

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN**

TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
GEORGE DOOHER, JR., STEPHEN EVANS, LINDA
FANTON, JERRY FISHMAN, JAY FRANTZ,
LAWRENCE GARVEY, ALAN NEPHEW, SUSAN
ROWLEY, JOSEPHINE THOMAS, and MARIANNE
VOLANTE,

Petitioners,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT
GOVERNOR AND PRESIDENT OF THE SENATE
BRIAN A. BENJAMIN, SENATE MAJORITY LEADER
AND PRESIDENT PRO TEMPORE OF THE SENATE
ANDREA STEWART-COUSINS, SPEAKER OF THE
ASSEMBLY CARL HEASTIE, NEW YORK STATE
BOARD OF ELECTIONS, and THE NEW YORK STATE
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT,

Respondents.

Index No. E2022-0116CV

McAllister, J.S.C.

Return Date:
May 26, 2022

**Executive Respondents' Memorandum of Law in Opposition to
Motion to Intervene by the Parent Party of New York, Patrick Donohue, William Noel,
Brian Robinson, Danyela Souza Egorov, Pooi Stewart, Otis D. Danne, Jr., and Gavin Wax**

(Motion # 15 via NYSCEF)

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PRELIMINARY STATEMENT

Respondent Governor Kathy Hochul, Governor of the State of New York¹ (the “Executive Respondent”), respectfully submits this memorandum of law opposing the pending motion to intervene by The Parent Party of New York, Patrick Donohue, William Noel, Brian Robinson, Danyela Souza Egorov, Pooi Stewat, Otis D. Danne, Jr., and Gavin Wax (collectively, “the proposed intervenors”). *See* NYSCEF No. 561 (“Motion #15”).

Proposed intervenors seek the following extraordinary relief at a time after the June primary election (that includes all statewide races, races for all 150 seats in the State Assembly and numerous other election contests has been underway for close to two weeks:

- a) to apply the Ballot Access Order—which currently applies to only congressional offices and the State Senate (NYSCEF #524)—to all statewide offices, the New York State Assembly, and all local offices;
- b) first day to sign is modified to read “4/19/22”; and
- c) reduce the signature requirements for independent nominating petitions by 50%.

In perhaps the most novel filing of these proceedings, proposed intervenors stray far from the redistricting issues at the heart of this case, stating that one of their goals is “to become an official ballot access party in New York State”, and that because redistricting has condensed timeframes around ballot access that will no longer be possible. This, they argue, infringes upon their First Amendment right to free association and speech. To remedy this alleged infraction, instead of obtaining the requisite number of signatures required by the law and this Court’s Order through traditional methods, they would again change the elections process to the detriment of voters, other candidates, and elections administrators. This includes candidates for statewide and assembly offices

¹ The office of the Lieutenant Governor and President of the Senate is currently vacant.

already in the midst of their election. They make these arguments with no legal basis, and with a disregard for this Court and the Fourth Department's prior decisions on intervention in this case. In short, this motion to intervene should be easily denied.

To date, five other motions to intervene brought by various registered voters, candidates, and potential candidates (including independent candidates) were denied, four recently by this Court, and one in April by the Appellate Division, Fourth Department. *See* NYSCEF Nos. 441 & 520. One such motion this Court denied was brought by five candidates for Congress and State Senate, who sought to “intervene to protect their rights as candidates” to appear on primary party ballots and/or as independent candidates on the general election ballot. *See* NYSCEF Nos. 327 & 339 (Motion #12). Regarding independent nominating petitions, those proposed intervenors asserted that “[i]f said petition periods are truncated, the Court should reduce the number of signatures accordingly.” NYSCEF No. 331 ¶ 11. In its Decision and Order filed May 11, 2022, this Court, *inter alia*, denied intervention as untimely, and held that “the existing parties will be able to adequately represent the interests of these people going forward.” NYSCEF No. 520 at p. 4-5.

Further, like here, in the most recent motion to intervene denied by this Court (NYSCEF No. 541, “Motion #14”), the proposed intervenors sought an Order to extend the time for petitioning 4 weeks beyond the statutory May 31 deadline, waiving the NY Election Law requirement of 45,000 signatures to petition onto the ballot for non-recognized-party statewide candidates and reducing that requirement to 30,000 or 15,000, and to waive the 500-signature requirement for each of 13 congressional district.

In denying that motion, this Court held:

A reduction in the Independent nominating signature requirement would be in contravention of Election Law §6-142(1). A similar reduction in signatures was requested in a case last year, *Libertarian Party of N.Y. v. New York Bd. of Education*, 539 F.Supp 3rd 310

(SDNY 2021). That court denied a similar motion to reduce the signature requirements. “The Commission’s recommendation of 45,000 signatures amounts to 0.74 percent of the voters who voted in the 2018 New York gubernatorial election and only 0.33 percent of the New York’s 13.55 million registered voters.” *Libertarian Party of N.Y. v. New York Bd. of Education*; (supra. at 317).

