

**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.: 1:22-cv-0578

Judge Robert W. Gettleman

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

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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 response in opposition to Plaintiffs’ Emergency Motion for Preliminary or Permanent Injunction and Declaration as a Matter of Law (“Motion”), stating:

INTRODUCTION

This case is not about ballot access. Plaintiffs have not been prohibited or excluded from participating fully and fairly in the upcoming 2022 General and Primary elections. Instead, Plaintiffs here seek recognition as an “established political party” (“Established Party”) as described by Section 10 ILCS 5/10-2 of the Illinois Election Code (“Election Code”) for the purposes of the upcoming election cycle. The Election Code establishes two procedures pursuant to which a group may attain Established Party status: i) poll greater than 5% of the vote in the last Statewide election; or ii) poll more than 5% of the entire vote cast within such territorial area or political subdivision has voted as a unit for the election of officers to serve the respective territorial area of such district or political subdivision.

Plaintiffs here correctly contend that a Libertarian Party candidate polled higher than 5% in the last county-wide election for State’s Attorney. The Clerk agrees that Plaintiffs attained Established Party status for the upcoming municipal elections for any county-wide seat, such as Cook County Sheriff, Cook County Board President, etc. Plaintiffs have not asked the Clerk whether she will recognize the Libertarians as an Established Party in these races nor has the Clerk stated that she will not. There is no dispute for this Court to resolve on this point.

However, the Clerk will not recognize Plaintiffs as an Established Party for races in the *political subdivisions* of Cook County in which a Libertarian candidate did not poll greater than 5% in the last election for an officer who serves that subdivision. Conflating the standards

which apply to statewide elections and those in smaller political subdivision, Plaintiffs seek to apply the rules for establishing a state-wide political party to the County. But the Election Code draws a clear distinction mandating otherwise with which this Court should agree.¹

Plaintiffs fail to meet the requirements for a temporary restraining order or preliminary injunction where they cannot establish a right to relief against the County Clerk or a likelihood of success on the merits. Plaintiffs raise claims that are either i) not justiciable as there is not dispute; or ii) purely speculative and seek relief to which they are not entitled under a plain reading of the Illinois Election Code. For the foregoing reasons, Plaintiffs' Motion should be denied.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs, the Libertarian Party of Illinois and a group of registered voters who are members of the Libertarian Party and potential candidates, seek an injunction directing the Clerk's actions with respect to the June 2022 primary elections. On February 1, 2022, Plaintiffs filed their Complaint against the Clerk, the Chicago Board of Election Commissioners, and individual Chicago Board of Election Commissioners.²

Plaintiffs filed an amended emergency motion for preliminary injunction and/or temporary restraining order (ECF No. 11) asking this Court to enter an injunction directing the Clerk (a) to amend her "General Information" disclosure to identify the Libertarian Party as an established political party for all offices in Cook County including Cook County Board members, and committeepersons; (b) to prominently notify the public on the Clerk's website and

¹ Further still, the political subdivisions within the County as it relates to County Board Commissioner Districts have all undergone redistricting. See Exhibit A, ¶¶ 4, 5.

² Plaintiffs stipulated to voluntarily dismiss the Chicago Board of Election Commissioners and Commissioners Hernandez, Kresse, and Brown. The parties were dismissed on February 9, 2022. (ECF No. 17).

at all physical office locations of the foregoing amendment to the “General Information” disclosure; (c) to place Plaintiffs Humay, Ross Decker, and Sizelove on the June 28, 2022 primary election ballot as candidates of the Libertarian Party for Cook County Board commissioners for Districts 1, 5, and 11, respectively; (d) to accept nomination papers from Libertarian Party candidates for the offices of Cook County Board commissioner and township committeeperson for the June 28, 2022 primary election; (e) to commence all preparations for a Libertarian Party primary election to include its candidates for Cook County Board and for its party committeepersons; (f) to thereafter accept certifications to fill vacancies for the November 8, 2022 general election from the Libertarian Party seeking to fill vacancies in nominations from the primary election; and (g) to protect Plaintiffs’ First and Fourteenth Amendment rights.

The Illinois Election Code (“Election Code”) provides in part that a political party which “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.*” 10 ILCS 5/10-2 (emphasis added). Section 10-2 further provides:

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.*

Id. (emphasis added). Plaintiffs allege the Libertarian Party is an Established Party because a Libertarian Party candidate received more than 5% of the vote in the 2020 general election for Cook County State’s Attorney. According to Plaintiffs, the Libertarian Party is now an Established Party within the geographic boundaries of Cook County, including its districts and townships. *See* ECF No. 1, ¶¶ 31, 33-34.

On September 23, 2021, the Cook County Board of Commissioners adopted the “Cook County Redistricting Ordinance of 2021,” attached to the Complaint as Exhibit C, which redistricted each of the seventeen Cook County Board Districts located within Cook County. The Redistricting Ordinance provides that the Cook County Board Districts “shall become effective upon approval and adoption of this Ordinance and County Commissioners shall be nominated and elected in 2022 by the legal voters of each County Board District as set forth and specified in this Ordinance” with certain limitations. *See* ECF No. 1, Ex. C, Section 5(a).

