

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

Libertarian Party of Illinois, *et al.*,

Plaintiffs,

v.

Karen A. Yarbrough, *et al.*,

Defendants.

Case No.: 22-cv-0578

Judge Robert W. Gettleman

**DEFENDANT COOK COUNTY CLERK'S SUR-REPLY IN OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY OR PERMANENT
INJUNCTION AND DECLARATION AS A MATTER OF LAW**

Defendant Karen A. Yarbrough, Cook County Clerk, in her official capacity (the "County Clerk"), by and through her counsel, Kimberly M. Foxx, State's Attorney of Cook County, through her assistant, Jessica M. Scheller, Silvia Mercado Masters, and Leilani Ana-Maria Pino, hereby submits this sur-reply in opposition to Plaintiffs' Emergency Motion for Preliminary or Permanent Injunction and Declaration as a Matter of Law ("Motion"), stating:

INTRODUCTION

Plaintiffs are not being denied access to the ballot. On the contrary, Plaintiffs are free to collect signatures and file their petitions to be placed on the ballot in the General Election in November 2022. The sole issue here is whether Plaintiffs are entitled to be on the ballot in the Primary Election in June 2022, as an established party, in the races for Cook County Board Districts and Cook County Townships. Pursuant to the Illinois Election Code, the answer to that question is a resounding no. Plaintiffs seek to muddy the waters and claim they are an Established Party with respect to every race within the territorial boundaries of Cook County pursuant to Article 7 of the Election Code. Nonetheless, Article 10 of the Election Code governs here and

unequivocally states that the Libertarian Party is not an Established Party for purposes of the Board Districts and Townships of Cook County.

RELEVANT CODE SECTIONS

The Illinois Election Code (“Election Code”), under its General Provisions, provides the following definitions:

“Political or governmental subdivision” means any unit of local government, or school district in which elections are or may be held.

10 ILCS 5/1-3(6).

“District” means any area which votes as a unit for the election of any officer, other than the State or a unit of local government or school district, and includes, but is not limited to, legislative, congressional and judicial districts, judicial circuits, county board districts, municipal and sanitary district wards, school board districts, and precincts.

10 ILCS 5/1-3(7)

The word “township” and the word “town” shall apply interchangeably to the type of governmental organization established in accordance with the provisions of the Township Code [60 ILCS 1/1-1 et seq.].

10 ILCS 5/1-3(14).

“Leading political party” means one of the two political parties whose candidates for governor at the most recent three gubernatorial elections received either the highest or second highest average number of votes. The political party whose candidates for governor received the highest average number of votes shall be known as the first leading political party and the political party whose candidates for governor received the second highest average number of votes shall be known as the second leading political party.

10 ILCS 5/1-3(21).

Article 10 of the Election Code governs the Making of Nominations in Certain Other Cases and Article 10-1 applies Article 10 to minor political parties. 10 ILCS 5/10-1. Article 10-2 defines “political party” to mean:

any “established political party”, as hereinafter defined and shall also mean any

political group which shall hereafter undertake to form an established political party in the manner provided for in this Article 10

It goes on to state:

A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an “established political party” as to the State and as to any district or political subdivision thereof.

A political party which, at the last election in any congressional district, legislative district, county, township, municipality or other political subdivision or district in the State, polled more than 5% of the entire vote cast within such territorial area or political subdivision, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district or political subdivision, is hereby declared to be an “established political party” within the meaning of this Article as to such district or political subdivision.

Article 7 of the Election Code pertains to the Making of Nominations by Political Parties. Article

7-2 provides in part:

A political party, which at the general election for State and county officers then next preceding a primary, cast more than 5 per cent of the entire vote cast in any county, is hereby declared to be a political party within the meaning of this Article, within said county, and shall nominate all county officers in said county under the provisions hereof, and shall elect precinct, township, and ward committeepersons, as herein provided.

It goes on to state:

A political party, which at the municipal election for town officers then next preceding a primary, cast more than 5 per cent of the entire vote cast in said town, is hereby declared to be a political party within the meaning of this Article, within said town, and shall nominate all town officers in said town under the provisions hereof to the extent and in the cases provided in Section 7-1.

