Nos. 16-1667 & 16-1775

IN THE
UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

LIBERTARIAN PARTY OF ILLINOIS, LUPE DIAZ, JULIA FOX, and JOHN KRAMER, Plaintiffs-Appellees, v. CHARLES W. SCHOLZ, ERNEST L. GOWEN, WILLIAM M. McGUFFAGE, JOHN R. KEITH, ANDREW K. CARRUTHERS, WILLIAM J. CADIGAN, BETTY J. COFFRIN, and CASANDRA B. WATSON, in their capacities as members of the Illinois State Board of Elections; and JOHN CUNNINGHAM, in his capacity as the County Clerk of Kane County, Illinois, Defendants-Appellants.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Case No. 12-cv-02511 The Honorable ANDREA R. WOOD, Judge Presiding.

BRIEF OF STATE DEFENDANTS-APPELLANTS

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JURISDICTIONAL STATEMENT

The district court had jurisdiction of this action under 28 U.S.C. § 1331. Plaintiffs are the Libertarian Party of Illinois (sometimes, the "Party"); Lupe Diaz, the Party chair; Julia Fox, a prospective candidate for the office of Kane County Auditor; and John Kramer, an individual who wished to circulate a petition to have Fox placed on the November 6, 2012 ballot and to vote for her as a Party candidate for Kane County Auditor. (Doc. 26 at 1-3.) They brought this action against state and local officials under 42 U.S.C. § 1983 alleging violations of their First Amendment and Fourteenth Amendment rights and seeking declaratory and injunctive relief against several provisions of the Illinois Election Code. (*Id.* at 2, 5-7.) (As noted below at 14, Defendants dispute that Plaintiffs had standing to seek any relief against the Kane County Clerk for elective Kane County offices.)

This Court has jurisdiction of this appeal under 42 U.S.C. § 1291. The district court's judgment resolved all claims as to all parties. Plaintiffs' original complaint named as defendants the Illinois State Board of Elections and its members in their official capacities. (Doc. 1 at 1, 3.) The district court's September 5, 2012 order dismissed Plaintiffs' claims against the State Board of Elections on the basis that it is a department of the State of Illinois and therefore not a "person" subject to suit under section 1983. (Doc. 22 at 4.) Plaintiffs' amended complaint added as a defendant the Kane County Clerk, who administers the Election Code for elections to offices for that county. (Doc. 26 at 5-6.) That pleading challenged the constitutionality of provisions in the Election Code that prescribe the number of petition signatures necessary to

establish a new party and to have its candidates appear on an election ballot; set the deadline for submitting such petitions; and require such petitions to include a "full slate" of candidates for all of the offices to be filled in the electoral area for which a new-party petition is submitted. (Doc. 26 at 3-6.) Plaintiffs later abandoned their claims challenging the required number of petition signatures and the filing deadline for new-party petitions. (Doc. 40-2 at 2 & n.3; A 4 & n.1.)

On Plaintiffs' last claim, the district court granted Plaintiffs' motion for summary judgment and denied Defendants' cross-motion for summary judgment, declaring that the full-slate requirement is unconstitutional on its face and as applied to Plaintiffs, and permanently enjoining Defendants from enforcing that requirement. (A 7-12, 13.) On February 29, 2016, the district court issued its final judgment pursuant to Fed. R. Civ. P. 58, which was entered on the district court docket the same day. (A 1-12, 13; Docs. 98, 100.) No motion was filed seeking a new trial or amendment of the judgment. Appellants' notice of appeal, filed on March 25, 2016, was timely under F.R.A.P. 4(a)(1)(A). (Doc. 103.)

ISSUE PRESENTED FOR REVIEW

Section 10–2 of the Illinois Elections Code (10 ILCS 5/10–2) provides that groups seeking to qualify as a new political party and to have candidates appear on the general election ballot with their party affiliation must timely submit to the relevant election authorities petitions signed by a specified number of voters who declare their intention to form the new party and their desire to include on the ballot a candidate for each contested office in the relevant electoral area, commonly referred to as a "full slate."

The issue presented in this appeal is whether the full-slate requirement in section 10–2 violates the First Amendment, either as applied to Plaintiffs or on its face.

STATEMENT OF THE CASE

After Plaintiffs abandoned their other claims, the district court entered summary judgment in their favor on their claim that the full-slate requirement in the Illinois Election Code violates the First and Fourteenth Amendments, both on its face and as applied to Plaintiffs in this case. (A 12.) The district court specifically held "that the full slate requirement imposes a severe burden on the First and Fourteenth Amendment rights of new parties and their supporters, and that the requirement is not narrowly tailored and does not advance a compelling state interest." (*Id.*)

Relevant Provisions of the Election Code

The Illinois Election Code, 10 ILCS 5/1–1 *et seq*. (the "Election Code"), governs many aspects of the procedures for voters to elect state and federal officials in Illinois, both in primary elections and general elections. In a general election, at which the candidate with the most votes is elected to the relevant office, an individual may run either as a specific party's candidate, with that party's name appearing next to the candidate's name on the ballot, or as an independent candidate. 10 ILCS 5/7–1 *et seq.*; 10 ILCS 5/10–1 *et seq*. Candidates who are not independents may be associated either with an "established party" or a "new party." 10 ILCS 5/10–2. That distinction has two principal consequences. *First*, established party candidates for a general election are determined by primary elections, which are held in the month of March preceding the general election, and at which each voter may vote only for candidates of a single party. 10 ILCS 5/2A–1.1, 2A–1.2, 7–5. New party candidates for a general election, by contrast, may be selected by the party itself (e.g., at a party convention or caucus) before the party

is legally qualified to field candidates for the election. *Second*, an established party need not present a "full slate" of candidates for all contested offices for the relevant area (the entire State, a county, municipality, or other district or political subdivision), but a new party must present a full slate of candidates for that area. 10 ILCS 5/10–2.

A party becomes "established" when its candidates receive a minimum number of votes in the last general election. 10 ILCS 5/10–2. A party whose candidate for Governor received more than five percent of the votes for that office is automatically an established party on a statewide basis — for all contested offices in the State, at all levels of government. *Id.* That status exists through the next general election for Governor and is continued if, at that election, the party's candidate again receives more than five percent of the votes cast for that office. *Id.* A party may also be an established party on a more limited basis — just for state offices (e.g., Illinois Comptroller or Secretary of State), or for offices in a political district or subdivision of the State (e.g., a county) — if any of its candidates at the relevant level received more than five percent of the votes cast for offices at that level. *Id.* In that event, its established party status at that level continues for as long as any of its candidates receives more than five percent of the votes cast in the general election for the office sought by that candidate. *Id.*

Both attaining the status of a new party and qualifying the party's candidates to appear on a general election ballot identified by their party affiliation are accomplished by a single procedure, which involves the circulation and submission to election officials of petitions signed by a minimum number of eligible voters. 10 ILCS 5/7–10, 10–2. Under section 10–2 of the Election Code, the petition must declare "the intention of the

signers thereof to form a new political party." 10 ILCS 5/10–2. As noted above, section 10–2 further requires the petition to list the party's proposed candidates for all contested offices in the general election to which the petition applies. *Id.* With the exception of voter petitions that propose placing a referendum on the ballot, all voter petitions seek to have a candidate put on the ballot, and, among those, new-party petitions are the only ones that seek any other consequence — i.e., formation of a new political party. *Id.*

Nomination petitions for a new party and its proposed candidates for statewide offices, for congressional, state legislative or judicial offices, and for some multi-county offices, are submitted to the State Board of Elections. 10 ILCS 5/10–2, 10–6. For county offices, petitions to form a new party and have its candidates put on the ballot are submitted to the county clerk. 10 ILCS 5/10–6. For statewide offices, such petitions must be signed either by 25,000 voters, or voters representing at least one percent of the votes cast at the last statewide general election, whichever is less. 10 ILCS 5/10–2, 10–6. New-party petitions submitted to the State Board or to a county clerk for other offices must be signed by voters representing at least five percent of the votes cast at the last general election for offices representing the relevant district or subdivision. 10 ILCS 5/10–2, 10–6. To appear as an independent candidate on a general election ballot, a person must submit petitions to the relevant election authorities with the same number of supporting signatures by registered voters as are required for a new-party petition. 10 ILCS 5/10–3, 10–6.

The permitted time to circulate petitions to put an independent candidate or new party candidates on a general election ballot begins 90 days before the last day to file the

petition, which is 224 days before the election. 10 ILCS 5/10–4. The signed petitions must be filed with the relevant election authorities at least 134 days, but not more than 141 days, before the election. 10 ILCS 5/10–6.

Plaintiffs' Attempt to Qualify the Libertarian Party of Illinois As a New Party in Kane County for the November 2012 Election

Since 1990, the Party has never been an established party, as defined in section 10–2 of the Election Code, in the entire State of Illinois or in Kane County. (Doc. 46-2, Ex. A at 3-4.) When Plaintiffs filed this action, the Party was not an established party in any part of the State, and no Party members occupied a "partisan elected office" anywhere in the State (although a "very small number" held a "nonpartisan elective office," for which no party identification appears on the ballot, for a smaller political subdivision, such as a local school board). *Id.* at 1-2.

In the months before the November 2012 election, the Party circulated petitions seeking to qualify it as a new party in Kane County and to have plaintiff Julia Fox be put on the ballot as its candidate for the office of Kane County Auditor. (Doc. 46-2, Ex. D.) A total of 129,050 votes were cast for county offices in Kane County in the preceding general election, so 6,453 signatures were required to meet the five-percent threshold for petitions for independent candidates and for new parties and their candidates in the Kane County 2012 general election. (Doc. 46-2, Ex. B at 3, Ex. C.) The petitions circulated by Plaintiffs included the statement that the signers declared their "intention to form a new political party" in Kane County. (*Id.*, Ex. D.) The petition further stated that it presented a "complete slate" of candidates for contested Kane County offices, but it listed Fox as the only proposed candidate, although several other county offices were

contested in that election (e.g., state's attorney, county clerk). (*Id.*, Ex. A at 4, Ex. D.)

