

In The  
**United States Court Of Appeals  
For The Seventh Circuit**

**LIBERTARIAN PARTY OF ILLINOIS, *et al.*,**

*Plaintiffs – Appellees,*

**v.**

**CHARLES W. SCHOLZ, *et al.*; JOHN A. CUNNINGHAM,  
in his Official Capacity as Kane County Clerk,**

*Defendants – Appellants.*

**ON APPEAL FROM THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION  
THE HONORABLE ANDREA R. WOOD  
CASE No.: 0752-1 : 1:12-CV-02511**

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**BRIEF OF APPELLEES**

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Appellate Court No: 16-1667

Short Caption: Libertarian Party of Illinois v. Illinois State Board of Elections

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Libertarian Party of Illinois; Lupe Diaz; Julia A. Fox; John Kramer

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

Gary Sinawski (deceased); William James Malan (local counsel below); David I. Schoen

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

Libertarian Party of Illinois, <i>et al.</i>	)	
	)	
Appellees,	)	Docket No. 16-1667
	)	
v.	)	(Dist. Ct. 12-cv-02511) (Judge A. Wood)
	)	
Illinois State Board of Elections, <i>et al.</i>	)	
	)	
Appellants.	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of March, 2016, I caused a true and accurate copy of the foregoing Notice of Appearance and Disclosure Statement to be served on all counsel of record, by filing the same through this Court's ECF system. Counsel for Appellants already has filed his appearance and is registered with this Court's ECF system.

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### **APPELLEES' JURISDICTIONAL STATEMENT**

Pursuant to Circuit Rule 28(b), Appellants state that the jurisdictional summary in the appellants' briefs are complete and correct.<sup>1</sup>

### **STATEMENT OF THE ISSUES**

Under Rule 28(b) of the Federal Rules of Appellate Procedure, the Appellees' Brief need not contain a statement of the issues. Appellees will address the two issues for review set forth in Appellants' Brief in the Argument section below.

Similarly, under Rule 28(b), Appellees need not provide a statement of the case and see no need to do so here. However, Appellees do wish to call to the Court's attention a misrepresentation of fact in the Statement of the Case section of Appellants' Brief at Page 7 [Doc. 20 at 7; also at 29]. The misrepresented matter is not actually relevant to the issue presented to the Court; however, Appellants imply in their Brief that it is relevant and therefore, Appellees address it here.<sup>2</sup>

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<sup>1</sup> All Defendants/Appellants in this case, other than Defendant/Appellant Cunningham, filed a joint brief on appeal [Doc. 20] and Defendant/Appellant Cunningham filed his own brief [Doc. 29] adopting his co-appellants' brief in its entirety. [Doc. 29 at 4]. Each brief sets out a jurisdictional statement, as required by Rule 28(a)(4) of the Federal Rules of Appellate Procedure and Circuit Rule 28(a). The Appellees' Jurisdictional Statement above refers to the Jurisdictional Statement in both briefs. There appears to be one minor typographical error in the Jurisdictional Statement of Appellant Cunningham ("U.S.S" rather than U.S.C."); but Appellees do not consider errors of a clearly typographical nature to bear on the substantive correctness of the Jurisdictional Statement. All further discussion in this Brief and reference to the Appellants' briefs refers to the Brief filed by the State Defendants/Appellants, which will be referred to herein by its Document Number on this Court's Docket, ["Doc. 20"], since it contains all parties substantive arguments in this case. Reference to pleadings filed in the lower court will be made based on their Docket Entry number in the lower court, reflected as "[DE XX]."

<sup>2</sup> The undersigned attempted to address this matter with counsel for the Appellants by email and requested that Appellants' counsel voluntarily correct the misrepresentation. Appellants' counsel failed even to respond to the emails on this subject.

Appellants make the following representation in their Brief: “Since 1990, the Party has never been an established party, defined in section 10-2 of the Election Code, in the entire State of Illinois or in Kane County.” [Doc. 20 at 7 & 29]

Appellants know this to be patently untrue from their own official records. For example, the State of Illinois Official Vote records, compiled by the State Board of Elections, from the March 19, 1996, General Primary Election show the results of the Primary Election and reflect a Primary Election held by the Libertarian Party of Illinois, showing, by definition that it was an “established party” since it held a Primary Election in Illinois, including a Presidential primary.

Even more specifically to the point, on December 13, 1994, A.L. Zimmer, General Counsel to the Illinois State Board of Elections, wrote the following to the Appellee Libertarian Party of Illinois, expressly on behalf of David E. Murray, identified in the letter as the “Chairman of the Illinois State Board of Elections”: “I am pleased to confirm that, ... the Illinois State Board of Elections regards the Illinois Libertarian Party as an established political party for purposes of nominating candidates under the Election Code.” ... “The status of the Illinois Libertarian Party as an established statewide political party will continue will continue so long as ....”

It is therefore clear, from Appellants’ own records, that Appellants’ representation in their Brief that Appellee Libertarian Party of Illinois has not been an established party in Illinois anytime since 1990 is patently untrue. Appellants have given no reason for refusing to correct their misrepresentation. If Appellants do not correct this misrepresentation in their Reply Brief

or in some other pleading, Appellees will seek leave to supplement the record on appeal with the relevant official documents now *dehors* the record. Appellants should not be able to misrepresent the facts with impunity simply because their documents proving the same are *dehors* the record. It is no excuse to refer to a mistaken response to an unclear discovery request when Appellants know the facts from their own official records to which they have full access.

Unfortunately, this is not the first time Defendants/Appellees have made a material misrepresentation in this case. *See* DE 84 at 3 n.2; DE 73]

### **SUMMARY OF THE ARGUMENT**

The lower court's analysis and conclusion in this case are correct and the decision below is due to be affirmed. This is a frivolous appeal.

Appellees clearly have standing to challenge Illinois's full-slate requirement.

Illinois's full-slate requirement, on its face and as applied to Appellees, is unconstitutional. It violates the First and Fourteenth Amendment rights of the Appellees and voters who wish to cast their vote for a minor party's candidate.

Illinois is the only state in the country that has or ever has had a full-slate requirement. [DE 40-3] Moreover, Illinois itself does not even apply its full-slate requirement in U.S. House elections or to state legislative elections conducted in Illinois. Obviously, it does not apply to independent candidates who wish to gain ballot access nor does it apply to established parties. They are free to run one party candidate for one office on a slate and not run any candidate for any other office. It only applies to, and unfairly discriminates against minor political parties and their candidates, only in some elections within Illinois, and has been

applied selectively. It clearly is designed to prevent new parties from forming, organizing, and growing.<sup>3</sup>

Illinois's full-slate requirement imposes a severe burden on the First and Fourteenth Amendment rights of minor parties, their candidates and voters who wish to cast their ballot for such candidates and there is no sufficient state interest justifying this burden.

Indeed, there is no rational relationship between any purported state interest offered to attempt to justify the full-slate requirement, let alone any compelling state interest, nor would the full-slate requirement be the least restrictive means available to meet any legitimate state interest at issue. In fact, the interests which the Defendants/Appellants claim justify the full-slate requirement appear to be a work in progress. They argued below that the full-slate requirement serves the state's interest in having new parties and their candidates show that they have a "modicum of support." [DE 44 at 2, ¶6; DE 45 at 7; DE 55 at 4] But then they attempt to add in additional unexplained purported interests in "showing that a political (sic) exists" [DE 44 at 2, ¶6], and in avoiding "party splintering." [DE 55 at 4]. Tellingly, Defendants/Appellants did not even attempt to argue that any purported state interest they articulated rose to the level of a compelling interest; rather they refer to their purported interests as "important" [DE 44 at 2, ¶6] and "legitimate." [DE 55 at 4]

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<sup>3</sup> In the instant case, as all parties acknowledge, in order for Appellant Fox to get on the ballot as Libertarian Party candidate for Kane County Auditor, the Libertarian Party would also have to field a candidate for Kane County Clerk, Kane County Recorder, Kane County State's Attorney, Kane County Coroner, Kane County Board Chairman, and Kane County Regional Superintendent of Schools. [DE 46 at 3] This means, of course, that for the Libertarian Party (or any non-established party) to get any one of its candidates on the Kane County ballot as a Libertarian Party candidate, it would have to have at least one lawyer (State's Attorney) and one doctor (County Coroner) in its party and willing to run for office. This kind of severe burden is outrageous, has nothing to do with level of support for the party or any other purported interest and is not imposed on any candidate or party other than a minor party like the Libertarian Party, leading to their complete exclusion in this case.

