

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

**LIBERTARIAN PARTY OF ILLINOIS,
LUPE DIAZ, JULIA A. FOX and JOHN
KRAMER,**

Plaintiffs,

v.

**ILLINOIS STATE BOARD OF ELECTIONS
and WILLIAM M. McGUFFAGE, JESSE R.
SMART, HAROLD D. BYERS, BETTY J.
COFFRIN, ERNEST L. GOWEN, JUDITH
C. RICE, BRYAN A. SCHNEIDER and
CHARLES W. SCHOLZ, in their Official
Capacities as Members of the Illinois State
Board of Elections, and JOHN A.
CUNNINGHAM, in his Official Capacity as
Kane County Clerk,**

Defendants.

Case No. 12 C 2511

Judge Thomas M. Durkin

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Introduction

This memorandum is submitted in opposition to defendants' motion for summary judgment and in further support of plaintiffs' motion for summary judgment.

Under Illinois law, a political group can become an "established" political party by circulating a petition to qualify for the ballot as a "new" party, then meeting a 5% vote threshold in the ensuing election. The petition requirement and the vote threshold demonstrate the required modicum of public support. *See Monroe v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). The additional requirement that the petition name a complete slate of candidates is unique to Illinois and is unconstitutional surplusage.

Defendants argue that because plaintiffs did not meet the statutory petition-signature requirement, the Court should not reach the issue of whether the complete-slate requirement is constitutional. In the alternative, defendants argue that the full-slate requirement is a reasonable, non-discriminatory means to ensure that a prospective new party like the LP-Illinois has an existence; that it has a significant modicum of support; and that multiple candidates for the same offices do not circulate separate petitions under the same new party name. As explained more fully below, both of these arguments fail.

Argument

I. MEETING THE SIGNATURE REQUIREMENT IS NOT A PRECONDITION FOR CHALLENGING THE COMPLETE-SLATE REQUIREMENT

Defendants correctly note that plaintiff Fox filed some 618 petition signatures and that 6,452 were required by law for ballot access. Defs.' Mem. in Support of Mot. for Sum. J'mt. at 2. However, it has long been established that litigants who have not submitted enough signatures to gain access to the ballot may nevertheless contest other ballot access requirements in court. In *Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006), the plaintiff-independent candidate had abandoned his attempt to collect the required number of signatures within the allotted time frame. Apparently he filed no petition signatures at all. Yet he mounted a successful challenge to Illinois' early filing deadline as well as its high signature requirement. The Seventh Circuit did not question his right to contest these requirements, and noted that "[t]here would be no question of [the candidate's] standing to seek [an injunction placing his name on the ballot] in advance of the submission or even collection of any petitions" (quoting *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004)). See also *Williams v. Rhodes*, 393 U.S. 23 (1968) (Socialist Labor Party had standing to challenge Ohio ballot access requirements even though it did not submit the petition required by law).

Other plaintiff-candidates who filed no petition signatures whatsoever have also been permitted to challenge the constitutionality of various ballot access impediments, and have been granted access to the ballot. *See, e.g., McCarthy v. Briscoe*, 429 U.S. 1317 (1976); *McCarthy v. Askew*, 540 F.2d 1254 (5th Cir. 1976); *McCarthy v. Slater*, 553 P.2d 489 (Sup. Ct. Okla. 1976); *Hall v. Austin*, 495 F. Supp. 782 (E.D. Mich. 1980); *Goldman-Frankie v. Austin*, 727 F.2d 603 (6th Cir. 1984). In these cases, the state either precluded independent candidates from qualifying for the ballot or had no procedures by which they could do so. Because they demonstrated a significant modicum of public support by means other than collecting petition signatures, the plaintiff-candidates were granted access to the ballot. In the present case, the election has passed and the plaintiffs no longer seek access to the ballot. Under the authorities just cited, the fact that they did not meet the petitioning requirement should not prevent them from contesting the state's complete-slate requirement.

II. THE COMPLETE-SLATE REQUIREMENT IS UNDULY BURDENSOME, COMPLETELY UNNECESSARY, AND CANNOT BE JUSTIFIED BY ANY COGNIZABLE STATE INTEREST