While we think it is of no legal moment, in the interest of transparency and to demonstrate that Plaintiffs’ efforts would largely fail even if the results of the 2020 election were considered, according to data maintained by the Clerk, in the 2020 general election, in the race for Cook County State’s Attorney, the Libertarian Party candidate polled 6.71%. Broken down by then County Board Districts, the Libertarian Party polled 5% or higher in former District 11, 4.5% in former District 1, and 3.421% in former District 5. *See* Declaration of James Nally, Legal Counsel for the Clerk, attached here as Exhibit A, ¶ 2. The Libertarian Party polled 5% or higher in 26 townships. *See Id.* at ¶ 3. According to Plaintiffs’ own Complaint and Exhibits, the positions of Cook County Board Commissioner and Cook County Township officers were not up for election in 2020 in any County Board District or in any Township. ECF No. 1.

ARGUMENT

I. This Court Should Find that Plaintiffs Fail to Meet the Legal Standard for The Extraordinary Relief They Seek.

A. Plaintiffs Do Not Establish a Right to Relief

Plaintiffs here fail to establish that they have presented petitions to be placed on the ballot which have been wrongfully denied. Nor could they – candidates may first file their

petitions with the Clerk on March 7, 2022.³ Thereafter, other parties may file objections to Plaintiffs' respective petitions to the extent those challengers contend that the Plaintiffs' petitions do not comport with the Election Code. To win a preliminary injunction, the moving party must establish that (1) without preliminary relief, Plaintiffs will suffer irreparable harm before final resolution of their claims; (2) legal remedies are inadequate; and (3) their claim has some likelihood of success on the merits." *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018). Plaintiffs here make no such showing. Indeed, they fail to meet the threshold standing requirements to move forward with their suit against the County Clerk. "To assert [Article III] standing for injunctive relief, [Plaintiffs] must show that [they are] under an actual or imminent threat of suffering a concrete and particularized 'injury in fact'; that this injury is fairly traceable to the defendant's conduct; and that it is likely that a favorable judicial decision will prevent or redress the injury." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 949 (7th Cir. 2019) (*quoting Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

First, Plaintiffs have not alleged or otherwise asserted that without the entry of preliminary relief *against the County Clerk*, they will suffer a particularized injury in fact traceable to the conduct of the County Clerk. *Eli Lilly & Co.*, 893 F.3d at 381; *Common Cause Ind.*, 937 F.3d at 949. Plaintiffs' claims are entirely speculative and are premised upon an assumption that a series of potential events will occur which will then yield an actual controversy between the parties. But speculative and nebulous claims such as these should not give rise to injunctive relief. *See General Laborer's Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120, 1127 (7th Cir. 2019). In order to obtain the extraordinary relief sought here, Plaintiffs' claims must be concrete. *Id.* Plaintiffs ask this Court to prematurely enjoin the Clerk and modify the

³ Declaration of James Nally, Exhibit A, ¶ 7.

requirements of the Election Code to grant them Established Party status in all political subdivisions of Cook County. Plaintiffs do not allege they were blocked from filing petitions or from collecting signatures by the County Clerk. Nor do they allege that any municipality refused to certify their petition and that the County Clerk resultingly left the candidate off the ballot. Thus, Plaintiffs' claims are not ripe for adjudication.

Ripeness is predicated on the "central perception...that courts should not render decisions absent a genuine need to resolve a real dispute," *Merr v. Holmes*, 364 F.3d 862, 867 (7th Cir. 2004) (quoting 13A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 3532.1, at 114 (2d ed.1984)), and "[c]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Id.* (quoting *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir.1992)). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008) (emphasis added) (quotations omitted); *MedImmune, Inc. v. Genentech, Inc.*, 127 S.Ct. 764, 771 (2007).

Even if the issues here are ripe, Plaintiffs' claim that the Libertarian Party is an Established Party for purposes of County Board Districts fails on the merits due the fact that no County Board Commissioner position was up for election in 2020 and due to redistricting. Plaintiffs have not alleged that the Libertarian Party polled 5% or higher in the last election where the County Board Commissioners were elected. Moreover, the County Board Districts have since been redistricted. Instructive here is *Stevo v. Keith*, where plaintiff attacked the requirement that an independent candidate must obtain signatures of 5% of the number of people

who voted in the district in the last congressional election. *Stevo v. Keith*, 546 F.3d 405, 406 (7th Cir. 2008). The plaintiff there argued that the 5% requirement was too burdensome when only 5,000 signatures are required after a redistricting due to a decennial census. *Id.* at 407. The Court upheld the 5% requirement and recognized that a different requirement is in place after redistricting because “it is impossible to calculate a percentage of the votes in the previous election in a redistricted district because by definition there was no previous election in that district--the district didn’t exist.” *Id.* Likewise here, because the County Board Districts as they stand today did not exist prior to 2021, the Libertarian Party cannot rely on the vote totals from the 2020 election to declare itself an established political party. *See also Vestrup v. Du Page County Election Comm’n*, 335 Ill. App. 3d 156, 164, 779 N.E.2d 376, 268 Ill. Dec. 762 (2002).