The work in progress continues on appeal. Having had their unsupported and unsupportable purported state interests rejected below, on appeal Defendants/Appellants urge this Court to find the full-slate requirement to be justified by purported interests in “promoting political stability” and “avoiding voter confusion and deception.” [Doc. 20 at 26-33] Obviously, they do not refer to any evidentiary support for these purported state interests either, as there is none in the record.

Appellants have not provided any evidentiary support whatsoever in support of any of their claimed state interests offered to justify the full-slate requirement, rendering such proffered reasons insufficient as a matter of law. Indeed, Defendants/Appellants contend that they do not even need to make any sort of particularized showing to justify their interests - a notion that is irreconcilable with the well settled jurisprudence at the heart of ballot access analysis as will be described hereinbelow. The shifting nature of the purported state interests Defendants/Appellants claim and their repeated insistence, on a record that has no evidentiary support for any articulated interest, that they have no obligation to prove the bona fides of any of claimed interested exemplifies the approach courts repeatedly have emphasized has no place in ballot access regulation.<sup>4</sup>

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<sup>4</sup> See also, *Fulani v. Krivanek*, 973 F.2d 1539, 1546 (11<sup>th</sup> Cir. 1992)(characterizing the second step in the Court’s analytical process to be to “‘identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.’ determining ‘the legitimacy and strength of each of those interests.’” (Emphasis added), quoting from *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (Emphasis added). The Court in *Fulani* lambasted the State for “plucking” its purported interests “from other cases without attempting to explain how they justify” the burden the underlying restrictions imposed. *Id.* at 1546. *Green Party of GA v. GA*, 551 Fed. Appx. 982, 984 (11<sup>th</sup> Cir. 2014); *Gill v. Scholz*, 2016 U.S. Dist. LEXIS 113702, \*10-\*12 (C.D. Ill., August 25, 2016). That is exactly what Defendants/Appellants have done here.



## ARGUMENT

### **I. Plaintiffs/Appellees Do Not Lack Standing to Challenge the Constitutionality of the Illinois' Code's Full-Slate Requirement.**

Appellants argue in a single paragraph of their Brief that Plaintiffs/Appellees lack standing to challenge the full-slate requirement because they did not submit a sufficient number of signatures to meet the separate ballot access signature requirement for the office at issue, nor have they shown that they are likely to meet the signature requirement in the future. [Doc. 20 at 14]

The cases cited by Appellants are inapposite and Appellants omit from their brief the cases from this Court (and others) that are expressly contrary to their argument and that unequivocally demonstrate that the argument has no merit and that Plaintiffs/Appellees do, indeed, have standing.

The lower court, of course, expressly addressed and rejected this argument, based on long-standing precedent from this Court right on point and ignored by Appellants in their brief. [See A5-6, *citing*, *Nader v. Keith*, 385 F.3d 729, 736 (7<sup>th</sup> Cir. 2004); *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 945 n.2 (1982); *Stevenson v. State Bd. Of Elections*, 638 F. Supp. 547, 550 (N.D. Ill. 1986), *aff'd*, 794 F.2d 1176 (7<sup>th</sup> Cir. 1986).]

Appellants' standing argument has been rejected repeatedly by this Court and courts all across the country, in addition to the cases cited by the lower court. *See e.g.*, *Lee v. Keith*, 463 F.3d 763, 767 (7<sup>th</sup> Cir. 2006); *Krislov v. Rednour*, 226 F.3d 851, 857-58 (7<sup>th</sup> Cir. 2000); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Rainbow Coalition of Oklahoma v. Oklahoma State Election*

*Board*, 844 F.2d 740 (10<sup>th</sup> Cir. 1988); *Libertarian Party of Kentucky v. Ehrler*, 776 F. Supp. 1200, 1202-1203 (E.D. Ky. 1991).

Plaintiffs/Appellees have standing to challenge the Illinois Election Code's full-slate requirement and the lower court decision is due to be affirmed.

## **II. Illinois's Full-Slate Requirement In Order for a New Party to Have Its Candidates On a General Election Ballot is Unconstitutional On Its Face and As Applied.**

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) ..."

*Clingman v. Beaver*, 544 U.S. 581, 600 (O'Connor, concurring).

"For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences. *See Anderson v. Celebrezze*, 460 U.S. 780, 793-794, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 59 L. Ed. 2d 230, 99 S. Ct. 983 (1979); *Williams v. Rhodes*, 393 U.S. 23, 30-31, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968). To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, *see Anderson, supra*, at 789, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance. *See Socialist Workers Party, supra*, at 184, 186."

*Norman v. Reed*, 502 U.S. 279, 288-289 (1992)(considering the impact of Illinois's Election Code provisions on the ability of a new political party to form, organize, and grow); *see also, Bullock v. Carter*, 405 U.S. 134, 146-147 (1972)(regulation that effectively caused candidates to choose to avoid party affiliation to get on the ballot deserves strict scrutiny and was struck down on Equal Protection grounds).

### **ANALYTIC FRAMEWORK IN BALLOT ACCESS CASES**

The constitutional rights at issue here, including the right to associate for political purposes, the right to be a political party's candidate on the general election ballot for public elective office, and the right to cast one's vote for a political candidate and party, as well as the right to equal protection of the law are fundamental rights guaranteed by the First and Fourteenth Amendments. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

The Supreme Court's most recent pronouncement in the area of ballot access - its decision in *Clingman v. Beaver*, 544 U.S. 581 (2005) - is important both for the analytical framework it reaffirms and the emphasis it places on vigilantly protecting the rights of non-major party candidates. Some principles from *Clingman* are worth noting:

The Court wrote the following in *Clingman*:

We have held that the First Amendment, among other things, protects the right of citizens "to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000). Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. *Timmons*, 520 U.S., at 358, 117 S. Ct. 1364.

#### **The Court Must Analyze the Burden Imposed.**

In analyzing a particular burden to First and Fourteenth Amendment rights in the ballot access context, "(the Court) should begin with the premise that there are significant associational interests at stake. From this starting point, we then ask to what extent and in what manner the State may justifiably restrict those interests. Then under the framework expressly reaffirmed in

*Clingman*, 544 U.S. at 603, the Court “has sought to balance the associational interests of parties and voters against the States’ regulatory interests through the flexible standard of review reaffirmed by the Court....”

Under that 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.” *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). Regulations imposing severe burdens on associational rights must be narrowly tailored to advance a compelling government interest. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997).

The Court also wrote: “Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. Recognition of that basic reality need not render suspect most electoral regulations.

Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State’s asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.” *Clingman*, 544 U.S. at 603 (O’Connor, concurring)

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court considered the impact of early filing dates on small political parties and independent candidates. Commenting on election laws that disadvantage independents (and non-established party candidates), it noted:

“By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment—‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,’—are served when election campaigns are not monopolized by the existing political parties.” *Clingman*, 544 U.S. at 620-21, *quoting from Anderson, Id.*, at 794 (citations omitted).

