No. 130769

IN THE ILLINOIS SUPREME COURT

LESLIE COLLAZO, DANIEL BEHR, JAMES KIRCHNER, CARL KUNZ, CAMAXTLE "MAX" OLIVO, JUVANDY RIVERA, NANCY RODRIGUEZ, TERRY NGUYEN LE, JOHN ZIMMERS, RON ANDERMANN, CARLOS GONZALEZ, ASHLEY JENSEN, TERESA ALEXANDER, *and* DONALD PUCKETT,

Plaintiffs-Appellees,

v.

EMANUEL "CHRIS" WELCH, *in his official capacity as Speaker of the Illinois House of Representatives and his individual capacity,*

Intervening Defendant-Appellant,

THE ILLINOIS STATE BOARD OF ELECTIONS, CASANDRA B. WATSON, *in her official capacity as Chair of the Illinois State Board of Elections*; LAURA K. DONAHUE, *in her official capacity as Vice Chair of the Illinois State Board of Elections*; JENNIFER M. BALLARD CROFT, CRISTINA D. CRAY, TONYA L. GENOVESE, CATHERINE S. MCCRORY, RICK S. TERVEN, SR., *and* JACK VRETT, *in their official capacities as Members of the Illinois State Board of Elections*; *and* KWAME RAOUL, *in his official capacity as Attorney General of the State of Illinois*,

Defendants.

Direct appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois

No. 2024 CH 0032

The Honorable Gail Noll, Judge presiding

Brief of Appellees

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Nature of the Case

For decades Illinois provided two ways that a person who wished to run for a seat in the Illinois General Assembly could get on the ballot. On May 3, 2024, however, the Governor signed legislation that repealed one of those methods—in the middle of an election, after the time for using the other method has passed. This prevented Plaintiffs, who wish to run for General Assembly seats as members of the Republican Party in the 2024 election, from getting on the ballot. They brought this lawsuit to undo that injustice.

Until May 3, 2024, the Election Code provided a means for the state's political parties to fill a vacancy on the general election ballot if no candidate had run for a General Assembly seat up for election during the primary election—a process generally known as "slating." 10 ILCS 5/8-17 (2023). That process required a legislative or representative committee of a political party to nominate a candidate, who in turn would have to gather signatures on nomination petitions and submit them to the Illinois State Board of Elections within 75 days after the primary election, which for this year was June 3, 2024. 10 ILCS 5/7-61, 8-17 (2023). Plaintiffs sought to avail themselves of the slating process to become candidates for General Assembly seats on the November 2024 general election ballot after no Republican ran to be a candidate for those respective offices in the March 19, 2024, primary. They were designated by the appropriate committee of the Republican Party and were in the process of obtaining signatures to submit to the Board by the

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June 3, 2024, deadline. But then Illinois Senate Bill 2412 was enacted as Pub. Act 103-0586 ("the Act")—on May 3, 2024, two days after its text was introduced. Among other things, the Act strikes the provision that allowed slating for General Assembly candidates, like Plaintiffs—but did not prohibit slating for candidates for any other office—and purports to be effectively immediately. Since the Act would prevent Plaintiffs from becoming candidates on the 2024 general election ballot after they had already begun the nomination process, they brought this action, alleging that the Act, as applied to them for the 2024 general election only, violates their right to access the ballot, implicated by the right to vote protected by article III, section 1, of the 1970 Illinois Constitution.

Argument

I. The trial court correctly found that it had subject matter jurisdiction over Plaintiffs' complaint.

Intervening Defendant's principal argument is that the circuit court did not have subject matter jurisdiction over this case. Appellant's Br. 14. But Intervening Defendant's claim is based on his misunderstanding of Plaintiffs' constitutional claim.

A. Courts, not administrative agencies, have authority to hear constitutional challenges.

Subject matter jurisdiction "refers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs." *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 334 (2002). As this Court has stated, "[w]ith the exception of the circuit court's

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power to review administrative action, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution." *Id.* And that jurisdiction extends to all justiciable matters. *Id.* A justiciable matter "is a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Id.* at 335.

Intervening Defendant asserts this case falls into the one exception to circuit court's jurisdiction under the state constitution: administrative review. As Intervening Defendant points out, circuit courts are only empowered to review administrative actions as provided by law. Appellant's Br. 15 (citing *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2014 IL 116642, ¶ 9).

Thus, Intervening Defendant categorizes Plaintiffs' case as one seeking judicial review over an agency determination: "At issue in this lawsuit is whether plaintiffs are eligible to be candidates for the General Assembly through the slating process Public Act 103-0589 removed from the Election Code." Appellant's Br. 14. And, according to Intervening Defendant, since the legislature has vested the electoral boards, and not circuit courts, with original jurisdiction over objections to nomination papers, the circuit court did not have subject matter jurisdiction over Plaintiffs' claim. Appellant's Br. 14 (citing *Cinkus v. Stickney Mun. Officers Elec. Bd.*, 228 Ill.2d 200, 209 (2008)).

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But Intervening Defendant's argument rests entirely on his assertion that Plaintiffs' claim is about challenging objections to their nomination papers. *See e.g.,* Appellant's Br. 23 (seeking to reclassify this case as "an attempt to preemptively resolve an anticipated objection to plaintiffs' nomination papers"). But Plaintiffs did not seek the circuit court's review of objections to their nomination papers. This is not an administrative review challenge; it's a constitutional challenge. *See* First Amd. Compl., SR249 (alleging one count for violating "Plaintiffs' right to vote set forth in Article III, section 1, of the 1970 Illinois Constitution"). Intervening Defendant seeks to reframe the case that Plaintiffs actually brought—a constitutional challenge to the application of Public Act 103-0589 ("the Act") to Plaintiffs in the 2024 election—to a case Intervening Defendant wishes Plaintiffs brought—an administrative challenge to objections to Plaintiffs' nomination petitions. And Intervening Defendant completely ignores the fact that the deprivation of Plaintiffs' constitutional rights began as soon as the Act went into effect, immediately removing the slating process Plaintiffs sought to use to access the ballot.