The entire purpose of requiring a number of signatures is to show that a candidate has widespread support. Similarly, the requirement that a candidate be able to gather at least 500 signatures from at least ½ of the congressional districts is an indication of widespread support. The court is not inclined to decrease the signature requirement or to waive the 500 signatures per district requirement.

This court issued an advisory opinion on May 5, 2022 to warn potential candidates that were seeking to get on the November ballot via an Independent nominating petition that she/he should continue collecting signatures as the court was not inclined to change the signature period for those persons. Six weeks is six weeks.

(NYSCEF #668). Here, the proposed intervenors seek similar remedies for even further attenuated concerns as those raised in Motion #14, and their motion should likewise be denied.

The proposed intervenors’ concerns about timing and signature requirements for independent nominating petitions are untimely, as they were foreseeable from commencement of this proceeding challenging the congressional districts and were already raised by the existing parties.

Furthermore, intervention is inappropriate because the proposed intervenors cannot demonstrate a sufficiently “severe burden” on their First Amendment rights to overcome the State’s well-recognized, substantial interest in (a) regulating access to the general election ballot by independent candidates to avoid voter confusion and declutter the ballot by ensuring only those candidates with sufficient support appear on the ballot; and (b) upholding reasonable election deadlines to preserve orderly and efficient elections.

STANDARD OF REVIEW

Two provisions of New York State Civil Practice Law and Rules (“CPLR”) govern intervention by third parties in a pending action or proceeding. First, CPLR § 1012(a)(2) permits intervention as of right: “[u]pon timely motion, any person shall be permitted to intervene in any action . . . when the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment.” Second, CPLR § 1013 allows intervention in the discretion of the court:

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person’s claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

By their terms, “[i]ntervention pursuant to either CPLR 1012 or 1013 requires a timely motion.” *Rutherford Chemicals, LLC v. Assessor of Town of Woodbury*, 115 A.D.3d 960, 961 (2d Dept 2014). The same generally applicable defenses, including lack of standing, apply to intervenor claims. *See generally Kobrick v. New York State Div. of Hous. & Cmty. Renewal*, 126 A.D.3d 538, 540 (1st Dept 2015) (“Supreme Court properly found that the proposed intervenor lacked standing to intervene in this proceeding.”).

ARGUMENT

A. The proposed intervenors cannot satisfy the elements for mandatory or discretionary intervention.

This motion to intervene is untimely because it raises concerns readily ascertainable upon Petitioners’ filing of the original petition three months ago. “Consideration of any motion to intervene begins with the question of whether the motion is timely.” *In re HSBC Bank U.S.A.*, 135 A.D.3d 534, 534 (1st Dept 2016). “[I]ntervention . . . will not be allowed merely to permit the intervenor to

accomplish now what it could have done as of right but . . . omitted to do earlier.” *Darlington v. City of Ithaca, Bd. of Zoning Appeals*, 202 AD2d 831, 834 (3d Dept 1994), quoting Siegel, N.Y. Prac. §183, at 276 (2d ed.).

As it relates to the instant motion, the ultimate relief sought in this action always included a remedial congressional map. Since its commencement, it was obvious this proceeding could disrupt the 2022 electoral calendar, necessitate a modification of that calendar to accommodate any remedial maps this Court would order, and possibly truncate the period in which candidates, including independent candidates, could file petitions to obtain ballot access. However, it is now three months after this action began and the proposed intervenors make no serious attempt to justify their late filing. Although the date by which remedial maps could be achieved was not immediately known, such specificity was not required to foresee that candidates’ interests were implicated. In fact, existing respondents raised of concerns about inadequate time and ongoing petitioning throughout these proceedings (see, e.g., NYSCEF Nos. 88 and 617). Therefore, any purported reliance upon this Court’s May 11, 2022 order is unavailing. *See* NYSCEF No. 529 at p. 6. Even assuming the potential intervenors’ prior three-month delay could be overlooked, this Court’s May 5, 2022 Advisory Opinion set out the terms for independent candidates to appear on the ballot, yet proposed intervenors dragged their feet for another eleven days before submitting their papers. *See* NYSCEF No. 520 at p. 5, citing *Matter of Fink v. Salerno*, 105 A.D.2d 489 (3d Dept 1984) (affirming denial of intervention due to expedited process for election matters where proceeding commenced October 3rd, Court set a return date of October 9th, and putative intervenor sought intervention on October 8th).