Accordingly, “[r]estrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, and may not survive scrutiny under the First and Fourteenth Amendments.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S. Ct. 533 (1986), *citing Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 10 (1968).

It is true, of course, that “States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office.” *Id.* Thus, courts must engage in a balancing test to weigh the rights of States to condition access to the general election ballot against the rights of citizens to form political parties that can vie for election, the right to associate with the independent candidate of choice, and the rights of citizens to cast votes effectively for their chosen candidate.

The Court's "primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters'" *Anderson*, 460 U.S. at 786. (Internal citation omitted.) Where "the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest." *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 222, 109 S. Ct. 1013 (1989). (Internal citation omitted.) *See also, Clingman*, 544 U.S. at 596-87 ("Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest).

In the instant case, the burden is severe, as the lower court found. [A 12] Strict scrutiny applies and so, in addition to demonstrating an articulated compelling interest to justify the regulation, states must "adopt the least drastic means to achieve their ends." [A 12] *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979).

Further, in this case, the full-slate requirement must be considered together with the other barriers to ballot access for a new party and its candidates (and voters) that Illinois has in place, including, but not limited to the significant signature requirement. These provisions in **combination** undoubtedly create a severe burden and any suggestion that any one factor should be analyzed in isolation is simply contrary to the mandated analysis. *See Nader v. Keith*, 385 F.3d 729, 731 (7<sup>th</sup> Cir. 2004)("Restrictions on candidacy must . . . be considered together rather than separately."); *See also Williams*, 393 U.S. at 34 (ballot access laws should be viewed in their totality, not in isolation); *Pilcher v. Rains*, 853 F.2d 334, 336 (5<sup>th</sup> Cir. 1988)(facially valid

provisions may operate in tandem to produce impermissible barriers to ballot access - for example, if a state had a 1% signature requirement, but imposed a single other unreasonable barrier, it would still effectively deny ballot access and would be unconstitutional, *citing Storer and Anderson*).<sup>5</sup>

“[W]hat is demanded (by the State) may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot. The Constitution requires that access to the electorate be real, not ‘merely theoretical.’” *Party of Texas v. White*, 415 U.S. 767, 783, 94 S. Ct. 1296 (1974).

Ballot access requirements that raise the bar so high as to virtually prevent independent candidates or minor party candidates, *qua* minor party candidates, from appearing should not survive strict scrutiny analysis. *See e.g., Williams*, 393 U.S. at 31-32.

Additionally, in case after case has directed an analyzing court to look to past experience as a factor in determining the burden imposed. *See e.g., Mandel v. Bradley*, 432 U.S. 173, 177 (1977)(“Past experience will be a helpful, if not always unerring guide; it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.”), *quoting from, Storer v. Brown*, 415 U.S. 724, 742 (1974).

A court evaluating such issues as are presented here also should consider “ballot access history” as “an important factor in determining whether restrictions impermissibly burden the freedom of political association.” *Lee v. Keith*, 463 F.3d 763, 769 (7<sup>th</sup> Cir. 2006), *citing Storer v. Brown*, 415 U.S. 724, 742, 94 S. Ct. 1274 (1974).

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<sup>5</sup> A Court must examine the *cumulative* burdens imposed by the *overall* scheme of electoral regulations upon the rights of voters and parties to associate .... “A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms.” *Clingman*, 544 U.S. at 607-08.

**The State Must Put Forward Evidence In Support of Its Claimed Interests.**

Under the applicable framework, once the burden imposed by the regulation at issue is established, the court must then consider the interests claimed by the State to justify that burden, just as the lower court did. [A 8-12]

In striking down Ohio's ballot access restriction in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court set out the requisite analytical framework as follows:

Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. 460 U.S. at 789. (Internal citation omitted.)

The Court in *Anderson* rejected the use of any "litmus-paper" to "separate valid from invalid [ballot access] restrictions." 460 U.S. at 789. Instead, a court determining whether a challenged ballot access restriction is unconstitutional must: 1) evaluate the character and magnitude of rights protected by the First and Fourteenth Amendments; 2) identify the State's interests advanced as justifications for the burdens imposed by the ballot access restrictions; and 3) evaluate the legitimacy and strength of each asserted state interest, and determine whether and to what extent those interests required burdening the plaintiffs' rights. *Id. Bergland v. Harris*, 767 F.2d 1551 1553-54 (11<sup>th</sup> Cir. 1985).

In order to permit the required evaluation of competing interests, "[t]he State must introduce evidence to justify both the interests the State asserts and the burdens the State imposes



on those seeking ballot access.” *Bergland*, 767 F.2d at 1554. *See also*, *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 662-664 (6<sup>th</sup> Cir. 2016)(State must put on evidence to prove the legitimacy, strength, and necessity for claimed interests its identifies as justifying the burden; State failed to meet its obligation by presenting no testimony or expert report in support of its claimed interests); *Rideout v. Gardner*, 838 F.3d 65, 72-73 (1<sup>st</sup> Cir. 2016)(State’s assertion of abstract interests not specifically tied to justifying the specific burden at issue cannot even survive intermediate level scrutiny, let alone strict scrutiny); *Mandel v. Bradley*, 432 U.S. 173, 178 (1977)(Court must sift through conflicting evidence and make findings of fact as to the difficulty of obtaining signatures in time to meet the deadline); *Storer v. Brown*, 415 U.S. 724 (1974)(a court is required to examine the facts and circumstances of each case individually and may not apply a “litmus test”).<sup>6</sup>

In the instant case, Defendants/Appellants submitted no evidence whatsoever in support of their claimed interests that purportedly justify the full slate requirement.

Appellants offered nothing more than generalized interests below, which surely do not and cannot suffice to justify the severe burden imposed by the truncated schedule.

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<sup>6</sup> The Court in *Storer* also makes clear that in analyzing a ballot access regulation, the reviewing court should look at past experience in qualifying to determine the severity of the obstacle and the Court also looked to other States for guidance. *See e.g Storer*, 415 U.S. 740, n.10 & 742. Of course, as noted earlier, no state in the country other than Illinois has or ever has had a full slate requirement. [DE 40-3] *See e.g. Jenness v. Fortson*, 403 U.S. 431, 439, notes 15-20 (1971)(Comparing other States’ provisions with respect to the ballot access at issue); *Williams v. Rhodes*, 393 U.S. 23, 47, n.10 (1968)(Harlan, J., concurring)(comparing “size” of “barriers” to third-party candidates for each State and comparing ballot history among the States for third-party candidates); *New Alliance Party v. Hand*, 933 F.2d 1568, 1571-1572 (11<sup>th</sup> Cir. 1991)(Citing expert witness Allen J. Lichtman’s testimony comparing other States’ signature filing deadlines and number of signature requirements relative to Alabama’s). *See also, Lee v. Keith*, 463 F.3d 763, 768-769 (7<sup>th</sup> Cir. 2006).

Notwithstanding, or perhaps because of the conclusions of three district court judges (Judges Tharp, Gottschall, and Wood) who have considered and rejected the argument that the full-slate requirement is justifiable consistent with the First and Fourteenth Amendment rights of new political party candidates, parties, voters and party supporters and that Illinois' proffered interests in support of the full-slate requirement bear no relationship to the requirement and are bereft of logic, Appellants make a most extraordinary assertion with respect to purported state interests in this case. Throughout their Brief, Appellants assert that the State has no obligation to prove or justify any claimed interests supporting the full slate requirement. [E.g. Doc. 20 at 19, 35] This assertion is absolutely wrong and is contrary to an entire body of jurisprudence from the United States Supreme Court and from courts around the country on this subject, both old and new.

