the *Anderson-Burdick* Analysis.

The Supreme Court has long recognized that "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974). Consequently, when the constitutionality of such laws is challenged, lower courts must address the combined burden that they impose. *See Lee*, 463 F.3d at 770 ("[W]e are required to evaluate challenged ballot access restrictions together, not individually, and assess their combined effect on voters' and candidates' political association rights") (citing *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004)). Here, the undisputed facts demonstrate that the Challenged Provisions, when enforced, have operated as an absolute bar to independent congressional candidates in Illinois since 1974 (excepting elections following a redistricting when the 5 percent requirement does not apply). [Pl. SUMF ¶¶ 23-24, 35.] That is their combined effect, and it, together with the other undisputed facts cited herein, demonstrate that the Challenged Provisions are severely burdensome as applied in combination.

A. The Undisputed Facts Demonstrate That the Challenged Provisions Severely Burden Gill's First and Fourteenth Amendment Rights.

Under the first step in the *Anderson-Burdick* analysis, the Court must address the specific facts demonstrating the "character and magnitude" of the injury to a plaintiff's First and Fourteenth Amendment rights. *Gill I*, 962 F.3d at 364-65. "[M]uch of the action takes place at [this] stage,"

because it determines the appropriate level of scrutiny that applies. *Stone v. Board of Election Com'rs for City of Chicago*, 750 F.3d 678, 681 (7th Cir. 2014). "If the burden on the plaintiffs' constitutional rights is 'severe,'" strict scrutiny applies and "a state's regulation must be narrowly drawn to advance a compelling state interest." *Id.* (quoting *Burdick*, 504 U.S. at 534). The "'inevitable question for judgment' is whether 'a reasonably diligent independent candidate [could] be expected to satisfy the signature requirements…?'" *Lee*, 463 F.3d at 769 (quoting *Storer*, 415 U.S. at 742). The undisputed facts establish that the answer to that question here is No. [*See supra* pp. 6-9].

There can be no doubt that Gill was a reasonably diligent candidate. He began his petition drive on the first day of the 90-day period and worked around the clock to collect 5,000 signatures himself, while recruiting 18 volunteers who collected the balance of the 11,348 total signatures that he ultimately submitted. [Pl. SUMF ¶¶ 40-42.] Gill obtained more valid signatures than any candidate for U.S. House in Illinois since H. Douglas Lassiter in 1974 – and unlike Gill, who was subject to the 90-day collection period, Lassiter had an unlimited time to do it. [Pl. SUMF ¶ 24.] Gill also obtained more valid signatures than 99.9 percent of all candidates who ran for Congress in more than 25,000 races nationwide since states began regulating ballot access in 1890. [Pl. SUMF ¶¶ 29-30.] As a matter of objective fact, therefore, Gill was not merely "reasonably diligent" but more diligent than almost any other congressional candidate in American history.

But still it was not enough. And it was not enough because Illinois' 5 percent requirement is among the most restrictive, if not the most restrictive, in the entire nation. It is more than three times greater than the median requirement imposed by other states. [Pl. SUMF ¶ 32.] Indeed, only two other states – South Carolina and Georgia – impose a requirement of 10,000 signatures

or more, and those states' requirements, like Illinois' five percent requirement, operate as an absolute or near-absolute bar to independent candidates. [Pl. SUMF ¶ 25; *see supra* p. 4, n.2.]

The undisputed facts further show that the Challenged Provisions, when enforced, have not only excluded Gill but also every other independent congressional candidate in Illinois for the last 45 years (excepting elections following redistricting when the five percent requirement does not apply). [Pl. SUMF ¶¶ 23-24, 35.] The inability of any candidate to overcome Illinois' five percent requirement in 45 years – including a candidate as extraordinarily diligent as Gill – is "powerful evidence" that the Challenged Provisions impose a severe burden as applied in combination. *See Stone*, 750 F.3d at 683. As this Court has explained, "[w]hat 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." *Id.* at 682 (citation and quotation marks omitted). When this Court struck down the provisions challenged in *Lee*, for example, it emphasized "the importance of the historical record to the constitutional equation," and thus relied heavily on the "complete exclusion" of independent candidates from Illinois' ballot in the preceding 25 years to support its finding of a severe burden. *Lee*, 463 F.3d at 770. "Whether measured by comparison to the ballot access requirements in the other 49 states or by the stifling effect they have had on independent legislative candidacies since their inception," the Court reasoned, "the combined effect of Illinois's ballot access requirements for independent General Assembly candidates falls on the 'severe' end of [the] sliding scale." *Id.* at 768.

The same reasoning applies here but with greater force. Illinois's 5 percent requirement is among the most if not the most restrictive in the nation. [Pl. SUMF ¶ 25]. It is more than 10 times greater than the median signature requirement for independent candidates for Congress in all 435 districts nationwide, and it is three times greater than the average requirement nationwide. [Pl.

SUMF ¶ 32]. The five percent requirement is also more than double the requirement that Illinois imposes in elections following redistricting, [Pl. SUMF ¶ 20], and it is more than seven times greater than the percentage requirement that Illinois imposes on candidates for U.S. Senate. [Pl. SUMF ¶ 51.]

Illinois's June filing deadline is also one of the earliest in the nation. [Pl. SUMF ¶ 48]. Further, the burden of complying with that early deadline is compounded by the fact that Illinois, unlike a majority of states, imposes a time limit on the petitioning period. [Pl. SUMF ¶ 47]. That 90-day time limit is half as long as the six-month period allowed by Georgia, the state with the closest comparable signature requirement. [Pl. SUMF ¶¶ 25, 36.] Additionally, the burden of complying with Illinois's five percent requirement and June deadline was exacerbated by the difficulty and confusion inherent in collecting signatures in Gill's large, sparsely populated district with boundary lines that cut across county lines and divided metropolitan centers. [Pl. SUMF ¶¶ 18, 43-44.] Perhaps most important, no independent candidate for U.S. House has overcome the five percent requirement in 45 years, [Pl. SUMF ¶ 24] – a full two decades longer than the period of "complete exclusion" the Court deemed sufficient to establish a severe burden in *Lee*. *See Lee*, 463 F.3d at 769-70.

As in *Lee*, therefore, the Challenged Provisions are severely burdensome as applied in combination when measured by every relevant metric. *See id*. at 768-70. They are severe by comparison to the requirements imposed by other states. They are severe by comparison to the requirements that Illinois imposes on candidates for U.S. Senate, and by comparison to the requirements that Illinois imposes in elections following redistricting. And when enforced, they have a stifling effect on independent candidates for U.S. House, operating as an absolute bar to

their participation in Illinois's elections. That is the *sine qua non* of a severe burden. *See id*. at 769 (citing *Storer*, 415 U.S at 742).

B. The Undisputed Facts Demonstrate That the Challenged Provisions Are Not Narrowly Drawn to Serve a Compelling State Interest.

Restrictions that impose a severe burden must be "narrowly drawn" to serve a compelling state interest. *See Stone*, 750 F.3d at 681 (citation omitted); *Lee*, 463 F.3d at 768. The District Court declined to perform this step in the *Anderson-Burdick* analysis because it incorrectly concluded that "Illinois need only have a legitimate interest in its regulations…." [Slip Op. at 24; (App. 24).] Nonetheless, the undisputed facts demonstrate that the Challenged Provisions fail this test.

In the proceedings below, ISBE never even attempted to show that the Challenged Provisions are narrowly drawn to serve any compelling state interest – it only asserted that they further legitimate state interests. [ECF No. 58 at 15-20; 20-27.] That is not at issue. Gill has never asserted that the Challenged Provisions serve no legitimate state interest, and ISBE's assertion is insufficient to demonstrate that they withstand scrutiny under the *Anderson-Burdick* analysis. They do not.

ISBE offered just one justification for the five percent requirement – that Illinois has a legitimate interest in limiting ballot access to candidates who demonstrate a "modicum of support" among the electorate. [ECF No. 58 at 20 (citations omitted).] The relevant question, however, is whether the five percent requirement is narrowly drawn to serve that interest. *See Stone*, 750 F.3d at 681; *Lee*, 463 F.3d at 768. The undisputed facts show it is not: the 5 percent requirement is so restrictive that no independent candidate has overcome it in 45 years, and no independent candidate has ever overcome it as applied in combination with the 90-day period. [Pl. SUMF ¶ 28.] Simply

put, Illinois does not have a compelling or even legitimate interest in requiring a "modicum of support" so great that no candidate can meet it.

The five percent requirement is also among the most if not the most restrictive in the nation. [Pl. SUMF ¶ 25]. It is more than ten time greater than the median requirement imposed by other states and it is three times greater than average requirement imposed by other states. [Pl. SUMF ¶ 32.] Further, it is approximated by only two other states' requirements, which like Illinois's, also operate as an absolute or near-absolute barrier to ballot access. [Pl. SUMF. ¶ 25.] These facts further support the conclusion that the five percent requirement, as applied in combination with the other challenged provisions, is more restrictive than necessary to protect Illinois' regulatory interests. *See Hall v. Simcox*, 766 F.2d 1171, 1174 (7th Cir. 1985) ("Of course the existence of a less restrictive alternative may be relevant to an assessment of reasonableness; one way in which a requirement may be unreasonable is that it is unnecessary in light of another requirement that could be imposed instead.")