A political party, which at the municipal election in any other municipality or political subdivision, (except townships and school districts), for municipal or other officers therein then next preceding a primary, cast more than 5 per cent of the entire vote cast in such municipality or political subdivision, is hereby declared to be a political party within the meaning of this Article, within said municipality or political subdivision, and shall nominate all municipal or other officers therein under the provisions hereof to the extent and in the cases provided in Section 7-1.

ARGUMENT

Plaintiffs concede that Article 10-2 of the Election Code defines how a new political party attains established political party (“Established Party”) status. ECF No. 12, p. 1. Despite arguing throughout their Motion that the Libertarian Party is an Established Party under Article 10-2, Plaintiffs quickly pivot in their Reply arguing for the first time that their rights are governed by Article 7-2. ECF No. 22, p. 4. Plaintiffs deliberately try to muddy the waters even though they concede that a new political party never gets to Article 7 unless they first pass the requirements of Article 10. Plaintiffs misinterpret the texts of Articles 10 and 7 to argue that the Libertarian Party is an Established Party not only for County-wide races, but all local races within Cook County. The plain text of Articles 10 and 7 do not support such an argument.

Plaintiffs would have this Court determine that because the Libertarian Party polled 6.71% of the votes for Cook County State’s Attorney in the 2020 General Election, a single race for one County-wide position, that the Libertarian Party should be considered an Established Party for every local race in Cook County, including County Board Districts and County Townships, and therefore be included in the Primary Elections. Conversely, the County Clerk’s position is that the Libertarian Party can be an Established Party for County Board Districts and Township elections *only* if the Libertarian Party polled 5% or higher in the last election where County Board Commissioners and Township officers were elected. Because in that instance, the County Board Districts and Townships voted as a unit for their elected officials.

A careful reading of Article 10-2 supports the County Clerk’s argument. First, Article 10-2 states that any political party that polls higher than 5% in the gubernatorial election is an Established Party as to the State and any district or subdivision of the State. 10 ILCS 5/10-2. Plaintiffs do not allege the Libertarian Party achieved Established Party status state-wide from the

last gubernatorial election. Article 10-2 goes on to state:

A political party which, at the last election in any congressional district, legislative district, county, township, municipality or other political subdivision or district in the State, polled more than 5% of the entire vote cast within such territorial area or political subdivision, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district or political subdivision, is hereby declared to be an “established political party” within the meaning of this Article as to such district or political subdivision.

Article 10-2 specifically requires that in order to become an Established Party the political party must poll more than 5% of the territorial area or political subdivision that *has voted as a unit for the election of officers to serve that territorial area or political subdivision*. Plaintiffs have not established, nor could they, that the County Board Districts or Townships voted for the election of officers in their Districts or Townships in the 2020 General Election because there was no such election. Therefore, the Libertarian Party is not an Established Party for purposes of the County Board Districts and Townships.

While it is the County Clerk’s position that this ends the inquiry as to Primary Elections for County Board Districts and Townships because Article 7 is never triggered, Article 7 itself supports the conclusion that the Libertarian Party is not an Established Party for purposes of Board Districts and Townships. Plaintiffs rely heavily on language in Article 7-2 which states that a political party that casts more than 5% of the entire vote cast in the county is an Established Party and “shall nominate all county officers in said county under the provisions hereof, and shall elect precinct, township, and ward committeepersons, as herein provided.” But Plaintiffs ignore the words “as herein provided” because Article 7-2 goes on to outline exactly how a political party becomes an Established Party under Article 7 in towns and political subdivisions.

A political party, which at the municipal election **for town officers** then next preceding a primary, cast more than 5 per cent of the entire vote cast in said town, is hereby declared to be a political party within the meaning of this Article, within said town, and shall nominate all town officers in said town under the provisions

hereof to the extent and in the cases provided in Section 7-1.

A political party, which at the municipal election in any other municipality or political subdivision, (except townships and school districts), **for municipal or other officers therein** then next preceding a primary, cast more than 5 per cent of the entire vote cast in such municipality or political subdivision, is hereby declared to be a political party within the meaning of this Article, within said municipality or political subdivision, and shall nominate all municipal or other officers therein under the provisions hereof to the extent and in the cases provided in Section 7-1.

