

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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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 VIOLANTE,

Index No.: E2022-0116CV

Petitioners,

v.

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.

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**LARRY SHARPE, DIANE SARE and WILLIAM CODY
ANDERSON as Chair of the LIBERTARIAN PARTY OF NEW
YORK'S MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO INTERVENE AND ADDITIONAL CAUSE OF ACTION
TO MODIFY ELECTION LAW PROVISIONS FOR INDEPENDENT
STATEWIDE CANDIDATES**

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Date: May 11, 2022

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Larry Sharpe, Diane Sare and William Cody Anderson as Chair and de facto President of the Libertarian Party of New York respectfully submit this Memorandum in support of their request to intervene and in support of their additional cause of action seeking to Modify Election Law Provisions for Independent Statewide Candidates in light of this Court’s adoption of the May 11, 2022 Proposed Order from the New York State Board of Election, which is silent on independent statewide candidates and qualification of non-recognized parties.

PRELIMINARY STATEMENT

Judicial oversight, the Court Appeals explained in its April 27, 2022 decision, is “required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election.” Harkenrider v. Hochul, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022) at 1. An oversight to this well-meaning project that can and should be remedied is that independent statewide candidates and non-recognized parties are effectively prevented from circulating petitions and raising sufficient signatures within the tight time-frame set by a Legislature that did not anticipate the absence of district lines to which petitioning is tied. Proposed intervenors have been unable to gather sufficient nominating petition signatures in the absence of district lines, and if the Court does not modify additional election provisions as it has already done with others, the statutory and constitutional rights to compete in elections will have been violated, pursuant to the New York Constitution, Art. I, § 8 and the First Amendment of the United States Constitution as it is applied to the states by the 14th Amendment.

ARGUMENT

I. Intervention is Warranted Under CPLR 1012 or 1013

Proposed Intervenors satisfy the standards for mandatory intervention, or in the alternative, satisfy the standards for permissive intervention. Mandatory Intervention: CPLR § 1012(a) permits intervention as of right where (1) a state statute “confers an absolute right to intervene,” or (2) “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[.]”

With respect to CPLR § 1012 (a)(1), the New York Constitution confers a right on each of the proposed intervenors to free speech and to compete in elections. Constitution, Art. I, §§ 8, 11. Without modification of recently enacted and never-before executed election provisions, especially a reduction in signature requirements and a postponement of the May 31 petitioning deadline, proposed intervenors will be irreparably harmed, as attested to by the supporting affidavits of two independent statewide candidates among intervenor-petitioners Larry Sharpe, Diane Sare, and William Cody Anderson, Chair and de facto president of the New York Libertarian Party, and witness-candidate Michael Braiman.

With respect to CPLR 1012(a)(2), Petitioners do not represent the interests of proposed intervenors, any independent candidates or any non-recognized parties, since they have no interest in and do not pursue the remedies to any of the above sought by proposed intervenors. See, Petition pars. 197, 207, 215, 226; Prayer for Relief, p. 65, et seq. This, despite acknowledging in their Amended Petition the predicament proposed-petitioners ask the court to remedy: “Redistricting is an extremely time-sensitive requirement, including because candidates must know what their districts are in advance of an election, in order to meet state ballot-access requirements. Multiple petition and signature-related deadlines are looming for New York congressional candidates.” Amended Petition, (Doc 33), par 36.

CPLR § 1013 permits intervention “when the person's claim or defense and the main action have a common question of law or fact.” The Court of Appeals stated that the Legislature's maps are substantively defective where they have been drawn with an intent or motive “to ‘discourage competition’ or ‘favor or disfavor incumbents or other particular candidates or political parties.’” Harkenrider, 2022 WL 1236822, at 10 (quoting N.Y. Const. art. III, § 4(c)(5)). The invalidation of state district maps adopted by the Legislature, and the present redrawing of those lines, together with remedial actions this Court has already taken, plainly presents a common question of fact or law with the congressional and State Senate maps that the current petitioners challenge, insofar as petitioning for independent statewide candidates is unavoidably intertwined with petitioning for independent Congressional and State Senate candidates.

II. The Merits of the Proposed Intervenors' Petition are Clear Based on Irreparable Harm and Upon the Court of Appeals' April 27, 2022 Opinion

The Court of Appeals has already tasked the Supreme Court with judicial oversight over the administration of this election: “[The] Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and compliance with federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act (see 52 USC§ 20302).” Id at 11.

In any election, to say nothing of the present one, New York places substantial time constraints upon petitioning candidates. At the outset, no candidate may begin circulating an independent nominating petition prior to six weeks before the last day to file that petition, regardless of the candidate's ability or willingness to do so. Election Law §6-138(4). Election Law 6-158(9) requires independent nominating petitions to be filed not later than 23 weeks preceding the November election, meaning the 31st of May this year, or eleven days after May 20, when candidates will learn of the new district lines. Neither the New York Board of Elections nor the Court of Appeals in its April 27 decision has provided any guidance if signatures collected before issuance of the new district lines will be valid, and since the April 27 decision down-ballot candidates have thus had little reason to continue collecting signatures.

To appear on a ballot, a potential candidate must obtain signatures from voters who meet specific residency requirements, and these residency requirements are tied to the boundaries of districts. See, e.g., N.Y. Elec. Law § 6-138. Election Law § 6-142(1) ties signatures to actual districts, none of which currently exist, requiring 500 signatures from each of half of congressional districts.