This case does not present a question about an administrative matter over Plaintiffs' nomination papers. The question presented by Plaintiffs' Complaint is whether the Act, which eliminated the slating process for gaining access to the ballot in the middle of that process for the 2024 election, is unconstitutional as applied to Plaintiffs in the November 2024 general election. Indeed, the declaratory relief that the circuit court entered held that

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Act unconstitutional as applied to Plaintiffs in the 2024 election cycle; it did not rule on the validity of Plaintiffs' nomination papers. *See* A17.

And it is clear that courts, not administrative agencies, have jurisdiction to hear constitutional challenges to the application of laws. Illinois Const. 1970, art. VI, § 9; *Emps. Mut. Companies v. Skilling,* 163 Ill. 2d 284, 289 (1994) ("Administrative agencies are given wide latitude in resolving factual issues but not in resolving matters of law."). Intervening Defendant admits as much. Appellant's Br. 17-18 (citing *Delgado v. Bd. of Election Comm'rs of City of Chicago*, 224 Ill. 2d 481, 485 (2007) (holding that "[a]dministrative agencies such as the Election Board have no authority to declare a statute unconstitutional or even to question its validity")). Indeed, a decision by the Election Board that the Act is unconstitutional as applied to Plaintiffs would be void. *Delgado*, 224 Ill. 2d at 485. And as Intervening Defendant must know—as he presided over the passage of Pub. Act 103-5, codified at 735 ILCS 5/2-101.5—the Code of Civil Procedure requires that constitutional challenges to legislation, like this one, be brought not just in any circuit court, but in the circuit court of Cook or Sangamon County. If the General Assembly wanted to give the Board of Elections original jurisdiction over a constitutional claim, it needed to "explicitly exclude[] the circuit courts from hearing such cases." *People v. N L Industries,* 152 Ill. 2d 82, 97 (1992). But the General Assembly has not done so.

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Intervening Defendant cites *Ameren Transmission Co. of Illinois v. Hutchings*, 2018 IL 122973, as support for his assertion that the circuit court did not have subject matter jurisdiction over Plaintiffs' constitutional claim. But, as Intervening Defendant admits, that case is "not exactly on-point." Appellant's Br. 18. Indeed, it is not on-point at all. There, this Court found that a circuit court lacked jurisdiction to determine that a provision of the Public Utilities Act was unconstitutional when the case came before it on direct administrative appeal. *Id.* ¶¶ 8, 15. That was because the Public Utilities Act had a provision that required a constitutional challenge to an agency order, rule, or regulation to go directly to the appellate court. *Id.* ¶ 14. Thus, the circuit court lacked statutory authority to determine the constitutional challenge. *Id.* But *Ameren Transmission* doesn't help Intervening Defendant's argument at all. The circuit court in that case didn't have jurisdiction because the statute provided that the appellate court had jurisdiction. But Intervening Defendant points to no statutory authority that says that the circuit court lacked jurisdiction over Plaintiffs' constitutional claim here. Rather, the Illinois Constitution provides that circuit courts *do* have jurisdiction over constitutional claims like Plaintiffs' claim here. *See* Illinois Const. 1970, art. VI, § 9.

B. Plaintiffs were not required to exhaust their administrative remedies for relief no administrative agency could grant.

Intervening Defendant asserts that by filing their complaint "plaintiffs sought to skip to the end of the administrative process before it started."

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Appellant's Br. 14. As Plaintiffs made clear before the circuit court, they are "not seeking administrative review of a ruling on an objection to their petitions." SR412, Pls' Resp. Mot. Summ. J. and Mot. Dismiss. Plaintiffs are not seeking to skip any administrative process. There is no administrative process that determines the constitutionality of a statute. Plaintiffs' constitutional injury occurred when the Act went into effect, preventing the slating process for accessing the ballot for General Assembly candidates; not by an administrative ruling. And as Intervening Defendant admits, the circuit court's injunction has not prevented the administrative procedure before the Board for Plaintiffs' nomination papers. *See* Appellant's Br. 19-20 (stating that "objections have been filed against these plaintiffs" based on claims other than the Act's removal of slating).

That procedure will continue as it would without the injunction, with one exception: the Board cannot constitutionally apply the Act's removal of the slating procedure to Plaintiffs as a basis of denying them access to the ballot. But the Board can determine Plaintiffs' eligibility to be on the ballot based on other factors. And Intervening Defendant admits that the Board is already doing that. Appellant's Br. 20 ("plaintiffs face challenges questioning whether their petitions contain a sufficient number of valid signatures").

Intervening Defendant cannot deny—and he does not try—that courts, not administrative agencies, have proper subject matter jurisdiction over constitutional claims. That is likely why Intervening Defendant alludes to a

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claim that the issue is not necessarily that the circuit court did not have subject matter jurisdiction over Plaintiffs' claim, but that Plaintiffs did not exhaust administrative remedies before bringing their constitutional claim before the circuit court. *See* Appellant's Br. 14, 17 ("the Election Code's administrative process must be exhausted before the courts can address this question"). But this argument, too, does not support Intervening Defendant's claim that the circuit court did not have authority to hold the Act unconstitutional as to Plaintiffs.