B. There is No First Amendment Violation to be Litigated

Plaintiffs have offered no facts necessary to undertake an analysis to conclude the Election Code unfairly burdens their interest in access to the ballot or their right to associate under the First Amendment. Although Plaintiffs seek injunctive relief for the purported denial by the County Clerk of their First Amendment right to associate as a political party, nominate their candidates, and vote for their candidates at the primary election, they fail to provide any legal support for their position. Notably, Plaintiffs do not claim the Election Code is unconstitutional. Instead, Plaintiffs make a wide-sweeping allegation that the County Clerk’s anticipated actions violate rights guaranteed to these Plaintiffs under the First Amendment. The County Clerk however followed the Election Code properly and Plaintiffs’ claims of First Amendment violations find no support in the law.

i. The Plaintiffs Fail to Assert a First Amendment Violation.

Despite well-settled law and the Election Code, Plaintiffs argue “due to the Clerk’s failure to recognize the Libertarian Party as being an established for Cook County Board members and township committee persons, the Libertarian Party is hobbled in its ability to gather

signature petitions, and in its ability to promote its platform and grow the Libertarian Party.” ECF No. 12, p. 6. Plaintiffs also allege the Clerk willfully, intentionally, and erroneously denied ballot access to Plaintiffs, deprived the Libertarian Party of its right to nominate its candidates, and is *anticipated* to deny nominations to fill vacancies. *Id.* Plaintiffs consider these violations of their First Amendment Rights. Yet, Plaintiffs fail to establish how the Clerk denied ballot access when the Plaintiffs have not yet filed anything seeking to be placed on the ballot for the Clerk to deny. Additionally, Plaintiffs fail to establish an anticipatory deprivation of their nominations.

Administration of the electoral process is a matter that the Constitution largely entrusts to the States, and excessively restrictive state election laws may so impose upon freedom of association that violate the First and Fourteenth Amendments. *Kusper v. Pontikes*, 414 U.S. 51, 57, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973). Likewise, “ballot access is a substantial right and not lightly to be denied.” *Siegel v. Lake County Officers Electoral Board*, 385 Ill. App. 3d 452, 460-61, 895 N.E.2d 69, 324 Ill. Dec. 69 (2008). Nonetheless, the mere fact that an election statute burdens the First Amendment does not render the statute immediately unconstitutional. *Libertarian Party of Conn. v. Merrill*, 470 F. Supp. 3d 169, 176 (D. Conn., June 27, 2020).

In determining whether the restriction is unconstitutional, courts must first determine whether the restriction is “reasonable and nondiscriminatory” or “severe.” *Yang v. Kosinski*, 960 F.3d 119, 129 (2d Cir. 2020). If the restriction is severe, then a strict scrutiny test is applied to determine whether the restriction advances state interest of compelling importance. *Libertarian Party of Conn.*, 470 F. Supp. 3d 169 at 177. In the alternative, if the restriction is “reasonable and nondiscriminatory” then courts apply a two-step balancing test, the “*Anderson-Burdick* balancing test.” *Id.*; *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Nondiscriminatory restrictions impose only slight burdens and are usually justified by the need for orderly and fair elections. *Libertarian Party of Illinois v. Scholz*, 872 F.3d 518, 524 (7th Cir. 2017).

Here, Plaintiffs offer no facts that provide the Election Code and the Cook County Redistricting Ordinance severely burden their interest in access to the ballot. A review of the

record however provides the redistricting provision is reasonable and nondiscriminatory since the Cook County Redistricting Ordinance was guided by the district population, complied with the United States Constitution and the federal Voting Rights Act, and each district was drawn following redistricting principles recognized by state and federal court decisions. Additionally, the pertinent portion of section 10-2 of the Election Code provides guidelines with which a party can access the ballot after redistricting. Accordingly, the *Anderson-Burdick* balancing test is applied to the Election Code and Redistricting Ordinance rather than a strict scrutiny test.

Under the *Anderson-Burdick* balancing test, the court “must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments and then . . . identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Yang*, 960 F.3d at 129; *Libertarian Party of Conn.*, 470 F. Supp. 3d 169 at 177. The ultimate question is whether a reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot. *See Storer v. Brown*, 415 U.S. 724, 742 (1974). Consequently, Plaintiffs must demonstrate that the Clerk’s application of section 10-2 of the Code is unconstitutional and contributed to a ballot access burden.