Additionally, Illinois has made the determination that a flat 5,000-signature requirement is sufficient to protect its regulatory interests in election cycles following a redistricting. *See* 10 ILCS 5/10-3. In those election cycles, Illinois does not experience ballot-overcrowding or any other problems as a result. [Pl. SUMF ¶¶ 50-51]; *see Gill I*, 962 F.3d at 366 (identifying a total of only four candidates who complied with the reduced requirement in two election cycles). Yet the five percent requirement, as applied to Gill, is more than double the 5,000-signature requirement. Therefore, ISBE cannot plausibly maintain that the 5 percent requirement is narrowly drawn to serve the very same interest that the much lower 5,000-signature requirement adequately protects. *See Hall*, 766 F.2d at 1174.

Similarly, the fact that Illinois imposes a flat 25,000-signature requirement upon candidates for U.S. Senate – which in 2016 amounted to only 0.694 percent of the voters in the preceding 2014 general election, [Pl. SUMF ¶ 20] – provides yet another indication that the five percent requirement is unnecessarily restrictive. If Gill were subject to that same 0.694 percent requirement in 2016, he would have needed only 1,460 valid signatures, which is still far more than the 1,000-signature median requirement for all 435 congressional districts. [Pl. SUMF ¶¶ 21, 32.] ISBE offered no state interest that is served by imposing a percentage requirement on U.S. House candidates that is more than seven times greater than the percentage requirement for U.S. Senate candidates. *See Hall*, 766 F.2d at 1174.

ISBE likewise failed to explain why its interest in limiting access to the ballot makes it necessary to impose a restriction as severe as the five percent requirement when Illinois grants ballot access to virtually any candidate – even those who obviously submit an insufficient number of signatures – provided that no objection is filed. *See* 10 ILCS 5/10-8 (providing that nomination petitions are "presumed" to be valid unless an objection is filed).

Finally, evidence from the 2020 election cycle provides further confirmation that the Challenged Provisions are not narrowly drawn to serve the state's regulatory interests. Due to the outbreak of the COVID-19 virus, Chief Judge Pallmeyer of the Northern District of Illinois entered an order granting certain minor political parties and independent candidates relief from the Challenged Provisions. *See Libertarian Party of Il. v. Pritzker*, No. 20-cv-2112 (N.D. Ill. April 23, 2020) (as modified by a subsequent order entered on May 15, 2020). In particular, the order: 1) reduced the number of signatures required under the five percent requirement by 90 percent; 2) extended the June filing deadline until July 20, 2020; 3) enjoined enforcement of the notarization requirement; and 4) authorized the use of electronic petitioning procedures, among other relief.

See id. This Court denied ISBE's motion to stay the injunction and ultimately affirmed on the merits. *See Libertarian Party of Il. v. Cadigan*, No. 20-1961 (7th Cir. August 20, 2020).

Despite the substantial and comprehensive relief that Chief Judge Pallmeyer granted by enjoining enforcement of the Challenged Provisions, Illinois did not experience ballot overcrowding or any other problems administering the 2020 general election. On the contrary, even if all candidates included on ISBE's official Candidate List as of August 4, 2020 successfully qualified for the November 3, 2020 general election ballot, there would be, on average, only 2.3 candidates in Illinois' congressional races, and no such race would have more than three candidates. [Pl. SUMF ¶ 58.]

Once again, by any relevant metric – whether measured in comparison to other state's requirements, in comparison to Illinois' requirements for other offices, or by reference to the historical inability of candidates to overcome it (even when substantially reduced) – the five percent requirement, as applied in combination with the other Challenged Provisions, is far more restrictive than necessary to protect Illinois' regulatory interests. *See Lee*, 463 F.3d at 768. Unable to rebut that conclusion, ISBE asserted instead that the state is not required to make a "particularized showing" of ballot-overcrowding or other problems before adopting "reasonable restrictions on ballot access." [ECF No. 58 at 26.] But that does not mean the foregoing facts are not relevant. On the contrary, they are relevant precisely because they demonstrate that the Challenged Provisions, as applied in combination, are not reasonable restrictions. *See Lee*, 463 F.3d at 768-69; *Hall*, 766 F.2d at 1174; *Storer*, 415 U.S. at 742.

Because ISBE did not and cannot show that the Challenged Provisions are narrowly drawn to serve its asserted state interests, they fail to withstand scrutiny under the *Anderson-Burdick*

analysis. The Challenged Provisions are unconstitutional as applied in combination, and Gill is entitled to summary judgment on that claim.

II. The District Court Should Be Reversed With Instructions to Enter Summary Judgment For Gill.

The District Court's order granting summary judgment to ISBE should be reversed on several grounds. First, the District Court violated this Court's precedent – including this Court's express guidance in *Gill I* – by failing to conduct the fact-intensive analysis of Gill's as applied in combination claim that is required under the *Anderson-Burdick* framework. Second, the District Court relied on improper evidence and imposed an improper evidentiary burden to reject Gill's argument that the Challenged Provisions are severely burdensome. Third, the District Court violated the legal standards applicable to motions for summary judgment filed under Rule 56(c) by failing to address the undisputed facts on which Gill relies, and by resolving issues of fact against Gill. But for these errors, the District Court could not have granted summary judgment to ISBE. The District Court therefore should be reversed with instructions to enter summary judgment in Gill's favor.

A. The District Court Erred By Failing to Conduct the Fact-Intensive Analysis of Gill's as Applied in Combination Claim That Is Required Under the *Anderson-Burdick* Framework.

This Court's precedent could not be clearer: courts applying the *Anderson-Burdick* analysis "are required to evaluate challenged ballot access restrictions together, not individually, and assess their combined effect on voters' and candidates' political association rights." *Lee*, 463 F.3d at 770 (citing *Nader*, 385 F.3d at 735). Other circuits are in accord. *See*, *e.g.*, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006) ("Our inquiry is not whether each law individually creates an impermissible burden but rather whether the combined effect of the applicable election regulations creates an unconstitutional burden on First Amendment rights") (citation omitted).

This precedent is grounded in the Supreme Court's recognition that "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer*, 415 U.S. at 737.

In direct violation of this precedent, the District Court devoted the large majority of its analysis to a determination of whether each Challenged Provision, "standing alone," violates the First and Fourteenth Amendments, [Slip Op. at 8-19; (App. 8-19)], then relied on its conclusion that they do not as the basis for its subsequent perfunctory analysis of Gill's as applied in combination claim. [*See id.* at 20-22; (App. 20-22).] This approach was especially improper here because on remand Gill did not even argue that the Challenged Provisions are unconstitutional as applied separately, but only that they are unconstitutional as applied in combination. [*See id.* at 5 n.6; (App. 5).] Indeed, the District Court expressly declined to rule on any other claim. [*See id.*] It therefore had no need to determine whether each provision is unconstitutional as applied separately, much less to base its analysis of Gill's as applied in combination claim on the result of that inquiry.

The District Court attempted to justify its improper analytic method by suggesting that whether the Challenged Provisions are unconstitutional as applied separately is "relevant" to whether they are unconstitutional as applied in combination. [*Id.*] That is incorrect. As the Supreme Court made clear more than 45 years ago, ballot access restrictions may be valid as applied in isolation but unconstitutional as applied in combination. *See Storer*, 415 U.S. at 737; *see also Blackwell*, 462 F.3d at 592-93 (observing that analyzing "the burdens imposed by the challenged statutes separately, rather than addressing their collective impact … misses the point."). That is precisely why this Court has unequivocally concluded that courts "are *required* to evaluate

challenged ballot access restrictions together, *not individually*…." *Lee*, 463 F.3d at 770 (emphasis added) (citation omitted). The District Court never even acknowledged this requirement.

To be sure, the District Court eventually turned, in the final pages of its discussion, to Gill's as applied in combination claim, [*see* Slip Op. at 19; (App. 19)], but that does not remedy its error because the District Court expressly predicated its cursory analysis of that claim on its prior conclusion that the Challenged Provisions are valid as applied separately. "As discussed above," the District Court began, "the Court does not find that the five percent requirement … is severely burdensome." [*Id.* at 20.] The District Court then devoted three scant paragraphs to arrive at its ultimate conclusion that the five percent requirement as applied in combination with the other Challenged Provisions does not "push[] the cumulative burden over the edge" into severity. [*Id.* at 22.] In reaching this conclusion, the District Court failed to address almost all of the evidence on which Gill's as applied in combination claim relies. [*Compare supra* pp. 6-9 *with* Slip Op. at 20-22 (App. 20-22).] The District Court also reached that conclusion before it even acknowledged Gill's "main argument" in support of his as applied in combination claim. [Slip Op. at 22; (App. 22).]

Simply put, the District Court did not conduct the fact-intensive analysis of Gill's as applied in combination claim that is required under the *Anderson-Burdick* framework. *See Lee*, 463 F.3d at 770 (citing *Nader*, 385 F.3d at 735). It did not properly assess the Challenged Provisions' "combined effect" on voters' and candidates' constitutional rights, *id.*, based on a "careful analysis of the facts…." *Gill I*, 962 F.3d at 364. Instead, the District Court treated its analysis of the Challenged Provisions as applied separately as practically dispositive of Gill's as applied in combination claim. [*See* Slip Op. at 20-22; (App. 20-22).]

In *Gill I*, this Court reversed the District Court for failing to conduct "the fact-intensive analysis required by the *Anderson-Burdick* balancing test." *Gill I*, 962 F.3d at 366-67. The District Court's specific error in *Gill I* was in treating this Court's decision in *Tripp* as dispositive of Gill's claims. *See id.* Here, the District Court improperly relied not on *Tripp* but on its analysis of the Challenged Provisions as applied separately. It nonetheless committed the same error and it should be reversed on the same grounds.