The doctrine of exhausting administrative remedies holds that "a party aggrieved by administrative action ordinarily cannot seek review in the courts without first pursuing all administrative remedies available to him." *Illinois Bell Tel. Co. v. Allphin*, 60 Ill. 2d 350, 358 (1975). But here, Plaintiffs are not aggrieved by an administrative action; they are aggrieved by the Act's elimination of slating that went into effect while they were in the middle of the slating process. The doctrine of exhaustion doesn't apply here because the "Administrative Review Law does not apply to the legislative acts of legislative bodies." *Hawthorne v. Vill. of Olympia Fields*, 204 Ill. 2d 243, 253 (2003). And here Plaintiffs challenge a legislative act: the constitutionality of the Act eliminating slating for General Assembly offices for the 2024 general election. Because "proceedings to secure review of a legislative determination under the Administrative Review Law would be a nullity," *id*. at 254, the doctrine of exhaustion of administrative remedies does not apply here.

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Further, the doctrine of exhaustion of administrative remedies applies "[w]here the Administrative Review Law . . . is applicable and provides a remedy." *Canel v. Topinka*, 212 Ill. 2d 311, 321 (2004). Not only is the Administrative Review Law not applicable to Plaintiffs' constitutional challenge, but administrative review, here, can provide no remedy. The Board is prohibited from giving Plaintiffs the remedy they need: finding that the Act is unconstitutional as applied to them in the 2024 general election. *Delgado*, 224 Ill. 2d at 485.

And even if the doctrine of exhaustion did apply here—which it does not—the circuit court still would have had jurisdiction over this case under one or more of this Court's recognized exceptions to the exhaustion doctrine. First, this case would be exempted from the exhaustion requirement because "issues of fact are not presented and agency expertise is not involved." *Canel*, 212 Ill. 2d at 321. This case presents a legal question—whether the Act is unconstitutional as applied to plaintiffs in the 2024 election. And the case presents no issues of fact; indeed, the parties agreed to the facts before the circuit court and the circuit court ruled on summary judgment. A6. And because the case presents only the legal question of constitutionality, there is no reason that the Board would need to utilize its expertise. Not only does the Board not have any expertise in constitutional law, but it is prohibited from determining a statute's constitutionality. *Delgado*, 224 Ill. 2d at 485.

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Second, "exhaustion is not required if the administrative remedy is inadequate or futile or in instances where the litigant will be subjected to irreparable injury due to lengthy administrative procedures that fail to provide interim relief." *Canel*, 212 Ill. 2d at 321. Here, there is no chance that Plaintiffs would succeed before the Board because the Act clearly prohibits slating for General Assembly races and Plaintiffs seek to access the ballot for General Assembly races using slating. And, again, the Board could not legally find the Act unconstitutional as to Plaintiffs. Further, Plaintiffs will suffer irreparable injury due to lengthy administrative procedures that fail to provide interim relief. There is no question that the Act prohibits Plaintiffs from being slated as candidates, yet Intervening Defendant would have Plaintiffs go through a lengthy administrative process, whereby the Board could not even grant them the relief they seek, before bringing their constitutional claim. Not only is such a process unnecessary for purposes of Plaintiffs' claim, but it would irreparably harm them, because the longer they do not have certainty on whether they will be candidates on the ballot, the less time they will have to campaign and raise money for their campaign.

Another exception to the exhaustion doctrine allows "[a]n aggrieved party [to] seek judicial review of an administrative decision without complying with the exhaustion of remedies doctrine where a statute, ordinance or rule is attacked as unconstitutional on its face." *Canel*, 212 Ill. 2d at 321. "A facial attack to the constitutionality of a statute, which presents purely legal

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questions, is not dependent for its assertion or its resolution on the administrative record." *Arvia v. Madigan*, 209 Ill. 2d 520, 533 (2004). And although this is not a facial challenge, the same logic applies because, again, the case presents only a question of law and no question of fact. The only relevant facts are those that give plaintiffs standing and are agreed: that they were in the process of using the slating to get on the 2024 election ballot and that the Act prevents them from using that process. The reasons this Court has given for exempting facial challenges from the exhaustion doctrine are present here. "[A]dministrative review is confined to the proofs offered and the record created before the agency. A facial attack to the constitutionality of a statute, which presents purely legal questions, is not dependent for its assertion or its resolution on the administrative record." *Id.* at 532-33 (citations omitted). Here, too, Plaintiffs' claim presents purely legal questions and is not dependent for its assertion or resolution on the administrative record.

In this regard, this case is like *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474 (2008). In that case plaintiffs challenged "an administrative rule that forces pharmacies to dispense Plan B contraception" *Id.* at 477. This Court rejected the claim that plaintiffs needed to exhaust the administrative remedies by going through "a disciplinary proceeding and suffer loss of their licenses, or at least wait to be cited and sued, before challenging the rule in circuit court. *Id.* at 496. This Court gave several reasons: First, it held that

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there was no procedure under which plaintiffs could achieve what they were looking for. *Id.* at 497. So too here. Even if plaintiffs went through the administrative procedure, the Board could not have granted the relief they seek. Thus, like in *Morr-Fitz*, there is no administrative remedy. Second, this Court held that even if there were administrative remedies, the exceptions to exhaustion apply because plaintiffs' challenge was a facial challenge and because recourse before the administrative agency would be futile. Here too, going through the administrative process would be futile. *See also County of Kane v. Carlson*, 116 Ill. 2d 186, 199 (1987) (holding that exhaustion was not required where "the questions presented are entirely legal and do not require fact finding by the administrative agency or an application of its particular expertise").

