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

LIBERTARIAN PARTY OF ILLINOIS, et al.,	)	
	)	
Plaintiffs,	)	No. **2022-cv-0578**
v.	)	
	)	Honorable Robert W. Gettleman
KAREN YARBROUGH, in her capacity as the	)	
COOK COUNTY CLERK, et al.,	)	Magistrate Judge
	)	Honorable Jeffrey Cole
Defendants.	)	

Plaintiffs' Reply in Support
of their Emergency Motion for Preliminary Injunction

Plaintiffs submit their reply in support of their amended memorandum of law and amended emergency motion for preliminary injunction, as follows.

Introduction

In her Response (Dkt.#20), the Clerk has cobbled together various collateral arguments that largely shrug off arguments and decisions cited in Plaintiffs' memorandum, with the addition of specious and inconsistent allegations. Yet the Clerk has not yet (a) admitted that she would ***fully*** recognize the LPI as an established political party in Cook County for all "county offices" and committeepersons as defined in the Election Code, (b) publish LPI signature requirements for all offices, (c) accept nomination papers from all LPI candidates, or (d) explain a compelling state interest for her disregard of the plain language of the Election Code, 10 ILCS 5/7-2 and 10 ILCS 5/7-4(6). A clear adversarial conflict exists between the Clerk and the Plaintiffs.

Indeed the Clerk's Response does not contain one citation to or argument regarding 10 ILCS 5/7-2 or 10 ILCS 5/7-4, nor any argument contradicting

Plaintiffs' assertion that these two sections of the Election Code govern the Plaintiffs' rights. Not only is the Clerk's position antithetical to democracy, it is illogical, inconsistent, and without authority in the Election Code.

The Clerk's hostility to the LPI and other newly established political parties violates fundamental and core First and Fourteenth Amendment rights of the Plaintiffs, as explained by the Seventh Circuit:

> The fundamental right of political association is, in part, founded on "the right [of individuals] to band together in a political party to advance a policy agenda by electing the party's members to office." *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 520-21 (7th Cir. 2017). When individuals create new political parties, they "advance[ ] 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." *Norman v. Reed*, 502 U.S. 279, 288, 112 S.Ct. 698 (1992).[4] Under the First and Fourteenth Amendments, third-party candidates have a constitutional right in ensuring their political parties have ballot access. Id. The same right is invoked when politicians run as independent (non-party) candidates. See *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187, 99 S.Ct. 983 (1979).

Gill v. Scholz, 962 F.3d 360, 363-364 (7th Cir. 2020) *fn*. "[4] As our court has noted, third parties not only 'inject[ ] new ideas' but sometimes 'actually displac[e] one of the major parties.' " *Nader v. Keith*, 385 F.3d 729, 732 (7th Cir. 2004).

A. <u>Application of the Election Code confirms Plaintiffs' right to seek relief.</u>

The Clerk admits that the LPI achieved established political party status within Cook County, IL at the November 3, 2020 general election. As a result, established parties nominate candidates pursuant to Article 7 or 8 of the Election Code, rather than the onerous burdens of Article 10 of the Election Code.

Benefits of established party status include a significantly lower signature requirement for ballot access, opportunity to promote and grow the party during two election cycles (primary election and general election), the ability to elect

committeepersons, and the right to nominate candidates for the general election ballot to fill vacancies from the primary election. 10 ILCS 5/7-1, et seq.