10 ILCS 5/7-2 (emphasis added). Both paragraphs state that you must look to the municipal election for town officers or officers of political subdivisions next preceding a primary. *Id.* Clearly, the 2020 General Election is not the relevant election to determine whether the Libertarian Party is an Established Party for Board Districts and Townships as Plaintiffs concede in their own filings that no Commissioners or Township officers were elected in the 2020 General Election. ECF No. 1, Ex. A. Plaintiffs heavily rely upon *Ramirez v. Chi. Bd. of Election Comm'rs*, 2020 IL App (1st) 200240 for their position that when the Election Code refers to the last general election, it is referring to the most recent in time general election, not the last election at which the same officers were elected. Plaintiffs are misguided as the case is clearly distinguishable. First, *Ramirez* does not involve a question of Established Party as the candidate at issue was from the Democratic Party and not a new party. *Id.* at ¶4. Second, the position of Ward committeeperson arises from Article 7 and the requirements for office are contained Article 7-10. *Id.* at ¶17. Finally, the issue in *Ramirez* was the election from which to determine signature requirements and there is nothing in *Ramirez* or Article 7-10 which states that its provisions control over the clear language contained in Article 7-2. *Id.* at ¶¶25-29.

If the language in Article 7-2, relied upon by Plaintiffs, that an Established Party in a County may elect precinct, township and ward committeepersons with no further requirements than casting more than 5% in a County-wide election, then the General Assembly would not have

included the following paragraphs which outline how a political party becomes an Established Party for towns and political subdivisions. *See Brucker v. Mercola*, 227 Ill. 2d 502, 514 (2007) (When interpreting a statute, “each word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous.”). Plaintiffs are cherry-picking the provisions of the Election Code which best suit them without viewing the Code as a whole.

In *Libertarian Party of Illinois, et al. v. Rednour, et al.*, the Seventh Circuit affirmed the district court’s ruling that the Libertarian Party was not an established party in congressional districts by virtue of its being an established party as to statewide elections and that the procedural requirements for new parties did not violate plaintiffs’ constitutional rights. 108 F.3d 768, 777 (7th Cir. 1997). The Court recognized that the Election Code characterizes political parties in two categories, as “established” and “new,” and looked to Article 10-2 to determine how a party is considered established. *Id.* at 771. The Court further noted that if a party receives more than 5% of the vote in the gubernatorial race than they are established for all state, local, and congressional races. However, that rule does not apply to certain other statewide elections, e.g., United States Senate, Illinois Attorney General; if in those races a party receives more than 5% of the vote than that party is considered established only for statewide elections, and not for congressional or other non-statewide elections. *Id.* The same principle applies here; while the Libertarian Party is an Established Party as to Countywide races in Cook County by virtue of their performance in the 2020 General Election, they are not an Established Party for non-Countywide elections.

Significantly, a new party only retains Established Party status as long as it keeps up the criteria outlined in Article 10-2. *Rednour*, 108 F.3d at 771, and see Michael J. Kasper, *Political Parties*, IICLE on Election Law, §6.4 (2020) (Established political party status is maintained at the district and political subdivision level only if the party’s candidates within those areas receive

in excess of five percent of the votes cast for the offices sought.). Therefore, if at the 2022 General Election the Libertarian Party fails to poll higher than 5% for Countywide offices, it will no longer be an Established Party for those offices. The numerous requirements for attaining and maintaining Established Party status set forth in Article 10-2 and Article 7-2, belie Plaintiffs' argument that they are automatically an Established Party for all District and Township races in Cook County just by virtue of polling higher than 5% in a single Countywide race. Because Article 10-2 clearly applies here and the Libertarian Party did not achieve Established Party status with respect to County Board Districts and Townships, Plaintiffs are not entitled to the relief they seek.