Intervening Defendant asserts that "[o]rdinarily, any issue that is not raised before the administrative agency, even constitutional issues that the agency lacks the authority to decide, will be forfeited by the party failing to raise the issue." Appellant's Br. 18 (quoting *Bd. of Educ., Joliet Twp. High Sch. Dist. No. 204 v. Bd. Of Educ., Lincoln Way Cmty. High Sch. Dist. No. 210*, 231 Ill. 2d 184, 205 (2008)). But there is a difference between a requirement that one must bring any relevant constitutional claims when one is before an administrative agency and a requirement that a party must *always* bring constitutional claims before an administrative agency in the first instance. And, as Intervening Defendant admits, this Court has

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refrained from adopting a bright-line rule requiring a party to raise all constitutional issues before an administrative agency. *Arvia*, 209 Ill. 2d at 527. This Court has held that "[a] principal reason underlying this court's preference that litigants assert a constitutional challenge before the agency—notwithstanding the agency's inability to rule on the matter—is that it allows opposing parties a full opportunity to present evidence to refute the constitutional challenge. Such an evidentiary record is indispensable because administrative review is confined to the record created before the agency." *Id.* at 527-28. But here, such an evidentiary record is unnecessary because the facts are not only a matter of public record—plaintiffs are seeking to be listed on the ballot through slating—but also not contested.

Thus, to the extent that Intervening Defendant's argument is that Plaintiffs did not exhaust their administrative remedies before bringing their constitutional claim before the circuit court, that argument must be rejected.

C. Plaintiffs' claim is ripe for adjudication.

Intervening Defendant might also implicitly be asserting an argument that Plaintiffs' constitutional claim was not ripe because they brought it in the circuit court before the Board determined the validity of their nomination papers. *See* Appellant's Br. 19 ("even on the date of the filing of this brief, Public Act 103-0586 *has yet to be applied* to any plaintiff") (emphasis in original). But this, too, is unavailing to Intervening Defendant.

The basic rationale of the ripeness doctrine is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in

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abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Morr-Fitz*, 231 Ill. 2d at 490 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). This Court's two-prong inquiry to evaluate ripeness requires a court to first look at whether the issues are fit for judicial decision; and second look at any hardship to the parties that would result from withholding judicial consideration. *Id.* at 490.

As to the first inquiry—fitness—Plaintiffs' constitutional claim is clearly fit for judicial review because the claim is legal in nature: whether the Act is unconstitutional as applied to Plaintiffs. *See id.* at 491-92 (citing *Minn. Citizens Concerned for Life v. Federal Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997) for the proposition that fitness for judicial decision means that an issue is legal rather than factual). As to the second prong—hardship—Plaintiffs have shown not only hardship, but also irreparable harm. *See id.* at 494. "[I]rreparable harm occurs only where the remedy at law is inadequate; that is, where monetary damages cannot adequately compensate the injury, or the injury cannot be measured by pecuniary standards." *Best Coin-Op, Inc. v. Old Willow Falls Condominium Asso.*, 120 Ill. App. 3d 830, 834 (1st Dist. 1983). Because of the Act, Plaintiffs will not be able to fill the vacancies on the November 2024 general election ballot. Once the election passes, Plaintiffs' opportunity to appear as candidates for the November 2024

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election will be gone forever, and monetary damages will not be able to compensate Plaintiffs for that lost opportunity. A15.

Plaintiffs' constitutional claim is ripe. There is no reason to wait for an electoral board to "apply" the Act against Plaintiffs. The Act eliminates the slating process for General Assembly races. The Act already applies to Plaintiffs by eliminating that process while they were in the midst of it. Under the Election Code as it exists after the Act went into effect, there is no slating process for candidates seeking nominations to the ballot in the general election. Under the Act, without the circuit court's injunction, Plaintiffs would be prohibited from accessing the ballot using slating. Thus, the constitutional injury to Plaintiffs occurred when the Act went into effect. The only way an electoral board could allow Plaintiffs to be candidates on the ballot using the slating process on which Plaintiffs rely would be to hold the Act unconstitutional, which it has no power to do. There is no uncertainty about Plaintiffs' legal position under the Act. Plaintiffs' constitutional claim is ripe for review.

D. The circuit court had subject-matter jurisdiction, and Intervening Defendant's arguments to the contrary would result in an unnecessary delay in resolving Plaintiffs' constitutional claim that would result in irreparable harm.

Intervening Defendant asserts that the trial court's order creates confusion in the objection process. Appellant's Br. 20-21. He asks rhetorically what an electoral board should do if objections are made to candidates who are not Plaintiffs here. Appellant's Br. 20. But Intervening Defendant's

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question is simply an objection to how all as-applied challenges work. Such claims apply to the specific facts and circumstances of the challenging party. *People v. Harris,* 2018 IL 121932, ¶ 38. Other prospective candidates are allowed to bring similar challenges in court. And electoral boards are bound to apply the law to other non-Plaintiff candidates who did not bring such a challenge in court, and those candidates may raise as a defense the constitutionality of the Act, which they may appeal to the circuit court. A circuit court does not lose subject-matter jurisdiction over an as-applied constitutional claim simply because there are other potential people injured by the unconstitutional law.

Similarly, Intervening Defendant alleges there is a possibility of confusion because circuit courts could issue conflicting rulings on the constitutional issue. But, again, this objection would apply to any as-applied challenge. And it's an inadequate objection to the circuit court's jurisdiction in this case, since Intervening Defendant's preferred method—all 14 Plaintiffs going through the objection process and filing 14 separate appeals based on the Act's unconstitutionality—would be *more* likely to result in the confusion he complains of.

Intervening Defendant argues that "[i]t is very possible many of the plaintiffs before this Court will never have Public Act 103-0586 applied to them because they will lose ballot access for failure to comply with other nomination paper requirements." Appellant's Br. 20. But even if this is true,

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it does not explain how the circuit court's ruling would create confusion in the objection process.

Intervening Defendant's confusion arguments actually weigh in *favor* of the circuit court's order enjoining the Act before the electoral boards hear objections to Plaintiffs' nomination papers. Under Intervening Defendant's theory, Plaintiffs would be required to collect petition signatures knowing that the Act eliminated their path to the ballot; file those nomination papers; wait to see whether objections to those papers are filed, including an objection based on the Act's elimination of slating; wait for the electoral board to grant the objection to their nomination papers based on the Act (which the electoral board would have no other choice but to do); and only then could Plaintiffs bring their constitutional claim before a circuit court through an appeal of the electoral board's denial of their nomination. Intervening Defendant's argument assumes each electoral board would address and resolve every other objection to their nomination in addition to the Act's elimination of slating. If an electoral board simply rejected a Plaintiff's nomination papers based on the Act's prohibition of slating, then the administrative process could be even more drawn out, even if Plaintiffs successfully appealed to the circuit court.