Federal courts apply Illinois principles of statutory construction when interpreting an Illinois statute. *Shipley v. Chicago Bd. of Election Com'rs*, 947 F.3d 1056 (7th Cir. 2020). The Illinois Supreme Court explained the process for construing a statute, and Legislative intent, as follows:

> ¶ 13 When construing a statute, this court's primary objective is to ascertain and give effect to the intent of the legislature. *Barragan v. Casco Design Corp*., 216 Ill. 2d 435, 441 (2005). The best indication of legislative intent is the language used in the statute, which must be given its plain and ordinary meaning. *Gillespie Community Unit School District No. 7 v. Wight & Co.,* 2014 IL 115330, ¶ 31. It is improper for a court to depart from the plain statutory language by reading into the statute exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent. *Metropolitan Life Ins. Co. v. Hamer,* 2013 IL 114234, ¶ 18. Words and phrases should not be viewed in isolation, but should be considered in light of other relevant provisions of the statute. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 320 (2003). Further, each word, clause and sentence of a statute must be given a reasonable construction, if pos*sible, and should not be rendered superfluous.* Prazen v. Shoop, 2013 IL 115035, ¶ 21. This court presumes that the legislature did not intend absurdity, inconvenience, or injustice. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.,* 2012 IL 111286, ¶ 23. Where statutory language is clear and unambiguous, it will be given effect without resort to other aids of construction. *Kunkel v. Walton*, 179 Ill. 2d 519, 534 (1997). However, where the meaning of an enactment is unclear from the statutory language itself, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy. *Id*. at 533-34.

Bettis v. Marsaglia, 2014 IL 117050, ¶ 13.

The provisions of the Election Code are clear and unambiguous. The Election Code contains no exceptions or qualifications that create a second tier or "class" of established party, with lesser rights than the Democratic and Republican parties. Similarly, there is no discretion vested in an election authority such as the Clerk to confer her favoritism upon one party. Yet, this is precisely what the Clerk

has embarked upon regarding newly established political party candidates – not only has she maligned the LPI by publicly proclaiming that the LPI is not established for election of commissioners to the Cook County Board, MWRD, and Board of Review, but that they are not "established enough" to elect their committeepersons. The Clerk's bias is shown when she adopts a similar bias against the Illinois Green Party and the Willie Wilson Party, which have offices omitted from the Clerk's "General Information" disclosure.

The Election Code confers established political party status equally to all parties, and for all offices, within the territorial area in which such party is established. The Clerk has no authority to disregard the Election Code and unilaterally determine which offices an established party may, or may not, nominate candidates. The Clerk's inconsistencies and denial of a path to the ballot are denials of First Amendment rights to the LPI under the Election Code, with no compelling state interest to support her unilateral and inconsistent approach.

Section 7-2 of the Election Code, 10 ILCS 5/7-2, expressly addresses the facts presented, including the election of committeepersons, as follows:

> 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. *(emphasis added)*

Leaving no doubt as to the Legislature's intent that "**all county officers**" in 10 ILCS 5/7-2 expressly includes the nomination of members of the Cook County Board, Section 7-4 of the Election Code, 10 ILCS 5/7-4 goes on to define "county office" and "county officers" as follows:

> Sec. 7-4. The following words and phrases in this Article 7 shall, unless the same be inconsistent with the context, be construed as follows:
> [* * *]
> 6. The words "county office" or "county officer," include an office to be filled or an officer to be voted for, by the qualified electors of the entire county. "**County office**" or "**county officer**" also include the assessor and board of appeals and **county commissioners and president of county board of Cook County**, and county board members and the chair of the county board in counties subject to Division 2-3 of the Counties Code. *(emphasis added)*

Although the Clerk's Response brings up the November 2018 election as having some significance because it was the last election at which Cook County Board members were elected, she cites no authority for the relevance of the November 2018 election to attaining established party status. The Election Code certainly does not so define the procedure for attaining established party status.

The Election Code at 10 ILCS 5/7-2 and 10 ILCS 5/10-2 is clear when it identifies the election that is used to determine whether a new political party "graduates" to established party status. Although 10 ILCS 5/10-2 is consistent, Section 7-4 is more precise when it addressed county elections and defines the 5% threshold as being attained "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." The general election next preceding the June 28, 2022 primary was the general election held on November 3, 2020.