B. The District Court Erred By Relying on Improper Evidence and Imposing an Improper Evidentiary Burden to Reject Gill's Argument That the Challenged Provisions Are Severely Burdensome.

The District Court also erred when it rejected Gill's "main argument" that the Challenged Provisions are severely burdensome because they operate to freeze the political status quo. [Slip Op. at 22; (App. 22)]; *see Jenness*, 403 U.S. at 439. The District Court rejected this argument on two grounds, neither of which is valid.

First, according to the District Court, Gill's argument ignores the fact that "independent candidates may appear on the ballot, even if they have not submitted the required number of signatures, if no one objects to their nomination petitions." [Slip Op. at 22; (App. 22).] Citing evidence that certain candidates have in fact appeared on Illinois's ballot without complying with the Challenged Provisions, the District Court concluded that "[t]his undermines [Gill's] argument" that the Challenged Provisions "have had a stifling effect on independent candidates for Congress." [Slip Op. at 23 (quotation marks and ellipses omitted); (App. 23).] The District Court is incorrect.

As a threshold matter, the District Court's conclusion is not logical. The fact that independent candidates may appear on Illinois's ballot if the Challenged Provisions are not enforced is not evidence that the burden the Challenged Provisions impose is less than severe. It only means that such candidates were not subject to that burden. In no way does this undermine

Gill's argument that the Challenged Provisions are severely burdensome because their enforcement operates as an absolute bar to independent candidates for Congress.

Furthermore, in *Gill I* this Court rejected the very same reasoning the District Court employs here. In *Gill I* the District Court had cited four minor party or independent candidates who qualified for Illinois's ballot in the 2002 and 2012 general elections as "'powerful evidence' that the burden of satisfying the 5% signature requirement is not severe." *Gill I*, 962 F.3d at 366 (citation omitted). As this Court explained, however, those candidates were not required to comply with the five percent requirement because they ran in years following a redistricting, when Illinois imposes a lower requirement. *See id*. (citing 10 ILCS 5/10-3). Reliance on such examples to assess the burden imposed by the Challenged Provisions was therefore "misplaced," this Court concluded. *Gill I*, 962 F.3d at 366 & n.7.

Here, the District Court's reliance on candidates who qualified for Illinois's ballot without complying with the Challenged Provisions is similarly misplaced. It makes no difference that the candidates referenced in *Gill I* did not have to comply with the five percent requirement because they ran in years following a redistricting, whereas the candidates the District Court cited below did not have to comply with the five percent requirement because it was not enforced. The principle is the same. In assessing the burden imposed by the Challenged Provisions, evidence that candidates who were not subject to that burden qualified for Illinois's ballot is not relevant. *See id.*; *see also Storer*, 415 U.S. at 742 (explaining that the purpose of the inquiry into candidates' "past experience" with a challenged statute is to determine whether "a reasonably diligent independent candidate [can] be expected to satisfy" its requirements.).

On this point there is no dispute: no congressional candidate against whom the Challenged Provisions were enforced has overcome their requirements in more than 45 years. [Pl. SUMF ¶¶

23-24.] Furthermore, the last candidate who overcame the five percent requirement – H. Douglas Lassiter in 1974 – was not subject to the 90-day period but had an unlimited time to collect signatures. [Pl. SUMF ¶ 24.] Contrary to the District Court's conclusion, therefore, the record unequivocally establishes that the Challenged Provisions do have a stifling effect on independent candidates. That no such candidate has overcome their requirements in nearly half a century is powerful evidence that they are severely burdensome. *See Lee*, 463 F.3d at 769 (concluding that independent candidates' failure to comply with signature requirement for 25 years supports finding of a severe burden).

The District Court's second ground for rejecting Gill's argument that the Challenged Provisions are severely burdensome because they operate to freeze the political status quo is that Gill did not submit "evidence that any candidate other than Gill attempted to collect the required number of signatures but was subsequently excluded from the ballot." [Slip Op. at 24; (App. 24).] On that basis the District Court concluded that Gill "failed to satisfy [his] burden of showing" that the Challenged Provisions are severely burdensome as applied in combination. [*Id*.] Once again, the District Court is incorrect.

In *Storer*, the Supreme Court did not impose a burden on plaintiffs to present evidence that candidates had tried but failed to comply with the restrictions they challenge. *See Storer*, 415 U.S. at 742. Instead, the Court found that the absence of qualifying candidates, by itself, may be sufficient to support the conclusion that the restrictions are severely burdensome. *See id.* ("[I]t will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not."). Similarly, in *Lee*, this Court did not require the plaintiff to present evidence that independent candidates had tried but failed to comply with the challenged signature requirements during the 25 years in which they were excluded from Illinois's ballot. *See*

Lee, 463 F.3d at 769. Rather, the failure of such candidates to qualify during that time was itself sufficient (together with the other record evidence) to carry the plaintiff's burden. *See id.*

Furthermore, the single case the District Court cited does not hold that plaintiffs are required to present evidence that candidates have tried but failed to comply with the restrictions they challenge. [*See* Slip Op. at 24 (*citing Graveline v. Benson*, 992 F.3d 524 (6th Cir. 2021); (App. 24).] On the contrary, in the very decision that the Sixth Circuit affirmed in *Graveline*, the District Court flatly rejected that conclusion: "Defendants fail to cite any authority for the proposition that a plaintiff challenging ballot access laws must produce evidence of candidates who tried but failed to qualify." *Graveline v. Benson*, 430 F. Supp. 3d 297, 311 (E.D. Mich. 2019), *aff'd*, 992 F.3d 524 (6th Cir. 2021). Additionally, at the preliminary stage of that case, the District Court granted relief despite the absence of such evidence, relying instead on the undisputed fact that "independent candidates for statewide office have *never* qualified for the ballot" under the challenged regulations. *Graveline v. Johnson*, 336 F. Supp. 3d 801, 811 (E.D. Mich. 2018) (concluding that the regulations "operate to freeze the political status quo and effectively bar independent candidates from accessing the ballot.") (internal quotation marks omitted). Once again, the Sixth Circuit not only affirmed, but expressly approved the District Court's reasoning. *See Graveline v. Johnson*, No. 18-1992, __ (6th Cir. Sept. 6, 2018) ("True, we do not know how many independent candidates have sought statewide office, but that omission is the result of Michigan's practice of rejecting petitions with insufficient signatures.").

Accordingly, the District Court's reasons for rejecting Gill's argument that the Challenged Provisions are severely burdensome because they operate to freeze the political status quo have no basis in law. The first violates this Court's guidance in *Gill I* and the second imposes an improper evidentiary burden on Gill. The District Court should be reversed on that ground too.

C. The District Court Erred By Violating the Legal Standards That Apply to Motions for Summary Judgment Under Rule 56(c).

It is a matter of black letter law that a court reviewing a motion for summary judgment must address the evidence on which the parties expressly rely. *See* Fed. R. Civ. P. 56(c)(3). Additionally, "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." *See Rednour*, 108 F.3d at 772. In ruling on the parties' cross-motions here, the District Court repeatedly violated these requirements.

As discussed *supra* at Part II.A, the District Court concluded that the Challenged Provisions are not severely burdensome as applied in combination without addressing almost of the evidence that Gill cited in support of that claim. For example, the District Court opined that complying with the five percent requirement as applied in combination with the 90-day period "does not seem unreasonable to the Court," [Slip Op. at 21; (App. 21)], but failed to address the undisputed fact that no candidate has ever done it. [Pl. SUMF ¶¶ 23-34.] By reaching that conclusion without addressing the undisputed facts contradicting it, the District Court violated its express obligation under Rule 56(c). *See* Fed. R. Civ. P. 56(c)(3).

The District Court was similarly dismissive of the evidence that Gill's large and sparsely populated district with split population centers compounded the burden of complying with the five percent requirement. [Pl. SUMF ¶¶ 18, 43-44.] "[A] smaller and denser district," the District Court opined, "poses its own challenges, such as heavy traffic." [Slip Op. at 21; (App. 21).] The District Court cited no evidence to support such a finding. Next the District Court opined that Gill could "remedy" the confusion caused by the split population centers in his district "by using clearly marked maps…." [*Id.*] Again the District Court cited no evidence to support such a finding. "Arguably," the District Court concluded – once more, without citing evidence – "keeping track

of district boundaries would be *more* onerous in small, densely populated districts…." [*Id.* (emphasis original).] Here, unlike in *Gill I*, the District Court did not merely err by "gloss[ing] over" these factual issues, *Gill I*, 962 F.3d at 365, but by resolving them against Gill, notwithstanding the fact that they are not actually in dispute. *See Rednour*, 108 F.3d at 772.

The District Court committed similar errors in its analysis of the Challenged Provisions as applied separately. For example, the District Court concluded that the five percent requirement is not severely burdensome standing alone without acknowledging the undisputed facts demonstrating that it is more than 10 times greater than the national median and more than three times greater than the national average, or the undisputed fact that Georgia is the only other state that requires more than 10,000 signatures and its requirement, like Illinois's, has historically operated as an absolute bar to independent candidates. [*Compare* Pl. SUMF ¶¶ 25, 32 *with* Slip Op. at 12-16; (App. 12-16).] As this Court recognized in *Lee*, such facts are directly relevant to the analysis. *See Lee*, 463 F.3d at 769. Moreover, because Gill expressly relied on these facts, the District Court was required to address them. *See* Fed. R. Civ. P. 56(c).