To the extent they relate to this ongoing proceeding, the potential intervenors’ concerns were already adequately represented by the existing parties. Previously, Executive Respondent objected to moving Congressional and Senate races due to the timing, logistics, and impact on election

administration. *See* NYSCEF 82 at p. 25-26. As the State’s Chief Executive, Executive Respondent continues to have a strong interest in ensuring that the rights of all candidates to appear on the ballot are respected and believe that the schedule proposed by the State Board of Elections and adopted by this Court guarantees those rights. The proposed intervenors cannot explain how their interests sufficiently diverge from the concerns already expressed and balanced by this Court.

Insofar as the proposed intervenors complain about portions of the Election Law not already raised by the existing parties, they seek to drag this Court far astray from the redistricting issues at the heart of this action. Even discretionary intervention is limited to intervenors who raise claims or defenses involving “common question of law or fact.” *See* CPLR 1013. Because this Court’s orders did not reduce or otherwise affect the petitioning period for independent nominating petitions, it should deny intervention.

B. The proposed intervenors have not demonstrated a sufficiently “severe burden” on their right to association or free speech to justify intervention.

The proposed intervenors premise their need to intervene upon their claim that “polarized, tribal political culture is broken”, and a desire to form a new political party—the Parent Party—and their intent to secure a third-party ballot line for the November general election. They claim that the Parent Party intended to circulate nominating petitions as “slate petitions” (NYSCEF #546, ¶13). And that by “utilizing this slate petitioning . . . the signatures gathered count for all the candidates on each petition sheet, thus allowing the candidates on each petition sheet, thus allowing the candidates to work with each other and make the process of gathering signatures a synergistic one.” (NYSCEF #546, ¶13). Proposed intervenors claim they could not obtain signatures on nominating petitions before now because “[i]t was only when the Court issued its [Ballot Access Order] that candidates for office and political advocates . . . began to have some guidance as to the future of the independent nominating petitioning process.” (NYSCEF #546, ¶19). However, utilizing a “slate petition” is not a

right that requires changing the dates for independent nominating petitions. Nothing prohibited these candidates from collecting petitions before the Order was issued. Moreover, intervenors have no inherent right to form a new political party.

“The U.S. Constitution grants States ‘broad power to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives,” Art. I, §4, cl. 1, which power is matched by state control over the election process for state offices.’” *SAM Party of New York v. Kosinski*, 987 F.3d 267, 274 (2d Cir. 2021), quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). To ensure effective democratic electoral processes, “States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” *Id.* Instead of strict scrutiny, therefore, voting regulations like those challenged by the proposed intervenors are analyzed under the *Anderson-Burdick* framework.

As the Second Circuit recently reiterated:

“Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” [*Burdick v. Takushi*, 504 U.S. 428, 434 (1992)]. First, if the restrictions on those rights are “severe,” then strict scrutiny applies. *Id.* “But when a state election law provision imposes 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.” *Id.* (quoting *Anderson*, 460 U.S. at 788).

This latter, lesser scrutiny is not “pure rational basis review.” *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108 (2d Cir. 2008). Rather, “the court must actually ‘weigh’ the burdens imposed on the plaintiff against ‘the precise interests put forward by the State,’ and the court must take ‘into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Id.* at 108–09 (quoting *Burdick*, 504 U.S. at 434). Review under this balancing test is “quite deferential,” and no “elaborate, empirical verification” is required. *Id.* at 109 (quoting *Timmons*, 520 U.S. at 364).

SAM Party of New York, 987 F.3d at 274.

In applying this sliding scale test, the severity of the restrictions imposed determines the level

of judicial review. “Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (internal quotations omitted); *see also Price v. New York State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (State’s reasonable and nondiscriminatory restrictions are generally sufficient to uphold the statute if they serve important state interests, and judicial review in such circumstances will be quite deferential). Notably, “[c]andidacy is not a fundamental right in our political system, and not all restrictions imposed by the States on candidates’ eligibility for the ballot impose constitutionally suspect burdens on voters’ rights to associate or to choose among candidates.” *Fulani v. McAuliffe*, 2005 WL 2276881, at *3 (SDNY 2005), *citing Anderson*, 460 U.S. at 788, and *Clements v. Fashing*, 457 U.S. 957, 963 (1982).

The Election Law requirements for independent nominating petitions were previously upheld, and the proposed intervenors cannot demonstrate a sufficiently “severe burden” upon their First Amendment right to association or speech to warrant intervention at the risk of extending these proceedings. The Southern District of New York recently found New York’s requirement that “independent nominating petitions for statewide office must be signed by the lesser of 45,000 registered voters or 1% of the votes cast in the last gubernatorial election (nominating petitions for non-statewide office require fewer signatures),” to be “in line with other states’ requirements,” and in fact, *less strict* than seventeen other states when compared by population of eligible signatories. *SAM Party of New York v. Kosinski*, 2021 WL 6061301, at *8 (SDNY 2021).