The following excerpt from another court's recent decision on this subject provides a clear explanation of the law on this specific issue, which proves fatal to Appellants wholesale failure to provide any support whatsoever in this record for any of its claimed interests:

The Supreme Court has established an analytical framework for balancing the interests of political parties, candidates, and voters in engaging in the political process with the interests of States in conducting fair and effective elections. Under this framework, a court must first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." .... **Second, the court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."** ... **Third, "the court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."** .... In this analysis, "the burden is on the state to 'put forward' the 'precise interests ... [that are] justifications for the burden imposed by its rule,'" and to "explain the relationship between these interests" and the challenged provision. .... "The State must introduce evidence to justify both the interests the State asserts and the burdens the State imposes on those seeking ballot access."

*Hall v. Merrill*, 2016 U.S. Dist. LEXIS 135446 \* (M.D. Ala. Sept. 30, 2016)(citations omitted), quoting from *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983)(emphasis added).

This is a fundamental principle of ballot access jurisprudence repeatedly enunciated by this Court and by courts around the country for well over thirty years; yet Defendants/Appellants put on no evidence, even after warnings from Judges Tharp and Gottschall in analyzing the full-slate requirement that the State's interests provided no justification at all for the full-slate requirement.<sup>7</sup>

Appellants' position seems to provide a true *raison d'être* for Justice O'Connor's admonition in *Clingman v. Beaver*, 544 U.S. 581, 603 (2005), that courts must be very leery of proffered interests and consider whether they are really offered to advance compelling/important State interests applicable to the underlying situation and justifying the burden created or interests intended instead to serve the goals of the dominant political parties.<sup>8</sup>

In a case directly addressing this subject, the Fifth Circuit wrote, "It is clear that the Supreme Court has consistently required a showing of necessity for significant burdens on ballot access." *Pilcher v. Rains*, 853 F.2d 334, 337 (5<sup>th</sup> Cir. 1988)(also requiring evidence on necessity). *Anderson* rejected the notion of complete deference to state legislatures, and made clear that any attempted justification of a significant burden will be strictly scrutinized. *Munro* in no way disturbs that.

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<sup>7</sup> See also, *Georgia Party of Ga. v. Georgia*, 551 Fed. Appx. 982 (11<sup>th</sup> Cir. 2014)(State's claimed interests must be supported by evidence showing their applicability to the specific ballot access restriction at issue); *Bergland v. Harris*, 767 F.2d 1551 (11<sup>th</sup> Cir. 1985); *Lux v. Judd*, 651 F.3d 396, 404 (4<sup>th</sup> Cir. 2011).

<sup>8</sup> "Although the State has a legitimate role - and indeed critical - role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefits." *Clingman v. Beaver*, 544 U.S. at 603 (O'Connor, J., concurring).

*Swanson v. Worley*, 490 F.3d 894, 902-903 (11<sup>th</sup> Cir. 2007)[DE 28 at 6], also makes it abundantly clear when read *in toto* that the selected quote does not in any way give Bennett the license he claims to have.

The Court in *Swanson v. Worley* wrote that after considering the “character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the [candidate] seeks to vindicate,” “[the court] then must identify and **evaluate the precise interests put forward by the State as justification for the burden imposed by its rule.**” “**In making this evaluation, a court must ‘determine the legitimacy and strength of [the State’s] interests [and] consider the extent to which those interests make it necessary to burden the [candidate’s] rights.’**” “A court then must weigh all these factors to determine if the statute is constitutional.” *Swanson*, 490 F.3d at 902-903 (citations omitted)(Emphasis added).

The Court then goes further and expresses the well known principle that “if the state election scheme imposes “severe burdens” on the plaintiffs’ constitutional rights, it may survive only if it is “narrowly tailored and advance[s] a **compelling state interest.**” *Id.* at 903 (citations omitted). This is a far cry from the Secretary’s assertion that he need only “articulate” the State’s interests and the inquiry ends there.

Case after case completely tear asunder Appellants’ claim of full license with respect to its interests and its notion that any articulated interests, once articulated, are not to be subjected to scrutiny, or that the State cannot be made to justify them or prove some relationship to the restriction at issue. *See e.g., Norman v. Reed*, 502 U.S. 279 (1992)(Applying strict scrutiny to State’s purported interests and requiring least restrictive means to advance any legitimate interests).

Again, the most recent decision from the Supreme Court in this area of the law makes clear that a court in no way is to merely be satisfied simply by the State's articulation of its purported interests and go no further. In *Clingman v. Beaver*, 544 U.S. 581, 603 (2005)(O'Connor, J., concurring), at least 5 Justices subscribe to the principle that as a ballot access restriction increases in the burden it imposes on the candidate or voter's constitutional rights, scrutiny of the purported state interests supporting the restriction are subjected to increasingly heightened scrutiny to insure "... that the State's asserted interests are not merely a pretext for exclusionary or anti-competitive restrictions."

**The Lower Court's Decision Correctly Applied the Applicable Ballot Access Framework.**

In striking down the full-slate requirement, the lower court correctly applied the *Anderson/Burdick* framework. [A 7-A12]

In applying the *Anderson/Burdick* framework, the lower court correctly concluded that the full slate requirement of 10 Ill. Comp. Stat. 5/10-2 places a severe burden on Plaintiffs/Appellees First and Fourteenth Amendment rights and that the interests claimed by Defendants/Appellees in support of the full-slate requirement do not support constitutionality of the full-slate requirement and, indeed, bear little relationship altogether to the full-slate requirement. [A 7-A 12]

The court found several ways in which the full-slate requirement severely burdens the Plaintiffs/Appellees and unfairly causes them harm.<sup>9</sup> First, it prevents a candidate from

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<sup>9</sup> See also, *Summers v. Smart*, 65 F. Supp. 3d 556, 563-565 (N.D. Ill. 2014)(Tharp, J.)(strong case for finding the full-slate requirement imposes a severe burden on First Amendment rights); *Libertarian Party of Ill. State Bd. of Elections*, 2012 U.S. Dist. LEXIS 126674, \*15-\*27 (N.D. Ill., Sept. 5, 2012)(Gottschall, J.)(same).

appearing on the ballot with her chosen party affiliation even if she fulfills the significant signature requirement within tight time frame provided under the statute. [A 6] Secondly, the full-slate requirement serves as a deterrent to interested supporters who might hesitate to sign a ballot access petition solely because it did not show a full-slate and therefore could not succeed in gaining ballot access under the statute. [A 6]

The court expressly noted that under the statute, a new political party's candidate, unlike any other candidate for political office in Illinois, has the multi-part burden of not only getting signatures from at least 5% of the number of voters who voted at the next preceding election and of submitting a petition with such signatures 134 to 141 days prior to the upcoming election, but on top of those requirements, a new political party's candidate had to list her party's candidates for every office to be filled in the upcoming election - a burden on First and Fourteenth Amendment rights of the new political party, its candidates, and supporter, not shared by any other candidate or entity in Illinois. [A 8]

The court next turned to a consideration of the Appellants' claimed, but unsupported interests, as the *Anderson/Burdick* framework requires.

The court noted, as Judge Tharp wrote in *Summers v. Smart*, 65 F. Supp. 3d 556, 564 (N.D. Ill. 2014), there is no logical relationship between (let alone compelling interest in) the full-slate requirement and the level of support for the party - more accurately a function of the stringent signature requirement.<sup>10</sup> [A 9] *See also, Libertarian Party of Ill. v. Ill. State Bd. Of Elections*, 2012 U.S. Dist. LEXIS 126674, \*23-\*24 (N.D. Ill., September 5, 2012)(Gottschall,

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<sup>10</sup> *See Gill v. Scholz*, 2016 U.S. Dist. LEXIS 113702 (C.D. Ill., August 25, 2016) for a description of the difficult burden a 5% signature requirement imposes.

J.)(finding the full-slate requirement is not relevant to satisfying the state's interest in a show of support and is not necessary, given that no other state has it and that established parties have no such requirement to show support for them).