Turning to the question of whether a reasonably diligent candidate could be expected to comply with the five percent requirement, *see Storer*, 415 U.S. at 742, the District Court again elided critical facts from its analysis. For example, the District Court observed that a handful of candidates nationwide had collected "around [the] number of signatures" that Gill was required to collect (10,754), and thus concluded, "it does not strike the Court that no reasonably diligent candidate could collect this number of signatures." [Slip Op. at 17; (App. 17).] What the District Court failed to acknowledge, however, is that the few examples it cited are culled from more than 25,000 U.S. House races nationwide since 1890, and they represent a miniscule percentage of the total number of candidates who ran in those races. [Pl. SUMF ¶¶ 29.] Specifically, it is undisputed

that only 0.021 percent of those candidates overcame a signature requirement of 10,754 or more – or a total of three candidates in 126 years – and no candidate in Illinois has ever done so. [Pl. SUMF ¶¶ 23, 26]. The District Court was required to address these facts: they directly contradict its conclusion that reasonably diligent congressional candidates should be able to collect 10,754 signatures because they establish that almost no candidate in the entire nation has ever done it.

Finally, the District Court suggested that Gill himself was not sufficiently diligent because "with a few more diligent petition circulators, it is reasonable that he could have collected enough to satisfy the five percent requirement…." [Slip Op. at 17; (App. 17).] The District Court's ultimate conclusion was even more explicit: "simply because Gill was unable to get on the ballot does not mean that no reasonably diligent candidate could," it reasoned. [Slip Op. at 24; (App. 24).] But the undisputed facts establish that Gill was more diligent than 99.9 percent of all congressional candidates in American history. [Pl. SUMF ¶¶ 23, 29, 30.] If the District Court deemed his efforts insufficient to establish reasonable diligence – as it necessarily did in rejecting his claim – it was obliged to address those facts. Its failure to do so was error.

Conclusion

For the foregoing reasons, this Court should reverse the District Court and remand with instructions to enter summary judgment in Gill's favor.

Dated: May 31, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Appellants complies with the type-volume limit of Fed. R. App. P. 32(a(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the brief contains 10,689 words.

I certify that the foregoing Brief of Appellant complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief is prepared in Times New Roman 12 Point Font.

/s/ Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 2022, 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. 22-1653

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

Plaintiff-Appellants,

- v. -

CHARLES W. SCHOLZ, IAN K. LINNABARY, WILLIAM J. CADIGAN, LAURA K. DONAHUE, WILLIAM R. HAINE, KATHERINE S. O'BRIEN, and CASSANDRA B. WATSON,

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

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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

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

DAVID M. GILL, DAWN MOZINGO, DEBRA KUNKEL, LINDA R. GREEN, DON NECESSARY, and GREG PARSONS, Plaintiffs, v. CHARLES W. SCHOLZ, IAN K. LINNABARY, WILLIAM J. CADIGAN, LAURA K. DONAHUE, WILLIAM R. HAINE, WILLIAM M. MCGUFFAGE, KATHERINE S. O'BRIEN, AND CASSANDRA B. WATSON,[1] Defendants.	)	Case No. 3:16-cv-03221-SLD-EIL

ORDER

Plaintiff David M. Gill aspired to represent the 13th Congressional District of Illinois in the United States House of Representatives. To achieve that goal, he filed nominating petitions to be an independent candidate in the November 2016 election. Although he collected more than the required number of signatures, an objection was filed, and the Illinois State Officers Electoral Board found that the number of valid signatures fell below the requirement. He brings suit, alleging that certain provisions of Illinois's election laws, individually and in combination with the characteristics of the 13th Congressional District, violate the First and Fourteenth Amendments. Before the Court is Defendants Charles W. Scholz, Ian K. Linnabary, William J. Cadigan, Laura K. Donahue, William R. Haine, William M. McGuffage, Katherine S. O'Brien,

[1] The members of the Illinois State Board of Elections ("ISBE") are sued in their official capacities. *See* Compl. 1, ECF No. 1. Pursuant to Federal Rule of Civil Procedure 25(d), the new members of the ISBE, Ian K. Linnabary, Laura K. Donahue, William R. Haine, and Katherine S. O'Brien, are substituted for their predecessors, Andrew K. Carruthers, Betty J. Coffrin, Ernest L. Gowen, and John R. Keith. *See* Defs.' Second Mot. Summ. J. 1 n.1, ECF No. 58. The Clerk is directed to update the docket accordingly.

and Cassandra B. Watson's renewed motion for summary judgment, ECF No. 58, and Gill and fellow Plaintiffs Dawn Mozingo, Debra Kunkel, Linda R. Green, Don Necessary, and Greg Parsons's renewed cross-motion for summary judgment, ECF No. 62. For the following reasons, Defendants' renewed motion for summary judgment is GRANTED, and Plaintiffs' renewed cross-motion for summary judgment is DENIED.

BACKGROUND[2]

I. Factual Background

Gill is a resident of Bloomington, Illinois. In advance of the 2016 election, he filed nominating petitions to be an independent candidate for a position representing the 13th Congressional District of Illinois in the U.S. House of Representatives. Mozingo, Kunkel, Green, Necessary, and Parsons are registered voters in the 13th Congressional District who wished to vote for Gill in the election. They circulated and/or signed Gill's petition. Scholz, Linnabary, Cadigan, Donahue, Haine, McGuffage, O'Brien, and Watson are the current members of the Illinois State Board of Elections ("ISBE"). When an objection to nomination papers is filed, these same parties constitute the State Officers Electoral Board ("SOEB").

For an independent candidate to appear on a ballot in Illinois, he must submit a total number of signatures from registered voters in his district that equals or exceeds five percent of the voters who voted in the most recent general election, 10 ILCS 5/10-3[3]; all signatures must be

[2] At summary judgment, a court must "construe[] the record in the light most favorable to the nonmovant." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). Unless otherwise noted, the factual background of this case is drawn from Defendants' statement of undisputed material facts, Defs.' Second Mot. Summ. J. 3–12; Plaintiffs' response to Defendants' statement, Pls.' Resp. Statement Material Facts 1–22, ECF No. 61-1; Plaintiffs' statement of undisputed material facts, Pls.' Statement Undisputed Material Facts 1–17, ECF No. 62-1; Defendants' reply to Plaintiffs' response and their response to Plaintiffs' additional material and immaterial facts, Defs.' Reply & Resp. to Mots. Summ. J. 3–11, ECF No. 67; Plaintiffs' reply to Defendants' response, Pls.' Reply to Mot. Summ. J. 1, ECF No. 69; and exhibits to the filings.

[3] For the first election following a redistricting of congressional districts, the number of signatures required shifts to 5,000. 10 ILCS 5/10-3. The five percent requirement applies in all other elections.

collected during the 90 days preceding the last day for filing the petition, 10 ILCS 5/10-4. At the bottom of each sheet of the petition, the collector of the signatures must add a statement certifying that the signatures were signed in his presence and are genuine; the statement must be notarized by an officer authorized to administer oaths. *Id.*

Per the five percent requirement, Gill was required to collect and submit a minimum of 10,754 signatures from voters in the 13th Congressional District between March 29, 2016 and June 27, 2016. On June 27, 2016, Gill filed petitions containing approximately 11,350 signatures; he had personally gathered nearly 5,000 signatures himself. Eighteen other petition circulators worked with him to gather signatures.

Any legal voter of the relevant district may file an objection to the nominating papers of a candidate within five business days of the last day for filing nominating papers; nominating papers that are "in apparent conformity with the [signature requirements], shall be deemed to be valid" unless such an objection is made. 10 ILCS 5/10-8. On July 5, 2016, Jerrold Stocks, a voter in the 13th Congressional District, filed an objection to Gill's nominating papers. After reviewing the records and conducting administrative proceedings, the SOEB determined that 8,593 of the signatures submitted by Gill were valid. It revised that number to 8,491 after further review. Because Gill had fewer than the 10,754 required to appear on the ballot, the SOEB decided that his name would not be printed on the ballot for the November 2016 election.

II. Procedural History

Plaintiffs initiated this suit on August 2, 2016. Compl., ECF No. 1. They bring four claims. In Count I, they allege that the notarization requirement, standing alone, violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment both facially and as applied to the 13th Congressional District. *Id.* at 7–12. In Counts II and III, they allege

that the five percent minimum signature requirement, standing alone, violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment both facially and as applied. *Id*. at 12–18. In Count IV, they allege that cumulatively, the notarization requirement, the five percent minimum signature requirement, the 90-day signature gathering period, and the rural nature and splitting of population centers in the 13th Congressional District violate the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (Count IV). *Id*. at 18–21. Plaintiffs request declaratory and injunctive relief, along with costs and expenses of the suit. *Id*. at 11–12, 14, 18, 21.

After Plaintiffs filed their complaint, they filed a motion for a preliminary injunction, Mot. Prelim. Inj., ECF No. 4, which Judge Sue E. Myerscough[4] granted on August 25, 2016, Aug. 25, 2016 Order, ECF No. 15. The preliminary injunction enjoined Defendants from enforcing the signature requirement against Gill and, as such, "require[d] that Gill remain on the ballot." *Id*. at 26. Defendants appealed, Aug. 26, 2016 Not. Appeal, ECF No. 16, and the Seventh Circuit stayed the injunction pending resolution of the appeal, Sept. 9, 2016 Order, ECF No. 21. The Seventh Circuit subsequently mooted the appeal, as the election had already taken place. Dec. 6, 2016 Order, ECF No. 24.