Even during the height of the COVID-19 pandemic response, amidst strict social distancing and quarantine orders, courts found the timing and signature requirements to be “not severe, but

reasonable and nondiscriminatory,” and deferred to the State’s strong interest, as articulated by the State Board of Elections, “in assuring that there is a modicum of public support for independent candidacy, and substantial regulation of elections if they are to be fair, honest, and orderly.” *See* NYSCEF #629, Declaration of Heather L. McKay, Exhibit 1, ¶¶25-26 (denying TRO request by plaintiff-candidates Joshua Eisen and Gary Greenburg); *see also Eisen v. Cuomo*, 2020 WL 7978403, at *2 (N.Y. Sup. Ct. 2020) (“The United States Supreme Court has recognized that a state has a legitimate interest in limiting the names printed on a ballot to candidates who have demonstrated some degree of support. *See Kuntz v. New York State Senate*, 113 F.3d 326, 327 (2d Cir. 1997); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Candidates who have won their party’s primary have already demonstrated a substantial level of support, unlike independent candidates.” *Kuntz*, 113 F.3d at 328.).

Proposed intervenors’ entire argument is premised on their belief that they are entitled to delay this election further so they can attempt to form a new political party. And that they need more time and/or need the petitioning requirements reduced so that they can utilize a slate nominating process. However, proposed intervenors cite no precedent that makes utilizing slate petitions a right and have not commented on why collection of the required number of signatures is impossible or impracticable under the time constraints determined by the court. While proposed intervenors cite to court decisions dealing with the right of association, that right is not implicated by the ability to utilize slate petitions, the proposed intervenors’ decision not to obtain the required number of signatures under the law using a different mechanism for petitioning, or the proposed intervenors decision not to seek intervention until over three months after this action began.

Proposed intervenors utterly fail to demonstrate that either (a) the 45,000 signatures required for independent candidates to appear on the general ballot for statewide office; (b) the requirement to

obtain sufficient signatures from half the congressional districts; or (c) the modified political calendar adopted by this Court at the request of the State Board of Elections will severely burden their right of association or speech. Other than citing court decisions generally about the right of association, the proposed intervenors offer no factual or legal analysis (let alone any compelling evidence) to support their conclusory claim that their interests are “severely burdened”.

Proposed intervenors thus conflate the steps required under the *Anderson-Burdick* framework. Regardless of the nature of the speech, the first question under that framework is the extent to which that right is burdened, and “[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot,” which is not demonstrated here. *Libertarian Party v. Lamont*, 977 F.3d 173 (2d Cir. 2020), quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016). Proposed intervenors failed to show that absent their proposed changes, they will be excluded or virtually excluded from the ballot. In fact – the proposed intervenors could be among a number of candidates who presumably will obtain enough signatures for ballot access before the petitioning period concludes.

Furthermore, *Lerman v. Bd. Of Elections in City of New York*, 232 F.3d 135 (2d Cir. 2000), cited by proposed intervenors, involved a challenge to a substantive restriction on petitioning—i.e., that witnesses to the signing of designating petitions be residents of the political subdivision in which the office or position is to be voted for—whereas proposed intervenors here object to the overall signature and timing requirements, which are “reasonable, nondiscriminatory restrictions.” See *SAM Party of New York*, 987 F.3d at 274. “What is ultimately important is not the absolute or relative number of signatures required but whether a ‘reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot.’” *Libertarian Party*, 977 F.3d at 177-78, quoting *Stone v. Bd. of Election Comm’rs*, 750 F.3d 678, 682 (7th Cir. 2014).

Under the circumstances here and given the above precedent, Executive Respondents agree

with and defer to the expert judgment of the Board of Elections (see NYSCEF #617) that the proposed intervenors failed to show a sufficient burden on their First and Fourteenth Amendment rights from application of the standard signature requirement and the modified political calendar adopted by this Court, so as to outweigh the State's substantial interest in limiting ballot access to those who demonstrate public support and in maintaining reasonable election deadlines. Even on the merits, the proposed intervenors cannot demonstrate that intervention is warranted.

CONCLUSION

For the reasons set forth above, Executive Respondents respectfully request that the motion to intervene (Motion # 15) be denied in its entirety.

May 24, 2022

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CERTIFICATION

Under Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 3,114 words.

May 26, 2022
Rochester, NY

/s/ Matthew D. Brown
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