Enforcement of these provisions without modification would, as applied, severely burden Free Speech under the First Amendment to the US Constitution and New York State Constitution, Art. 1, § 8. People trying to persuade potential voters to sign a ballot access petition engage in "interactive

communication concerning political change" (Meyer v. Grant (486 U.S. 414, 420 (1998)), which is "core political speech." Lerman v. N.Y.C. Bd. Of Elections, 232 F.3d 135, 146, 148 (2nd Cir. 2000) (holding that the speech of those gathering signatures for ballot access petitions is "identical" to the speech of those gathering signatures for ballot initiatives at issue in Meyer); see also Buckley v. Am. Const'l Law Found., 525 U.S. 182, 192 n. 12 (1999) (witness residency requirements engender the most exacting review.)

So that the rights to Free Speech and to compete in elections are not burdened, this Court should enjoin the New York State Board of Elections from enforcing Election Law 6-158(9) and extend the petitioning deadline by four weeks, as it has already postponed primary dates. Preliminary Order, NYSCEF No. 301 (Preliminary Order, Apr. 29, 2022). The Court should also enjoin the New York State Board of Elections from enforcing for the first time new Election Law 6-142(1), which now requires 45,000 rather than 15,000 signatures, or in the alternative keep the previous election's executive ordered, 30,000 signature threshold. Lastly, the Court should enjoin enforcement of Election Law 6-142(1), which requires 500 signatures from half of each of the congressional districts that do not currently exist, and for the reasons stated in this motion's affidavit from independent candidate Diane Sare, is impossible to comply with.

III. The Relief Sought Will Not Prejudice Any Party, Whereas Denial of Intervention will prejudice proposed intervenors and the voters of New York State, and the Relief thus Serves the Public Interest

Given that this court's Amended Order of April 29, 2022 (NYSCEF No. 296) provides that Congressional and State Senate Maps will not be issued until May 20, there is ample time to remedy the prejudice to independent statewide candidates and non-recognized parties who currently face a May 31, 2022 petitioning deadline.

a. Prejudice to Independent Statewide Candidates is Unaddressed By the New York State Board of Election's Proposed Order Signed by this Court on May 11, 2022

Unlike the relief sought by previous, putative intervenors, present proposed petitioners' relief would not "substantially affect the rights of the Petitioners in that it could or likely result in new maps not being enacted in time for a primary this year." Order, May 11, 2022, Doc (524) at 2. Such proposed relief includes an extension of the May 31, 2011 petitioning deadline, which remains fixed per the Court's adoption of the the New York State Board of Election's proposed order. Nor would an extension, or reduction in the 45,000 signature threshold for independent statewide candidates, "impact the Congressional and State Senate maps that should be in place by May 20th." Id.

This Court has already taken it upon itself to postpone primary dates, which Respondents are duly able to institute, and the New York State Board of Elections has shown itself able to effect and enforce modified election law provisions in the wake of the 2020 Covid-19, when the signature requirements pursuant to Election Law 6-142(1) were slashed to 30,000 to accommodate for the disruptions caused by the pandemic. The Governor has maintained a COVID-19 state of emergency to this day, and petition gathering is still stymied by venue restrictions and state public health guidance, as attested to in the supporting affidavits of intervenor-candidates Diane Sare and Larry Sharpe, and witness-candidate Mark Braiman.

The Court's recent orders, including the most recent May 11, 2022 Order proposed by the New York State Board of Elections, can be readily amended to modify election law provisions that burden independent statewide candidates and non-recognized parties, and Respondents including the New York State Board of Elections have shown themselves able to accommodate such modifications in the past. See, eg, Credico v. NYSBOE, E.D.N.Y. Case No. 10-CV-4555, Order dated Oct. 27, 2010 (vacating an order granting a preliminary injunction that changed the face of the ballot in favor of an LPNY candidate, because "compliance with my order is not logistically possible given the fact that the election is only a week away.")

b. The Intervention is Timely

Proposed petitioners had reason to suppose, given the broad mandate given to this Court in the April 27, 2022 Court of Appeals decisions, that Judicial oversight would “facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election.” Harkenrider, at 1. However the May 31, 2022 petitioning deadline is reiterated in the New York State Board of Election’s proposed order entered by the Court on May 11, 2022, and it is silent on independent statewide candidates and non-recognized parties generally, and the insurmountable obstacles they face in the form of unmodified election provisions in particular.

This request to intervene would not "unduly delay the determination of the action or prejudice the substantial rights of any party." See NY CPLR § 1013. Not only will this request to intervene neither delay the action nor prejudice any party, but also, this request to intervene will protect the first amendment rights of independent statewide candidates and safeguard the rights of all New Yorkers to elect their preferred representatives.

CONCLUSION

Article I, Section 8 of the New York Constitution provides that “Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” “[S]ecuring First Amendment rights is in the public interest.” N.Y. Progress & Protection PAC v. Walsh, 733 F.3d 483,488 (2nd Cir. 2013) (barring enforcement of speech restrictive campaign finance statute).

Given the dramatic and sudden invalidation of congressional and state senate district lines, and the ongoing “State of Emergency” maintained by the Governor of New York, enforcement of certain election law provisions without modification would, as applied, severely burden the Free Speech rights

of proposed-intervenors and all New York State voters.

Respectfully submitted,

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New York, NY


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