Plaintiffs filed a motion for summary judgment on July 26, 2018, Pls.' First Mot. Summ. J., ECF No. 41, and Defendants filed a cross-motion for summary judgment on August 20, 2018, Defs.' First Mot. Summ. J., ECF No. 42. Judge Colin S. Bruce denied Plaintiffs' motion for summary judgment and granted Defendants' motion for summary judgment. Dec. 18, 2018 Order 1, ECF No. 47. He found that the Seventh Circuit's decision in *Tripp v. Scholz*, 872 F.3d

[4] Judge Myerscough was originally assigned to this case, but it was reassigned to Judge Colin S. Bruce on November 8, 2018. *See* Nov. 8, 2018 Text Order. It was then reassigned to Judge Harold A. Baker, *see* Aug. 30, 2021 Text Order, before being finally reassigned to this Court, *see* Sept. 7, 2021 Text Order.

857 (7th Cir. 2017), was directly on point, and he resolved the summary judgment motions on each count according to that decision. *Id*. at 8, 17–21. Plaintiffs appealed. Jan. 17, 2019 Not. Appeal, ECF No. 49.

On June 18, 2020, the Seventh Circuit reversed Judge Bruce's decision and remanded the case. *Gill v. Scholz*, 962 F.3d 360, 361 (7th Cir. 2020). The court found that Judge Bruce had "erred by automatically concluding that the holding in *Tripp* controls this case" instead of applying the fact-based balancing test established by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). *Gill*, 962 F.3d at 365–66 (noting that "the facts in *Tripp* do not align with Gill's challenge"). As such, it remanded the case so the district court could carry out the test. *Id*. at 366–67.[5] Defendants and Plaintiffs have both filed renewed motions for summary judgment, Defs.' Second Mot. Summ. J.; Pls.' Second Mot. Summ. J.,[6] which the Court will now resolve.

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[5] The Seventh Circuit held that, although the 2016 election had passed, "a justiciable controversy remained under the 'capable of repetition, yet evading review' doctrine." *Gill*, 962 F.3d at 363 n.3. "Under that well-recognized exception to mootness, a claim still presents a justiciable controversy if (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id*. (quotation marks omitted). The court found that "[b]oth factors were met in this case: Gill was unable to litigate his claims before the November 2016 election was held, and he has expressed his intent to run for office in 2020." *Id*. For the same reasons, the Court finds that Plaintiffs' claims are not moot; Gill indicated as recently as March 2021 that he intends to run again as an independent candidate for the House of Representatives in Illinois. *See* Gill Decl. ¶ 5, Pls.' Reply Ex. A, ECF No. 69-1; *see also Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 947–48 (7th Cir. 2019) (finding that "[t]hough the election is over, [the candidate's] claim is not moot because it is capable of repetition, yet evading review": the period prior to the previous election was too short to allow litigation of the action and the candidate "has expressed his intention to run for office . . . again"); *Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006) (finding the case to not be moot after the election was over because "[t]he statutes [the plaintiff candidate] challenges thwarted his bid to appear on the ballot and continue to restrict potential independent candidacies for the Illinois General Assembly").

[6] Defendants seek summary judgment on all four claims. Defs.' Second Mot. Summ. J. 15–28. Plaintiffs appear to reference only Count IV, regarding the cumulative effect of Illinois's election regulations and the 13th Congressional District's geography. *See* Pls.' Resp. Opp'n Defs.' Second Mot. Summ. J. 11–24, ECF No. 61 (addressing only the regulations and other factors in combination); Pls.' Second Mot. Summ. J. 10–18 (same). Arguably, Plaintiffs have waived the issues in Counts I, II, and III. *See Nichols v. Mich. City Plant Plan. Dep't*, 755 F.3d 594, 600 ("The nonmoving party waives any arguments that were not raised in response to the moving party's motion for summary judgment."). The Court will nevertheless address Counts I, II, and III in full, as its analyses in those sections will be relevant to its analysis as to Count IV. *See, e.g.*, *Tripp*, 872 F.3d at 864–72 (examining the challenged provisions individually before analyzing them in combination). The Court will, however, treat Plaintiffs' motion as a motion for summary judgment on Count IV only.

DISCUSSION

I. Legal Standard

Summary judgment is warranted when "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). Where one party has properly moved for summary judgment, the nonmoving party must respond "by identifying specific, admissible evidence showing that there is a genuine dispute of material fact for trial." *Grant v. Trs. of Ind. Univ.*, 870 F.3d 562, 568 (7th Cir. 2017). "The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Parties may not merely refer to their own pleadings, *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), but must instead "cit[e] to particular parts of materials in the record, including depositions, documents, [and] . . . affidavits or declarations" or show "that the materials cited do not establish the absence or presence of a genuine dispute," Fed R. Civ. P. 56(c)(1).[7] The court is to "construe[] the record in the light most favorable to the nonmovant," *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003), "resolving all factual disputes and drawing all reasonable inferences in favor of [the nonmovant]," *Grant*, 870 F.3d at 568. However, the nonmovant "is not entitled to the benefit of inferences that are supported by only speculation or conjecture." *Nichols v. Mich. City Plant Plan. Dep't*, 755 F.3d 594, 599 (7th Cir. 2014) (quotation marks omitted).

"The ordinary standards for summary judgment remain unchanged on cross-motions for summary judgment . . . ." *Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017). The court simply "construe[s] all inferences in favor of the party against whom the motion under

[7] "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

consideration is made." *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 561–62 (7th Cir. 2002) (quotation marks omitted).

II. Analysis

"It is well-settled that [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." *Stone v. Bd. of Election Comm'rs for City of Chi.*, 750 F.3d 678, 681 (7th Cir. 2014) (alteration in original) (quotation marks omitted). However, "not all restrictions imposed by the States . . . impose constitutionally-suspect burdens" on these rights. *Anderson*, 460 U.S. at 788. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

"[T]here is no litmus-paper test to separate valid from invalid restrictions." *Stone*, 750 F.3d at 681 (quotation marks omitted). Rather, a court must conduct "a practical assessment of the challenged scheme's justifications and effects." *Acevedo v. Cook Cnty. Officers Election Bd.*, 925 F.3d 944, 948 (7th Cir. 2019). Courts carry out this analysis using the *Anderson-Burdick* balancing test, *id.*, under which 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 must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the [c]ourt must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighting all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. When the plaintiff's rights "are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance."

Burdick, 504 U.S. at 434 (quotation marks omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id*. (quotation marks omitted). The Supreme Court has acknowledged that deciding whether a provision is unconstitutional is "very much a matter of degree" and that "[w]hat the result of this process will be in any specific case may be very difficult to predict with great assurance." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (quotation marks omitted).[8]

a. Notarization Requirement, Individually (Count I)

The Court turns first to the question of whether the notarization requirement, standing alone, violates the First and Fourteenth Amendments. 10 ILCS 5/10-4 provides that

> [a]t the bottom of each sheet of [a] petition [for nomination] shall be added a circulator's statement, . . . certifying that the signatures on that sheet of the petition were signed in his or her presence; certifying that the signatures are genuine; and either (1) indicating the dates on which that sheet was circulated, or (2) indicating the first and last dates on which the sheet was circulated, or (3) certifying that none of the signatures on the sheet were signed more than 90 days preceding the last day for the filing of the petition; and certifying that to the best of his knowledge and belief the persons so signing were at the time of signing the petition duly registered voters . . . of the political subdivision or district for which the candidate or candidates shall be nominated, and certifying that their respective residences are correctly stated therein. *Such statements shall be sworn to before some officer authorized to administer oaths in this state.*

[8] Courts routinely cite Supreme Court cases predating *Anderson* and *Burdick* when addressing questions about the constitutionality of state election laws, continuing to treat them as valid precedent. *See, e.g.*, *Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 773–75 (7th Cir. 1997) (citing to *Anderson* and *Burdick* along with a variety of Supreme Court opinions predating those cases, including *Storer*). As the Sixth Circuit explained in *Green Party of Tennessee v. Hargett*, 767 F.3d 533 (6th Cir. 2014):

> [T]he Supreme Court has continued to treat [pre-*Anderson* and *Burdick*] cases as valid precedent. [The court] understand[s] *Anderson* and *Burdick* to clarify the proper analysis a court should use in evaluating an election-law claim, without calling into question the Supreme Court's determination[s] [in these earlier cases]. Furthermore, the Court's older precedent is consistent with *Anderson* and *Burdick* in acknowledging that the severity of a burden significantly influences a court's analysis.

Id. at 546 n.2 (citation omitted).

(emphasis added). In Count I, Plaintiffs allege that the notarization requirement "places a severe burden" on the candidate and voters interested in seeing the candidate on the ballot because "[n]otaries are not always available at times when circulators have an opportunity to seek their services," notarization often costs money, and repeat trips to the notary might be necessary for circulators who gather more than a few sheets. Compl. 9. They further assert that "no State interest . . . is served by this *a priori* notarization requirement" because if an objection is filed, the SOEB has to compare the signatures on the petition sheets to signatures obtained from various election authorities to determine the signatures' validity anyway. *Id*. at 8.