The argument about the 2018 election having any relevance is also contradicted by interpretations of the Illinois appellate court. Facing a similar question about which past election is relevant, the Illinois appellate court confirmed that when the Election Code refers to the last general election, it is referring the most recent in time general election, not the last election at which the same officers were elected. See e.g., *Ramirez v. Chicago Board of Election*

Commissioners, 2020 IL App (1st) 200240 (construing Article 7 of the Election Code, court held that ward committee person signatures were calculated based on most recent general election, rather than prior election at which ward committeepersons were elected).

The argument about committeepersons not being elected at the November 3, 2020 general election is also unsupported. The Election Code does defines established political party status for a county based upon election of its county officers, not its committeepersons – the right to elect committeepersons flows from the established party status achieved at the countywide election.

This point is confirmed by the Election Code, at 10 ILCS 5/7-2 and 7-4(6), which unequivocally states that after a party achieves more than 5% of the vote, it is established for the county "and shall nominate all county officers [defined in § 7-4 as including "county commissioners and president of county board of Cook County"] in said county under the provisions hereof, and shall elect precinct, **township**, and ward **committeepersons**, as herein provided." 10 ILCS 5/7-2.

By operation of the Election Code, 10 ILCS 5/10-2, 7-2, and 7-4(6), the Plaintiffs are authorized to nominate candidates for all offices on the June 28, 2022 primary election, and elect their township committeepersons. The Clerk has no authority to deny such rights, or compelling state interest to assert, yet she zealously opposes new established political parties' ability to grow in Cook County.

B. There is a substantial controversy between the Clerk who maintains an adverse interest to that of the Plaintiffs and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

The Clerk published her "General Information" disclosure (Dkt.#1, Exh. B at PageID #74-76) shortly before the January 13, 2022 petition start date. The

disclosure however omitted information defining the process for LPI candidates to attain ballot placement as commissioners of the Cook County Board and for each of the township committeepersons. Although the Clerk recognized the LPI as being established for ***selected*** county-wide offices (e.g., Cook County Board President), the Clerk failed to recognize the LPI as established for the remaining members of that same governmental body, or for other county-wide offices such as MWRD and Board of Review. This was through her public disclosure as the Cook County election authority – an official pronouncement of ballot access requirements by an elected official.

Township committeepersons are elected by voters in each respective township. Township boundaries have not changed as a result of redistricting. The Clerk calculated and published the signatures for Democratic and Republican committeepersons (presumably) based upon the November 2020 election results (Dkt. #1 at PageID#76). No similar committeeperson signature table was published for the LPI (or other county-wide newly established political parties).

Similarly, the Clerk refused to define a procedure and signatures requirement for nomination of LPI candidates for commissioners of the Metropolitan Water Reclamation District of Greater Chicago which has the same territorial boundaries as Cook County, IL. Adding insult to injury, the Clerk also omitted information that would recognize the LPI as an established party for nomination of commissioners to the Cook County Board of Review.

The Clerk's stance regarding the LPI's status is logically inconsistent with multiple conflicts. She recognized the LPI's right to nominate a candidate for Cook County Board President, yet denied the LPI the right to nominate the rest of the

board members. The Clerk also recognized the LPI for certain countywide Cook County offices she selected, yet refused to recognize the LPI and provide signature requirements for Metropolitan Water Reclamation District of Greater Chicago or Board of Review – both are entities operating within the territorial area of Cook County. The Clerk's position regarding committeepersons is illogical and inconsistent, even though township boundaries were not subject to redistricting. The Clerk published signature requirements for Democratic and Republican committeepersons, but refused to similarly define a path to ballot access for the LPI. There is no logic to the Clerk's approach to her dissection and removal of the LPI First and Fourteenth Amendment rights that she allowed to the Democratic and Republican Parties.

Plaintiff, Jason Ross Decker, on behalf of himself and the LPI contacted the Clerk's office to amicably reconcile the Clerk's omission of information regarding the LPI in her "General Information" disclosure, and request that the Clerk recognize the LPI for all county offices and provide signature requirements for commissioners and committeepersons. The Clerk's manager, Ms. Gleason, confirmed that the LPI had achieved established party status for Cook County[1], but refused to alter the Clerk's position desiring recognition as to all other offices on the primary ballot (Dkt. #1 at PageID #84).