Unjustifiably, Plaintiffs inject malice into the County Clerk's actions, and anticipated actions, arguing the Clerk is hostile to the Libertarian Party and other new political parties. ECF No. 22, p. 2. But the County Clerk is merely administering the Election Code which clearly separates established political parties from new parties and which distinctions have been upheld. *See Rednour*, 108 F.3d at 775 (The disparity in the nomination process between major and minor party candidates "serves the State's important interest of ensuring that a political party that is new in a particular political subdivision demonstrates a modicum of public support before it can place its candidates on an election ballot.") Indeed, Plaintiffs' block quote from *Gill v. Scholz*, (ECF No. 22, p. 2), is misleading as the following line of the opinion is "But the right [of third-party candidates to ensure ballot access] is not absolute." *Gill v. Scholz*, 962 F.3d 360, 364 (7th Cir. 2020) *citing Rednour*, 108 F.3d at 773. *Gill* is also distinguishable as the Seventh Circuit remanded the case to the district court because it had failed to apply the *Anderson-Burdick* test to evaluate the burden imposed by the signature requirements on third-party candidates. *Gill*, 962 F.3d at 365-66. Notably, Plaintiffs failed to mention or apply the *Anderson-Burdick* test in their First Amendment claims.

Plaintiffs complain of the County Clerk's "refusal to define a procedure" for Libertarian Party candidates "to attain ballot placement" (ECF No. 22, p. 9) but it is the Election Code, and not the County Clerk, that defines the procedure. Article 10-2 defines how a new party places its candidates on the ballot of the General Election. Indeed, following the requirements of Article 10 is precisely how the Libertarian Party candidate got on the General Election ballot in 2020 for Cook County State's Attorney, and that candidate successfully achieved more than 5% of the vote. The Libertarian Party was certainly not denied ballot access in 2020, and the same is true here for the 2022 General Election. Plaintiffs have never established, or cited any case law, that they have a fundamental right to be placed on the Primary Election ballot.

For the first time in their Reply, Plaintiffs argue they are entitled to declaratory relief which they claim is un rebutted by the County Clerk. ECF No. 22, p. 11. Plaintiffs' Motion and Memorandum requests injunctive relief and make no mention of declaratory judgment. ECF Nos. 11, 12. Plaintiffs' claim for declaratory judgment is premature, has not been properly raised, and should be disregarded.

Plaintiffs complain in their Reply that the County Clerk has not "defined a procedure/signature requirement" for certain offices. ECF No. 22, p. 13. But it is not the function of the County Clerk to *define* a procedure or signature requirement, the requirements come from the Election Code itself. Plaintiffs repeatedly attempt to confuse the issues here in order to fabricate a controversy with the County Clerk. The fact remains that Plaintiffs have access to the ballot for the 2022 General Election, as set forth in Article 10-2. This ballot access extends to all races, including those for County Board Districts, Townships, the Board of Review, and Municipal Water Reclamation District. Moreover, the fact is that Plaintiffs have not established they have any right to participate in the 2022 Primary Election specifically, or that there is a fundamental right to

participate in primary elections in general.

Plaintiffs' reliance on case law regarding a district court's ability to place candidates on a ballot is unavailing and unpersuasive as there is no justifiable reason to do so here as there is a clear path to ballot access. ECF No. 22, p. 13. Moreover, each of the cases cited regarding independent candidate Eugene McCarthy relate to him being placed on the ballot for the *general election*, not a primary election, making them particularly unpersuasive here. Likewise, in *Williams v. Rhodes*, 393 U.S. 23, 24 (1968), the Supreme Court noted that it was virtually impossible for a new party candidate to get on the ballot in Ohio, which is clearly inapposite here where Article 10-2 outlines exactly how a new party may get on the ballot. Likewise unpersuasive is *Libertarian Party of Illinois v. William J. Cadigan, et al.*, 824 Fed. Appx. 415, 417 (7th Cir. Aug. 20, 2020), because there the parties had *agreed* to allow certain candidates on the ballot, it was not a determination made by the district court, and the election board was not appealing that part of the ruling. Plaintiffs have failed to establish any justification for their candidates, who have not even filed their nomination papers, to be placed on the Primary Election ballot in Cook County.

CONCLUSION

WHEREFORE Respondent Karen A. Yarbrough, Cook County Clerk, in her official capacity, respectfully requests that this Court deny Plaintiffs' Emergency Motion for Preliminary or Permanent Injunction and Declaration as a Matter of Law.

February 25, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on February 25, 2022, she caused to be filed through the Court's CM/ECF system the foregoing document, a copy of which will be electronically mailed to the parties of record.

s/ Silvia Mercado Masters