The petitions submitted to the Kane County Clerk contained only 614 signatures, or less than ten percent of the number needed to qualify the Party as a new party in Kane County and to allow its candidates to appear on the ballot as members of the Party. (*Id.*, Ex. A at 2, Ex. B at 3.) Following an objection to the petitions, the Kane County Officers Electoral Board, responsible for deciding such matters (see 10 ILCS 5/6A–1), ruled that the petitions were legally insufficient for two reasons: they contained fewer signatures than required to qualify a new party, and they did not comply with the full-slate requirement. (*Id.*, Ex. B at 3-4.)

Proceedings in the District Court

Before the Kane County Officers Electoral Board issued its ruling for the 2012 general election, Plaintiffs filed this action in which they contested the constitutionality of, and sought declaratory and injunctive relief against, three provisions of the Election Code regarding new-party petitions: the petition filing deadline, the five percent signature requirement, and the full-slate requirement. (Doc. 40-1 at 4.) (As noted above, they later abandoned all but the last challenge.) Defendants filed a motion to dismiss (Doc. 11), which the district court granted in part and denied in part (Doc. 22), dismissing the State Board of Elections as a defendant (*id.* at 4) and dismissing Plaintiffs' challenge to the filing deadline for new-party petitions (*id.* at 7-9), but allowing Plaintiffs' other claims against the State Board's members to proceed (*id.* at 5-6, 9-17). At the district court's suggestion (*id.* at 5-6), Plaintiffs also filed an amended complaint adding as an additional defendant the Kane County Clerk, who is charged with implementing Illinois

election laws in Kane County, including with respect to county offices. (Doc. 26 at 1, 3.)

Following discovery, the parties filed cross-motions for summary judgment. (Docs. 29, 40, 44, 50.) The district court granted Plaintiffs' motion and denied Defendants' cross-motion, holding that "the full slate requirement for new political parties under the Illinois Election Code violates the First and Fourteenth Amendments to the United States Constitution on its face and as applied to Plaintiffs in this case." (A 12.) After describing the standard for evaluating constitutional challenges to state election laws that restrict a minor-party candidate's access to the ballot, the district court concluded "that the full slate requirement imposes a severe burden on the First and Fourteenth Amendment rights of new parties and their supporters, and that the requirement is not narrowly tailored and does not advance a compelling state interest." (*Id.*) (The court's opinion also mentioned equal protection principles in connection with laws regulating elections (*id.* at 7-8, 11), but it did not expressly find that the full-slate requirement violated any equal protection standards stricter than those imposed by the First Amendment.)

Addressing the threshold question of the burden imposed on Plaintiffs, the district court stated that the full-slate requirement "places a burden on the First and Fourteenth Amendment rights of new parties, their candidates, and their supporters, which is not shared by established parties, their candidates, and their supporters." (*Id.* at 8.) The court then addressed various justifications for the full-slate requirement, including ensuring a minimum level of support for the party, and preventing factionalism and party-splintering. (A 8-9.) The court concluded that these objectives were achieved just

as well or better by other provisions in the Election Code, including the minimum signature requirement for nominating petitions (which Plaintiffs no longer contested), and that the full-slate requirement was not carefully tailored to achieve these objectives. (*Id.* at 8-10.) For example, the court said, "in some cases a new party might be required to run a candidate for a position to which that party is ideologically opposed." (*Id.* at 9-10.) The court further stated that the significance of the full-slate requirement "as an indicator of a party's legitimacy" is weakened by the fact that established parties are allowed to have candidates appear on the ballot without meeting the requirement and "frequently fail to field candidates for every position on the ballot." (*Id.* at 10.)

The district court acknowledged contrary authority on the issue, in *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (three-judge court), and *Green Party v. Henrichs*, 822 N.E.2d 910 (Ill. App. Ct. 2005), but it found that authority unpersuasive or distinguishable. Among other things, the district court criticized the court's reliance in *Henrichs* on a candidate's ability to run as an independent candidate, stating that party membership and independent candidacy are distinct, with neither being a substitute for the other. (A 11.)

Although the district court declared the full-slate requirement unconstitutional both "on its face and as applied to Plaintiffs in this case" (A 12), the court did not describe the different standards for facial and as-applied challenges, nor did it specifically evaluate Plaintiffs' claim under each standard.

SUMMARY OF ARGUMENT

The full-slate requirement in the Illinois Election Code is fully consistent with the First and Fourteenth Amendments, both on its face and as applied to Plaintiffs. Examined first as an as-applied challenge, Plaintiffs' First Amendment claim fails. The burden on constitutionally protected rights of expressive association caused by the full-slate requirement is not severe. That requirement does not prevent candidates from belonging to a non-established party or campaigning as candidates of that party, nor does it prevent the party from campaigning for them or supporting them generally. It governs only the information that appears on the ballot for a general election by establishing criteria that must be met before a candidate may be listed on the ballot with a party affiliation. That is a modest restriction, not subject to strict scrutiny. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453 n.7 (2008); *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 359-64 (1997).

The full-slate requirement also reasonably furthers valid state interests, including promoting political stability, avoiding overcrowded ballots, and preventing voter confusion. Those purposes are not fulfilled equally well or better, as the district court held, by the Election Code's separate requirement for a minimum number of signatures on petitions to form a new party and have its candidates appear on the ballot.

The State may properly promote political stability by restricting the right to have a candidate's party affiliation appear on the ballot to parties that have an established depth and breadth of support that goes beyond support for a single candidate. Satisfying only the requirement for a minimum number of petition signatures would allow isolated

candidates, with no meaningful party behind them, to appear on the ballot as the representative of such a party. The full-slate requirement also serves to prevent voter confusion and deception. At the general election, it prevents voters from being misled to believe that a candidate with a party designation next to his or her name is backed by a political organization with support similar to that of a traditional party. And at the petition circulation stage, that requirement increases the likelihood that voters who sign a new-party petition understand that they are actually declaring their intention to form a new party, not just agreeing to have someone's name appear on the ballot.

The facts of this case demonstrate the sufficiency of the State's interests to justify the full-slate requirement as applied to Plaintiffs. Plaintiffs brought this suit to have one candidate appear with the Party's name next to hers on the general-election ballot for Kane County's 2012 elections. In the decades preceding the election, the Party never achieved the status of an established party, either in the entire State or in Kane County, by receiving a sufficient number of votes at any election. And at the time of the election, no Party members held any partisan elected office in the State, and the Party was not an established party anywhere in the State. In these circumstances, the law could properly assume that the signatures on the petition to put this one candidate on the ballot (even if there had been enough of them) did not demonstrate enough broad-based support for the Party to justify having its name next to hers on the ballot. Exempting such a party from the full-slate requirement as a constitutional matter would open the ballot to single-candidate "parties," potentially undermining the State's interest in political stability, creating the risk of voter confusion and deception, and crowding the

ballot with candidates who fail to qualify for the general-election ballot in a primary election.

The validity of the full-slate requirement is not undermined by the difference in treatment under the Election Code between established parties, which have demonstrated broad and enduring support in past elections, and aspiring new parties, which have not demonstrated such support. And by hypothesizing situations where the full-slate requirement does not advance the State's interest in a narrowly tailored way, the District Court adopted the wrong standard of scrutiny, relied on impermissible conjecture, and improperly rejected reasonable policy assumptions by the Illinois legislature. The same considerations defeat Plaintiffs' as-applied equal protection claim.

Finally, the failure of Plaintiffs' as-applied challenge necessarily entails the failure of their facial challenge, which lacks merit in any event. The full-slate requirement is certainly constitutional in some circumstances, including those presented in this case. In any event, by disallowing only the notation of a candidate's party affiliation on the ballot, that requirement does not severely burden constitutional rights, and it reasonably advances valid state interests, including promoting political stability, avoiding ballot overcrowding, and preventing voter confusion. The district court's speculation about possible situations in which the full-slate requirement might not advance these goals with great precision is not enough to sustain a facial challenge to the law.

ARGUMENT

I. Plaintiffs Lack Standing to Challenge Implementation of the Election Code's Full-Slate Requirement for Kane County Offices.

As an initial matter, Defendants submit that Plaintiffs lack standing to contest the Kane County Clerk's application of the full-slate requirement to Kane County offices because their inability to meet the separate signature requirement for new-party petitions, which they do not challenge, independently prevents any Party candidate from getting on the ballot for such offices. *See Storer v. Brown,* 415 U.S. 724, 736-37 (1972) (holding that where two candidates were validly barred from ballot by certain provisions of state law, no need existed to examine constitutionality of other provisions as applied to them). And Plaintiffs have not presented any evidence that in the future they are likely to satisfy the Election Code's signature requirement to qualify a new party and have its candidates appear on the general-election ballot for a Kane County office. *See Sierakowski v. Ryan*, 223 F.3d 440, 443-45 (7th Cir. 2000).

II. Illinois' Full-Slate Requirement for Voter Petitions to Establish a New Party and Have Individuals Appear as Its Candidates on a General-Election Ballot Is Constitutional, Both As Applied and On Its Face.

The district court erred in declaring the full-slate requirement in section 10–2 of the Election Code unconstitutional on its face and as applied to Plaintiffs in this case. Section 10–2's full-slate requirement provides that a group seeking to qualify as a new political party and to have the party's name appear next to its candidates' names on a general-election ballot must include, on petitions circulated for signatures by supporting voters, a candidate for each contested office in the relevant electoral area. That requirement is constitutionally valid.

A. Standard of Review

The district court's judgment in this case is subject to *de novo* review for two reasons: it granted Plaintiffs' motion for summary judgment, *see Yahnke v. Kane County*, 823 F.3d 1066, 1070 (7th Cir. 2016), and the operative issue in this case, involving the constitutional validity of a statute governing election procedures, presents a question of law, *see Center for Individual Freedom v. Madigan*, 697 F.3d 464, 476 (7th Cir. 2012); *United States v. Olofson*, 563 F.3d 652, 659 (7th Cir. 2009).

B. Standards Governing Facial and As-Applied Challenges

A facial challenge to a statute, which seeks to have it declared invalid in all possible applications, not just as to the individual plaintiffs, requires establishing that there is "'no set of circumstances'" in which the statute could be validly applied. *Wash. State Grange*, 552 U.S. at 449 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also Mulholland v. Marion County Election Bd.*, 746 F.3d 811, 819 (7th Cir. 2014) ("Facial unconstitutionality as to one means facial unconstitutionality as to all"). At a minimum, such a challenge fails if the statute has "a plainly legitimate sweep." *Wash. State Grange*, 552 U.S. at 449 (citation and internal quotation marks omitted).

