**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 Tyrrell Ben-Avi**

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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 Tyrrell Ben-Avi ("proposed intervenor"). *See* NYSCEF No. 673.

Proposed intervenor seeks, inter alia, to move the primary election for the New York Assembly from June 28, 2022 to August 23, 2022—"thus aligning the primary election date for the United States Senate with the adjourned primary election dates for the State Senate and U.S. Congress"—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. Oddly, granting the relief requested and moving the Assembly primary date would not change the U.S. Senate primary date, which is scheduled for June 28.

Proposed intervenor gives no legal or factual basis for this request and it should therefore 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."

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

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—who were also potential candidates for the Libertarian Party of New York—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.

Like the five prior motions to intervene, the instant motion should be denied.

Furthermore, intervention is inappropriate because the proposed intervenor failed to 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. 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 and necessitate a modification of that calendar to accommodate any remedial maps this Court would order. 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 eighteen days before submitting his papers. *See* NYSCEF No. 520 at p. 5, citing *Matter of Fink v. Salerno*, 105 AD2d 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 failed to explain how his interests sufficiently diverge from the concerns already expressed and balanced by this Court.

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

The proposed intervenor offers no facts to support his request to intervene or support the relief he seeks, and his motion should therefore be denied.

"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).
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> 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).

Here, the proposed intervenor makes no argument, cites no precedent, and provides no reason why the Assembly primary should be adjourned, and the proposed intervenor cannot demonstrate that intervention is warranted.

**C. The Present Application is barred by doctrine of laches.**

Proposed intervenor's request to cancel the June 28, 2022 primary for NYS Assembly is barred by the doctrine of laches. "Laches bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered it inequitable to permit recovery*." Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 AD2d 68, 82 (4th Dept 1980).

Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Reif v. Nagy*, 175 AD3d 107, 130 (1st Dept 2019) (quoting *Saratoga County Chamber of Commerce v. Pataki,* 100 NY 2d 801, 816 (2003)). To show prejudice, a defendant must show reliance and change of position from the delay. *Id.* Here, the prejudice that would stem from proposed intervenor's belated request is manifest. On May 4, 2022, the State Board

of Elections certified the primary ballot for Assembly elections,[2] with local county boards of election throughout the State preparing for the election to go forward on June 28 (at significant effort and expense), with early voting and absentee balloting taking place before that date. As noted above, military ballots have already been sent out to military voters on or about May 13, 2022. If proposed intervenor's requested relief were allowed and the Assembly primary could not go forward in June, and insofar as numerous other races are tied to Assembly districts, it is not clear what primaries, if any, could go forward in June.

The proposed relief would cause yet more delay and add to the already formidable logistical challenges faced by the State and local boards of elections associated with having to accommodate entirely new Congressional and State Senate districts. This Court should decline to entertain this application.

## CONCLUSION

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

May 24, 2022

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[2] *See* https://www.elections.ny.gov/NYSBOE/Elections/2022/Primary/Jun282022PrimaryCertification.pdf.

**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 ____ words.

May 26, 2022
Rochester, NY

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