The Court finds that the notarization requirement, both facially[9] and as applied, does not pose a severe burden. First, Illinois does not strictly limit who can become a notary. *See* Notary Public Application Checklist, Defs.' Second Mot. Summ. J. Ex. 5, ECF No. 58-5 (noting that an applicant must pay a $10 filing fee, obtain a $5,000 Illinois Notary Public Bond, provide a copy of his driver's license or state ID, and get his signature notarized by a current Notary Public); Illinois Notary—Bonds and Insurance 1, Defs.' Second Mot. Summ. J. Ex. 4, ECF No. 58-4 (indicating that a $5,000 Illinois Notary Public Bond can be purchased for $30.00). The situation is therefore unlike that in *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003), in which the First Circuit found Puerto Rico's notarization requirement to pose a severe burden in part because only licensed attorneys could become notaries, making the supply "inelastic." *Id*. at 240. Indeed, there is nothing to stop one or several petition circulators for a candidate from becoming a notary and notarizing the petition sheets. *See Tripp v. Smart*, Case No. 14-cv-0890-

[9] A facial challenge "asserts that a statute is invalid on its face as written and authoritatively construed, when measured against the applicable substantive constitutional doctrine, without reference to the facts or circumstances of particular applications." *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011) (quotation marks omitted).

MJR-PMF, 2016 WL 4379876, at *5 (S.D. Ill. Aug. 17, 2016), *aff'd sub. nom. Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017) (finding the Illinois notarization requirement to not pose a severe burden because "the time and expense to become a notary in Illinois is not extreme" and so "circulators could become notaries to ease things").

Second, Plaintiffs do not argue or provide evidence that notarization is prohibitively expensive or that a candidate is *required* to pay for notarization services, effectively constituting a mandatory fee. *Cf. Green Party of Pa. v. Aichele*, 89 F. Supp. 3d 723, 743–44 (E.D. Pa. 2015) (finding that a notarization requirement imposed a severe burden because of a mandatory minimum fee of $5.00 per signature). Evidence regarding the cost of notarization or indicating that such a cost dissuaded Plaintiffs from obtaining more signatures is absent from Plaintiffs' briefing. *See also Tripp*, 2016 WL 4379876, at *5 (noting that many communities around the country, including in Illinois, offer free notary services).

Third, Illinois requires one notary signature per page of a petition and does not set a maximum number of voter signatures that can be contained on a page. *See* 10 ILCS 5/10-4. This requirement is much less onerous than the one struck down in *Perez-Guzman*, which required that each *signature* be notarized. *See* 346 F.3d at 239. Gill asserts that his standard petition page contains spots for fifteen signatures. Gill Suppl. Aff. ¶ 15, Defs.' Second Mot. Summ. J. Ex. 8, ECF No. 58-8. With 10,754 signatures at fifteen per page, Gill would need approximately 717 notarizations; if he modified his petition page to contain spots for twenty signatures, he would need 538 notarizations. While certainly not easy, the Court does not believe this to be so burdensome as to prevent Gill from accomplishing it—indeed, Gill does not argue that he was unable to have each page of his petitions, containing nearly 11,350 signatures in total, notarized. *See Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)

("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot."); *see also Tripp*, 872 F.3d at 869 ("[A]lthough Illinois's notarization requirement certainly imposes some logistical burden on plaintiffs' ballot access rights, it cannot be fairly characterized as 'severe.'").[10]

As the notarization requirement does not impose a severe burden, it need not be narrowly drawn to advance a compelling state interest, *Stone*, 750 F.3d at 681; rather, it "need only be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation," *Tripp*, 872 F.3d at 869 (quotation marks omitted). Defendants assert that "[t]he notarization requirement is an important antifraud measure that serves the vital state interest in maintaining an honest election process." Defs.' Second Mot. Summ. J. 15. This is a legitimate interest sufficient to justify the requirement. *See, e.g.*, *In re Armentrout*, 457 N.E.2d 1262, 1267 (Ill. 1983) (detailing the harm caused by the forging of signatures on ballot petitions). "Notarization ensures that circulators can be easily identified, questioned, and potentially prosecuted for perjury." *Tripp*, 872 F.3d at 869.[11]

Other federal courts evaluating similar requirements have come to the same conclusion. *See Richards v. Dayton*, Civil No. 13-3029 (JRT/JSM), 2015 WL 1522199, at *16 n.17 (D. Minn. Jan. 30, 2015) (collecting cases that "have upheld notarization requirements in the absence of some evidence that the statute at issue is unusually burdensome"). For example, the Seventh

[10] The Court also notes that the notarization requirement is not limited to independent candidates—candidates from established parties must have each page of a petition notarized. *See* 10 ILCS 5/7-10.

[11] Plaintiffs allege in the complaint that the certification procedure contained in Illinois's Code of Civil Procedure is a better alternative to the notarization requirement. Compl. 8; *see* 735 ILCS 5/1-109 (providing that an individual may certify in writing that the statements set forth in a document are true and correct "with the same force and effect as though subscribed and sworn to under oath, and there is no further requirement that the pleading, affidavit, or other document be sworn before an authorized person"). They do not make this argument in their briefing on the instant motions. Regardless, because the notarization requirement does not impose a severe burden, it need not be narrowly tailored, merely justified by a legitimate government interest. *See Burdick*, 504 U.S. at 434; *see also Hall v. Simcox*, 766 F.2d 1171, 1174 (7th Cir. 1985) ("The courts may sometimes talk the language of least drastic means but they only strike down ballot-access regulations that are unreasonable . . . .").

Circuit found in *Tripp* that Illinois's notarization requirement, as applied to the facts of that particular case, did not violate the First Amendment, 872 F.3d at 866–70, and in *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court agreed with the district court that a requirement that petition signatures be notarized was not "unusually burdensome" and that there was "no alternative if the State was to be able to enforce its laws," *id*. at 787.

The Court thus finds that Illinois's notarization requirement, standing alone, does not violate the First or Fourteenth Amendment. Defendants are entitled to summary judgment on Count I.

b. Five Percent Requirement, Individually (Counts II and III)

The Court next considers the five percent requirement, standing alone. 10 ILCS 5/10-3 provides that

> [n]ominations 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% . . . 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.

In Counts II and III of the complaint, Plaintiffs allege that this requirement, facially and as applied to the 13th Congressional District, violates the First and Fourteenth Amendments. Compl. 12–18. The theory underlying each count differs: in Count II, the focus is on the geography of the district and its rural nature, which allegedly make it more difficult for circulators to obtain signatures than in more compact and dense districts, *id*. at 12–14, while in Count III, Plaintiffs assert that the five percent requirement is unconstitutional because candidates from established parties need to obtain signatures from a lower percentage of prior voters and because independent candidates for Senate need to obtain a proportionally lower

number of signatures compared to established-party candidates for Senate, unfairly imposing a more severe burden on the independent candidates running for the House of Representatives, *id.* at 14–18.

The Court first notes that many courts, including the Supreme Court, have upheld state election laws requiring certain candidates to obtain signatures from five percent of the entire eligible voting base. *See Jenness v. Fortson*, 403 U.S. 431, 433, 442 (1971) (upholding a requirement that a candidate from an unestablished party obtain signatures from five percent of the number of electors eligible to vote in the previous election to appear on the ballot); *American Party*, 415 U.S. at 789 (requiring signatures that equal three percent or five percent of the vote is not facially invalid); *see also Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 775 (7th Cir. 1997) ("In light of *Jenness* . . . and several other cases, the [plaintiff] cannot argue that the 5% petitioning requirement is severe on its face."). Moreover, the statute at hand limits the base to voters who actually voted in previous elections, whereas in other cases approving similar percentage rules, such as *Jenness*, "the base was all registered voters" and thus constitutes "a larger base than actual voters in a particular election, as here." *Hall v. Simcox*, 766 F.2d 1171, 1173–74 (7th Cir. 1985). While the Court must evaluate the facts of this case independently, it is difficult, in the face of the repeated upholding of five percent requirements, to find that Illinois's five percent requirement here facially violates the Constitution.

The Court also does not find that limiting the five percent requirement to independent candidates (and those from unestablished parties) without requiring established-party candidates to do the same constitutes "invidious discrimination." *Jenness*, 403 U.S. at 441. The Supreme Court has held that "[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." *Id*. at 442. An established party in Illinois must continually demonstrate such a "modicum of support," *id*.—to remain established, it must continually receive more than five percent of the entire vote cast for Governor of Illinois, or, if it did not nominate a candidate for Governor, then it must continue to receive more than five percent of all the votes cast for offices for which it nominated candidates within a particular district or subdivision to remain an established party within that district or subdivision. 10 ILCS 5/10-2. Moreover, an established-party candidate must obtain at least 5,000 signatures to appear as a delegate to a national nominating convention for a statewide office, or at least 0.5% of the qualified primary electors of his party for congressional office. 10 ILCS 5/7-10.