Facial challenges are disfavored for several reasons. *Id.* at 450. Among other things, they "often rest on speculation"; they offend the principle that courts should not anticipate questions of constitutional law before they must be decided or announce rules broader than required by the specific facts to which they are to be applied; and they frustrate the democratic process by preventing laws from being applied in situations where doing so would be consistent with the Constitution. *Id.* at 450-51; *see also Berron*

v. Ill. Concealed Carry Licensing Review Bd., 825 F.3d 843, 846 (7th Cir. 2016) (holding that, "with few exceptions," the constitutionality of statutes must be "evaluated in operation ('as applied') rather than peremptorily"); *Doe v. Heck*, 327 F.3d 492, 528 (7th Cir. 2003). In addition, a facial challenge may not rely on "speculat[ion] about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 450, 454; *see also Crawford v. Marion County Election Bd.*, 553 U.S. 181, 202-03 (2008); *Center for Individual Freedom*, 697 F.3d at 476.

A court should decide an as-applied challenge to a statute before considering, if at all, whether it is facially unconstitutional. *Renne v. Geary*, 501 U.S. 312, 324 (1991); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985); *Doe*, 327 F.3d at 527-28; *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 458 (7th Cir. 2002); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 683, 688 n.5 (7th Cir. 1998). And the failure of an as-applied challenge on the ground that a statute validly applies to the facts presented in a specific case virtually forecloses a successful facial challenge, for in that case the court has held that the statute is valid in some circumstances. *See United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011); *see also Wash. State Grange*, 552 U.S. at 449.

C. The full-slate requirement is not unconstitutional as applied to Plaintiffs in this case.

The district court erred in finding that the full-slate requirement violates the First and Fourteenth Amendments as applied to Plaintiffs on the facts of this case.

1. General standards governing regulation of election ballots

"The First Amendment protects the right of citizens to associate and to form

political parties for the advancement of common political goals and ideas." *Timmons*, 520 U.S. at 357-58; *see also Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (recognizing First Amendment right "to associate with others for the common advancement of political beliefs and ideas"); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."). These rights of association include the right to seek the election of specific candidates by having them placed on the election ballot. *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

At the same time, States have broad authority to regulate elections for state and federal offices. *Wash. State Grange*, 552 U.S. at 451; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Timmons*, 520 U.S. at 358. This authority carries with it the ability to promote a variety of interests, which include preserving the integrity of the electoral process, promoting political stability, preventing party splintering and excessive factionalism, avoiding overcrowded ballots, and preventing voter confusion or deception. *Timmons*, 520 U.S. at 366-67; *Burdick v. Takushi*, 504 U.S. 428, 439 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); *Storer,* 415 U.S. at 736; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 774 (7th Cir. 1997).

When a law regulating ballot access is challenged under the First Amendment, courts first examine the nature and effect of the relevant provision, viewed in the context of the overall regulatory scheme. *Storer*, 415 U.S. at 738; *see also Bullock v. Carter,* 405 U.S. 134, 143 (1972) ("In approaching candidate restrictions, it is essential

to examine in a realistic light the extent and nature of their impact on voters."); *Lerman v. Board of Elections in New York,* 232 F.3d 135, 145 (2d Cir. 2000) (observing that claimed burden of right of ballot access "is not evaluated in isolation, but within the context of the state's overall scheme of election regulations"). Given the variety of situations that can arise, as well as the number of state interests implicated, there is no simple formula or easily administered test to determine the validity of laws regulating ballot access. *Timmons*, 520 U.S. at 359 ("No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."). Instead, the Supreme Court has adopted a sliding-scale standard pursuant to which courts "weigh the character and magnitude of the burden the State's rule imposes on [First Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 351 (citation and internal quotation marks omitted); *see also Rednour*, 108 F.3d at 773 (referring to "flexible standard").

The degree of scrutiny applied to a specific provision depends on the severity of the burden it places on the exercise of protected rights of expressive association. If a challenged law imposes a severe burden on rights of expressive association, it is subject to strict scrutiny and will be upheld only if it is narrowly tailored to further a compelling interest. *Wash. State Grange*, 552 U.S. at 451; *Timmons*, 502 U.S. at 358. If it imposes a burden that is not severe, the State's interest need only be "sufficiently weighty to justify the limitation." *Timmons*, 502 U.S. at 352; *see also Clingman*, 544 U.S. at 587. In that situation, the State is not required to provide "empirical verification" of the

weight of the its asserted justification, *Timmons*, 520 U.S. at 364; *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot over-crowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access.").

2. The full-slate requirement does not impose a severe burden on new parties and therefore is not subject to strict scrutiny.

The district court erred in finding that section 10–2's full-slate requirement imposes a severe burden on new parties, their candidates, and voters who support them. Nothing in section 10–2 prevents a group of individuals from forming a political party, choosing their preferred candidates for public office, and supporting such candidates, including by campaigning and voting for them. Those activities, which represent an exercise of core First Amendment rights, are essentially unaffected by section 10–2. Instead, section 10–2 indirectly affects those activities only to the extent that a political party and its candidates seek to require the State to publish the candidates' party affiliation on the general election ballot. In other words, the only expression that is affected is the information that appears on the ballot itself. And that effect is not a severe burden on protected rights of expressive association.

Addressing this precise issue, the Supreme Court in *Washington State Grange* declared, "The First Amendment does not give political parties a right to have their nominees designated as such on the ballot." 552 U.S. at 453 n.7. In that case, the Supreme Court upheld, against a facial challenge, a voter-approved initiative permitting candidates to identify themselves on a first-round ballot by their party preference, even

if they were not endorsed by, or members of, that party. *Id.* at 449-59. Making the same point in *Timmons*, the Court held that a state law preventing an individual from appearing on ballot "as a particular party's candidate does not severely burden that party's associational rights," 520 U.S. at 359, and that the circuit court accordingly erred by applying strict scrutiny to that law, *id.* at 360-64. Those holdings from *Washington State Grange* and *Timmons* govern here.

Timmons upheld a state "anti-fusion" law that prohibited a candidate from appearing on the ballot as the candidate of more than one party. 520 U.S. at 369. The suit was brought by a party that wanted the ballot to include, as the party's own candidate, a person who already represented another party. The plaintiff claimed that the law burdened its First Amendment rights, as well as the First Amendment rights of its supporters, to have that information communicated on the ballot. *Id.* at 362. Rejecting that argument, the Court explained that "[b]allots serve primarily to elect candidates, not as forums for political expression." *Id.* at 363. The Court held that the burden of preventing the party from having its support for the candidate listed on the ballot was not a severe burden on First Amendment rights, and that the State's valid interests justified excluding that information from the ballot. *Id.* at 358-70.

Narrowing the relevant focus, the Court stated, "The New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. . . . It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." *Id.* at 359. Then, emphasizing the specific nature of the law's effect, the Court added,

> Minnesota has not directly precluded minor political parties from developing and organizing. . . . Nor has Minnesota excluded a particular group of citizens, or a political party, from participation in the election process. . . . The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen.

Id. at 361 (internal citations omitted). Addressing the threshold issue of the applicable standard of scrutiny, the Court concluded that although the contested law did "limit, slightly, the party's ability to send a message to the voters and to its preferred candidates," the burdens it "imposes on the party's First and Fourteenth Amendment associational rights — though not trivial — are not severe." *Id.* at 363. The circuit court accordingly erred, the Supreme Court held, in subjecting the law to strict scrutiny. *Id.* at 363-64.

The same observations apply to Plaintiffs' challenge to Illinois' full-slate requirement. Even if it prevents the Party from being recognized as a new party, it does not preclude the Party from "developing and organizing" or from "participation in the election process," and the Party "remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen." *See Timmons*, 520 U.S. at 361. Instead, the full-slate requirement just limits which candidates may have their party affiliation included on the ballot. *See Libertarian Party of New Hampshire v. Gardner*, 638 F.3d 6, 14 (1st Cir. 2011) ("Unlike many election cases, this case is not about denial of access to the ballot or a party's inability to vote for its nominee. Rather, this is a case about a state's regulation of what is said on a ballot about the party affiliation of a candidate.") (citations and footnote omitted);

see also Schrader v. Blackwell, 241 F.3d 783, 787, 790-91 (6th Cir. 2001) (holding that law regulating disclosure of party affiliation on ballot for minor parties did not impose severe burden); *Dart v. Brown*, 717 F.2d 1491, 1495-1504 (5th Cir. 1983) (addressing law that did not allow listing party affiliation next to candidate's name on ballot for parties that failed to meet criteria to be "recognized").