In this case, Plaintiffs have not established their burden that a constitutionally significant restriction exists which caused injury. “The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.” *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016). There is no exclusion from the ballot for the Plaintiffs in Cook County. Rather, they must follow section 10-2 of the Election Code. Plaintiffs cannot sustain a constitutional challenge to a well-settled election law simply because they feel aggrieved of the process in collecting signatures as a new party and submitting it to the County Clerk. Their position does not pass constitutional muster.

Plaintiffs also fail to establish that Illinois does not have a State justification for the burden imposed by the law. States may and must enact reasonable regulations of parties, elections, and ballots to reduce election and campaign related disorder. *Timmons v. Twin Cities*

Area New Party, 520 U.S. 351, 358 (1997). “As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.” *Storer*, 415 U.S. 724 at 730. Illinois has a vested interest in preserving the fairness of elections, particularly after redistricting. It does so by specifically outlining what a political party must do to obtain a place on the ballot after redistricting in section 10-2. “Whether an election takes place before or immediately after redistricting, we find that Illinois has an interest in requiring candidates and political parties seeking access to the ballot to demonstrate a modicum of support.” *Druck v. Ill. State Bd. of Elections*, 387 Ill. App. 3d 144, 151, 899 N.E.2d 437, 326 Ill. Dec. 220 (2002).

The County Clerk’s anticipated refusal to recognize the Libertarian Party as an Established Party for a district that has not voted as a unit for that party aligns with the State’s interest to protect the ballot and treat all candidates fairly. Plaintiffs have not shown Illinois lacks an interest in requiring a party to establish a new political party following redistricting as set forth in section 10-2 of the Election Code. As such, the extraordinary remedy Plaintiffs are seeking to be automatically added to the ballot, without any measure of supporting facts or evidence, eliminates the interests protected by the State. It would essentially result in discriminatory treatment to other minor parties. Ultimately, Plaintiffs have not demonstrated that the Election Code creates a challenge for the candidates. Furthermore, Plaintiffs have not presented any support that the County Clerk did not properly follow the Election Code after the redistricting. Therefore, Plaintiffs’ First Amendment claim fails.

ii. The Cook County Clerk properly applied the Illinois Election Code.

On September 23, 2021, the Board of Commissioners of Cook County approved and adopted the Cook County Redistricting Ordinance of 2021, as required by law, to redistrict the seventeen (17) County Commissioner Districts according to the census data from the United States Census Bureau. *See* ECF No. 1, Exhibit C. The Redistricting Ordinance applies to the 2022 election and provides that the County Commissioners shall be nominated and elected in

2022 by the legal voters of each County Board District. *Id.* The redistricting plan accounted for the district population; complied with the United States Constitution and the federal Voting Rights Act; and was drawn following redistricting principles recognized by state and federal court decisions. *Id.* The Redistricting Ordinance further provides a vacancy in nomination for the office of County Commissioner in the November 2022 general election shall be governed by Cook County Code of Ordinance, Chapter 23, Article II, Sec. 22-32. As a result of the Cook County Redistricting Ordinance, section 10-2 of the Election Code was triggered. The Cook County Clerk's Office is the chief election authority for the 2022 elections. As such, the County Clerk is responsible for following the Election Code.

Under the Election Code, general election candidates are placed into three groups: those affiliated with an established political party, those affiliated with a new political party, and those running as independents. *Libertarian Party of Illinois*, 872 F.3d 518 at 521. After a redistricting, a party loses Established Party status and must proceed under the provisions in section 10-2 that directs establishing a new political party. *Vestrup*, 335 Ill. App. 3d 156 at 164. It is uncontested that the Redistricting Ordinance remapped the boundaries for each of the seventeen (17) Cook County Board Districts. *See* ECF No. 1, ¶ 35; Exhibit 3 of Declaration. As a result of the redistricting, the Libertarian Party is not an established party and alternatively is a new political party under section 10-2 of the Election Code.

Disregarding the Redistricting Ordinance, Plaintiffs argue that the Libertarian Party is an established political party within Cook County, including the election of its committeepersons, and that they are guaranteed all associated rights under the Election Code based upon the polling of the Libertarian candidate in the prior election for State's Attorney. This is in contravention with previous court rulings and the plainly stated Election Code which is clear on what a political party must do to obtain a place on the ballot after redistricting. Illinois courts have held "a party's status as an established political party in a particular representative district does not outlast in any fashion the existence of that district once it has been altered by redistricting." *Vestrup*, 335 Ill. App. 3d at 163.

