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:
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Executive Respondents' Memorandum of Law in Opposition to Motion to Intervene by Mark Braiman

(Motion # 16 via NYSCEF)

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PRELIMINARY STATEMENT

Respondent Governor Kathy Hochul, Governor of the State of New York[1] (the "Executive Respondent"), respectfully submits this memorandum of law opposing the pending motion to intervene by Mark Braiman ("proposed intervenor"). *See* NYSCEF No. 583 ("Motion #16").

Proposed intervenor, who was previously denied intervention in motion #14, seeks a second bite of the apple in the form of the following extraordinary relief at a time after the June primary election (that includes Statewide races, races for all 150 seats in the State Assembly and numerous other election contests) is already underway:

a) to apply the Ballot Access Order—which currently applies to only congressional offices and the State Senate (NYSCEF #524)—to independent statewide candidates and independent New York State Assembly candidates;

b) reduce the signature requirements for independent nominating petitions by 50%; and

c) allow signatures gathered between April 19 and April 27 by independent State Senate and congressional candidates be counted toward the total required number of signatures.

Proposed intervenor argues that because redistricting has condensed timeframes around ballot access, he will have difficulty using his preferred method of a slate ballot. This, he argues, infringes upon his First Amendment right to free association and free 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, he would again change the elections process to the detriment of voters, other candidates, and elections administrators. This includes candidates for statewide and assembly offices who are already in the midst of their election. He makes these arguments with no legal basis, and with a disregard for this Court and the Fourth Department's prior decisions on intervention in this

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

case. In short, this motion to intervene should be 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—including the proposed intervenor here, Mark Braiman—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 districts.

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 gamer 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).

Like the five prior motions to intervene, the instant motion should be denied. That Mark Braiman has returned to seek similar remedies and for similar reasons as those already denied by this Court in Motion #14 require that this Court deny intervention on the basis of *res judicata* and collateral estoppel. Moreover, the proposed intervenor's concerns about timing and signature requirements for independent nominating petitions remain as untimely now as they were when the proposed intervenor sought relief in Motion #14. They were clearly 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 intervenor cannot demonstrate a sufficiently "severe burden" on his 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. This Motion is Barred by a Prior Judicial Determination.

Proposed intervenor's motion arises from the same issues that were the subject of a previous motion to intervene brought by, and decided against, the proposed intervenor. Specifically, in Motion #14 (NYSCEF No. 541), this proposed intervenor 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 districts.

"It is well settled, under the transactional-analysis approach adopted by the State in deciding res judicata issues, that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (*Beninati v. Nicotra*, 232 AD2d 242 [1st Dept 1997], citing *Schneider v. David*, 197 AD2d 363 [1st Dept 1993]; *see O'Brien v. City of Syracuse*, 54 NY2d 353 [1981]; *Smith v. Russell Sage College*, 54 NY2d 185 [1981]; *Prospect Owners Corp., v. Tudor Realty Services Corp*., 260 AD2d 299 [1st Dept 1999]). Here, the claims brought by proposed intervenor were the subject of a motion previously brought by, and decided against, this proposed intervenor.

Even if the legal theories asserted in this motion were different than proposed intervenor's legal theories in his previous motion, proposed intervenor would be precluded by *res judicata* from bringing such new claims. Proposed intervenor had the opportunity in the earlier motion to assert such claims. Proposed intervenor may not bring a new motion to intervene each time he dreams of a new argument he failed to raise in his previous motion to intervene. At this point proposed intervenor already had enough bites at the apple. As noted by the Court of Appeals "in deciding *res judicata* issues, we have moved to a more pragmatic test, which sees a claim or cause of action as 'coterminous with the transaction regardless of the number of substantive theories or variant forms of relief *** available to the plaintiff'" (*Smith*, 54 NY2d at 192, 445 NYS.2d at 71 [citation omitted]). The Court noted that:

> Even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the action is brought'. This holds true even when 'several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts or would call for different measures of liability or different

> kinds of relief.' For, what 'factual grouping' constitutes a 'transaction' or 'series of transactions' depends on how 'the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether *** their treatment as a unit conforms to the parties' expectations or to business understanding or usage.'

(*Smith*, 54 NY2d at 192-193 [citations omitted]).