Independent candidates, however, may appear on the ballot in the general election solely by collecting the requisite number of signatures, and thus they need not continually demonstrate community support, like established parties must do, or win a primary like candidates seeking to represent established parties. *See Jenness*, 403 U.S. at 440 (finding that "the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary . . . . cannot be uncritically accepted" (footnote omitted)). With such vastly different requirements, "[c]omparing the petitioning requirement for an 'established' party's candidate in a primary election and a 'new' party's [or an independent] candidate in a general election" is akin to "compar[ing] apples with oranges." *See Rednour*, 108 F.3d at 771, 776 (noting that in Illinois, candidates from unestablished parties and independent candidates "must satisfy nearly identical nominating requirements to appear on the general election ballot"); *see also American Party*, 415 U.S. at

782–83 (finding that since established parties must continuously demonstrate support from the community in each election to maintain that status, "whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner"); *Jenness*, 403 U.S. at 441–42 (acknowledging that "there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other" and finding that the State was not "guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot").[12]

As far as the difference between the number of signatures an independent candidate for Senate must collect compared to an independent candidate for the House of Representatives, neither the Supreme Court nor the Seventh Circuit, in cases involving the differences between petitions for Senate and House candidates, have expressed a general opposition to lack of proportional equality between these two different races. In *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), the Supreme Court addressed the objection of the Socialist Workers Party, an unestablished party, to the requirement that statewide candidates had to obtain 25,000 signatures but candidates for political subdivisions had to follow the five percent requirement because it had resulted in a situation where a candidate for the subdivision in Chicago needed more than 25,000 signatures—a greater number than a candidate for Senate, a

[12] In 2008, the Seventh Circuit addressed a challenge to Illinois's different signature requirements for years following redistricting and years not following redistricting. In *Stevo v. Keith*, 546 F.3d 405 (7th Cir. 2008), the plaintiff argued that the 5,000 signature requirement in years following a redistricting and the five percent requirement in years not following a redistricting constituted disparate treatment. *Id*. at 407. The Seventh Circuit rejected this argument, stating that redistricting can be "disorienting," as "[c]andidates and voters alike must adjust to the new political landscape," and that therefore "[i]t is plausible that it would be more difficult for candidates to obtain signatures in such circumstances, and so the required number is reduced" to 5,000. *Id*. at 408. It found that the plaintiff's proposal for making 5,000 the requirement for every election would be "as or more arbitrary"—"at best [arguments in favor of a universal flat number] make[] the choice between number and percentage a standoff; it does not justify invalidating the percentage approach." *Id*.

statewide office. *Id*. at 175–77. Because the ISBE "advanced no reason . . . why the State needs a more stringent requirement for Chicago" than for statewide elections, the Court held that "the Illinois Election Code is unconstitutional insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago." *Id*. at 186. The Seventh Circuit addressed this case in *Bowe v. Board of Election Commissioners of the City of Chicago*, 614 F.2d 1147 (7th Cir. 1980), and disagreed with Bowe's position that *Socialist Workers Party* "stands for the broad proposition that a state may never impose a higher signature requirement for an office of a smaller subdivision than the requirement imposed for any office of a larger subdivision." *Id*. at 1151. Thus, there is no obligation that the proportions between Senate and House signature requirements remain the same from district to district, lest they be considered invidious discrimination.

The Court turns next to the application of the five percent requirement, standing alone, to the 13th Congressional District. While, as noted above, the percentage is relevant to whether the requirement constitutes a severe burden, "to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates it is necessary to know other critical facts," in particular the actual number of signatures that needs to be obtained to achieve that percentage. *See Storer*, 415 U.S. at 739. Plaintiffs and Defendants agree that, to appear on the ballot in 2016, Gill needed to obtain 10,754 valid signatures. Defs.' Second Mot. Summ. J. 4–5; Pls.' Resp. Statement Material Facts 3, ECF No. 61-1.

The Court does not find that the requirement that Gill obtain 10,754 signatures, standing alone, imposed a severe burden on him such that no reasonably diligent candidate could be expected to achieve this number. *See Stone*, 750 F.3d at 682 ("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." (quotation marks omitted)). Plaintiffs' own expert, Richard Winger, testified that there have been other independent and new party House of Representatives candidates who have collected around this number of signatures. *See* Winger Dep. 28:7, Defs.' Second Mot. Summ. J. Ex. 9, ECF No. 58-9 (Wendall Fant collected 16,292 signatures); *id*. (Franzier Reams collected 12,919 signatures); *id*. at 28:8 (Jack Gargan collected 12,141 signatures); *id*. at 28:18–19 (H. Douglas Lassiter collected more than 8,593 signatures); *id*. at 37:17–18 (Cindy Sheehan collected 10,198 signatures); *id*. at 37:19–20 (Steve Kelly collected 10,186 signatures); *id*. at 38:6 (Stephen Wheeler collected 10,191 signatures); *id*. at 38:12 (David Golding collected 9,803 signatures); *id*. at 38:13 (Samuel Grove collected 9,100 signatures); *id*. at 38:16–17 (John Hager collected 9,758 signatures).[13]

In light of the fact that other House candidates across the country have obtained more than 10,754 signatures or nearly that amount, it does not strike the Court that no reasonably diligent candidate could collect this number of signatures. Gill himself came fairly close: he and his circulators obtained nearly 11,350 signatures, 5,000 of which Gill himself collected. Gill Suppl. Aff. ¶ 3. Although only 8,491 of these were ultimately deemed valid, Defs.' Second Mot. Summ. J. 5; Pls.' Resp. Statement Material Facts 4, with a few more diligent petition circulators, it is reasonable that he could have collected enough to satisfy the five percent requirement, even accounting for a cushion in case of invalidations, *see Krislov v. Rednour*, 226 F.3d 851, 859–60 (7th Cir. 2000) ("In reality a candidate needs a surplus of signatures, because they will likely be challenged on any number of grounds, resulting in some, perhaps many, invalidations."); *see*

[13] As a reminder, at this point the Court is addressing only the issue of whether the five percent requirement, standing alone, violates the Constitution. It will address whether the five percent requirement cumulatively with other factors present in the 13th Congressional District violates the Constitution, including whether a reasonably diligent candidate could succeed under those conditions, in the following section. *See infra* Section II(c).

also McDonald v. Cook Cnty. Officers' Electoral Bd., No. 18 C 1277, 2018 WL 1334931, at *6 (N.D. Ill. Mar. 15, 2018) (stating that "what is relevant about [the plaintiff candidate's] efforts is how many signatures she obtained and how close she was to being placed on the ballot"). While this would require perhaps more than the eighteen petition circulators he already had, it is well recognized that "[h]ard work and sacrifice by dedicated volunteers are the lifeblood of any political organization." *See American Party*, 415 U.S. at 787. Moreover, the Illinois Election Code allows candidates to hire paid circulators to gather petition signatures on their behalf, 10 ILCS 5/10-4, even if, as Winger argues, this may be harder than it seems because paid petition circulators may not circulate petitions for both independent candidates and candidates from established parties, *see* Winger Dep. 41:9–13 ("It is tough for independent candidates to hire paid circulators because the odds are high that many of them will have already worked on a primary petition and then they aren't available to work on the independent's petition."); *see* 10 ILCS 5/10-4 ("[N]o person shall circulate or certify petitions for candidates of more than one political party, or for an independent candidate or candidates in addition to one political party . . . .").

Having found that the five percent requirement, standing alone, does not impose a severe burden on Plaintiffs' rights, the Court now looks to whether Illinois has a legitimate justification for the requirement. *See Burdick*, 504 U.S. at 434. Defendants point to the need for States to ensure that independent candidates "have some modicum of support before gaining ballot access," as "ballots are finite in size and elections are complicated and expensive to run," and assert that "[p]etition signature requirements are the main way to demonstrate this modicum of support." Defs.' Second Mot. Summ. J. 20. A State's interest in ensuring that its elections are orderly—which includes making sure ballots are not overcrowded so that voters are not confused—is well recognized by courts all the way up to the Supreme Court. *See, e.g.*,

Timmons, 520 U.S. at 366–67 ("States also have a strong interest in the stability of their political systems . . . . [which] permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system, and that temper the destabilizing effects of party splintering and excessive factionalism." (citations and footnote omitted)); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) ("It is now clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office."); *Rednour*, 108 F.3d at 776 ("[I]t is neither irrational nor unfair to require a candidate from a new party [or an independent candidate] 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" because the "new party [or independent candidate] has not yet demonstrated a significant modicum of support[.]"). And the Supreme Court has made it clear that it does not "require[] 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." *Munro*, 479 U.S. at 194–95. The Court finds that Defendants have presented a legitimate reason sufficient to justify the five percent requirement.

Accordingly, Defendants are entitled to summary judgment on Counts II and III.

c. Cumulative Requirements (Count IV)[14]

Finally, the Court will address whether the challenged provisions, in combination and along with the geographical characteristics of the 13th Congressional District, violate the Constitution. Along with the notarization requirement, 10 ILCS 5/10-4, and the five percent

[14] Plaintiffs argue that as Defendants "offer[] no defense against [Plaintiffs'] central claim that the challenged provisions are unconstitutional as applied in combination, [they are] not entitled to summary judgment as to that claim." Pls.' Resp. Opp'n Defs.' Second Mot. Summ. J. 13. However, Defendants do address the provisions in combination in their briefing and thus have not waived the issue. *See* Defs.' Second Mot. Summ. J. 27–28.

requirement, 10 ILCS 5/10-3, Illinois's election law provides that "no petition sheet shall be circulated more than 90 days preceding the last day . . . for the filing of such petition, 10 ILCS 5/10-4. In Count IV, Plaintiffs allege that these requirements, plus the "splitting of population centers" in the 13th Congressional District, cumulatively "constitute a regimen or scheme imposed on . . . Plaintiffs by the Defendants to unconstitutionally limit ballot access to only two established political parties." Compl. 19.

The 13th Congressional District comprises over 5,793 square miles. Defs.' Second Mot. Summ. J. 9–10; Pls.' Resp. Statement Material Facts 19–20. It includes the entire cities of Champaign, Urbana, and Decatur and substantial portions of Springfield, Bloomington, Normal, Edwardsville, Glen Carbon, and Collinsville. Defs.' Second Mot. Summ. J. 9–10; Pls.' Resp. Statement Material Facts 19–20. As of 2020, it had a population density of 123.0 persons per square mile. Defs.' Second Mot. Summ. J. 9; Pls.' Resp. Statement Material Facts 19.