To be sure the LPI understood the Clerk's position Plaintiff, Adam Balling, on behalf of the LPI contacted the Clerk's election attorney, James Nally, and discussed the Clerk's position regarding the LPI's established party status. Mr. Nally

1 Ms. Gleason wrote in her email (Dkt. #1 at PageID #84) that the LPI candidate received 6.63% of the vote for state's attorney. The official election results (Dkt#1, Exh A at PageID #51) reports 6.71% of the vote for state's attorney.

confirmed that the Clerk remained steadfast in her denial of established party status to the LPI for all offices on the primary ballot excepting only countywide Cook County officer based upon the citations in Ms. Gleason's email (Dkt. #1 at PageID #86).

Even though LPI brought its concerns to the Clerk, and the Clerk had opportunity to change her position and amend her "General Information" disclosure, the Clerk has not done so.

After this litigation was initiated, the Clerk again had an opportunity to correct her prior position, but instead chose to oppose the Plaintiff's request recognition of rights that are afforded to them by operation of the Election Code.

The Clerk's refusal to define a procedure for LPI candidates to attain ballot placement is not simple inadvertence or sloppiness, but willful and intentional. The Clerk's zeal to protect the predominant party in Cook County reveals her overt bias against newly established third parties[2]. Her public statements through her disclosure have disparaged the LPI's standing as an established political party and are currently denying the Plaintiffs the fruits of their prior electoral success.

The parties are clearly adverse and are at an impasse. Plaintiffs seek a declaration of their rights as an established political party consistent with the express provisions of the Election Code – Plaintiffs are not seeking anything more than afforded them under the Election Code. Since the March 7, 2022 filing date is fast approaching, there is urgency to seeking a resolution of the issues presented.

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2 Clerk, Karen Yarbrough, in her capacity as the Proviso Township Democratic Party committeeperson, a position she continues to hold, filed objections to the Illinois Green Party in 2014 to remove their candidates from the ballot. *Karen Yarbrough v. Lopez, et al. State Officers Electoral Board,* 14-SOEB-GE-516.

Waiting until after objections are filed would only delay a judicial interpretation of the Clerk's removal of LPI candidates from the ballot[3] based upon her consistent refusal to recognize the LPI as being fully established for all "county offices" including commissioners of the Cook County Board, and otherwise.

The Clerk's actions are tantamount to a denial of ballot access rights for "second class" established political parties such as the LPI. It is well settled that "the 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *ACLU of Il.*, 679 F.3d at 589 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The Clerk's assertions that no First Amendment rights are at issue is incredulous.

The concerns raised herein will also arise in relation to the 2023 Chicago municipal election when the LPI will be seeking to elect its ward committeepersons at the municipal election, based upon the established party status conferred through the November 3, 2020 election. Petition gathering will be under way prior to the results of November 8, 2022 general election. A determination from this court would be instructive to the Chicago Board of Election Commissioners for LPI ward committeeperson elections.

The Plaintiffs' complaint requests a declaratory judgment from this honorable Court ***before*** litigation arises and before the petition filing date, so that is clarity as the Plaintiffs' rights, and subsequent efficiency and consistency in application of the Election Code.

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3 The Cook County Officers Electoral Board would be convened to rule upon objections to nomination papers, 10 ILCS 5/10-8 and 10-9, with Clerk Yarbrough as the Board's chair, with advice from James Nally as the Board's attorney.

Plaintiffs' request for a declaratory judgment is intended to obtain the court's guidance regarding future rights in order to guide the parties' conduct – a question that is ripe for adjudication. The Clerk's response confirms her belief that the LPI should once again overcome the considerably higher 5% but no more than 8% or 25,000 signature requirement hurdles of Article 10 of the Election Code, rather than enjoy the 0.5% signature requirements under Article 7 of the Election Code. This position is directly contrary to the express provisions of the Election Code.