It would be easy to assume that the effect of the full-slate requirement is to prevent a candidate from getting on the general-election ballot, but that is not an accurate assessment of the requirement. Any Party member who wishes to run for office is free to do so by meeting the voter-petition requirements for an independent candidate, which has the same deadline and signature requirement as a new-party petition, and similarly bypasses the primary process. Thus, the full-slate requirement just prevents one of the Party's candidates from having his or her affiliation with the Party appear on the ballot itself. Someone who identifies with the Party and is supported by it may get on the ballot without fulfilling the full-slate requirement. In that situation, the party's name will not appear next to the candidate's name on the ballot. *See Vasquez v. Mun. Officers Electoral Bd.*, 450 N.E.2d 1379, 1382 (Ill. App. 1983) (holding that where candidates' petitions contained required number of signatures but did not satisfy other requirements for forming new party, law's purpose is served by leaving them "on the ballot as individuals" but "striking the party designation"). But that is not a severe burden on the candidate or the party. *Schrader*, 241 F.3d at 786-87, 790-91 (upholding law denying disclosure of party affiliation on ballot where plaintiff met criteria to run

as independent candidate, but party did not meet criteria to be "recognized").[1]

The critical feature of the full-slate requirement challenged in this appeal, then, is that it simply limits the party's and candidate's expression *on the ballot itself*, and both are free to campaign for the candidate and announce the candidate's party affiliation by all other lawful means. *See Timmons*, 520 U.S. at 361; *see also Jenness v. Fortson*, 403 U.S. 431, 438 (1971) ("Any political organization, however new or however small, is free to endorse any otherwise eligible person as its candidate for whatever elective public office it chooses."); *Ohio Council 8, AFSCME v. Husted*, 814 F.3d 329, 334-36 & n.2 (6th Cir. 2016) (upholding law establishing nonpartisan judicial elections, which imposed "minimal" burden of disallowing party affiliation on ballot, "because political parties and judicial candidates remain free to provide, and voters remain free to receive, a plethora of information regarding whether a given candidate affiliates with or is endorsed by a particular political party," and "a party has many other opportunities to champion its nominee and educate voters"); *Gardner*, 638 F.3d at 14. Because "[b]allots serve primarily to elect candidates, not as forums for political expression," *Timmons*, 520 U.S. at 363, that limitation on such expression, by itself, is not severe, and is not subject to strict scrutiny. *Id.*; *see also Wash. State Grange*, 552 U.S. at 453

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[1] For the 2012 election, plaintiff Fox could not run as an independent candidate because she voted in the preceding Republican primary election. (Doc. 46-2, Ex. B at 2, par. 8; *see* 10 ILCS 5/7–43(f).) But that election has passed, and even for Fox that disability, which Plaintiffs did not challenge, has expired. That disability therefore has no further relevance to Fox specifically, or to Plaintiffs generally, for their claim for declaratory and injunctive relief, on which the district court entered judgment in their favor. There is, in any event, no basis to challenge that disability. *See Storer*, 415 U.S. at 728-36 (upholding California's disaffiliation law prohibiting persons who were registered with a party within one year before primary election to run as independent candidates in general election).

n.7; *Burdick*, 504 U.S. at 438 (stating that "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently"); *Dart v. Brown*, 717 F.2d 1491, 1495-1504 (5th Cir. 1983) (rejecting strict scrutiny for challenge to state law that did not allow listing party affiliation next to candidate's name on ballot for parties that failed to meet criteria to be "recognized" based on number of voters registered as members or percentage of votes for its candidate in last presidential election).[2] The district court therefore erred by subjecting the full-slate requirement to strict scrutiny.

The district court rejected this reasoning, which the Illinois appellate court adopted in *Henrichs*, stating that the ability to run as an independent candidate is materially different from the ability to run as the candidate for a specific party. (A 11.) But the district court's support for this view rests on case law holding that a person who wants to run *as an independent candidate* would be subject to a significant burden by being required to run *as a candidate for an established political party*, not vice versa. Specifically, in *Williams*, the Court invalidated provisions of an Ohio law that collectively made it "virtually impossible" for an independent candidate to get on the ballot. 393 U.S. at 24-33. In *Storer*, the Court remanded the case for further fact-finding regarding

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[2] Highlighting the nature of the actual restriction, *Dart* stated:

> The Libertarian Party here offered its candidate, Henry Dart, whom it supported for City Council. Although the words "Libertarian Party" did not appear under Dart's name, the Libertarian Party was not denied access to the ballot. The ballot's only significance was in electing candidates. It was a candidate, not a party, ballot. Any ballot slot to which the Libertarian Party might have been entitled would have been granted to it through its candidate, Dart.

717 F.2d at 1499.

the petition requirements for an independent candidate to get on the ballot. 415 U.S. at 740. Rejecting the State's contention that these requirements were "of no consequence" because persons seeking to run as independent candidates could pursue the alternative of being nominated by an established party, the Court stated that "the political party and the independent candidate approaches to political activity are entirely different." *Id.* at 745. Observing that "[a] new party organization contemplates a statewide, ongoing organization with distinctive political character [whose] goal is typically to gain control of the machinery of state government by electing its candidates to public office," the Court concluded,

> *For the candidate himself, [affiliation with the new party] would mean undertaking the serious responsibilities of qualified party status under California law, such as the conduct of a primary, holding party conventions, and the promulgation of party platforms.* But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status.

Id. at 745-46.[3]

Those additional responsibilities do not apply to the converse situation, where someone affiliated with a party fulfills the requirements for an independent candidate to get on the ballot. Indeed, as explained above, getting on the ballot as an independent

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[3] Addressing the argument before it, *Storer* said not only that the approaches to political activity taken by a political party and by an independent candidate "are entirely different," but also that "neither is a satisfactory substitute for the other." 415 U.S. at 745. But the issues in the case did not involve a *party* candidate contemplating running *as an independent*, and the Court's oblique reference to that situation — which was not before the Court, and on which it did not elaborate — must be considered dicta.

candidate in Illinois is significantly easier than doing so as the candidate for an established party or a new party. The one disadvantage to satisfying the criteria to be an independent candidate on the ballot — which is not trivial, but is not severe — is not having a party's name appear on the ballot next to one's own.

In sum, the full-slate requirement did not prevent Fox from getting on the ballot. Like the laws upheld in *Timmons*, *Washington State Grange*, *Gardner*, *Schrader*, and *Dart*, that requirement does not prevent a new party's chosen candidates from running for office. It does prevent them from being identified with their party *on the ballot* unless the party also files a sufficient number of signed petitions that list a candidate for each open office and that satisfy the other petition requirements. That may be a burden, but it is not a severe one, either for the candidate or for the party. *Timmons*, 520 U.S. at 363; *Schrader*, 241 F.3d at 786-87, 790-91. Having incorrectly found the burden to be severe, the district court improperly applied strict scrutiny, and for this reason alone its judgment is in error.

3. As applied to Plaintiffs in this case, the full-slate requirement reasonably advances Illinois' interests in promoting political stability, avoiding overcrowded ballots, and preventing voter confusion and deception.

Evaluated under the proper standard, Illinois' full-slate requirement, as applied to Plaintiffs, reasonably advances the State's legitimate interests in a way that justifies the limited burden it imposes on Plaintiffs' rights of expressive association. These interests, recognized by the courts in similar cases, include promoting political stability, avoiding overcrowded ballots, and preventing deception and voter confusion.

a. Promoting political stability

Although a State may not make it "virtually impossible" for new parties to have access to the ballot, *Williams*, 393 U.S. at 24-33, it may properly take actions that reflect a preference for the political stability created by a two-party system, *see Timmons*, 520 U.S. at 366-367 (noting that "[b]road-based political parties supply an essential coherence and flexibility to the American political scene") (citation and internal quotation marks omitted). As the Court recognized in *Storer*, the founders of our Republic believed "that splintered parties and unrestrained factionalism may do significant damage to the fabric of government." 415 U.S. at 786 (citing *The Federalist*, No. 10 (Madison)). The full-slate requirement reasonably advances ths interest in political stability and discourages the proliferation of little parties on the ballot by limiting the ability to have a candidate's party affiliation appear on a general-election ballot to parties that have demonstrated extensive and broad-based political support.

In the American political tradition, voters elect individuals, not parties. But candidates have long recognized the benefit of being associated with an established party that stands for certain political beliefs and ideas in the public mind. *See Timmons*, 520 U.S. at 366-367 (noting that "American politics has been, for the most part, organized around two parties since the time of Andrew Jackson"). Against this background, state laws have legitimately distinguished in numerous ways between candidates for established political parties and other candidates, and courts have repeatedly held that States are under no obligation to ignore these differences and treat both types of parties identically, including with respect to the ability to have the party's name appear next to

a candidate's name on the ballot. *See Jenness*, 403 U.S. at 441-42 (stating that election laws may properly account for "obvious differences" between "a political party with historically established broad support . . . and a new or small political organization"); *see also American Party of Texas v. White*, 415 U.S. 767, 781 & n.13 (1974) (upholding law under which "small parties must proceed by convention when major parties are permitted to choose their candidates by primary election"); *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (plurality opinion) (stating that "the Court has upheld reasonable level-of-support requirements and classifications that turn on the political party's success in prior elections"); *Gardner*, 638 F.3d at 17 ("It is well established that a state may base its recognition of a party, and the benefits of recognition, on the party's past electoral strength or demonstrated support."); *Dart*, 717 F.2d at 1510.

Thus, States have a legitimate interest in ensuring that the benefits associated with being a political party — including the ability of its candidates to convey their party affiliation on the ballot — are limited to groups or organizations that have, in fact, a meaningful depth and breadth of support and participation, rather than just one or a few individual candidates who don a party label. *See Libertarian Party of Florida v. State of Florida*, 710 F.2d 790, 795 (11th Cir. 1983) ("When candidates list a party affiliation, however, the voters and the state are entitled to some assurance that [a] particular party designation has some meaning in terms of a 'statewide, ongoing organization with distinctive political character.'") (quoting *Storer*, 415 U.S. at 745); *see also Schrader*, 241 F.3d at 790 (noting that "other circuits . . . have concluded that the states have significant authority to regulate the formation of political parties and the identification

of candidates on the ballot"); *Henrichs*, 822 N.E.2d at 913 ("If a new party is not able to field candidates for each open position in a political district, that raises doubts as to whether the organization should even be considered a political party."). That is just as true for counties as it is for the State as a whole.

Nothing about the facts of this case demonstrates that the Party has that level of lasting, broad-based support, or that applying the full-slate requirement to Plaintiffs subjects them to arbitrary treatment. The petitions submitted by Plaintiffs sought to qualify only one person (plaintiff Julia Fox) as a candidate for a single contested office in Kane County. But support for one candidate is not the same as support for a broad-based political party, which as a historical matter has been viewed by the public as embracing a wider set of policies and political goals than merely supporting one candidate, and has represented a means to seek greater control over government than one person can exercise. *See Timmons*, 520 U.S. at 357-58, 366-67; *Storer*, 415 U.S. at 745.

Plaintiffs admit that, going back at least to 1990, they have never achieved the level of support at the ballot box necessary to become an established party in the State as a whole or in Kane County. (Doc. 46-2, Ex. A at 1-4.) Plaintiffs further admit that, when this dispute arose, the Party did not have that status anywhere in the State, and no member of the Party held any office for a partisan elective position. (*Id.*) Yet despite this lack of significant public support, Plaintiffs insist that they should have the same ability as major, established parties to have their name appear on the ballot next to candidates they support. This claim is unpersuasive. Despite the Party's lack of success in elections, the Election Code gives it a way to acquire that ability by achieving the

status of a "new party," either in the entire State or in parts of it. Indeed, achieving that status — by circulating nominating petitions instead of winning actual votes at an election — is much less demanding than becoming an established party. Diluting those criteria even further, by eliminating the requirement that the Party offer a slate of candidates and allowing it to present just a single candidate who can be listed on the ballot with his or her party affiliation, goes too far.