A. THE CHARACTER AND MAGNITUDE OF THE BURDEN ON PLAINTIFFS' RIGHTS

Under Illinois law, the plaintiffs' petition was supposed to name a complete list of candidates for all offices to be filled in Kane County. 10 ILCS 5/10-2 (¶¶ 4 and 7). Compliance would have required that the petition name candidates not only for County Auditor (plaintiff Fox), but also for County Clerk, County Recorder, County Coroner, County Board Chairman, States' Attorney and Regional Superintendent of Schools. Doc. 46, State Defs.' LR 56.1 Statemt., ¶ 12. New or small parties like plaintiff LP-Illinois are likely to be unwilling or simply unable to field candidates for all of these positions. The severity of the resulting burden on plaintiffs' First and Fourteenth Amendment rights to speak and associate politically is a subject

of legitimate debate. If the full-slate requirement imposes a severe burden, it must be narrowly tailored to advance a state interest of compelling importance. If it imposes only reasonable, nondiscriminatory restrictions, it is subject to less exacting scrutiny and might be justified by the state's legitimate regulatory interests. If it is unnecessary to the advancement of any state interest, it cannot be justified even if the burden it imposes is not severe. For a more complete discussion of standards of review, see Doc. 18-1, Pls.' Mem. of Law In Opp. to Mot. to Dismiss at 6-8.

B. THE STATE'S INTERESTS IN THE FULL-SLATE REQUIREMENT

Whether the burden on plaintiffs' rights be more or less severe, the "precise interests put forward by the state as justifications for the burden" must be identified and evaluated in terms of their legitimacy and strength and also in terms of the extent to which they make it necessary to burden the plaintiffs' rights. *Id.*; *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). In addition, the burden must not be evaluated "in isolation, but within the context of the state's overall scheme of election regulations." *Lerman v. Board of Elections in City of New York*, 232 F.3d 135, 145 (2nd Cir. 2000). In support of the full-slate requirement, defendants point to the state's interest in ensuring that new parties demonstrate public support and also to the state's interest in preventing multiple candidacies for the same office using the same new party name.

1. DEMONSTRATING PUBLIC SUPPORT

Defendants assert that the full-slate requirement is a legitimate component of Illinois' statutory framework governing the formation of new parties, an arena in which states have different approaches. They correctly assert that the state has a legitimate interest not only in requiring candidates to demonstrate public support in order to gain access to the ballot, but also in requiring parties to demonstrate such support. Requiring a new party to field a complete slate

of candidates, say the defendants, is merely the particular means which Illinois has chosen to serve this state interest.

However, public support for new parties and for their candidates is amply demonstrated by compliance with Illinois' petitioning requirements. Judge Gottschall of this Court, to whom this case was previously assigned, observed that "[t]he signature requirement is a much more direct way to measure support than the complete list requirement." Doc. 22, Mem. Op. and Order at 15. Illinois law requires that a new party be formed by circulating a petition, such as the petition circulated by plaintiffs,¹ which states that its purpose is to form the new party, the party's name, and the political subdivision in which it is to be formed. ILCS 5/10-2 (¶4). In compliance with these requirements, the heading of plaintiffs' petition states the following:

**PETITION FOR NOMINATION
(To Form a New Political Party)**

We, the undersigned, qualified voters of the County of Kane and State of Illinois, do declare that it is our intention to form a new political party in the political division aforesaid, to be known and designated as the *Libertarian Party*, and do hereby petition that the following named persons shall be candidates for the offices hereinafter specified, to be voted at the *General Election* to be held on *November 6, 2012*.

The petition needs signatures equal to 5% of the number of voters in the political subdivision in the preceding regular election. ILCS 5/10-2 (¶4). The completed petition qualifies the new party and the candidate(s) named on the petition for the ballot:

The filing of such a petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at such next ensuing election such list [] of party candidates for offices to be voted for throughout the State, or for offices to be voted for in such district or political subdivision less than the State, as the case may be, under the name of and as the candidates of such new political party.

10 ILCS 5/10-2 (¶8). The party's performance in the election determines whether it becomes an "established" party entitled to run candidates in future elections without further petitioning. *See*

¹A copy of plaintiffs' petition is in the record at Doc. 46-2, Page ID #:308.

10 ILCS 5/10-1. The petition itself demonstrates that a large segment of the voting public supports the new party's presence on the ballot. Neither a complete slate of candidates nor any additional showing of public support need be required. Moreover, as Judge Gottschall noted, "the fact that established parties are not required to meet the complete slate requirement suggests that the state's interest in the requirement is not great [It] does little to further the state's interest in requiring new parties to demonstrate that they have a 'significant modicum of support' from the community." Doc. 22, Mem. Op. and Order at 15.

2. PREVENTING MULTIPLE CANDIDACIES

Defendants assert that the full-slate requirement serves the state's purported interest in preventing multiple candidacies for the same offices under the same new party name:

Illinois does not require a formal party convention to winnow the field for those vying for the party nomination. Illinois law leaves it to the new party to fill out the complete slate The full slate requirement serves a valid purpose here as well because otherwise various people from the new party could circulate petitions with a partial slate, and the winnowing would not take place. Indeed, in some cases a complete slate could be just one person (for example, a single member legislative district). A group and a "party," however, should be more than one person.