Vestrup, while not binding on this Court, is persuasive authority applying the Election Code to nearly identical facts. In *Vestrup*, the Libertarian candidate for state representative of the 39th Representative District received over 26% of the votes in the November 2000 general election. 335 Ill. App. 3d at 158. Later, the 39th Representative District was redrawn with portions of that District now falling within the boundaries of District 47. *Id.* In May 2002, the similarly situated plaintiff, Vestrup, filed a petition to fill the Libertarian Party of Illinois vacancy in the 47th Representative District. *Id.* It was Vestrup's contention that the Libertarian Party was an established party in District 47 under section 10-2 because the party polled more than 5% of the vote in District 39 in the 2000 general election. *Id.* at 159. The DuPage County Officers Electoral Board rejected Vestrup's argument that the Libertarian Party was an established political party in the now newly created 47th District. *Id.* The appellate court agreed, opining that District 47 had not yet voted as a unit for the election of officers and the establishment provision of the Election Code did not confer the status of an established political party in District 47. *Id.* at 164. The analysis in *Vestrup* is applicable to the facts of the present case. The seventeen (17) County Board Districts have been redistricted. Because the boundaries of each of the Board Districts have changed, the Libertarian Party is not an established political party in those districts and therefore must proceed as a new political party.

C. Plaintiffs Fail to Establish a Due Process Violation

Plaintiffs do not claim that section 10-2 of the Election Code is unconstitutional on its face. Instead, Plaintiffs assert a challenge, alleging the County Clerk's "interpretation and application" of the Election Code violates their due process rights as it applies to them. A substantive due process claim is limited to violations of fundamental rights. *Palka v. Shelton*, 623 F.3d 447, 453 (7th Cir. 2010). Plaintiffs argue the fundamental rights at issue are the "right to associate for political purposes and to participate in the electoral process." ECF No. 12, p. 3. However, substantive due process demands a precise definition of the right purported to be

violated, which is not satisfied with sweeping generalities. *Students & Parents for Privacy*, No. 16-cv-4945, 2016 U.S. Dist. LEXIS 150011 at *70 (N.D. Ill. October 18, 2016).

The “right to associate for political purposes and to participate in the electoral process” does not adequately define the rights in question. The alleged right in question is more appropriately defined as the right of the Libertarian Party to be included in a primary election where it did not poll more than 5% of the entire vote cast for redistricted districts and townships. *See Washington v. Glucksberg*, 521 U.S. 702, 721, 722 (1997) (Supreme Court rejected “right to control one’s final days,” “liberty to shape death,” and “right to die” and defined right as “right to commit suicide which itself includes a right to assistance in doing so.”); *Winters v. Ill. State Bd. of Elections*, 197 F. Supp. 2d 1110, 1114 (N.D. Ill. 2001) (Court rejected “right to vote” and instead defined right as “right to have the tie-breaking member of a redistricting commission chosen by some means other than by lot” and applied rational basis standard.). When Plaintiffs’ right is defined more concisely, it is clear no fundamental right is implicated.

Plaintiffs fail to identify any fundamental right for a political party to be included in a primary election. The Election Code determines the manner in which primary elections are held; and are held for established political parties for contested races. *See* 10 ILCS 5/7-5. Indeed, the Supreme Court recognizes that States retain the power to regulate their own elections and that “election laws will invariably impose some burden on individual voters.” *Burdick*, 504 U.S. 428 at 433. The Court in *Burdick* went on to note “the mere fact that a State’s system creates barriers tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny.” *Id.* (internal citations omitted). The Court has specifically recognized 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.” *Munro v.*

Socialist Workers Party, 479 U.S. 189, 193 (1986). Plaintiffs fail to identify a fundamental right to have a political party be included in a primary election.

Plaintiffs' reliance on *Anderson v. Celebrezze*, 460 U.S. 780 (1982), is misguided as the case is clearly distinguishable. In *Anderson*, the Court struck down an Ohio law imposing an early deadline for independent candidates to file their nominating petition for the presidency where no similar deadline was imposed on candidates of political parties. *Id.* at 782-3. While recognizing that "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," the Court found that the early deadline imposed a severe burden and discriminated against independents. *Id.* at 788, 804. In that case, an independent candidate that did not file its nomination papers in March was excluded from the general election in November. *Id.* at 782. Contrarily, in the instant case, the Libertarian Party candidates for County Board Districts are only precluded from a primary election but they remain entitled to file nomination papers in keeping with the requirements of Section 10-3, related to independent candidates, to appear on the ballot for the general election. 10 ILCS 5/10-3. The case law relied upon by Plaintiffs do not support their argument that they have a fundamental right to participate in a primary election.

If no fundamental right is implicated, substantive due process requires only that a statutory imposition not be completely arbitrary and lacking any rational connection to a legitimate government interest. *See Turner v. Glickman*, 207 F.3d 419, 426 (7th Cir. 2000) *citing Washington*, 521 U.S. at 728. Here, the State has a legitimate government interest to maintain fair and orderly elections, and the Clerk, as the designated "election authority" under the Election Code, must maintain that order. 10 ILCS 5/1-3(8).

Plaintiffs do not attack the requirement that primary elections are limited to established

political parties under the Election Code, but instead argue that the Libertarian Party *is* an established party for races within Cook County. Significantly, Plaintiffs do not claim that a Libertarian Party candidate polled 5% or higher of the entire vote cast for Governor of Illinois in 2018. If the Libertarian Party candidate had polled 5% or higher, the Libertarian Party would be an established political party as to any district or political subdivision in the State. 10 ILCS 2/10-2. Because of this provision of Section 10-2, the Democratic and Republican Parties of Illinois are established political parties and take part in the primary election for all offices despite the redistricting of Cook County Board Districts. *See* Declaration of James Nally, ¶ 6.