As this case illustrates, nullifying the full-slate requirement would require giving ballot space for party affiliation to every so-called party, whether *bona fide* or not, that backs a single candidate for office and garners enough petition signatures. The likely result would be a cacophony on the ballot of single-candidate "parties" with little or no enduring, broad-based support, but with the benefit of being able to advertise a party label. *See Timmons*, 520 U.S. at 365 (emphasizing that the ballot's purpose as "a means of choosing candidates," not as "a billboard for political advertising," would be undermined if political groups could nominate someone "as the candidate for the newly-formed 'No New Taxes,' 'Conserve Our Environment,' and 'Stop Crime Now ' parties"). The full-slate requirement guards against that prospect and advances the State's interest in promoting political stability and preventing excessive factionalism.

b. Avoiding voter confusion and deception

A State also has a strong interest in avoiding overcrowded ballots and otherwise minimizing voter confusion, especially in a general election. *See Munro*, 479 U.S. at 194-95; *Stone v. Bd. of Election Comm'rs for City of Chicago*, 750 F.3d 678, 685 (7th Cir. 2014). A principal means to accomplish this goal is to require that all candidates and

parties that appear on the ballot have substantial public support. *Jenness*, 403 U.S. at 442; *see also Anderson*, 460 U.S. at 788 n.9; *Munro*, 479 U.S. at 193-94. A State likewise has a strong interest in preventing voter deception. *Jenness*, 403 U.S. at 442; *Rednour*, 108 F.3d at 774. The full-slate requirement validly furthers those interests under the facts of this case.

Putting a party affiliation next to a candidate's name on an election ballot typically connotes an organization with extensive political roots and substantial heft. That message can be misleading, however, if that impression by voters does not correspond to what the party actually represents. This case exemplifies the concern. Nowhere in the State did the Party have established party status or a representative elected to a partisan office, and for more than two decades it had not achieved established party status in Kane County or in the State as a whole. Plaintiffs have only limited support for one candidate for a single office in Kane County. Plaintiffs therefore have no convincing claim to add a party affiliation next to a candidate's name on the ballot. Doing so would put additional material on the ballot, potentially confusing or misleading voters, without any strong justification. And individuals in the voting booth are entitled to assume that a party whose name appears next to a candidate has significant, broad-based public support. *See Dart*, 717 F.2d at 1508 ("It is evident that if candidate political 'party' affiliation is to be designated on the ballot, the potential exists for voter confusion or deception unless there are some restrictions on what constitutes a political 'party' for these purposes."); *Libertarian Party of Florida*, 710 F.2d at 795 ("When candidates list a party affiliation, however, the voters and the state are entitled to some assurance that

[a] particular party designation has some meaning in terms of a 'statewide, ongoing organization with distinctive political character.'") (quoting *Storer*, 415 U.S. at 745); *Gill v. State of Rhode Island.*, 933 F. Supp. 151, 161 (D. R.I. 1996) ("just as the proliferation of candidate names on the ballot may foster confusion, so may an unrestricted proliferation of party names"), *aff'd*, 107 F.3d 1 (1st Cir. 1997) (per curiam, unpublished).

The State's interest in avoiding voter confusion also operates when voters are asked to sign a petition to form a new party and have its candidates placed on the ballot. At that stage of the electoral process, requiring that the petition list multiple candidates for different offices helps ensure that voters signing it actually intend to support a real party and are not just helping someone they do not personally support appear on the ballot so that other people have the choice to vote for that candidate. *Cf. Libertarian Party of Maine v. Diamond*, 992 F.2d 365, 373 & n.9 (1st Cir. 1993) (upholding requirement that party candidates "obtain the signatures of Party *members*, as opposed to independent voters or voters enrolled in other political parties," in light of State's legitimate interests in "ensuring sufficient party support among the electorate and sufficient candidate support within the party") (emphasis in original). Illinois may reasonably conclude, without the need for empirical proof, that new-party petitions limited to a single candidate would facilitate the ability to obtain signed petitions that do not reflect actual alliance with the new party.

As described above, a single petition serves to have a party recognized as a new party under the Election Code *and* to have its candidates qualified to appear on the ballot. Significantly, this is the *only* such petition (except for referenda petitions, which

by their nature have a distinctive appearance) that does anything beyond qualifying a person to appear on a ballot. Thus, it is particularly easy for voters who are asked to sign such petitions not to realize that they are *also* declaring their intention to form a new political party — a statutory requirement Plaintiffs never challenged. And that is especially likely if the petition, like all others, lists only a single candidate, as did the petitions submitted by Plaintiffs in this case.[4]

In short, the full-slate requirement reasonably guards against several types of voter confusion and deception by minimizing the risk that voters will sign new-party candidate petitions simply to allow someone's name to appear on the ballot, and by further requiring that a new party be more than a vehicle for just one or a few candidates to get on the ballot with a party label by their names.

4. The State's interests are not fulfilled by the Election Code's separate signature requirement.

The district court did not dispute the validity of the foregoing interests, but it held that they were fulfilled by the signature requirement for new party petitions, with the consequence that the full-slate requirement imposed an additional burden on new parties without a corresponding additional advancement of these goals. That analysis

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[4] Plaintiffs seem to be aware of, and even to have encouraged, this very possibility of voter confusion. Although the petitions they submitted do include a statement of the signer's "intention to form a new political party" (Doc. 46-2, Ex. D), the Party's own guide for petition circulators says they should tell "people who are hesitant to sign . . . that *they are not really supporting the candidate or his ideas*, just his right to be on the ballot." *See www.lpillinois.org/images/effective_campaigns.pdf,* at p. 36 (emphasis added) (accessed Sep. 16, 2016). And if someone specifically asks about the meaning of the language declaring the signer's "intention to form a new political party," the Party's advice is to say "it's *just the legal wording* the state requires *for us to get candidates on the ballot. It doesn't mean [you] are a Libertarian*." *See www.lpillinois.org/petition/petition_completed_sample.pdf* (emphasis added) (accessed Sep. 16, 2016).

is unsound. In addition, the district court effectively required the State to provide empirical verification of the accuracy of its justifications, while accepting speculative possibilities as grounds to reasonable policy assumptions by the Illinois legislature.

In support of its ruling, the district court stated that "[w]hile the signature requirement demands a new party to show public support roughly comparable to that of an established party, 'adding more *candidates* to the mix does not show that more support exists among the electorate.'" (A 9, quoting *Summers v. Smart*, 65 F. Supp. 3d 556, 564 (N.D. Ill. 2014), emphasis added by court below). Neither element of this statement is correct. Signatures on a nominating petition for a single proposed new-party candidate do not come close to reflecting a comparable level of actual support to the level demonstrated by established parties through the substantial percentage of votes their candidates receive in general elections. (See above at 4-6, 29-30.) Nor is it self-evident that a certain number of signatures for a *single* proposed new-party candidate reflects an equal level of support for the party as signatures for a *full list* of party candidates. To the contrary, a certain level of voter support for a slate of candidates listed as a party's representatives naturally shows more support for the type of traditional political party the law contemplates than for a one-candidate party.

The district court was correct when it acknowledged that "a new party's ability to list candidates for every open position in the upcoming election tends to indicate the existence of a well-supported party." (A 8.) But it was wrong to find that "the signature requirement . . . also serves that purpose and does it better." (A 8-9.) It stands to reason that it is easier to get voter support for a single candidate than for multiple candidates

at the same time. A voter's objection to any one of several listed candidates might well cost that voter's support. And common sense suggests that voters are generally less inclined to approve multiple propositions simultaneously. For this reason, allowing a new-party petition to list a single candidate, as opposed to a slate of candidates, would reduce the level of *actual* voter support necessary to meet the statutory minimum. At the same time, and more troubling, allowing new parties to be recognized — and to have their names appear on the ballot — with just a single candidate on a nominating petition would facilitate the ability to generate signed petitions that only appear to, but do not, reflect true support by the signers for the new party itself. (See above at 32-33 & n.4.)

Thus, obtaining the minimum number of signatures on petitions that list only one candidate to put on the ballot does not necessarily, or even probably, establish the same level of actual support to form a new party as the same number of signatures on a petition listing candidates for all contested positions in the relevant electoral unit. And the State, which was not required to rely on "empirical verification," *Timmons*, 415 U.S. at 364; *see also Munro*, 479 U.S. at 194-95 (rejecting need for "a State to make a particularized showing of the existence of voter confusion [or] ballot overcrowding . . . prior to the imposition of reasonable restrictions on ballot access"), could reasonably conclude that this practical difference in support justified making recognition of a new party, with the corresponding benefit of having the party's name appear next to a candidate's name on the ballot, subject to the condition that the party be comprised of a slate of candidates, not just one.

5. The full-slate requirement does not unfairly discriminate against minor parties.

The district court also incorrectly concluded that the full-slate requirement unfairly discriminates against minor parties who seek to put candidates on the general election ballot.[5] That is wrong. It is true, as the district court noted (A 8, 10), that the full-slate requirement does not apply to established parties. But the reasonableness of this distinction is evident in light of the significant differences between established parties and putative new parties, as well as the purposes the full-slate requirement is intended to serve. Established political parties have demonstrated over many years their continuing support among large numbers of voters. This level of widespread and longstanding support justifies giving them the ability to have their name next to their candidates' names on the ballot, even if the party does not field a candidate for every contested office. Proposed new parties are not similarly situated and therefore have no convincing claim to be treated identically. As the Supreme Court explained in *Jenness*:

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and

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[5] The district court did not separately base its judgment on any unique aspect of the Equal Protection Clause, which in this area does not impose a significantly different analysis than the First Amendment. *See Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) ("In election cases, free speech and equal protection analyses generally work in tandem."); *see also Clements v. Fashing*, 457 U.S. 957, 964-65 (1982) (plurality opinion) (noting that the Court "has departed from traditional equal protection analysis" in ballot access cases that "involve[] classification schemes that impose burdens on new or small political parties or independent candidates"). To the extent any unique equal protection concerns are relevant to this appeal, however, they are addressed in this section.

> providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . .

403 U.S. at 441-42; *see also New Alliance Party of Alabama v. Hand*, 933 F.2d 1568, 1574-75 (11th Cir. 1991) ("it has been a constant theme in the cases governing ballot access restrictions that a State need not, and indeed probably should not, treat minor parties and independents the same as major parties"); *Board of Election Comm'rs of Chicago v. Libertarian Party of Ill.*, 591 F.2d 22, 25 (7th Cir. 1979) (recognizing constitutionality of "[d]ifferent treatment of minority parties that does not exclude them from the ballot, prevent them from attaining major party status if they achieve widespread support, or prevent any voter from voting for the candidate of his choice, and that is reasonably determined to be necessary to further an important state interest"); *Werme v. Merrill*, 84 F.3d 479, 484 (1st Cir. 1996) ("Distinguishing between recognized political parties based on past electoral accomplishment is not *per se* invidiously discriminatory."); *Henrichs*, 822 N.E.2d at 913 ("the full-slate requirement does not discriminate between similarly situated entities . . . because new parties are not in the same position as established parties").

It is important to note, moreover, that under Illinois law established parties do not have the same freedom as new parties to choose their candidates, but instead must go through the primary election process, which imposes substantial burdens of its own. *See Jenness*, 403 U.S. at 438 (distinguishing *Williams* and stating that, "[u]nlike Ohio, Georgia does not impose upon a small party or a new party the Procrustean requirement of establishing elaborate primary election machinery"); *see also Rednour*, 108 F.3d at

775 (emphasizing "various freedoms available to new political parties in nominating [their] candidates," including no obligation to participate in a primary election). This is a substantial benefit to new parties, giving them greater leeway to select their candidates without qualifying these candidates to run in primary elections. *See Jenness*, 403 U.S. at 441 ("[W]e can hardly suppose that a small or a new political organization could seriously urge that its interests would be advanced if it were forced by the State to establish all of the elaborate statewide, county-by-county, organizational paraphernalia required of a 'political party' as a condition for conducting a primary election."). This also relieves new parties of the need to compete against the major parties for primary voters, who can only vote for primary candidates of a single party and therefore may not want to participate in a minor-party primary when that can mean having no vote in major-party primaries considered to have greater practical significance. It is also a potential benefit to a new party's candidates, who need not incur the expense and uncertainty of a primary election contest. Thus, it was myopic of the district court to examine the full-slate requirement in isolation from the overall treatment of established and new parties. *cf. Rednour*, 108 F.3d at 776 (stating that proposed comparison of petition requirements for established-party candidates for primary election and new-party candidates for general election "attempts to compare apples with oranges").

The full-slate requirement, as described above, provides a screening function to limit party identification on a general-election ballot to parties with a demonstrated depth and breadth of significant public support. For established parties, such public support is demonstrated by other means, which new parties, by definition, have not

achieved. Because established parties have already demonstrated significant broad-based voter support, they need not be treated the same as small or minor parties by being required to comply with the full-slate requirement.

6. The full-slate requirement is reasonably tailored to fit the State's interests.

In light of the relevant standard for evaluating the constitutionality of the full-slate requirement, the district court's criticism that this requirement is not narrowly tailored to achieve the State's legitimate objectives misses the mark. Giving virtually no weight to the State's valid reasons for limiting the appearance of party affiliations on the ballot to parties with broad and extensive political support, the district court focused on possible "unintended consequences," including the recruitment of "strawmen" to fill spots on the slate, and the possibility that a party might be forced to field a candidate "for a position to which that party is ideologically opposed." (A 9.) But these hypothetical and speculative concerns, which would not be well-taken even in a facial challenge to the statute, are entirely misplaced. Because the relevant standard is not strict scrutiny, suggestions about how the State's goals could be advanced by more finely tuned means, which amounts to second-guessing legislative choices, are misplaced. *See Libertarian Party of Kentucky v. Grimes*, No. 16-6107, ___ F.3d ___, 2016 WL 4487996, *5-6 (6th Cir., Aug. 26, 2016).

Such suggestions are especially misplaced when, as here, they are based on surmise or conjecture in support of an as-applied challenge, where the focus must be on the law's application in the situation actually faced by the parties. Plaintiffs did not present any evidence or other factual support for such speculative possibilities, much less

demonstrate that they had any relevance to Plaintiffs' own situation. Plaintiffs unsuccessfully nominated a single candidate. They did not express ideological objections to having a Party member occupy any of the contested offices in Kane County (which might be the basis for an as-applied challenge by a party that *does* have such objections). And the theoretical possibility that some other aspiring new party might be inclined to run "straw" candidates just to round out its slate cannot overcome the core justification for the full-slate requirement that is present in this case.

D. The District Court Wrongly Declared the Full-Slate Requirement Unconstitutional On Its Face.

The district court also offered no valid reasons — indeed no specific reasons at all — for its separate holding that the full-slate requirement is unconstitutional "on its face." (A 12.) That is reason enough to reverse that holding. In any event, the absence of any meritorious basis for the district court's conclusion that the full-slate requirement is unconstitutional as applied to Plaintiffs in this case demonstrates that its facial invalidation of the statute is unsound. In *Washington State Grange*, which involved a challenge to a law regulating primary elections, the Supreme Court stated that a statute is not facially unconstitutional unless there is "no set of circumstances" in which it could validly be applied. 552 U.S. at 449 (quoting *Salerno*, 481 U.S. at 745). The conclusion that a statute is not unconstitutional as applied to specific plaintiffs therefore effectively forecloses a facial attack on the same law because that conclusion establishes that there are *some circumstances* in which the statute validly applies. *See Masciandaro*, 638 F.3d at 474 (holding that failure of party's as-applied constitutional challenge necessarily foreclosed its facial attack). That logic governs here.

Even if, however, the Court could reach Plaintiffs' facial challenge to the law, that challenge must fail. Claims that a statute is unconstitutional on its face cannot depend on speculation. *Wash. State Grange*, 552 U.S. at 450, 454. And that principle has special force for state laws regulating election procedures, which a State is not obliged to justify with "empirical verification," *Timmons*, 415 U.S. at 364, or a "particularized showing" of the existence of the problems it seeks to prevent, such as voter confusion or ballot overcrowding, *Munro*, 479 U.S. at 194-95. Yet here, that is largely what the district court relied on.

Plaintiffs provided no evidence that, as a general matter, potential new party candidates cannot effectively communicate their proposed candidates' party affiliation through channels other than the ballot, or that the absence of a ballot-based avenue to convey that message prevents their candidates from being elected, thereby precluding the Party from becoming an established party. Nor did they offer evidence that, as a general matter, minor parties that field only one or a few candidates actually have the same type of broad-based support as established parties; that the State's interest in political stability would not be undermined by a plethora of single-candidate parties on the ballot; or that persons who sign new-party petitions for individual candidates or vote for such candidates at a general election are unlikely to be confused or misled about the nature of the party or their relation to it. Plaintiffs likewise have offered no evidence that the types of "unintended consequences" identified by the district court, such as the practice of fielding "straw man" candidates, will be so pervasive that they defeat the purpose of the full-slate requirement.

Faced with this evidentiary vacuum, the district court offered three reasons why the full-slate requirement does not adequately advance the State's interests:

- "the signature requirement would seem better suited to prevent factionalism and party-splintering, as members of a new political party would have an interest in joining forces with similarly-minded individuals to gather the requisite signatures";
- "the full slate requirement would not prevent two new parties espousing the same political ideology from filing nominating petitions under different party names with full slates on each petition"; and,
- "importantly, the Illinois Election Code requires all candidates for a particular party to appear on the same nominating petition, which would prevent overlapping candidates or tickets."

(A 9.) All of these reasons are based on unwarranted speculation, and none suffices to render the full-slate requirement facially unconstitutional.

The district court's first reason, even if it were factually supported, confuses cohesion *within* a new party with the risk that an established party will break into factions. As to the court's second reason, while it is certainly possible that two minor parties with similar ideologies would both field candidates for the same election, *cf.* *Gardner*, 638 F.3d at 14-15 (addressing First Amendment claim by one party to prevent second party with same name from appearing on ballot), that remote possibility falls far short of negating the core justification for the full-slate requirement — namely, limiting party affiliation on a ballot to parties with demonstrated broad-based political support. Finally, the district court provided no authority for its third assertion, that under the Election Code "all candidates for a particular party [must] appear on the same nominating petition." That appears to be required for new parties only by the full-slate

requirement in the Election Code, which the court declared invalid. (The situation does not arise for established parties, for which multiple prospective candidates may submit separate nominating petitions for a primary election, *see* 10 ILCS 5/7–10, and which do not submit any nominating petitions for a general election.) And even if the district court's statement were legally correct, imperfectly addressing a concern about "overlapping candidates or tickets" (which Defendants never offered as a significant justification for the law) does not minimize the full-slate requirement's advancement of the State's distinct interests in promoting political stability and avoiding voter confusion.

In sum, Plaintiffs' facial challenge is even weaker than their as-applied challenge, and the district court's judgment declaring the full-slate requirement unconstitutional on it face should also be reversed.

CONCLUSION

For the foregoing reasons, the district court's judgment granting Plaintiffs' motion for summary judgment and denying Defendants' motion for summary judgment should be reversed.

September 16, 2016

Respectfully submitted,

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Certificate of Compliance With
Fed. R. App. P. 32(a)(7) and Rule 32(c)

I certify that this brief complies with the type volume limitations set forth in Fed. R. App. P. 32(a)(7)(B), in that the text of the brief, including headings, footnotes, and quotations, but excluding the cover page, the table of contents, the table of authorities, the appendix, this certificate and the certificate of service, contains 12,286 words. In preparing this certificate, I relied on the word count of the WordPerfect X4 word processing system used to prepare this brief.