But even if an electoral board denied Plaintiffs' nomination papers based on the Act's prohibition of slating and also made determinations based on any other objections to Plaintiffs' nomination papers, Plaintiffs' appeals would

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result in unnecessary complication, delay, and possibly confusion. That's because, as Intervening Defendant points out, Plaintiffs' nomination papers will be determined by more than one electoral board, based on the geography of the district for office each Plaintiffs is seeking, Appellant's Br. 21 (citing 10 ILCS 5/10-9), and because judicial review of the decision of an electoral board must be sought in the circuit court of the county in which the hearing of the electoral board was held, Appellant's Br. 17 (citing 10 ILCS 5/10-10.1). Since there are 14 Plaintiffs, the result of waiting for each electoral board to inevitably determine that the Act prevents Plaintiffs' candidacies could result in 14 different appeals to different circuit courts, which could result in conflicting decisions on the Act's constitutionality—the very thing Intervening Defendant says he is concerned about. And ultimately Intervening Defendant's approach would require this Court to determine the constitutionality of the Act as applied to Plaintiffs and other litigants. But under Intervening Defendant's approach, the record would be longer and much more complex; the need for expedited review would be even greater; and Plaintiffs, even if successful, would lose time and resources that could otherwise be spent on their campaigns. Intervening Defendant's preferred procedure is therefore hardly more efficient and less confusing.

Not only does Intervening Defendant's claim that the circuit court did not have subject-matter jurisdiction lack any legal basis, but his preferred method would result in unnecessary delay, confusion, and expense and would

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waste judicial resources. For that reason, and all the others discussed above, this Court should reject Intervening Defendant's claim that the circuit court lacked subject-matter jurisdiction.

II. The application of the Act to prevent Plaintiffs from using the slating process to fill vacancies in General Assembly races on the 2024 general election ballot violates their constitutional right to access the ballot, protected as part of the right to vote.

The elimination of the slating process for General Assembly candidates in the middle of the 2024 election season violates Plaintiffs' constitutional right to access the ballot, protected as part of the right to vote under Article III, Section 1 of the Illinois Constitution. Thus, contrary to Intervening Defendant's arguments, Appellant's Br. 24-31, the circuit court decided this case correctly on the merits.

A. The right to gain access to the ballot is implicated by the fundamental constitutional right to vote.

Article III, section 1, of the 1970 Illinois Constitution guarantees the right to vote to every United States citizen of at least 18 years of age who has been a permanent resident of Illinois for at least 30 days preceding any election. This Court has recognized that the right to vote is a fundamental constitutional right, essential to our system of government. *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54, 74 (1990). "Legislation that affects *any* stage of the election process implicates the right to vote." *Tully v. Edgar*, 171 Ill. 2d 297, 307 (1996) (emphasis in original). Thus, "the right to vote is implicated by legislation that restricts a candidate's effort to gain access to the ballot." *Id.* (citing *Anderson v. Schneider,* 67 Ill. 2d 165, 172-73

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(1977)). "[B]allot access is a substantial right and not likely to be denied." *Nolan v. Cook County Officers Electoral Board,* 329 Ill. App. 3d 52, 55 (1st Dist. 2002) (quote and citation omitted). "[T]he rights of candidates and those of voters 'do not lend themselves to neat separation'; each statute affecting a candidate has some effect on the voter." *Anderson*, 67 Ill. 2d at 174 (citation omitted). "[V]oters can assert their preferences only through candidates or parties or both. . . . The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." *Id.* at 175 (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)). "The right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Lubin*, 415 U.S. at 716.

Intervening Defendant asserts that the "right to suffrage" and "ballot access" are two distinct concepts. Appellant's Br. 26. He asserts that while the right to vote is fundamental, the right to ballot access is not. *Id.* But Intervening Defendant simply ignores precedent. "Restrictions on access to the ballot burden two distinct and *fundamental* rights, the rights of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively." *Ghiles v. Mun. Officers Electoral Bd. Of Chi. Heights,* 2019 IL App (1st) 190117, ¶ 17 (quoting *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979)) (emphasis added). Illinois treats "access to a place on the ballot [as] a

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substantial right not lightly to be denied." *Bettis v. Marsaglia,* 2014 IL 117050, ¶ 28). And Intervening Defendant doesn't cite—nor could he—any cases that state that ballot access is not a fundamental right.

Intervening Defendant cites this Court's holding in *Corbin v. Schroeder*, 2021 IL 127052, ¶ 38, that "[t]hough ballot access is a substantial right, that right is circumscribed by the legislature's authority to regulate elections." Appellant's Br. 26. But *Corbin* doesn't hold that the right to ballot access is not fundamental; it simply acknowledges that the right to ballot access, like the right to vote, is not absolute. And *Corbin* did not concern a constitutional challenge to a statute; rather, it involved statutory construction of the Election Code. Nor does *Bullock v. Carter*, 405 U.S. 134 (1972), support his claim that the right to ballot access is not fundamental. *See* Appellant's Br. 26. *Bullock* simply acknowledged that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Bullock*. 405 U.S. at 143. Neither Plaintiffs nor the circuit court have said otherwise. A11-12. *Bullock*, like *Corbin*, simply recognizes that, although the right to vote is fundamental, like the right to ballot access, that right is not absolute, the legislature has some leeway in regulating voting and ballot access, and strict scrutiny review does not always apply to such regulation. But that is not the same as Intervening Defendant's claim that ballot access is not a fundamental right and that restrictions on ballot access *never*

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receives strict scrutiny review. Intervening Defendant cites no cases in support of that proposition.