C. The Election Code supports Plaintiffs' request for declaratory judgment action, which is unrebutted by the Clerk.

Plaintiffs' concerns are ripe for adjudication because an actual controversy exists currently – the denial of First and Fourteenth Amendment rights and disparagement of the LPI's established party status by the Clerk through her "General Information" disclosure – to which the Clerk is unwilling to compromise on her position regarding the LPI.

The LPI should not be forced to jeopardize a timely decision from judicial review. Waiting until after March 7, 2022 is not in anyone's interests, and could jeopardize the Plaintiffs' right to obtain timely judicial review before the June 28, 2022 primary election. Even on an expedited schedule, the deadline for filing objections is March 21, 2022, thereafter the Cook County Officers Electoral Board would convene and schedule administrative hearings that could last 3-4 weeks for resolution (approx. April 18, 2022). A petition for judicial review would need to be filed next, and would be resolved in about 30 days (May 18, 2022). Even expedited appellate review would not allow a decision before first mailing of ballots for the June 28, 2022 primary.

There is also no requirement to wait until the Clerk refuses to accept nomination papers, or perhaps waits further and refuses to certify LPI candidates to the ballot. The Clerk is resolute in the stance she has taken that is hostile and adverse to the interests of the Plaintiffs. She remains the Proviso Township Democratic Party committeeperson, and loyal to her party.

"[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S.Ct. 764, 772 (2007). See also *Nat'l Metalcrafters v. McNeil*, 784 F.2d 817, 822 (7th Cir.1986).

The Illinois Supreme Court explained Illinois' policy regarding actions under the Illinois Declaratory Judgment Act as follows:

> The declaratory judgment procedure allows " 'the court to take hold of a controversy one step sooner than normally — that is, after the dispute has arisen, but before steps are taken which give rise to claims for damages or other relief. The parties to the dispute can then learn the consequences of their action before acting.'" *Kaske v. City of Rockford*, 96 Ill.2d 298, 306 (1983), quoting *Buege v. Lee*, 56 Ill. App.3d 793, 798 (1978), quoting Ill.Ann.Stat., ch. 110, par. 57.1, Historical & Practice Notes, at 132 (Smith-Hurd 1968). "The declaratory judgment procedure was designed to settle and fix rights before there has been an irrevocable change in the position of the parties that will jeopardize their respective claims of right. [Citation.] The remedy is used to afford security and relief against uncertainty so as to avoid potential litigation." *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill.2d 165, 174 (1995); accord *Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill.2d 443, 452 (1979).

Beahringer v. Page, 204 Ill.2d 363, 372-373, 789 N.E.2d 1216, 1223 (2003).

"The procedure is used to afford security and relief against uncertainty with a view to avoiding [future] litigation, rather than in aid of it." *City of Chicago v. Dep't of Human Rights,* 141 Ill. App. 3d 165, 170 (1st Dist. 1986) (quoting *La Salle Casualty Co. v. Lobono,* 93 Ill.App.2d 114, 117 (1st Dist. 1968)).

"Declaratory judgments are intended to allow the trial court to settle and fix the rights of the parties and provide 'relief against uncertainty' *before* the parties change their position." *Roland Mach. Co. v. Reed,* 339 Ill.App.3d 1093, 1099 (4th Dist. 2003) (emphasis in original).

Plaintiffs similarly seek a declaratory judgment from this honorable Court for a determination of their First and Fourteenth Amendment right to associate a political party, promote and grow their party through a primary election, and be able to nominate and vote for the candidates of their choice.

D. Where an election authority fails to provide path to ballot access, the district court is authorized to place a candidate directly upon the ballot.