/s/ *Richard S. Huszagh*

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIBERTARIAN PARTY OF ILLINOIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 12-cv-02511
v.	)	
	)	Judge Andrea R. Wood
ILLINOIS STATE BOARD OF ELECTIONS, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The plaintiffs in this action for declaratory and injunctive relief challenge the constitutionality of the full slate requirement for new political parties seeking access to election ballots in the State of Illinois. The Libertarian Party of Illinois ("Libertarian Party"), its chairman Lupe Diaz, prospective candidate for Kane County Auditor Julie Fox, and Fox supporter John Kramer (collectively, "Plaintiffs") sued the members of the Illinois State Board of Elections and the Kane County Clerk (collectively, "Defendants") after Fox was excluded from the Kane County ballot for the November 2012 general election because her petition to run as the Libertarian Party candidate for County Auditor lacked the required number of signatures and did not list a full slate of candidates for her party. Plaintiffs claim that the requirement under the Illinois Election Code that, as a new political party, the Libertarian Party must field a complete slate of candidates at the county level to gain access to the ballot violates their rights under the First and Fourteenth Amendments to the United States Constitution. Now both Plaintiffs and Defendants have filed motions for summary judgment. For the reasons stated below, the Court grants Plaintiffs' motion (Dkt. No. 40) and denies Defendants' motion (Dkt. No. 44).

BACKGROUND

The relevant facts are undisputed. Founded in 1972, the Libertarian Party is an affiliation of voters formed for the purpose of influencing public policy through a variety of means, including running candidates for public office and disseminating the party's views on policy issues through its candidates' campaigns. (Def. Resp. to Pl. Stmt. of Mat. Facts ¶ 1, Dkt. No. 48.) It is the Illinois affiliate of the national party by the same name. (*Id.*) Diaz is the chairman of the Libertarian Party; Fox, who resides in Kane County, sought to run as the party's candidate for Kane County Auditor in the general election held on November 6, 2012; and Kramer, also a resident of Kane County, sought to be able to circulate Fox's nomination petitions and to vote for her. (*Id.* ¶¶ 2-4.)

Under the Illinois Election Code, an "established political party" is defined as "[a] political party which, at the last election in any congressional district, legislative district, county, township, municipality or other political subdivision of district in the State, polled more than 5% of the entire vote cast within such territorial area or political subdivision." (*Id.* ¶ 11 (citing 10 Ill. Comp. Stat. 5/10-2).) The Libertarian Party is not currently an established political party in Kane County. (*Id.* ¶ 10.) As a result, it must meet the requirements for a "new political party" seeking to obtain access to the ballot at the local level. One such requirement is that it must submit a petition "signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding regular election" in that political subdivision. 10 Ill. Comp. Stat. 5/10-2. Another is that it must file its nomination petition "not more than 141 but at least 134 days previous to the day of such election." 10 Ill. Comp. Stat. 5/10-6.

At issue in this lawsuit is yet a third requirement: that the new political party field a complete list of candidates for all offices in the political subdivision in which it wishes to complete. Specifically, as provided by the statute,

> [a]ny [nominating] petition for the formation of a new political party throughout the State, or in any such district or political subdivision . . . shall at the time of filing contain a complete list of candidates of such party for all offices to be filled in the State, or in such district or political subdivision as the case may be, at the next ensuing election to be held[.]

10 Ill. Comp. Stat. 5/10-2. This full slate requirement does not apply to candidates from established political parties or independent candidates. (Def. Resp. to Pl. Stmnt. of Mat. Facts ¶ 18, Dkt. No. 48.)

For the November 2012 election, Fox's nomination petition to run as the Libertarian Party candidate for Kane County Auditor contained 618 signatures and named her alone as a candidate for office. (Def. Stmnt. of Mat. Facts ¶ 9 & Ex. B, Dkt. No. 46.) On July 10, 2012, the Kane County Officers Electoral Board sustained an objection to Fox's petition. The board found Fox's petition deficient because (i) her 618 signatures fell short of the 6,543 that she was required to obtain (*i.e.*, 5% of the total of 129,050 votes that were cast in the preceding general election), and (ii) her petition did not list a complete slate of Libertarian Party candidates for all offices to be filled in Kane County, which for that election included the Circuit Clerk, County Recorder, States' Attorney, County Coroner, County Board Chairman, and Regional Superintendent of Schools. (Def. Stmnt. of Mat. Facts ¶¶ 9, 10, 12 & Ex. B, Dkt. No. 46.)

On April 5, 2012, Plaintiffs filed this lawsuit asserting claims under 42 U.S.C. § 1983 against the Illinois State Board of Elections and its individual members in their official capacities. Plaintiffs alleged that the application of the filing deadline, signature requirement, and full slate requirement for new political parties at the local level unconstitutionally burdened their First

Amendment rights to associate for advancement of their political beliefs and to vote effectively, and their Fourteenth Amendment rights to equal protection and due process of law. (Dkt. No. 1.) After Defendants moved to dismiss Plaintiffs' claims, the Court issued a Memorandum Opinion and Order dismissing the Illinois State Board of Elections as a Defendant because, as a state agency, it is immune from suit under the Eleventh Amendment. (Dkt. No. 22.) The Court also dismissed Plaintiffs' First and Fourteenth Amendment claims against the individual board members to the extent those claims challenged the filing deadline. The Court held that Plaintiffs constitutional claims could proceed against the individual board members, however, finding that "the [Illinois Election Code's] complete slate requirement imposes a heavy burden on Plaintiffs' voting and associational rights that is not justified by the state's regulatory interests." (*Id.* at 17.)

Plaintiffs subsequently filed an amended complaint naming Kane County Clerk John A. Cunningham, in his official capacity, as an additional Defendant. (Dkt. No. 26.) After discovery was completed, the parties filed the cross-motions for summary judgment that are now before the Court. (Dkt. Nos. 40, 44.) In their summary judgment motion, Plaintiffs state that while they originally sought relief from the signature and filing deadline requirements, they have abandoned those claims and are now challenging only the full slate requirement.[1]

DISCUSSION

Summary judgment should be granted where "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). In deciding such a motion, the Court examines the record in the light most favorable to the non-moving party, resolving all evidentiary conflicts in her favor and according her the

[1] Specifically, Plaintiffs state that they are no longer challenging the signature requirement and that in the ruling on the motion to dismiss, the Court "concluded that the filing deadline was not unconstitutional." (Dkt. No. 40-2 at 2.)

benefit of all reasonable inferences that may be drawn from the record. *Coleman v. Donahoe*, 667 F.3d 835, 842 (7th Cir. 2012).

I.

As an initial matter, Defendants contend that this Court need not decide whether the full slate requirement is constitutional in order to resolve this case. Instead, Defendants urge the Court to follow the well-established principle of judicial restraint, which counsels that a court generally should avoid reaching a constitutional question if there is some other ground upon which to dispose of a case. *See Escambia Cnty., Fla. v. McMillan*, 466 U.S. 48, 51 (1984); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will only decide the latter."); *Bhd. of Locomotive Eng'rs and Trainmen v. Union Pac. R.R.*, 522 F.3d 746, 750 (7th Cir. 2008) ("[I]t is a fundamental rule of judicial restraint that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable.") (internal citation and quotation marks omitted). In this case, Defendants ask the Court to decline to reach the constitutional question and instead find that Plaintiffs' claims fail because Fox would have been excluded from the ballot anyway for having an insufficient number of signatures on her nominating petition.

But while Defendants attempt to frame their argument as one of constitutional avoidance, it is more appropriately considered as a standing argument. In essence, Defendants contend that Plaintiffs did not suffer any injury as a result of the full slate requirement since Fox was also ruled ineligible to appear on the ballot for the independent reason that she lacked the requisite signatures. By this theory, however, anyone who would be excluded from a ballot due to one restriction would not be able to challenge that restriction without first demonstrating that they

satisfied, or at least could satisfy, every other requirement. The law imposes no such condition. To the contrary, Fox and her supporters were not required to collect *any* signatures for her nomination petition (let alone the full 6,452) as a prerequisite to challenging the full slate requirement. *See Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (noting that, in a case where the plaintiff challenged several restrictions imposed on independent and third-party candidates, "[t]here would be no question of his standing to seek such relief in advance of the submission or even collection of any petitions"); *see also Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 945 n.2 (1982) ("Because of the reciprocity requirement of § 46-613.01, appellants would not have been granted a permit had they applied for one. Their failure to submit an application therefore does not deprive them of standing to challenge the legality of the reciprocity requirement."); *Stevenson v. State Bd. of Elections*, 638 F. Supp. 547, 550 (N.D. Ill. 1986), *aff'd* 794 F.2d 1176 (7th Cir. 1986) ("The defendants in this case suggest that the plaintiffs have no standing because they have not tendered at this late date their petitions before the board and had them rejected. But this gesture of formality is unnecessary.").

Plaintiffs are harmed by the full slate requirement because it would prevent Fox from appearing on the ballot with her chosen party affiliation regardless of whether she fulfilled the other requirements. Indeed, one could imagine that the fact that Fox's petitions did not list a full slate of Libertarian Party candidates might have deterred interested supporters who, aware of the full slate requirement, were hesitant to sign what appeared to be an infirm petition. Thus, this Court rejects Defendants' suggestion that it avoid the constitutional issue by finding that Fox was properly ruled off the ballot due to an insufficient number of signatures and proceeds to consider the merits of Plaintiffs' claim.[2]

[2] Similarly, the fact that the November 2012 election has long since been decided does not render Plaintiffs' claims moot, as the ballot restrictions they challenge prevented Fox and the Libertarian Party

II.

"The First Amendment, as incorporated against the states by the Fourteenth Amendment, 'protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views.'" *Lee v. Keith*, 463 F.3d 763, 767-68 (7th Cir. 2006) (quoting *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)). Thus, restrictions imposed by a state on a political party's or candidate's access to the election ballot may impermissibly infringe on First Amendment rights. In addition, ballot access restrictions that treat similarly-situated parties or candidates unequally may violate the Fourteenth Amendment right to equal protection of the laws. *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 695 (6th Cir. 2015) (finding that a ballot access restriction that "imposes a greater burden on minor parties without a sufficient rationale put forth by the state . . . violates the Equal Protection Clause"); *see also Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1980); *Lubin v. Panish*, 415 U.S. 709, 713-714 (1974).