Defs.' Mem. at 13.

But the full-slate requirement does not advance these "winnowing" purposes. The requirement does not appear to prevent different groups from circulating separate petitions, each naming a different full slate of candidates, using the same new party name. Whether this is a problem, and whether the state has a legitimate interest in preventing it, are open questions. The point is that if it is a problem, the full-slate requirement does not solve it. Nor does the full-slate requirement appear to prevent new parties from petitioning for single-member "full slates" in single-member districts, such as state legislative districts.

Eliminating the complete-slate requirement would not appreciably change the status quo. Multiple full-slate petitions could still be circulated under the same new party name. Multiple single-member “slates” could still be circulated in single-member representative districts. Multiple partial-slate petitions would also be permitted.

When the cases cited by defendants in support of the full-slate requirement (Defs.’ Mem. at 14) were decided, independent candidate petitions had to be filed six months earlier than new party petitions. The rationale for the full-slate requirement was that without it, independent candidates might create sham new parties in order to avoid the earlier filing deadline. Subsequently, the filing deadlines for independent candidates were made identical to those for new parties as a result of the Seventh Circuit’s decision in *Lee v. Keith, supra*.

In short, the full-slate requirement was a solution to a problem that no longer exists. More importantly, the interests put forward by the state in support of the requirement (ensuring public support and preventing multiple candidacies) do not withstand even minimal constitutional scrutiny: Public support for new parties and their candidates is assured by requiring them to obtain petition signatures. The submission of multiple petitions naming different candidates for the same offices on the same new party line is not prevented. The state’s interests do not justify the burdens imposed on the plaintiffs and on similarly situated parties by the full-slate requirement.

III. THE FULL-SLATE REQUIREMENT IS UNIQUE TO ILLINOIS

Judge Gottschall noted that “[a]ccording to Plaintiffs, Illinois is the only state that has ever had a law requiring a new party to submit a complete list of candidates for all offices in the jurisdiction in which it wishes to compete.” Doc. 22, Mem. Op. and Order at 10. In fact, Illinois “is the only state that has ever had a law requiring newly-qualified parties (or any parties) to

submit a complete slate of candidates.” Winger Decl., ¶ 4. Forty-nine states and the District of Columbia have not found it necessary to impose a full-slate requirement in service of any state interests relating to elections. Furthermore, the Illinois requirement applies only to petitions to form a new party in the state or any of its political subdivisions. 10 ILCS 5/10-2 (¶¶ 4 and 7). There is no such requirement applicable to established (i.e., major) parties. As Judge Gottschall said, “[t]he requirement ... favors established parties over new parties. Established parties do not have to field a complete slate of candidates and frequently do not contest all offices up for grabs in a local election [footnote omitted]. * * * Established parties often have no candidate who wishes to contest a particular office; their other candidates may nonetheless appear on the ballot.” Doc. 22, Mem. Op. and Order at 12-13.

In addition to subverting plaintiffs’ equal protection rights, a ballot access restriction that is unique to Illinois and applies only to new parties and not to established parties cannot be, as defendants assert, a reasonable, nondiscriminatory regulatory limitation on new parties and candidates that furthers important state interests and is consistent with the First Amendment. Judge Gottschall properly “conclude[d] that the complete slate requirement imposes a heavy burden on Plaintiffs’ First Amendment rights, and that the requirement also treats similarly situated parties differently.” Doc. 22, Mem. Op. and Order at 14.

Conclusion

The full-slate requirement violates plaintiffs’ rights to associate for the advancement of their political beliefs and to vote effectively, because it is unduly burdensome, wholly unnecessary, and does not serve any cognizable state interest. In particular, it subverts plaintiffs’ “constitutional right ... to create and develop a new political party.” *Norman v. Reed*, 502 US. 279, 288 (1992). It also violates plaintiffs rights to equal protection, because it does not apply to

established parties or to independent candidates. It fails the *Anderson/Burdick* test for determining the legitimacy of ballot access restrictions. It is unconstitutional because it does not survive any level of constitutional scrutiny on the continuum from rational basis analysis to strict scrutiny. For the foregoing reasons, Illinois' full-slate requirement should be declared unconstitutional on its face and as applied to the plaintiffs in this case.

Date: June 15, 2013

Respectfully submitted,

/s/Gary Sinawski

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on July 15, 2013, he caused to be filed through the Court's CM/ECF system the foregoing document, a copy of which will be electronically e-mailed to the parties of record.

s/Gary Sinawski