Next, the lower court considered the Appellants' purported (and unsupported) interest in avoiding voter confusion and in preventing factionalism and party-splintering., finding that it is "unclear" how the full-slate requirement meets any such interests and rejecting even a mere logical connection between the claimed interest and the burden the full-slate requirement imposes. [A 9] *See also, Libertarian Party of Ill. v. State Bd. Of Elections*, 2012 U.S. Dist. LEXIS 126674, \*24-\*26 (N.D. Ill., September 5, 2012)(Gottschall, J.)(Same).

After finding that none of the proffered state interests provided any support for, let alone a compelling interest in the full-slate requirement, the lower court explained the significantly negative unintended consequences of the full-slate requirement, including its encouragement of sham new parties that enlist strawmen candidates just to fill empty slots - a factor which would satisfy the full-slate requirement but say nothing at all about overall support for the party. Additionally, the full-slate requirement could require a new party to run a candidate for a position for which it is ideologically opposed. [A 9] *See also, Summers v. Smart*, 65 F. Supp. 3d at 563 n.3.

The lower court emphasized again, as has Judges Tharp and Gottschall, the idea that filling a full slate of candidates is an indicator of the party's legitimacy or its level of support is badly undercut by the fact that often established parties do not field a full slate of candidates. [A 10]

The lower court rejected out of hand the argument that Illinois somehow conveys a benefit by allowing new parties to access the ballot at the local level, sharply noting that the provision for the same does not give the State license to violate the Constitution in the manner access is provided by erecting “severe” restrictions that are not narrowly tailored and do not advance compelling state interests.” [A 10]

Finally, the lower court dismissed Appellants’ arguments referring to earlier Illinois cases that appeared to support the full-slate requirement through incomplete analysis and without the benefit of material changes since those cases were decided.<sup>11</sup> [A 11]

The lower court’s analysis and conclusion were absolutely correct and the decision below is due to be affirmed.

**Additional Purported Justifying Interests Claimed by Appellants Have No Merit.**

Defendants/Appellants argue on appeal that there is no severe burden here because the party’s candidates can run either as independents or as candidates that support and are supported by the party, even if they cannot appear on the ballot as the Libertarian Party’s candidates and be so identified on the ballot. [Doc. 27-33] This position is contrary to well established ballot access law in this Circuit and around the country. The cases Defendants/Appellants purport to

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<sup>11</sup> Appellants acknowledge that the lower court (and at least two other judges in this District) already considered the decision in *Henrichs* and rejected both its holding and its reasoning. *See e.g. Libertarian Party of Illinois*, 2016 WL 723076 at \*6 (Wood, J.); *See also, Id.*, 2012 WL 3880124, \*6-\*9 (N.D. Ill., September 5, 2012)(Gotschall, J.)(Expressing significant concerns about the constitutionality of the full-slate requirement); *Summers v. Smart*, 65 F. Supp. 3d 556, 563-564 (N.D. Ill. 2014)(Tharp, J.)(Same); but they continue to argue based on the case. [Doc. 20 at 10, 24, 29, 37]. Appellants simply ignore Justice Heiple’s dissenting opinion in *Reed v. Kusper*, 154 Ill.2d 77, 607 N.E.2d 1198, 1203 (1992)(Heiple, J. *dissenting*) (expressing the view that the full-slate requirement would be held unconstitutional if the court had to squarely confront its constitutionality).



rely on are inapposite.<sup>12</sup> Significantly, Appellants never made any such argument in the lower court in their Motion for Summary Judgment or supporting Memorandum of law. [DE 45 & 45]

Nevertheless, the lower court correctly addressed and dismissed this argument earlier in this case when the judge then sitting on the case, Judge Gottschall, wrote the following:

“It is true that independent candidacy is an option for those whose new party is insufficiently organized to field a complete list. Thus, the Libertarian Party's

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<sup>12</sup> For example, Appellants rely heavily on the decision in *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008), even going so far as to represent to the Court that the decision addresses “the precise issue” raised in this case. [Doc. 20 at 19] In truth, the decision has absolutely nothing whatsoever to do with this case or Illinois’s full-slate requirement. It was a facial challenge before the Court only on the question of whether Washington’s primary election system violated the associational rights of political parties because candidates are permitted to identify their political preference on the ballot. It is disappointing that in relying on it so heavily before this Court, Appellants neglected to inform this Court that the Court in *Wash. State Grange* expressly noted that it was not considering any “ballot access” related arguments as they were not addressed in the lower court or part of the *certiorari* grant. *Id.* 552 U.S. 458 n.11. The case is completely irrelevant here; moreover, it was simply a remand for the parties to actually put on evidence.

Appellants also rely heavily on the decision in *Dart v. Brown*, 717 F.2d 1491 (5<sup>th</sup> Cir. 1983) for this proposition that it is no significant burden to any constitutional right to refuse to list a candidate’s party on the ballot. [Doc. 20 at 22, 24, 26, 28, 31] In addition to ignoring the entire body of ballot access jurisprudence to the contrary, including three Illinois cases that went to the United States Supreme Court cited herein, the reliance on *Dart* is wholly misplaced. The Louisiana system in *Dart* was unique in the nation. Parties did not have nominees. In any event, the entire system in operation in *Dart* was struck down as unconstitutional in *Foster v. Love*, 522 U.S. 67 (1997).

Appellants’ reliance throughout their Brief on the decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) for this point is just plain silly. The different level of burden and the different applicable state interests between that case in which the statute at issue prohibited a candidate from having more than one party identified with his name on the ballot and the statute here which wholly prevents ballot access for the new party without meeting the full-slate requirement are obvious to an reasonable observer familiar with the constitutional principles at play.

One other argument made by Appellants in support of their “voter confusion” interest should be addressed here. They suggest that Appellees encourage voter confusion by not expressly advising signers that their signature reflects the declaration of their intent to form a new political party, not just to support a candidate’s ballot access. [Doc. 20 at 33 and n.4] This argument is completely disingenuous and is misleading. Surely, Appellants are aware that courts around the country for many many years have struck down as unconstitutional statutory requirements for language that tells signers their signature pledges them to the support of a new party or otherwise aligns them with the party seeking ballot access. See e.g. *North Carolina Socialist Workers Party v. Bd. of Elections*, 538 F. Supp. 664 (E.D.N.C. 1982); *Libertarian Party of South Dakota v. Kundert*, 579 F. Supp. 735 (D. S.D. 1984); *Libertarian Party of Nebraska v. Berman*, 598 F. Supp. 57 (D. NE 1984); *Libertarian Party of Nevada v. Swackhamer*, 638 F. Supp. 565 (D. Nev. 1986) and more.

failure to meet the complete slate requirement would not prevent Fox from running for Kane County Auditor as an independent. But Fox's party preference would not appear on the ballot, and the Libertarian Party could not promote its views [\*18] through her candidacy. Political party membership and independent candidacy "are entirely different and neither is a satisfactory substitute for the other." *Storer v. Brown*, 415 U.S. 724, 745-46, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974). Being able to put forward candidates for political office is the *sine qua non* of a party's existence. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 575, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000) ("The moment of choosing the party's nominee, we have said, is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'" (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986))). Despite the alternative of independent candidacy, therefore, the complete slate requirement infringes upon "the right of individuals to associate for the advancement of political beliefs." *Williams*, 393 U.S. at 30."