B. The correct standard of review is strict scrutiny.

"When the means used by a legislature to achieve a legislative goal impinge upon a fundamental right, the court will examine the statute under the strict scrutiny standard." *Tully*, 171 Ill. 2d at 304.

While acknowledging that this case presents unique circumstances where a provision of the Election Code establishing a route for ballot access was eliminated during the election cycle, the circuit court held that it could reasonably rely on this Court's decision in *Tully* and on *Graves v. Cook Cnty. Republican Party*, 2020 IL App (1st) 181516. A12.

In *Tully*, the legislature passed a law that replaced the existing nine elected trustees of the University of Illinois and provided that the trustee positions would thereafter be appointed by the governor. 171 Ill. 2d at 303-04. The Court applied strict scrutiny in finding unconstitutional the provision removing the elected trustees from office in the middle of their terms because their removal would nullify the votes cast for them by citizens and thereby undermine and destroy the integrity of the vote. *Id.* at 307, 311. However, the Court did not apply strict scrutiny to the general change the Board of Trustees from an elective to an appointive office. *Id.* at 313. The reason the Court in *Tully* applied strict scrutiny to one aspect of the law, but not the other was timing—where the law generally changed how trustees were placed in the future, strict scrutiny did not apply; but where the law

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attempted to remove the trustees once the election had taken place, strict scrutiny applied.

In *Graves*, 2020 IL App (1st) 181516, ¶ 23, the First District Court of Appeals addressed whether the Republican Party violated the right to vote when it revised its bylaws to change candidate eligibility for committeemen after voting had already begun in the 2016 March primary election. The plaintiff did not dispute whether the Party could enact such a provision but claimed that doing so when the primary election was already underway violated the right to vote. *Id.* ¶ 49; A12. Relying on *Tully* and applying strict scrutiny because of the timing of the bylaw change, *id.* ¶ 57, the First District held that the Party's "attempt to nullify the election for ward committeeman through its bylaw revision during an ongoing primary election . . . impermissibly and unconstitutionally burdened the citizens' fundamental right to vote." *Id.* ¶ 68.

This case involves the same timing issue. Here, Plaintiffs do not challenge the state's authority to abolish the slating process for General Assembly candidates as a general matter. Plaintiffs object only to the Act's removal of the slating process *in the middle of that process*. That is, Plaintiffs object that it became effective during the 75-day process after the primary election during which potential candidates could be nominated to fill their party's vacancies on the general election ballot by obtaining the required number of signatures and submitting their petition to the Board of Elections.

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Eliminating slating in the middle of the process would ensure that no Republican candidate would appear on the ballot in Plaintiffs' districts and most likely would mean that only one candidate would appear on the general election ballot in those districts.

Intervening Defendant, however, attempts to distinguish *Tully* and *Graves* by asserting that, in those cases, an action nullified choices that voters had already made. Appellant's Br. 29-30. In other words, Intervening Defendant claims that the fundamental right to vote and the application of strict scrutiny are implicated only after an election has taken place.

But it does not matter that *Tully* involved a change in the law that occurred after the vote took place and that the change in the law here came in the middle of the process. The application of strict scrutiny in *Tully* to the removal of elected trustees would not have been different if the attempt to nullify the votes had happened in the middle of the election. It strains logic to suggest that strict scrutiny applies when a law goes into effect after an election and alters the results of that election, but does not apply when a law goes into effect in the middle of the voting ("in the middle of the game") and alters the result.

Surely strict scrutiny would apply if a law changed the standards under which mail-in ballots would be counted was enacted and went into effect after such ballots had begun to be collected, but before voting had ended ("in the middle of the game"). The situation here is no different: Plaintiffs only

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challenge the Act's application to the 2024 election because the Act was enacted and went into effect after the slating process had begun, obliterating their opportunity to appear on the 2024 general election ballot. Since the right to vote is intertwined with the right of a candidate to access the ballot, *see Anderson*, 67 Ill. 2d at 175, it makes no difference whether the Act attempted to remove candidates from the ballot after they had completed the process to access the ballot or whether the Act removed the process for accessing the ballot in middle of that process. Both, in effect, deprive those voters of the right to have their vote counted. *Tully*, 171 Ill. 2d at 306.

For the same reason, Intervening Defendant's reliance on *Bullock* is misplaced. Appellant's Br. 32 (quoting *Bullock*, 405 U.S. at 143 ("The fact that a state's system creates hurdles which tend to limit the field . . . does not require that regulations be narrowly tailored to advance a compelling state interest")). The Act does not merely impose "hurdles" for candidates in the current election. Hurdles can be overcome. Plaintiffs, however, cannot overcome the new absolute barrier the Act has imposed, in the middle of the game, to keep them off the 2024 general election ballot. If the Act had been passed far enough in time *before* the primary, such that Plaintiffs could have filed their nominating papers and run in the primary election, then it might be fair to say that the Act merely "creates hurdles" to their ballot access; any Plaintiff intending to be slated would have had to scramble to file their nomination papers in time for the primary, but the law would not have

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totally barred them from running. But that's not what happened. The Act was passed on May 3, 2024, well *after* the March 19 primary. Plaintiffs, who relied on the availability of the slating process, suddenly found themselves without a way to run as candidates under their party's banner.

Intervening Defendant's argument that Plaintiffs could run as independents, Appellant's Br. 34, is unavailing for the same reason. Prior to the end of the primary, Plaintiffs were given no notice that filing their nomination papers and participating in the primary would be the only way to run as Republicans, associate with the Republican Party, and have access to Republican funding.