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court articulated the standard to be applied when evaluating constitutional challenges to state election laws:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of

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from appearing on the ballot and continue to restrict the political activities of potential new parties and their members. *Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006); *see also Storer v. Brown*, 415 U.S. 724, 737 (1974) ("The . . . election is long over . . . but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the . . . statutes are applied in future elections. This is, therefore, a case where the controversy is capable of repetition, yet evading review.") (internal quotation marks and citations omitted); *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000) (holding that, even though the date of the primary in which the plaintiffs desired to participate had long since passed, because the ballot access restriction at issue was still in force with respect to future elections "this case is capable of repetition yet evading review, a recognized exception to the mootness doctrine").

> compelling importance. 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. at 434 (internal citations and quotations omitted); *see also Hargett*, 791 F.3d at 693 (applying the test established in *Burdick* and *Anderson* in an equal protection challenge to ballot restrictions for minor parties); *Lee*, 463 F.3d at 767-68 (applying the *Burdick* standard to conclude that certain restrictions on ballot access for independent candidates combined to severely burden the First and Fourteenth Amendment rights of candidates and voters).

In Illinois, new political parties are permitted to form and obtain access to the ballot at the local level. There are, however, certain restrictions with which new political parties must first comply in order to do so. New political parties must submit a nominating petition 134 to 141 days prior to the upcoming election that lists candidates for all offices to be filled at the upcoming election and has been signed by at least 5% of the number of voters who voted at the next preceding regular election. 10 Ill. Comp. Stat. 5/10-2, 5/10-6. In contrast, established political parties do not need to run candidates for all offices in the local election. In this respect the Illinois Election Code places a burden on the First and Fourteenth Amendment rights of new parties, their candidates, and their supporters, which is not shared by established parties, their candidates, and their supporters.

Defendants contend that the full slate requirement protects the legitimate state interest of ensuring the existence of sufficient support to permit identification as a party. But there must be some logical relationship between the asserted state interest and the burden imposed upon the constitutional rights of those seeking to appear on the ballot. *Summers v. Smart*, 65 F. Supp. 3d 556, 564 (N.D. Ill. 2014). Perhaps a new party's ability to list candidates for every open position in the upcoming election tends to indicate the existence of a well-supported party, but the

signature requirement (no longer challenged here) also serves that purpose and does it better. While the signature requirement demands a new party to show public support roughly comparable to that of an established party, "adding more *candidates* to the mix does not show that more support exists among the electorate." *Id.* (emphasis in original).

Defendants also argue that the full slate requirement serves the state's interest in preventing factionalism and party-splintering. It is unclear, however, how it serves those interests. Again, the signature requirement would seem better suited to prevent factionalism and party-splintering, as members of a new political party would have an interest in joining forces with similarly-minded individuals to gather the requisite signatures. In addition, the full slate requirement would not prevent two new parties espousing the same political ideology from filing nominating petitions under different party names with full slates on each petition. Additionally, and importantly, the Illinois Election Code requires all candidates for a particular party to appear on the same nominating petition, which would prevent overlapping candidates or tickets.

That the full slate requirement is ill-suited to achieve the goals espoused by Defendants is further demonstrated by the potential for unintended consequences. Requiring a new political party to field candidates for each and every position so that it can appear on the ballot for even one position could encourage new parties to enlist strawmen candidates—who may be uninterested or unqualified to run for their designated positions—just to fill empty slots. The fact that a new party does not have a viable candidate to put forward for County Coroner, for example, does not indicate much about the strength of the party's overall support or its legitimacy. Moreover, as another judge in this District recently pointed out, in some cases a new party might be required to run a candidate for a position to which that party is ideologically opposed. *See Smart*, 65 F. Supp. 3d at 563 n.3 (pointing to Lieutenant Governor as an example of a political

office in Illinois that some new parties might oppose filling as a matter of principle). The suggestion that a full slate of candidates serves as an indicator of a party's legitimacy is further weakened by the fact that even established parties frequently fail to field candidates for every position on the ballot,[3] yet the Illinois Election Code does not restrict their access to the ballot as a result.

Defendants place a great deal of emphasis on the fact that "only a small number of states are as generous as Illinois in permitting new political party formation at the local level." (Def. Reply at 4, Dkt. No. 55.)[4] There are at least nine states, including Illinois, that allow new political parties to access the ballot at the local level. (Pl. Sur-Reply at 1, Dkt. No. 57-1.) Defendants' observation might support the conclusion that Illinois is not required to allow new party formation at the local level, but it does not relieve the state from its obligation, once it determines to establish a process for party formation and participation at the local level, to do so in a way that comports with the constitution. Once new political parties are permitted access to the ballot at the local level, there is no reason to permit the state to enact severe restrictions that are not narrowly tailored and do not advance compelling state interests.

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[3] The Court provided examples in the Memorandum Opinion and Order dated September 5, 2012 addressing Defendants' motion to dismiss. (*See* Dkt. No. 22 at 12-13.) More recent ballots demonstrate that the previously-cited examples were not mere anomalies. For example, the 2014 General Election ballot for Kane County listed no Democratic Party candidate for County Clerk, County Treasurer, or County Board Member for Districts 9, 13, 15, or 21; and no Republican Party candidate for County Board Member for Districts 1, 3, 7, or 17. http://kanecountyelections.com/Candidates/Candidates.aspx?ElectID=6&PartyCode=NP&Lang=1 (last visited February 23, 2016). The Court takes judicial notice of information available to the public about the Kane County ballot. *See Denis v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of information found on the website of a government agency).

[4] Defendants rely on the deposition testimony of Richard Winger, a witness who also submitted an affidavit for Plaintiffs regarding the legislative history of the Illinois full slate requirement (Dkt. No. 40-3). Winger is a member of the Libertarian Party in California and has been the editor of a newsletter called Ballot Access News since 1985. (Dkt. No. 46-3 at 6, 11.) Winger has also testified as a witness in a number of election law cases. (Dkt. No. 40-4.)

Finally, Defendants point to prior cases from Illinois state courts and this District Court upholding the full slate requirement. *See Socialist Workers Party of Illinois v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (finding no First Amendment violation for failing to certify a new political party with no full slate of candidates); *Reed v. Kusper*, 607 N.E.2d 1198, 1202 (Ill. 1993) (noting that the statute is "unambiguous" in requiring a new party to "disclose candidates for all available positions"); *Green Party v. Henrichs,* 822 N.E.2d 910 (Ill. App. Ct. 2005) (finding the full slate requirement did not violate due process and equal protection rights).

Notably, the Illinois appellate court in *Henrichs*, whose opinion addressed the full slate requirement in the most detail of the cases cited, did not consider certain arguments before the Court in the present case that militate in favor of finding the full slate requirement to be a severe burden. First, *Henrichs* did not address the signature requirement for new political parties and whether that would be a reasonable means of having a new party show "that it is able to muster support in the community." *Henrichs*, 822 N.E.2d at 447. Second, in *Henrichs*, the court noted that the full slate requirement does not prevent any individual from running, since they would be able to run as independents. *Id.* This conclusion, however, fails to address the significance of political party membership. As explained by the Court in response to Defendants' motion to dismiss in this case, "[p]olitical party membership and independent candidacy 'are entirely different and neither is a satisfactory substitute for the other.'" (Mem. Op. at 11, Dkt. No. 22 (quoting *Storer v. Brown*, 415 U.S. 724, 745-45 (1974)).

Plaintiffs also correctly point out that the earlier cases were decided at a time when independent candidate petitions had to be filed six months earlier than new party petitions. (Pl. Mot. for Summ. J. at 7-8, Dkt. No. 40-2.) The full slate requirement therefore served the purpose of preventing independent candidates from creating "sham new parties to avoid the earlier filing

deadline." (*Id.* at 8.) As a result of the Seventh Circuit's decision in *Lee v. Keith*, 463 F.3d 763 (2006), the petition deadlines were made identical for new parties and independent candidates. The rationale for needing a separate full slate requirement for new parties therefore diminished substantially after that point.

Illinois is the only state with a full slate requirement. Despite Defendants' arguments to the contrary, the Court finds it meaningful that out of 49 other states and the District of Columbia—with their wide variety of approaches to local and state elections—none have seen fit to impose a comparable requirement. Because of the Court finds that the full slate requirement imposes a severe burden on the First and Fourteenth Amendment rights of new parties and their supporters, and that the requirement is not narrowly tailored and does not advance a compelling state interest, the Court grants summary judgment in favor of Plaintiffs.

CONCLUSION

Accordingly, the reasons discussed above, the Court finds that the full slate requirement for new political parties under the Illinois Election Code violates the First and Fourteenth Amendments to the United States Constitution on its face and as applied to Plaintiffs in this case. Accordingly, Plaintiffs' motion for summary judgment (Dkt. No. 40) is granted and Defendants' motion for summary judgment (Dkt. No. 44) is denied.

ENTERED:

Dated: February 24, 2016

Andrea R. Wood
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIBERTARIAN PARTY OF ILLINOIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 12-cv-02511
v.	)	
	)	Judge Andrea R. Wood
ILLINOIS STATE BOARD OF ELECTIONS, et al.,	)	
	)	
	)	
Defendants.	)	

FINAL JUDGMENT ORDER

For the reasons set forth in the Court's Memorandum Opinion and Order dated February 24, 2016 (Dkt. No. 98), the Court hereby enters Final Judgment and orders the following relief:

1. The Court declares that the State of Illinois's "full-slate" requirement for a new political party as set forth in 10 ILCS 5/10-2, Paragraphs 4 and 7, violates the First and Fourteenth Amendments to the United States Constitution on its face and as applied to Plaintiffs in this case.

2. The Court permanently enjoins the enforcement of the State of Illinois's "full-slate" requirement for a new political party as set forth in 10 ILCS 5/10-2, Paragraphs 4 and 7.

3. The Court orders Defendants to pay to Plaintiffs their reasonable attorneys' fees and costs, in an amount to be determined by this Court. The Court directs the parties to follow the procedures set forth in LR54.1 and LR54.3.

SO ORDERED, this 29th day of February, 2016.

Andrea R. Wood
United States District Judge

Certificate of Filing and Service

I hereby certify that on September 16, 2016, I electronically filed the foregoing Brief of State Defendants-Appellants with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will effect service on the other participants in the case, all of whom are registered CM/ECF users.

/s/ *Richard S. Huszagh*