*Libertarian Party of Ill. v. Ill. State Bd. of Elections*, 2012 U.S. Dist. LEXIS 126674 \*17-\*18 (N.D. Ill. Sept. 5, 2012); *See also, Lee v. Keith*, 463 F.3d 763, 771-772 (7<sup>th</sup> Cir. 2006)(rejecting converse argument that opportunity to run as a party candidate, rather than as an independent somehow lessens the burden). *See also Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)(Illinois case recognizing the right, grounded in Equal Protection, for all citizens to be equally able form a new political party); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184-86 (1979)(recognizing the right to associate as a political party as a fundamental right that is diminished in value if kept off the ballot as a party; recognizing the significant role new political parties have had in bringing about change through the dissemination of the party's idea and that overbroad ballot access restrictions "jeopardize this form of political expression."); *Norman v. Reed*, 502 U.S. 279 , 288-289 (1992)(Emphasizing the right to form and develop a new political party as implicating treasured fundamental constitutional rights).

In the Opinion below from which this appeal is taken, Judge Wood came to the same conclusion. [A 6]

It is but a simple matter to find examples that demonstrate the complete absurdity of the full-slate requirement and the concocted arguments the Appellants attempt to put forward (without supporting evidence) to justify it.

Consider for example, a new political party that has a single important issue of public interest as its *raison d'être* and focus - improving the public school education system. Call it the Education Party. The party wanted to grow in name, support, and influence in order to promote its views and the views of its supporters on public education policy and it determined that the best way to do so was to have a member of the party - a world renowned expert in the field of public education, fully identified as such and identified fully with the unique educational philosophy espoused by this party - serve as the Superintendent of schools in counties around the State, starting with Kane County.

The party's reputation in the field of education was such that it was able to satisfy not just the 5% signature requirement, but actually 25% of the number of voters who voted at the next preceding election signed the ballot access petition of the Education Party candidate for Kane County School Superintendent and the nominating petition with signatures five times the amount required was submitted between 134 and 141 days prior to the upcoming election. However, notwithstanding far more than a modicum of support the huge amount of signatures showed and the important message the Education Party had to convey through its candidate and, hopefully, through attaining the office it sought, under the full-slate requirement there could be no Education Party candidate on the ballot simply because this new political party did not have in its ranks a lawyer who wanted to be the Kane County State's Attorney or a doctor who wanted to be the Kane County coroner, or one who wanted to fill any of the other offices that had nothing to

do with the Party's single issue emphasis and identity. The full-slate requirement clearly worked a severe burden on the Party, its candidates, and its supporter/voters who believed the only way their educational philosophy would prevail would be to have the Education Party grow through having its members fill the ranks of county school superintendent positions. There is not a single interest mentioned by the State that would justify the burden effected by this exclusion from the ballot - and it is no answer to say that the Party's candidate could still be somehow associated with it in people's minds, but the Party name could not be reflected on the ballot.

Additional examples abound and include those given by courts in the district below that have considered the question. *See e.g. Summers v. Smart*, 65 F. Supp. 3d 556, 563 (N.D. Ill. 2014)(noting the severe burden the full slate requirement poses for a new political party that did not have the resources to effectively run seven candidates for elective office at once or is ideologically opposed to one of the offices on the full slate). The full slate requirement gives such a new political party the choice of running a candidate for every office, notwithstanding its desires, resources, ideology, focus, etc. or forfeiting the right to have any candidates run under its banner. *Id.*

Appellants belittle the conclusion by the lower court in this case [A 9] and the court in *Summers v. Smart*, 65 F. Supp. 3d 556, 564 (N.D. Ill. 2014) that satisfying the significant signature requirement should fully satisfy any legitimate state interest in having a new political party show a "modicum of support" to a degree similar to the support required for an established party to satisfy that interest [Doc. 20 at 34] and it decries the finding that the full-slate requirement unfairly is applied only to new political parties and not to established parties and therefore is unconstitutionally burdensome. [Doc. 20 at 36-39] Appellants entirely miss the point of the lower court's conclusion.

The lower courts have found this discriminatory application of the full-slate requirement significant in large part because of the claimed state interests. Once the new political party has met the threshold set for it to show a modicum of public support through satisfying the signature requirements, for all intents and purposes it is then similarly situated with the established party which also achieved that status by a show of support for its candidate or candidates. As the lower court noted, established parties regularly run less than a full slate of candidates [A 10] and so the “support” they achieve at the ballot box to maintain their status as an established party might be based on support for one candidate and certainly need not be for a full slate of candidates.

Yet for the new political party, Illinois adds the additional requirement, beyond the modicum of support showing, to require a full slate or no candidate at all and tries to justify it by saying that somehow fielding a full slate shows fuller support - when it there is no such requirement or conclusion with respect to an established party. All three district court judges have focused on this fault in the Appellants’ purported justification, leading to the conclusion that their justifications are both “flimsy” and “bereft of logic.” *Summers, Id.*

For the established party it seems that as long as it gets a certain level of support, even if for one candidate, that suffices. That is part of why the full-slate requirement imposes by a unconstitutionally severe burden on new political parties and an unconstitutionally discriminatory burden on new political parties.

Other factors further demonstrate the illogic and discriminatory nature of the full-slate requirement and the pretextual nature of the claimed justifications offered by Appellants.

Appellants claim that the full-slate requirement is supported by state interests in avoiding overcrowding and voter confusion.

In addition to the ways in which the lower courts have shot down those claims, consider the following: The full-slate requirement does not apply in Illinois to U.S. House election ballots or to Illinois State legislative election ballots. They are not statewide races. A new political party can gain access to the ballot in any of those kinds of elections in Illinois simply by showing the modicum of support through the signature petitions and without fielding any more than one candidate for state or federal legislative office. Are the state interests claimed in this case somehow abandoned or inapplicable to those races? Of course not; rather this simply demonstrates the phony nature of the claimed state interests in support of the full-slate requirement. It is nothing other than a device designed to limit the formation, growth, and development of new political parties in Illinois - exactly what the First and Fourteenth Amendments prohibit.

Moreover, further demonstrating the absurdity of the Appellants' claim is the fact that a new political party can qualify for ballot access at the statewide level by polling well there, but still not be on the ballot at the county level simply because it does not field a full slate of candidates. In fact, that is exactly what happened with the Appellee Libertarian Party in Illinois in 1994. It polled so well for statewide offices in 1994 that in 1996 it was an established party for statewide purposes and, as the Appellants' own official records show, its candidates were on the 1996 ballot in Illinois, listed as Libertarian Party candidates, for the only statewide offices being contested that in Illinois that year - U.S. President and U.S. Senate. Appellees qualified as an established party for those major races but could not have gotten on the ballot in Kane County under the circumstances present

here (just fielding Appellee Fox for County Auditor) without fielding a full slate of candidates. The full slate requirement bears no relationship to any of the claimed (and unsupported) state interests and imposes an unconstitutionally severe burden on Appellees.

Defendants/Appellants argue that the full slate requirement prevents voters from being misled into believing that a candidate with a party designation is backed by a political party with support similar to a larger traditional political party when it might actually just be a one candidate party. Appellants emphasize the purported danger in allowing one party candidates on the ballot. [Doc. 20 at 29-30] The contention is pure nonsense for a variety of reasons, not the least of which is that the state has no right or legitimate interest in regulating the size or focus of a political party so long as that party has achieved the modicum of support lawfully required.

But one particularly striking fact, related to the point made above, is that for some reason Illinois does not have the same view when it comes to U.S. House or Illinois state legislative elections. Moreover, this is not just an academic matter. One candidate parties historically abound in Illinois for those important races.

In 2002, for example, a dissident Democrat, James Meeks, formed the “Honesty and Integrity Party” and got on the ballot for an Illinois state senate race as the only candidate for that party, listed by party name on the ballot and he won the election. In 2006, another dissident Democrat, Bill Scheurer, formed the “Moderate Party” and put himself (and his single candidate party) on the ballot for Illinois’s U.S. House, 8<sup>th</sup> District ballot. In 1994, Robert L. Wheat formed the single candidate “United Independents Party” and he and his single candidate party were listed as such on the ballot for Illinois’s U.S. House, 6<sup>th</sup> District ballot. In 1992, a person named Louanner Peters formed the “Louanner Peters Party” and was listed as that party’s candidate on

the ballot for Illinois's U.S. House 2<sup>nd</sup> District election.<sup>13</sup> Such examples abound; but these should suffice to make the point.