Where the courts have applied less-than-strict scrutiny to changes in the Election Code, the timing issue in *Tully* has not been present. For example, in *East St. Louis Fed'n of Teachers, Local 1220 v. East St. Louis Sch. Dist. No. 189 Fin. Oversight Panel*, 178 Ill. 2d 399, 414 (1997)—relied on by Intervening Defendant, Appellant's Br. 31—a Financial Oversight Panel used existing law to remove school board members from office for disobeying a valid order from the panel. The Court found that the plaintiff's challenge to the existing law did not warrant strict scrutiny because it did not implicate the timing issue in *Tully*, where the change in the law had taken place after the election. *Id.* Similarly, *East St. Louis* did not involve the timing issues here—a change in the law in the middle of the ballot access process.

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Finally, Appellant relies on an unpublished opinion in which the First District distinguished *Tully*. Appellant's Br. 31 (citing *Gercone v. Cook Cnty. Officers Electoral Bd.,* 2022 IL App (1st) 220724-U). That decision stated that "[c]ourts have . . . drawn a distinction between laws that *impinge* on the right to vote, and are thus subject to strict scrutiny, and laws that merely *affect* the right to vote, and are therefore only subject to rational basis analysis." *Gercone*, 2022 IL App (1st) 220724-U, ¶ 54. But as that case also notes, "'[t]he compelling-interest [strict scrutiny] test is applied in cases where the limitations impose a real and appreciable impact on the exercise of the voting franchise,'" *id.* (quoting *Hoskins v. Walker,* 57 Ill. 2d 503, 509 (1974)), and rational basis applies "where any limitation on voting rights is incidental to a classification not specifically aimed at voters or elections," *id.* (citing *Trafelet v. Thompson,* 594 F.2d 623, 632 (7th Cir. 1979)). This case is clearly an example of the former, as, again, the Act removes Plaintiffs' ability to associate with their preferred political party, and to identify themselves on the ballot as such to potential voters.

Thus, the Act, as applied to Plaintiffs' efforts to gain access to the November 2024 general election ballot as candidates, is subject to strict scrutiny.

C. The Act does not satisfy strict scrutiny.

Intervening Defendant makes no attempt to defend the Act under strict scrutiny analysis. *See* Appellant's Br. 24-37. And under strict scrutiny

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analysis, the Act as applied to Plaintiffs in the 2024 general election is unconstitutional.

To satisfy strict scrutiny, legislation must: (1) advance a compelling state interest; (2) be necessary to achieve the legislation's asserted goal; and (3) be the least restrictive means available to attain the legislation's goal. *Tully*, 171 Ill. 2d at 311 (citing *Fumarolo*, 142 Ill. 2d at 90). The Act, as applied to Plaintiffs, fails on all three counts.

1. The Act as applied to Plaintiffs for the 2024 general election does not advance a compelling government interest.

The Act's elimination of the process of filling ballot vacancies by slating to prevent Plaintiffs from accessing the ballot as candidates in the November 2024 general election does not advance a compelling state interest. Defendants assert an important government interest in the need to prevent political insiders from having control over which candidates appear on the ballot and to ensure that the voters, and only the voters, make this determination. A13. Although the circuit court assumed that the Act advanced the purported government interest (while holding that the Act failed the other two prongs of strict scrutiny analysis, A13), applying the Act to keep Plaintiffs off the 2024 election ballot does not, in fact, serve the government's interest in preventing political insiders from having control over which candidates are slated and ensuring that only the voters make that determination.

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Indeed, if the Act were enforced against Plaintiffs, voters would not have a choice of a Republican in the general election for those General Assembly district races because Plaintiffs and the Republican Party would be prevented from placing a candidate on the ballot at all. SR281-300. And it's very likely that voters would have only one candidate on the ballot in the relevant districts, unless an independent or third-party candidate runs. And Plaintiffs cannot run as independent or third-party candidates—both because they are Republicans who are prevented by law from running as independent or third-party candidates in the general election after voting in the Republican primary, and because the requirements and the time remaining make doing so practically impossible. *See* 10 ILCS 5/7-43; 5/10-2; 5/10-3.

Further, in twelve of the fourteen districts at issue in this case, keeping Plaintiffs off the ballot would ensure that voters are *not* making the determination of which candidates should be on the ballot. That's because in those districts no Republican candidates ran in the primary, and only one candidate ran in the Democratic primary. SR281-300. Enforcing the Act against Plaintiffs in those districts would likely mean that voters in those districts only ever had one candidate for those offices to vote for in both the primary and general elections—and thus never had a choice of candidates at all.

Enforcing the Act against Plaintiffs in this election would mean voters would have fewer candidates to choose from; enjoining the Act as to Plaintiffs

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in this election would mean that voters would have more candidates to choose from. Applying the Act against Plaintiffs to prevent them from accessing the ballot in the 2024 general election not only does not advance the government's asserted interest; it would thwart that interest.

The Act does not advance its purported purpose for another reason: It only ends the slating process for races for the General Assembly and therefore is underinclusive to the government's purported purpose. *See Joelner v. Vill. of Wash. Park*, 508 F.3d 427, 433 (7th Cir. 2007) (finding an underinclusive regulatory scheme failed strict scrutiny). The purported government interest in preventing political insiders from having control over which candidates on the ballot and to ensure that the voters make this determination is undermined by the fact that the Act only eliminates slating for General Assembly, and no other, races. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (holding that "exemptions and inconsistencies bring into question the purpose of the [regulation]."") And the only candidates affected by the Act were candidates—like Plaintiffs—who sought to run in General Assembly races against some of the very members of the General Assembly who passed the Act.