Plaintiffs argue that "[t]he undisputed facts demonstrate that Gill was more diligent in his effort to qualify for Illinois's ballot than 99.9 percent of all congressional candidates in American history" and "[t]hat he nonetheless fell short is, by itself, powerful evidence that the challenged provisions are unconstitutionally burdensome." Pls.' Second Mot. Summ. J. 10. They add that "the record is also replete with facts demonstrating that the challenged provisions are severely burdensome by every other relevant metric." *Id.* at 10–11.

As discussed above, the Court does not find that the five percent requirement, here requiring 10,754 signatures, is severely burdensome. *See supra* Section II(b). While collecting that number of signatures in 90 days is more challenging than collecting them in an unlimited amount of time, the Court does not find that it is so onerous as to pose a severe burden on Plaintiffs' rights. Even assuming Gill needed to collect 15,000 signatures to allow him a cushion

in case of objections, *see* Winger Dep. 50:9–11 (recommending that candidates collect "at least 50 percent more raw signatures than the legal requirement"), if he engaged five more petition circulators who collected an average of eight signatures per day, he would reach that amount. *See* Gill Suppl. Aff. ¶¶ 3, 4 (noting that Gill and his eighteen petition circulators collected approximately 11,350 signatures). Gill himself averaged approximately fifty-six signatures per day. *See id.* ¶ 3. This does not seem unreasonable to the Court. *See Stone*, 750 F.3d at 684 ("Ninety days does not strike [the court] as an excessively short time to gather 12,500 signatures."); *see also Jenness*, 403 U.S. at 433 (addressing a requirement that a candidate collect signatures totaling five percent of registered voters in 180 days).

Moreover, while collecting signatures in a larger and more sparsely populated district such as the 13th Congressional District[15] may require travelling greater distances than in a smaller and denser district, the latter poses its own challenges, such as heavy traffic. It is difficult to pronounce for certain which is the more difficult task. And while much of the 13th District is rural, several large cities also are present, either fully or partially, within its boundaries. Plaintiffs assert that "[t]he division of cities and counties created confusion, errors, and impediments to collecting signatures and substantial loss of signature gathering opportunities at public events," Pls.' Second Mot. Summ. J. 5, but petition circulators could remedy much of the confusion by using clearly marked maps to ascertain whether an address is in-bounds. Arguably, keeping track of district boundaries would be *more* onerous in small, densely populated districts such as those in Chicago, where boundaries would be much closer together.

[15] The 13th Congressional District of Illinois is far from the largest, most rural district in the country. The entire state of Montana, for example, is a single congressional district, but one candidate, Steve Kelly, still managed to collect 10,186 signatures in 1994. *See* Winger Dep. 37:19–38:3.

Finally, the Court does not find that the notarization requirement pushes the cumulative burden over the edge. As discussed above, *see supra* Section II(a), Illinois's limitations on who can become a notary are not severe, and the Court finds the requirement that every page be notarized to be reasonable. Petition circulators in the 13th Congressional District could get an entire stack of petition pages notarized at the same time or could even become notaries themselves, which would make the additional burden minimal.

Plaintiffs' main argument in support of their contention that the combined provisions impose a severe burden is that "the challenged provisions have completely excluded independent congressional candidates from Illinois's ballot since 1974." Pls.' Second Mot Sum. J. 12[16]; *see Storer*, 415 U.S. at 742 ("Past experience will be a helpful, if not always an unerring, guide . . . ."). In support, Plaintiffs point to evidence provided by Winger, their expert. *See* Pls.' Statement Undisputed Material Facts 7–10. However, Plaintiffs ignore that independent candidates may appear on the ballot, even if they have not submitted the required number of signatures, if no one objects to their nominating petitions. *See* Winger Dep. 24:25–25:2 ("Illinois is the only state that will allow a petitioning candidate to get on the ballot even though he or she has not met the legal requirement.").[17] Winger only states that no candidate other than H. Douglas Lassiter in 1974

[16] Plaintiffs note that they do not include in this analysis candidates during elections following a reapportionment, when only 5,000 signatures are required to appear on the ballot. Pls.' Second Mot. Summ. J. 12. In 2012, which followed a reapportionment, independent candidate John Hartman collected more than 5,000 signatures and appeared on the ballot for the 13th Congressional District. Menzel Aff. ¶¶ 9–11, Defs.' Second Mot. Summ. J. Ex. 7, ECF No. 58-7. And that same year, Paula Bradshaw appeared on the ballot as a Green Party candidate for the 12th Congressional District after submitting 571 notarized sheets containing up to 10 signatures per sheet. Winger Dep. 33:6–34:8.

[17] In 2018, the ISBE created a new policy that even where no objection was filed to nominating petitions, petitions with fewer than ten percent of the legal requirement would be invalidated. State of Illinois Candidate's Guide Preface, Pls.' Second Mot. Summ. J. Ex. 8, ECF No. 62-9 ("Effective with the 2018 primary election and continuing thereafter, the [ISBE] will implement a limited 'apparent conformity' review of all nominating petitions filed with it" which "will be limited to determining the following: (1) whether a signed Statement of Candidacy has been filed, and (2) whether the filed nominating sheets contain gross signatures equal to or exceeding 10% of the minimum number of signatures required for the office sought."). This does not change the Court's analysis. If that requirement had been present in 2016, an unobjected-to candidate would have needed to present 1,075 signatures, which, as discussed above, would have been easily satisfied by Gill and other candidates, for example, Bill

"has ever *overcome* a general election signature requirement of 8,593 or more in Illinois" and clarifies that his use of "overcome" indicates candidates whose nominating petitions were objected to. Winger Aff. ¶¶ 10, 12, Pls.' Second Mot. Summ. J. Ex. 4, ECF No. 62-5 (emphasis added). He testified in his deposition that he "d[id not] know" if there had "been candidates who did not overcome an objection who nevertheless submitted signatures in excess of 8,593." Winger Dep. 28:21–24. Further, he testified that "there [were] quite a few" independent or new party candidates "in recent years running for Congress who did get on the ballot," although he did not know how many signatures each collected. *Id*. at 29:16–30:22. He pointed to one candidate, Bill Scheurer, who appeared on the ballot in 2006 after submitting over 5,000 signatures (his petition was not objected to). *Id*. at 31:1–32:9.

From these undisputed facts, it is clear that, while there may not have been a candidate who overcame an objection that presented more than 8,593 valid signatures since Lassiter, there have been several independent or new party candidates for the House of Representatives in Illinois appearing on the ballot in the meantime. This undermines Plaintiffs' argument that Illinois's ballot restrictions have had a "stifling effect . . . on independent candidates for Congress." *See* Pls.' Second Mot. Summ. J. 11. While the Court believes a reasonably diligent candidate in the 13th Congressional District could collect 10,754 valid signatures, even if some candidates could not, that Illinois allows unobjected-to independent candidates to appear on the ballot—and that several have—makes it clear that Illinois's election laws "in no way freeze[] the status quo, but implicitly recognize[] the potential fluidity of American political life." *See Jenness*, 403 U.S. at 439.

Scheurer, who appeared on the 2006 ballot after no objection was filed to his nominating petitions, which contained 5,000 signatures, *see* Winger Dep. 31:1–32:9.

Moreover, Plaintiffs do not provide evidence that any candidate other than Gill attempted to collect the required number of signatures but was subsequently excluded from the ballot. Evidence that many candidates had tried and failed to access the ballot was important for the court in *Graveline v. Benson*, 992 F.3d 524 (6th Cir. 2021), in which the Sixth Circuit found that Michigan's cumulative ballot restrictions were unconstitutional in part because of the extensive evidence that candidates had actually attempted to satisfy the requirement but had fallen short. *Id*. at 539–40. Plaintiffs have failed to satisfy their burden of showing that the cumulative barriers to ballot entry in Illinois are severely burdensome.

Thus, Illinois need only have a legitimate interest in its regulations, which, as discussed extensively above, *see supra* Sections II(a), (b), it does. *See also Stone*, 750 F.3d at 685 (finding that "[t]here [wa]s no question that" the relevant signature requirement "and accompanying rules," which included a 90-day limitation on collecting signatures, "serve the important, interrelated goals of preventing voter confusion, blocking frivolous candidates from the ballot, and otherwise protecting the integrity of elections" (quotation marks omitted)).

Gill undoubtedly worked hard to collect signatures, managing to collect nearly 11,350. Unfortunately for him, enough of these were deemed invalid that he fell below the amount required to withstand an objection to his nominating papers. But simply because Gill was unable to get on the ballot does not mean that no reasonably diligent candidate could, and his failure to do so does not invalidate Illinois's regulations. The Court finds that Illinois's election provisions, cumulatively and in combination with the geographical features of the 13th Congressional District, do not violate the First and Fourteenth Amendments. Defendants' motion for summary judgment as to Count IV is granted, and Plaintiff's motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, Defendants Charles W. Scholz, Ian K. Linnabary, William J. Cadigan, Laura K. Donahue, William R. Haine, William M. McGuffage, Katherine S. O'Brien, and Cassandra B. Watson's renewed motion for summary judgment, ECF No. 58, is GRANTED, and Plaintiffs David M. Gill, Dawn Mozingo, Debra Kunkel, Linda R. Green, Don Necessary, and Greg Parsons's renewed motion for summary judgment, ECF No. 62, is DENIED. The Clerk is directed to enter judgment and close the case.

Entered this 31st day of March, 2022.

s/ Sara Darrow
SARA DARROW
CHIEF UNITED STATES DISTRICT JUDGE