In this instance, proposed intervenor previously brought a motion to intervene seeking similar relief that the Court denied. Proposed intervenor is therefore estopped from litigating these issues under *res judicata* [claim preclusion].

B. The proposed intervenor 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 relates to the instant motion, the relief sought in this action always included a remedial Congressional map. Since its commencement it was obvious that 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, the proposed intervenor makes no serious attempt to justify his 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, as evidenced by the existing respondents' raising 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 intervenor's 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 this proposed intervenor dragged his feet for another eleven days before submitting his 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 intervenor's concerns were already adequately represented by the existing parties. Previously, Executive Respondents 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 States' 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 intervenor cannot explain how his interests sufficiently diverge from the concerns already expressed and balanced by this Court.

Insofar as the proposed intervenor complains about portions of the Election Law not already raised by the existing parties, he seeks 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.

C. The proposed intervenor has not demonstrated a sufficiently "severe burden" on his right to association or free speech to justify intervention.

The proposed intervenor premises his need to intervene upon the claim that:

> Between April 19, 2022, when independent Congressional and State Senate candidates began petitioning to qualify for the ballot using the old district lines, and April 27, 2022, when the Court of Appeals affirmed (against the predictions of many) this Court's March 31, 2022 order voiding those old lines, Petitioner-Intervenor and many other such candidates spent countless hours collecting signatures and organizing volunteers and paid petitioners, in the expectation that their completed petitions could be filed six weeks later, on May 31, 2022. In addition, Petitioner Intervenor made, and other independent Congressional and State Senate candidates typically made, arrangements in their professional and personal lives to set aside those six weeks for the all-important petitioning drive, arrangements many of which could not be undone, and many of which cannot be made again.
>
> In addition, Petitioner-Intervenor will be losing a big motivational factor for collecting signatures, and organizing others to collect signatures, because he will not be able to collect also for his favored Governor candidate, Libertarian Larry Sharpe. While he may circulate his petitions (which are combined with four other statewide Libertarian candidates, for Lieutenant Governor, Attorney General, Comptroller, and US Senator), together with his new petitions between May 21 and May 31 (the last day to file the statewide petitions), for the remaining weeks, until the last day to file the Congressional and State Senate petitions which is July 5, he will be petitioning only for himself, while his Libertarian statewide candidate friends (if they have managed to qualify for the ballot at all), in tum, will have less incentive to assist his efforts. Together with the recent and recurring difficulties caused by constantly-evolving new strains of COVID-19 and related restrictions and common fears, which reduce the availability of signers and the efficiency of petition witnesses, this may very well be the most difficult year in New York history for independent candidates for office.

(NYSCEF #559, ¶¶4-5). 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.

"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 intervenor cannot demonstrate a sufficiently "severe burden" upon his First Amendment right to association or free 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 intervenor's entire argument is premised on his belief that he needs more time and/or needs the petitioning requirements reduced so that he can utilize a slate nominating process. However, proposed intervenor cites 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 intervenor cites to court decisions dealing with the right of association, that right is not implicated by the ability to utilize slate petitions, the proposed intervenor's decision not to obtain the required number of signatures under the law using a different mechanism for petitioning, or the proposed intervenor's decision not to seek intervention until over three months after this action began.

Proposed intervenor utterly fails 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 his 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".

Particularly because his petitioning process remained undisturbed, the proposed intervenor

fails 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 his right of association. Other than citing *Lerman v. N.Y.C. Bd. of Elections*, 232 F.3d 135 (2d Cir. 2000) for the proposition that the petitioning process constitutes "core political speech," the proposed intervenor offers no analysis (let alone evidence) to support his conclusory claim that his interests are "severely burdened" in this case.

Proposed intervenor thus conflates 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 intervenor failed to show that absent his proposed changes, he will be excluded or virtually excluded from the ballot. In fact – the proposed intervenor 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 intervenor, 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 the proposed intervenor here objects 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 intervenor failed to show a sufficient burden on his 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 intervenor cannot demonstrate that intervention is warranted.

CONCLUSION

For the reasons set forth above, Executive Respondents respectfully request that the motion to intervene (Motion # 16) 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 4,216 words.

May 26, 2022
Rochester, NY

/s/ *Matthew D. Brown*
Matthew D. Brown
Assistant Attorney General