2. The Act as applied to Plaintiffs for the 2024 general election is not necessary to achieve the asserted goal.

Applying the Act against Plaintiffs in the 2024 election also fails strict scrutiny because it is not necessary to achieve the Act's asserted goal. As shown above, doing so would not achieve the Act's asserted goal at all, so it

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could not be necessary to achieve that goal. Further, it is simply not necessary for the State to change the rules in the middle of the ballot access process after candidates and political parties had already relied on the slating process. The circuit court correctly held that "[c]hanging the rules relating to ballot access in the midst of an election cycle removes certainty from the election process and is not necessary to achieve the legislation's proffered goal." A13. The circuit court also held that the General Assembly could have made the revisions effective for the next election so "[e]veryone would then be on notice that, in General Assembly races, when there is no candidate for the nomination of the party in the primary, no candidate of that party for that office can be listed on the ballot at the general election." A13.

3. The Act as applied to Plaintiffs for the 2024 general election is not the least restrictive means to achieve the government's goal.

In addition, the Act's elimination of the slating process for the November 2024 general election after that process has already started fails strict scrutiny because it is not the least restrictive means to achieve the Act's goal. The least restrictive means would be for the Act to affect future elections so that all potential candidates and political parties know in advance the options for obtaining ballot access. *See Graves*, 2020 IL App (1st) 181516, ¶ 62 (holding that a political party by-law, enacted during a primary election, was not necessary or narrowly tailored).

The Act, as applied to Plaintiffs for the 2024 general election, fails strict scrutiny analysis and, thus, unconstitutionally restricts Plaintiffs'

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fundamental rights to suffrage by negating their efforts to gain access to the ballot.

D. The Act as applied to Plaintiffs for the 2024 general election does not satisfy the *Anderson-Burdick* test.

Even under the intermediate scrutiny standard that Intervening Defendant (incorrectly) asserts applies, applying the Act to Plaintiffs in the 2024 general election would violate their constitutional rights. Under the scrutiny asserted by Intervening Defendant—the *Anderson-Burdick* test, *see Anderson v. Celebrezze*, 460 U.S. 789 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)—when election provisions impose only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions. *Green Party v. Henrichs*, 355 Ill. App. 3d 445, 447 (3d Dist. 2005); see also Appellant's Br. 33 (quoting *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 773 (7th Cir. 1997)).

The circuit court held that Plaintiffs' claim would be successful "even if the less stringent *Anderson-Burdick* standard urged by Defendants applies." A14. The circuit court held that the Act "arbitrarily treats potential candidates seeking to use the now deleted slating process within the 75-day post-primary window differently and does not apply the same rules to all potential candidates." A14. And although Intervening Defendant asserts that *Anderson-Burdick* is the proper standard, his brief fails to even acknowledge, let alone refute, the circuit court's holding that the Act would be

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unconstitutional as applied to Plaintiffs in the 2024 election even under *Anderson-Burdick*. *See* Appellant's Br. 31-37.

The circuit court was correct. It's unreasonable and discriminatory to change the slating process in the middle of that process, when Plaintiffs had relied on it to access the ballot and are attempting to comply with it. As applied to Plaintiffs, the Act ensures that voters have less choice in the 2024 election. *See* Section II.C.1. And as the circuit court held, the Act treats some candidates differently from others: Because the Act is not retroactive and at least one potential candidate filed nomination papers prior to the Act going into effect, "[t]he Act arbitrarily treats potential candidates seeking to use the now deleted slating process within the 75-day post-primary window differently and does not apply the same rules to all potential candidates." A14.

When restrictions on the constitutional rights of potential candidates are discriminatory and unreasonable—as they are here—such restrictions must be "narrowly drawn to advance a state interest of compelling importance." *Green Party*, 355 Ill. App. 3d at 447. In other words, they must satisfy strict scrutiny. And as explained above, applying the Act to Plaintiffs to prevent them from using the slating process to access the 2024 general election ballot as Republican candidates for General Assembly elections fails strict scrutiny. *See* Section II.C.

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Applying the Act against Plaintiffs for the 2024 general election is not "substantially related to an important governmental interest." *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 208 (2008). As explained above, the result of applying the Act to Plaintiffs in the 2024 general election undermines the State's purported interest—in preventing political insiders from having control over which candidates are slated and to ensure that the voters make this determination—because it ensures that voters have less choice and political insiders have more control over which candidates are on the ballot. *See* Section II.C.1.

III. Intervening Defendant does not refute the circuit court's holding that Plaintiffs are entitled to a permanent injunction.

Intervening Defendant does not assert that the circuit court's analysis granting the permanent injunction was in error on its own terms. He only asserts that this Court should reverse because the Act survives scrutiny under *Anderson-Burdick*. Appellant's Br. 24-37; *see* Ill. Sup. Ct., R 341(h)(7) ("Points not argued are waived"). Because the circuit court's holding that the Act as applied to Plaintiffs in the 2024 general election was unconstitutional either under strict scrutiny or *Anderson-Burdick*, this Court should uphold the circuit court's decision, including the issuance of the permanent injunction.

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Conclusion

Because the circuit court had subject-matter jurisdiction over Plaintiffs' constitutional claim and because the application of the Act to prevent Plaintiffs from using the slating process to fill vacancies in General Assembly races in the 2024 election violates their constitutional right to access the ballot as protected as part of the right to vote, the judgment of the trial court should be upheld.

Dated: July 8, 2024

/s/ Jeffrey M. Schwab

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 8,648 words.

/s/ Jeffrey M. Schwab

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Certificate of Service

I, Jeffrey M. Schwab, an attorney, certify that on July 8, 2024, I electronically filed with Odyssey eFileIL the foregoing Brief of Appellees with the Clerk of the Supreme Court of Illinois.

The undersigned further certifies that on July 8, 2024, an electronic copy of the foregoing Brief of Appellees is being served through Odyssey eFileIL. In addition, I have caused the foregoing Appellant's Brief to be served via electronic mail on all attorneys on the attached service list.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, 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.

/s/ Jeffrey M. Schwab

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