Appellants offer no explanation whatsoever as to how their full slate requirement can be justified by the purported interest in avoiding voter confusion about the nature of the party in light of its practice with respect to U.S. House and state legislative races nor as to why such interest should apply at the county level but not for such important elections as for U.S. House and state legislative offices. Nor have Appellants made any showing of any historic overcrowding problem.

Additionally, it appears that Illinois applies its full-slate requirement selectively. For example, in 1992, the Conservative Party ran a candidate named Chad Koppie for U.S. Senate in Illinois, a statewide office such that the full-slate requirement required that the party field a full-slate of candidates for all statewide offices on the ballot. Koppie was listed on the U.S. Senate ballot as the Conservative Party's candidate. The Conservative Party did not field a candidate for the statewide presidential election that year as should have been required under the full-slate requirement.<sup>14</sup>

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<sup>13</sup> Historic information of this nature is available on the public website of the Illinois State Board of Elections: <https://www.elections.il.gov/ElectionInformation/ElectionResults.aspx>. *See also*, <http://history.house.gov/Institution/Election-Statistics/Election-Statistics/>. Appellees ask the Court to take judicial notice of it. *See e.g., Denis v. Dunlap*, 330 F.3d 919, 926 (7<sup>th</sup> Cir. 2003)(taking judicial notice of information found on the website of a government agency).

<sup>14</sup> <http://history.house.gov/Institution/Election-Statistics/Election-Statistics/>.



**III. Appellants have waived and abandoned an appeal of the lower court's holding that the full slate requirement in Section 10-2 of the Illinois Election Code (10 ILCS 5/10-2) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution on its face and as applied to the Plaintiffs/Appellees.**

Notwithstanding the fact that the lower court squarely held that the “full slate requirement under the Illinois Election Code violates the First and Fourteenth Amendments to the United States Constitution on its face and as applied to Plaintiffs ...,” [A 12]<sup>15</sup> Appellants’ Rule 28(a)(5) Statement of the Issues Presented for Review expressly limits their appeal to the lower court’s finding that the full slate requirement violates the First Amendment.<sup>16</sup>

Appellants have not raised any issue on appeal as to the lower court’s finding that the full slate requirement violates the Fourteenth Amendment (Equal Protection Clause) as well and therefore have waived and abandoned any challenge to the lower court’s finding that the full slate requirement violates the Fourteenth Amendment on its face and as applied. 21-328 *Moore’s Federal Practice - Civil* § 328.20[5], notes 17&18; *Forest Capital, LLC v. BlackRock, Inc.*, 2016 U.S. App. LEXIS 14704, \*17-\*18 (4<sup>th</sup> Cir., August 10, 2016)(failure to comply with specific dictates of Federal Rule of Appellate Procedure by not expressly raising even a preserved claim in the opening brief triggers “abandonment” of the specific claim, *quoting from*, *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4<sup>th</sup> Cir. 1999)); *Anderson v. Litscher*, 281 F.3d 672, 675 (7<sup>th</sup> Cir. 2002), *citing*, *United States v. Feinberg*, 89 F.3d 333, 340 (7<sup>th</sup> Cir. 1996); *McClain*

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<sup>15</sup> The lower court’s decision is reported at *Libertarian Party of Ill. v. Ill. State Bd. Of Elections*, 164 F. Supp. 3d 1023 (N.D. Ill. 2016); however, citations herein to the lower court’s Opinion will be to the Appendix cites used in the State Appellants’ Brief [Doc. 20] for ease of reference and purposes of consistency.

<sup>16</sup> Appellants’ Rule 28(a)(5) Statement of the Issue Presented for Review, reads in pertinent part as follows: “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.”

*v. Deuth*, 1998 U.S. App. LEXIS 13663, \*6 (7<sup>th</sup> Cir., June 24, 1998)(issues not presented in opening brief as required under FRAP 28 are waived); *Harris v. Folk Constr. Co.*, 138 F.3d 365, 367 n.1 (8<sup>th</sup> Cir. 1998).

Moreover, this is not a matter of oversight or inadvertence. The Appellees' emphasis on their Equal Protection argument as grounds for relief separate from their First Amendment claim was pointedly argued below. And, of course, the lower court's Memorandum Opinion and Order cites both the First Amendment and the Fourteenth Amendment (Equal Protection Clause) as independent grounds for relief, [A 1, A 7, A 12] as does the Final Judgment Order [A 13]. Indeed at A 7, the lower court expressly cited the decision in *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 695 (6<sup>th</sup> Cir. 2015) and its Equal Protection Clause analysis in such ballot access scenarios as this case presents, such that minor parties have a greater burden placed on them than others without sufficient cause [A 7]

The fact that Appellees claimed made claims under both the First and Fourteenth Amendments based on two conceptually different rationales was made crystal clear during the litigation. The following demonstrates the point:

Ironically, during the course of the litigation below, Appellants attempted to get the district court to find that Appellees had waived their Fourteenth Amendment Equal Protection claim by falsely claiming that the Appellees had failed to raise the Equal Protection in their Motion for Summary Judgment and had only raised it in their Reply with respect to that Motion.

The undersigned entered this case, following the tragic death of prior counsel for the Appellees, Mr. Sinawski, after the cross summary judgment motions had been briefed. Upon entering the case and reviewing the pleadings, the undersigned noticed the misrepresentation on this issue in Appellants' Reply Brief on their Motion for Summary Judgment [DE 55 at 6]. Rather than embarrassing defense counsel by drawing the misrepresentation to the court's attention, the undersigned contacted defense counsel directly, brought the false statement to his attention and suggested that defense counsel voluntarily correct the matter for the court. [See DE 84 at 3 n.2 for a full explanation of the matter] Defense counsel wisely agreed to this course of action and filed a pleading "clarifying" the matter in less than fully candid terms, but counsel at least made clear that Appellees had, indeed, pursued an Equal Protection Clause theory for relief at all time [DE 73].

On July 2, 2015, the United States Court of Appeals for the Sixth Circuit decided *Green Party of Tennessee v. Hargett*, 791 F.3d 684 (6<sup>th</sup> Cir. 2015), in which the Court used and fully Equal Protection Clause analysis to test the constitutionality of ballot access restrictions at issue there, making such analysis primary over the First Amendment analysis in the case. On July 2, 2015, Plaintiffs/Appellees filed a "Notice of Recent Authority" simply to bring the case and its Equal Protection analysis to the lower court's attention, without argument [DE 79].

Defendants/Appellants sought leave to file a memorandum of law addressing the *Hargett* decision and its Equal Protection analysis and filed their memorandum addressing the role of Fourteenth Amendment Equal Protection analysis vs. First Amendment analysis and in

doing so, turned the *Hargett* decision completely on its head, completely ignoring both its holding and its analysis through the Equal Protection Clause [DE 83].<sup>17</sup>

Plaintiffs/Appellees were given an opportunity to address the matter as well and filed their own memorandum addressing the *Hargett* decision and the independent significance of Fourteenth Amendment Equal Protection Clause analysis in a setting such as that presented by Illinois's unique full slate requirement which applies only to minor parties in the designated elections and to no other candidates or their supporters [DE84]. Additionally, in their memorandum, Plaintiffs/Appellees emphasized yet again their reliance independently on their Fourteenth Amendment Equal Protection Claims as well as their First Amendment claims, citing the many times Plaintiffs/Appellees expressly had raised and argued the Equal Protection grounds specifically and noting that the two claims raised conceptually different constitutional complaints about the full slate requirement [DE 84 at 2 n.1 & 3-4].