The Clerk has selectively defined a procedure for the LPI to gain ballot access at the primary election, but only for county-wide Cook County offices. The Clerk has not defined a procedure/signature requirement for ballot access for commissioners for the Cook County Board, the Board of Review, and the MWRD, nor has the Clerk defined a procedure/signature requirement for election of LPI township committeepersons. The Clerk's omission from her "General Information" disclosure is a statement from the Clerk that the LPI is not established for these offices.

When states fail to provide candidates and parties with a procedure by which they may qualify for the ballot, the United States Supreme Court and lower federal courts have not hesitated to remedy the defect by placing candidates and parties on the ballot by Court Order. In 1976, for instance, several states provided no procedure for independent candidates to qualify for the ballot. In each of these states, independent presidential candidate Eugene McCarthy sought relief in federal court, and without exception federal courts ordered that he be placed on

the ballot. See *McCarthy v. Briscoe,* 429 U.S. 1317, 97 S. Ct. 10 (1976) (Powell, J. in Chambers) (placing McCarthy on Texas ballot); *McCarthy v. Askew*, 540 F.2d 1254, 1255 (5th Cir. 1976) (per curiam) (affirming order placing McCarthy on Florida's ballot); *McCarthy v. Noel*, 420 F. Supp. 799 (D. R.I. 1976) (placing McCarthy on Rhode Island ballot); *McCarthy v. Tribbitt,* 421 F. Supp. 1193 (D. Del. 1976) (placing McCarthy on Delaware ballot); *McCarthy v. Austin,* 423 F. Supp. 990 (W.D. Mich. 1976) (placing McCarthy on Michigan ballot). As Justice Powell observed in *McCarthy v. Briscoe,* the Supreme Court had followed the same procedure in 1968, when it ordered that several candidates who successfully challenged the constitutionality of Ohio's ballot access laws be placed on its ballot. See *McCarthy v. Briscoe*, supra, citing *Williams v. Rhodes*, 89 S. Ct. 1, 21 L.Ed.2d 69 (Stewart, J., in Chambers, 1968).

In 1980, the State of Michigan had failed to enact a procedure for independent candidates to access the ballot following the decision in *McCarthy v. Austin*, supra, and two independent candidates running for president and vice-president filed suit. See *Hall v. Austin*, 495 F. Supp. 782 (E.D. Mich. 1980). Once again, a federal court ordered that the independent candidates be placed on Michigan's ballot. See *id.* at 791-92. The issue arose again in 1984, because Michigan still had not enacted a procedure for independent candidates to qualify for the ballot. An independent candidate for the State Board of Education filed suit, the district court again declared Michigan's ballot access scheme unconstitutional, and the Secretary of State was ordered to place the candidate on the ballot. See *Goldman-Frankie v. Austin*, 727 F.2d 603, 607-08 (6th Cir. 1984).

In *Williams*, the Supreme Court explained the rationale for federal courts to grant such relief: the Constitution does not permit states to restrict access to the

ballot in a manner that "favors two particular parties – the Republicans and the Democrats – and in effect tends to give them a complete monopoly." *Williams v. Rhodes,* 393 U.S. 23, 32 (1968)).

More recently, in *Libertarian Party of Illinois v. William J. Cadigan, et al.* No. 20-1961 (7th Cir. Aug. 20, 2020) the Seventh Circuit affirmed a preliminary injunction order entered by Hon. Rebecca R. Pallmeyer in case 20-cv-2112 which placed several candidates of the LPI and the Green Party directly upon the ballot by court order, based upon constitutional ballot access claims asserted by each party and its candidates.

Plaintiffs similarly request that their candidates for Cook County Board commissioner who are Plaintiffs in the case at bar be placed directly upon the Libertarian Party primary ballot.

Wherefore, Plaintiffs, through their attorney, respectfully request that their motion for preliminary injunction be granted.

Respectfully submitted:

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Certificate of Service

The undersigned an attorney, certifies under penalties of perjury that on February 18, 2022, he filed the foregoing Reply with the ECF/CM system for the Northern District of Illinois, Eastern Division, which sends an email with a download link to all counsel of record.

/s/ Andrew Finko