The County Clerk was clearly following the guidelines and requirements of the Election Code, and the Redistricting Ordinance adopted by the Cook County Board of Commissioners, when she did not include the Libertarian Party as an established political party in the General Information provided on her website. Section 10-2 is constitutional as applied to Plaintiffs as it does not severely burden their rights and its regulations serve the legitimate governmental interest to a fair and orderly election process. The Seventh Circuit decision in *Tripp v. Scholz* is instructive here as the Court upheld the Election Code's signature and notarization requirements imposed on "new," as opposed to established, political parties. *Tripp v. Scholz*, 872 F.3d 857, 87-872 (7th Cir. 2017). The *Tripp* court rejected plaintiffs' argument related to the confusion caused by a 2011 redistricting of districts, finding that "such confusion—which impacts *all* political parties and generally follows *every* redistricting that results from the decennial census-- is a necessary side effect of an electoral scheme that must evolve to fit the ever-changing footprint of the nation's citizenry. It does not, therefore, form the basis of a viable constitutional challenge." *Id.* at 872 (emphasis in original). As Plaintiffs cannot show any fundamental rights are implicated, and there is a rational basis for the regulations at issue, their due process claim must

be rejected.

D. The Balancing of the Harms Analysis Weighs in Favor of Maintaining the Status Quo

Further, injunctive and declaratory judgment remedies are discretionary. *Nat'l Health Fed'n v. Weinberger*, 518 F.2d 711, 712 (7th Cir. 1975) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)). Premature adjudication caused by meddling in abstract disagreements or interfering in agency decision-making should be avoided, as it wastes judicial resources. *Abbott*, 387 U.S. at 148-49. Courts grant such remedies only when the controversy is ripe for judicial resolution. *Alcan Aluminium Ltd. v. Dep't of Revenue of State of Or.*, 724 F.2d 1294, 1299 (7th Cir. 1984) (citing *Abbott*, 387 U.S. at 148).

Next, Plaintiffs have not shown that they lack an adequate legal remedy if, in fact, the certifying authorities determine that their petitions are otherwise invalid. *Eli Lilly & Co.*, 893 F.3d at 381; *Common Cause Ind.*, 937 F.3d at 949. Finally, and critically, Plaintiffs fall far short of demonstrating that their claim against the County Clerk has any likelihood of success on the merits. *See Protect Marriage Illinois, et al. v. Orr, et al.*, 463 F.3d 604, 606 (7th Cir. 2006).

II. The Balancing of the Harms Analysis Weighs in Favor of the County Clerk.

Even if we were to assume, *arguendo*, that the Plaintiffs demonstrated a right to relief, the balancing of the harms weigh in favor of denying injunctive relief directed against the County Clerk. “If the moving party makes” the initial requisite showing, “the court balances the harms to the moving party, other parties, and the public.” *Id.* “In so doing, the court employs a sliding scale approach: the more likely the plaintiff is to win, the less heavily need the balance of harms weigh in [its] favor; the less likely [it] is to win, the more need [the balance] weigh in [its] favor.” *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018) (alteration and internal quotation marks omitted). “The sliding scale approach is not mathematical in nature, rather it is

more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.” *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 678 (7th Cir. 2012) (internal quotation marks omitted). “Stated another way, the district court sits as would a chancellor in equity and weighs all the factors, seeking at all times to minimize the costs of being mistaken.” *Id.* (alteration and internal quotation marks omitted). Plaintiffs cannot establish that they have suffered irreparable harm and will continue to suffer such harm. Injunctive relief should be denied.

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 16, 2022

Respectfully submitted,

KIMBERLY M. FOXX
State’s Attorney of Cook County

/s/ Silvia Mercado Masters

Silvia Mercado Masters
Leilani Ana-Maria Pino
Jessica M. Scheller
Assistant State’s Attorneys
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-7795

silvia.mercadomasters@cookcountyil.gov
leilani.pino@cookcountyil.gov
jessica.scheller@cookcountyil.gov

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on February 16, 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

EXHIBIT A

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

LIBERTARIAN PARTY OF ILLINOIS,
et al.,

Plaintiffs,

v.

KAREN YARBROUGH, et al.,

Defendants.