Moreover, Defendants/Appellants are well aware that in her earlier decision denying Defendants/Appellants' motion to dismiss in this case, Judge Gottschall (assigned to this case

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<sup>17</sup> Equal Protection jurisprudence is of course alive and doing quite well in terms of requiring vigilance to ballot access related statutes which discriminate against minor parties or independent candidates and those who would vote for them and such jurisprudence clearly requires striking down statutes which discriminate against minor parties or independents, even when the discrimination falls short of functionally excluding such candidates from the ballot. *See e.g., Green Party of Tennessee v. Hargett*, 791 F.3d 684 (6<sup>th</sup> Cir. 2015)(reaffirming the centrality of Equal Protection analysis in considering the constitutionality of ballot access laws which treat minor parties differently from major parties - and emphasizing the importance of fact-finding and fact-specific analysis); *Green Party v. Aichele*, – F. Supp. 3d –, 2015 WL 871150, \*22 (E.D. Pa., March 2, 2015)(Ballot access restrictions must not discriminate against minor parties); *Lux v. Judd*, 651 F.3d 396 (4<sup>th</sup> Cir. 2011)(reversing Rule 12(b)(6) dismissal and remanding for fact-finding and opportunity for additional arguments, notwithstanding considerable leeway afforded in regulating ballots); *Lux v. Judd*, 842 F. Supp. 2d 895 (E.D. Va. 2012)(on remand, minor party prevails on First Amendment grounds); *Libertarian Party of Virginia v. Judd*, 881 F. Supp. 2d 719 (E.D. Va. 2012); *Delaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D.N.C. 2004)(Equal Protection prohibits discrimination against minor parties or independents and between minor parties and independents).

before it was transferred to Judge Wood) devoted a significant amount of effort explaining specifically why she believed the full slate requirement was constitutionally problematic on Fourteenth Amendment Equal Protection Clause grounds, but treating “similarly situated parties differently” as well as on First Amendment grounds. *Libertarian Party of Illinois v. Illinois State Bd. of Elections*, 2012 U.S. Dist. LEXIS 12664, \*23 (N.D. Ill., September 5, 2012).

Accordingly, when Appellants expressly formulated their Statement of Issue for Review exclusively in First Amendment terms, [DE 20 at 3], did the same in their Summary of Argument section, [DE 20 at 11], and throughout the rest of their brief, they did so intentionally, fully aware that the lower court’s decision was based on two separate and conceptually different constitutional theories - First Amendment rights and Fourteenth Amendment Equal Protection rights of candidates, the party, and voters - and they knowingly and intentionally waived and abandoned any challenge to the court’s conclusion that the full slate requirement violates the Fourteenth Amendment on its face and as applied to the Plaintiffs/Appellees. The lower court’s order on Fourteenth Amendment grounds was never appealed by the Defendants/Appellants and must be affirmed as a matter of law.<sup>18</sup>

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<sup>18</sup> Appellants’ knowing and voluntary abandonment and waiver of any challenge to the lower court’s Fourteenth Amendment holding is found not just in its omission from the requisite Statement of Issues for Review, Summary of Argument and throughout the Appellants brief. It is apparent from its wholesale dismissal of Fourteenth Amendment analysis. In its brief at Page 9, it attempts to minimize the lower court’s express holding that the full slate requirement violates the Fourteenth Amendment’s Equal Protection Clause on its face and as applied to Plaintiffs/Appellees (in addition to the First Amendment violation), but asserting that the decision “mentioned equal protection principles in connection with laws regulating elections, but did not expressly find that the full-slate requirement violated any equal protection standards stricter than those imposed by the First Amendment.” [DE 20 at 9] This statement is both misleading and irrelevant. The question is not whether the lower court found the full slate requirement to violate equal protection standards “stricter than” First Amendment standards; it is simply that the lower court found that the full slate requirement violated by separate and distinct fundamental constitutional provisions, which provide different conceptual frameworks and two different analytical focuses.

If this Court for some reason allows the Appellants in their Reply Brief to address the lower court's holding that the full slate requirement violates the Fourteenth Amendment's Equal Protection Clause on its face and as applied to Plaintiffs/Appellees, Appellants respectfully request an opportunity to file a sur-reply. However, under the applicable rules and case law cited herein, Appellants must be deemed to have waived and abandoned an appeal of the lower court's holding under the Fourteenth Amendment to the United States Constitution.

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Finally, Appellants make their discount of the lower court's decision based squarely on the Fourteenth Amendment Equal Protection claim by dropping a footnote on Page 36 of their brief [DE 20 at 36 n.5] in which they similarly claim that the district court decision "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." Appellants once again miss the point. First, Rule 28 expressly requires that each issue raised on appeal be expressly noted and Appellants have not raised on appeal in any cognizable way a claim that or error concerning the lower court's holding that the full slate requirement violates the Fourteenth Amendment's Equal Protection Clause on its face and as applied - whether or not they think constitutional analysis under that constitutional provision is "significantly different" from First Amendment analysis. Appellants end the footnote with the offhand remark that if there are any equal protection concerns that are relevant to the appeal this Court apparently should consider them addressed in the section of the brief to which the footnote relates. There is a whole body of Fourteenth Amendment Equal Protection Clause law that has developed in ballot access cases - *see e.g., Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 662-666 (6<sup>th</sup> Cir. 2016)(Equal Protection analysis applies when the state regulation either classifies in different ways or places restrictions on the right to vote); *Hargett, Supra.* and cases cited therein. Appellants chose to ignore entirely the Fourteenth Amendment violation found by the district court in identifying their issue for review on appeal and their summary of their argument and offered no case citations or other argument addressed to the Fourteenth Amendment violation of Fourteenth Amendment analysis anywhere in its brief. Surely by any standards, simply mentioning the Fourteenth Amendment in a footnote and leaving it to the Court to try to draw some argument actually addressed to the Fourteenth Amendment does not satisfy Rule 28's requirements. *See* 21-328 *Moore's Federal Practice - Civil* § 328.20[8], notes 29 & 30; *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1480 (11<sup>th</sup> Cir. 1997)(cursory statement in appellant's initial brief without argument on the underlying theory at issue constitutes a waiver on appeal of the issue); *Smithkline Beecham Corp. v. Apptex Corp.*, 439 F.3d 1312, 1320 & n.9 (Fed. Cir. 2006)(arguments raised in footnotes are not preserved); *United States v. Dunkel*, 927 F.2d 955 (7<sup>th</sup> Cir. 1991)("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim. . . . Especially not when the brief presents a passel of other arguments . . . . Judges are not like pigs, hunting for truffles buried in briefs."). Here it is even less than a "skeletal argument" - it is the deliberate and knowing dismissal of Fourteenth Amendment jurisprudence and the lower court's express holding and the Appellants unquestionably have waived any appeal of the lower court's holding under the Fourteenth Amendment.

**CONCLUSION**

Based on all of the foregoing and the record evidence in this case, it is respectfully submitted that lower court's decision must be affirmed. The analysis and conclusion reflected in the lower court's Opinion are correct. The full-slate requirement in Section 10-2 of Illinois's Election Code (10 ILCS 5/10-2) violates the First and Fourteenth Amendment rights of the Appellees and Illinois' voters. It creates a severe burden and is not supported by any legitimate state interest, let alone a compelling state interest. This Code section is unconstitutional on its face and as applied.

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Dated: January 18, 2017

/s/ David I. Schoen  
David I. Schoen

*Counsel for Appellees*



**CERTIFICATE OF FILING AND SERVICE**

The undersigned, counsel for Appellees, hereby certifies that on January 18, 2017, the foregoing Brief of Appellees was filed via the Court's CM/ECF System, which will send notice of such filing to all registered users.

The necessary filing and service were performed in accordance with instructions given to me by counsel in this case.

Dated: January 18, 2017

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