22-cv-578

Judge Robert W. Gettleman

DECLARATION

James P. Nally, states that he has personal knowledge of the facts contained in this Declaration and if called as a witness can testify competently thereto:

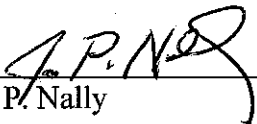
1. My name is James P. Nally and I am Legal Counsel for the Hon. Karen A. Yarbrough, Cook County Clerk. Among my duties is serving as primary counsel for the Cook County Clerk for election matters.
2. As part of its regular course of duties the Office of the Cook County Clerk compiled election data for the 2020 general election including a breakdown of total votes received and percentage of votes received for Libertarian Party Candidate Brian Dennehy for Cook County State's Attorney by Cook County Board District. The data is attached hereto and incorporated as Exhibit 1.
3. As part of its regular course of duties the Office of the Cook County Clerk compiled election data for the 2020 general election including a breakdown of total votes received and percentage of votes received for each of the candidates for Cook County State's Attorney, including Libertarian Party Candidate Brian Dennehy, by Cook County Township. The data is attached hereto and incorporated as Exhibit 2.
4. As part of my regular course of duties I am aware of a map of Cook County Board Commissioner Districts for 2012 which was in effect from 2012 to 2020. The map of Districts for 2012 is attached hereto and incorporated as Exhibit 3.
5. As part of my regular course of duties I am aware that the Cook County Board of Commissioners adopted a Redistricting Ordinance in 2021 and that the County Board Districts were redistricted in 2021. The County District Map of 2021 is attached hereto and incorporated as Exhibit 4.

6. As part of its regular course of duties the Office of the Cook County Clerk tracked election data for the 2018 gubernatorial election in Illinois including a breakdown of total votes received and percentage of votes received for the candidates from the Democratic Party, Republican Party, Libertarian Party, and Conservative Party. On information and belief, the Democratic candidate received 62.16% of the vote, the Republican candidate received 33.56% of the vote, the Libertarian Party candidate received 1.94% of the vote, and the Conservative Party candidate received 2.34% of the vote.

See <https://results1118.cookcountyclerkil.gov/summary.aspx?eid=110618>.

7. As part of my regular course of duties I am aware that the petition filing period for established political party candidates begins on March 7, 2022.

Under penalties provided by law, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.



James P. Nally

Dated: February 16, 2022

EXHIBIT 1

Data for Cook County State's Attorney 2020 election
by Cook County Board District.

State's Attorney, Cook County

	Precincts Reporting	Total Precincts	Kim Foxx	%	Patrick W. "Pat" O'Brien	%	Brian Dennehy	%					Total
Barrington	11	11	2945	29.8%	6548	66.3%	389	3.9%					9882
Berwyn	32	32	10573	53.6%	7065	35.8%	2106	10.7%					19744
Bloom	61	61	24386	67.2%	9684	26.7%	2227	6.1%					36297
Bremen	80	80	23054	48.9%	20685	43.9%	3421	7.3%					47160
Calumet	12	12	5805	81.8%	904	12.7%	384	5.4%					7093
Cicero	32	32	10989	59.3%	5839	31.5%	1688	9.1%					18516
Elk Grove	52	52	12451	33.1%	22379	59.4%	2820	7.5%					37650
Evanston	50	50	27846	72.8%	8411	22.0%	2017	5.3%					38274
Hanover	44	44	15425	42.2%	18344	50.1%	2824	7.7%					36593
Lemont	14	14	2372	18.6%	9624	75.5%	750	5.9%					12746
Leyden	50	50	11766	35.0%	19077	56.8%	2738	8.2%					33581
Lyons	78	78	16606	32.1%	31317	60.6%	3734	7.2%					51657
Maine	92	92	20624	33.1%	37227	59.8%	4390	7.1%					62241
New Trier	41	41	13336	38.8%	19383	56.3%	1691	4.9%					34410
Niles	64	64	23654	45.5%	24892	47.9%	3408	6.6%					51954
Northfield	62	62	17559	34.8%	30340	60.1%	2589	5.1%					50488
Norwood Park	17	17	2740	22.6%	8565	70.6%	832	6.9%					12137
Oak Park	37	37	21479	68.2%	7909	25.1%	2128	6.8%					31516
Orland	75	75	12245	23.2%	37323	70.8%	3182	6.0%					52750
Palatine	69	69	18511	34.7%	31442	58.9%	3413	6.4%					53366
Palos	39	39	6574	25.7%	17294	67.6%	1696	6.6%					25564
Proviso	102	102	40581	61.3%	21215	32.0%	4415	6.7%					66211
Rich	51	51	32318	79.5%	6528	16.1%	1812	4.5%					40658
River Forest	8	8	2770	42.5%	3384	51.9%	362	5.6%					6516
Riverside	13	13	3223	35.6%	5029	55.6%	793	8.8%					9045
Schaumburg	78	78	21607	38.2%	30669	54.3%	4218	7.5%					56494
Stickney	20	20	4786	34.6%	7708	55.8%	1320	9.6%					13814
Thornton	123	123	53265	79.1%	10756	16.0%	3321	4.9%					67342
Wheeling	92	92	24368	33.0%	44662	60.5%	4837	6.5%					73867
Worth	100	100	22446	33.7%	39078	58.7%	4998	7.5%					66522

EXHIBIT 2

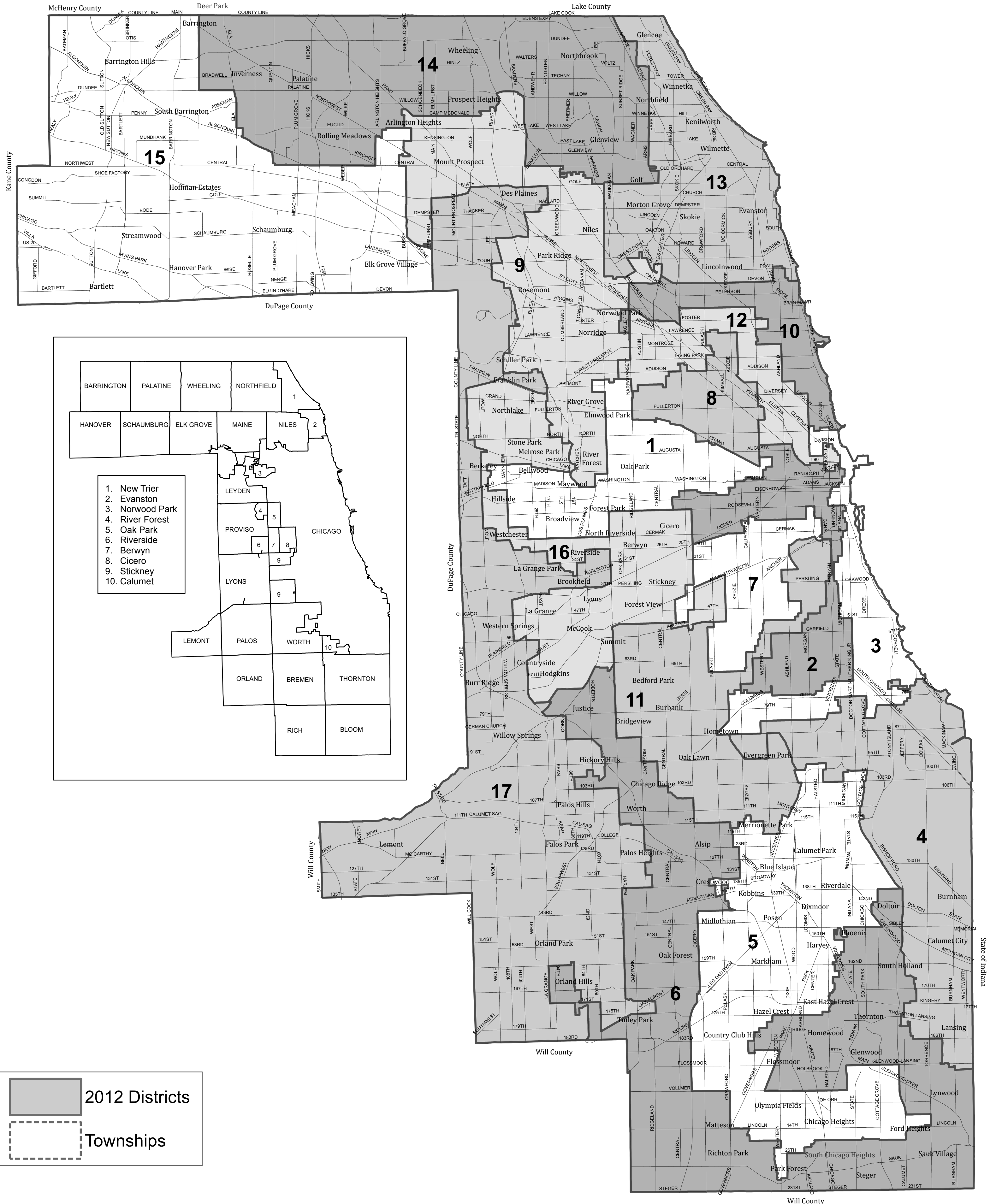
Data for Libertarian Party Candidate Brian Dennehy
by Cook County Township in 2020 general election.

	States Attorney	Nov-20		
Cook County Board Districts	Dennehy	Total Votes	Percentage	
1	3985	88,442	4.506	
2	6867	122,829	5.590	
3	6836	148,009	4.618	
4	1946	54,107	3.597	
5	4474	130,788	3.421	
6	9451	210,021	4.500	
7	6436	67,563	9.525	
8	10,047	116,853	11.630	
9	8053	156,222	5.155	
10	11,374	173,701	6.548	
11	3187	61,582	5.175	
12	11,138	155,494	7.162	
13	7090	174,531	4.062	
14	9714	214,728	4.524	
15	9002	200,986	4.479	
16	8590	144,857	5.930	
17	12,520	234,431	5.341	

EXHIBIT 3

Map of Cook County Board Commissioner Districts for 2012 to 2020.

Commissioner Districts 2012



Karen A. Yarbrough
cookcountyclerk.com

December 2018

EXHIBIT 4

Map of 2021 Redistricted Cook County Board of Commissioner
Districts.

County Redistricting Map of 2021 Final

9/22/2021

